Using Gig Cases to Teach Worker Classification:
A New Model Ignites an Old Problem

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ABSTRACT

The strategic role of management, including the choice between hiring contracted labor or employees, is an important instructional topic for emerging human resource (HR) professionals. Although students may quickly identify the cost savings attendant to hiring independent contractors, they often have little or no exposure to the complex regulatory system that determines worker classification. The emergence of gig-economy companies, which capitalize on hiring low-wage, on-demand, independent contractors, has generated a new wave of worker classification lawsuits. This paper discusses recent litigation involving GrubHub, Dynamex, and Uber and provides three authentic case studies for introducing students to worker classification analysis, the opposing views of industry and labor, and the compliance uncertainties created by the lack of statutory clarification.

INTRODUCTION

Simple business questions often do not yield straightforward answers, and the easiest of management concepts can lead to messy business problems. With the plethora of regulatory agencies and governmental laws, categorizing an individual as an employee or independent contractor (IC) would appear to be a simple either-or matter. Students may perceive worker classification as a simple determination, assuming that the role and hiring situation will overly denote a worker as an IC or employee. However, the recent wave in worker classification lawsuits of gig economy workers illustrates that this concept is neither clear nor simple.

GrubHub, Dynamex, and Uber, as well as other recent web-based organizations, have capitalized on the instant service/convenience economy model utilizing contract workers to meet customer demands and needs (Atmore, 2017). Additionally, each of these companies have categorized gig-workers as ICs, justifying their classification based on established policy. However, each company has recently been sued by workers seeking to be classified as employees. Remote, web-based, on-demand hiring practices did not exist when existing worker classification standards were created. As is typical, the legal system lags behind technological innovations, and the public is uncertain whether existing standards are appropriate for evaluating the new gig-worker model.

As management practitioners, business leaders, legal advisors, and the court system have struggled with applying current worker classification standards to new business models, allowing students to apply employee vs. IC classification tests, as well as process and evaluate worker perspectives, bridges a gap between relevant theory, current policy, and practical experience. Using recent legal cases for GrubHub, Dynamex, and Uber, this analysis provides a pedagogical resource for teaching federal worker classification standards within the context of the gig economy. Using relevant case studies to address this complex topic allows business students to (a) critically evaluate authentic scenarios using analytical, problem solving, and critical thinking methods; (b) grapple with contemporary and controversial employment conditions, trends, and policies; as well as (c) participate in a knowledge, principle, and application building exercise (Chatzimouratidis, Theotokas, & Lagoudis, 2012). The teaching activity is appropriate for courses in HR, employment law, or entrepreneurship.

THE GIG ECONOMY

Business demand for nontraditional, short-term laborers prompted the development and expansion of the gig economy (McKinney, 2018). Increasingly, businesses seek to hire for short-term, temporary, on-demand positions provided through online labor platforms (Works, 2018). The size and impact of the gig economy is unknown; yet most sources agree that gig work is an expanding labor model. Katz and Krueger (2016) report that 94% of net employment growth in the United States is a result of alternative or short-term work arrangements related to the gig economy. Other sources note that gig workers comprise an estimated 34% of the workforce or 3.9 million workers and are expected to expand to 43% or 7.7 million workers by 2020 (Gillespie, 2017; McKinney, 2018).

Gig workers are broadly considered as temporary, short-term, on-call, freelance, independent, or contingent contractors (Etzioni, 2018; Muhl, 2002). The gig model benefits independent contractors by allowing these workers to control when, where, and how they work (Green, Walker, Alabulththim, Smith, & Phillips, 2018; McKinney, 2018). Businesses also benefit from this model by accessing skilled and unskilled labor, cutting employee costs, and decreasing employment-related liability (Steinberger, 2018). As a cost-saving measure, many businesses opt to classify workers as ICs (Carboni, 2016). Despite its attractiveness to businesses and workers, the gig economy model presents worker classification risks as demonstrated by recent litigation (Crank, 2016; McHugh, 2018; Sanders & Pattison, 2016). The use of gig workers, and related classification concerns, are professionally relevant topics for emerging human resource and accounting professionals. Due to the popularity and growth of the gig worker model, today's college graduate is more likely than previous generations to participate in the gig economy, either as consumer, worker, or employer.

TEACHING WITH CASE STUDIES

Case studies present a business pedagogical approach which engages learners to clarify meaning, apply learning, and synthesize resources (Sheppard & Vibert, 2016). A widely used form of teaching, case studies allow students to analyze complex and vital business issues, while situating relevant concerns within larger organizational, industrial, legal, ethical, and societal contexts (Nohria & Rivkin, 2018). Case studies allow instructors to deviate from the traditional

one-way delivery method of teacher as lecturer and student as learner, allowing for a more student-focused learning approach where students experientially and more richly connect with the topic, actively reflect on policy, and process complex issues (Culpin & Scott, 2012).

By facilitating the realistic connection of new concepts with established ideas, case studies allow students to more easily recall information while developing critical thinking skills within their coursework (Kunsch, Schnarr, & van Tyle, 2014; Mukherjee, 2018; Nohria & Rivkin, 2018). With rapid global, industrial, and economic changes, business leaders must be able to think critically about issues, processing and evaluating data quickly to make effective decisions. Case studies contribute to the development of these essential skills by challenging students to address multifaceted business problems, weighing legal, regulatory, financial, and strategic aspects concurrently within the classroom environment (Kunsch et al., 2014).

WORKER CLASSIFICATION CASE STUDIES

Three current legal cases involving GrubHub, Dynamex, and Uber provide students with an authentic and relevant opportunity to evaluate the benefits and challenges of gig economy work from the worker and business perspectives. Recent litigation also presents a novel case study opportunity for teaching federal worker classification standards, allowing students to develop skills in analytical investigation, complex decision making, and ambiguity resolution.

Before assigning the three case studies, we generally provide a brief lecture on the worker classification regulatory environment. The lecture addresses the following themes: (a) worker classification determinations influence the hirer's legal requirements and workers' benefits (i.e. minimum wage, overtime, Family Medical Leave Act benefits, and civil rights protections); (b) federal agencies apply different worker classification standards, depending upon the applicable law (i.e. the IRS uses a control test for tax collection, while the DOL uses an economic reality test for laws focused on employee protections); (c) state classification standards often mirror federal standards, but a number of states utilize a more stringent ABC standard, limiting the number of workers who classify for IC status; and (d) the simultaneous application of inconsistent standards can result a in a single worker being classified as both an IC and employee.

The purpose of these case studies is to familiarize students with three primary worker classification tests and to facilitate critical analysis of the efficacy of the regulatory environment in general, and as applied to the gig economy. Before assigning the case studies to students, we recommend using the check sheets provided in Appendices A, B and C to discuss the individual requirements of three primary worker classification standards: (a) the IRS control test; (b) the DOL economy reality test; and (c) the ABC standard. Students should note that the IRS and DOL tests examine the totality of the circumstances, meaning that classification is not necessarily a quantitative determination. Just because a majority of the criterion indicate IC status, does not mean a judge will classify the worker as an IC. The federal standards allow for subjective determinations of the worker relationship. However, the ABC standard is different. To qualify a worker as an IC, an employer must satisfy all three parts of the ABC test. If any one element is lacking, the worker must be classified as an employee.

Each test within the appendices can be applied to all three business cases. The IRS control test (Appendix A) analyzes the employment relationship based on (a) behavioral controls such as the nature of work, performance evaluations, and required training; (b) financial controls such as personal investment in work related tools and reimbursement for work expenses; and (c) relationship controls such as employment contract, permanency of work, and the connection of work to the core function of the business (IRS Advisory Council, 2011; Internal Revenue Service, 2018).

Appendix B summarizes the common factors of the economic reality test. The DOL test evaluates the extent to which a worker is economically dependent upon the business (Department of Labor – Wage and Hour Division, 2018). Under this standard, workers are considered ICs if they are not economically reliant on the organization for income, have personally invested in themselves as a business venture, are able to obtain a variety of income producing sources, and can/do provide services to a variety of organizations; the relationship between IC and employee is comparable to the relationship between a buyer and seller.

The ABC standard (Appendix C) conditions IC status on three requirements: (a) the worker is free from the control and direction of the business, in relation to the performance of the work, both under the contract and in fact; (b) the worker performs work that is outside the usual course of the hirer's business; and (c) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hirer (Pearce & Silva, 2018).

Appendices D through F each provide a case synopsis of GrubHub, Dynamex, and Uber for distribution to students. The synopsis includes an overview of each organization and a summary of workers' and business' arguments made in each case.

Finally, Appendix G provides the instructor with a case study instructional sheet for the activity which includes sample discussion questions.

TEACHING NOTES

GrubHub Case Overview

Founded in 2004, GrubHub, Inc. (GrubHub, 2018) modernized the consumer dining experience by facilitating online take-out food orders and deliveries. Merging in 2013 with Seamless, a web-based food ordering and delivery service, GrubHub's mission is to be "the nation's leading online and mobile food ordering company dedicated to connecting hungry diners with local takeout restaurants." (GrubHub, 2018, para. 1). According to its website, GrubHub processes over 436,000 restaurant orders daily, allows customers to order from more than 80,000 restaurants in over 1,600 cities, serves over 15 million users, and facilitates $4 billion in gross food sales between diners and local takeout restaurants. GrubHub's assistance begins when customers order food via their online service. GrubHub transmits the order to the local restaurant, and a driver or the customer can pick up the food from the restaurant.

For four months in late 2015 and early 2016, Raef Lawson worked for GrubHub in southern California. Lawson alleged that he was misclassified as an IC (1099 employee), despite being treated as a W-2 employee. In the lawsuit, Lawson claimed he was due $585.56 in overtime pay and business expense reimbursements. While the monetary claim is quite low, the case garnered considerable media attention. Although Lawson was not the first gig worker to bring suit for improper worker classification, his was one of the first to be fully litigated and decided on the merits. Prior gig worker classification lawsuits ended in settlements, providing little to no judicial interpretation of how worker classification standards apply to gig workers.

At the time of Lawson's lawsuit, California applied the *Borello* test to determine proper worker classification (*Borello v. Department of Industrial Relations, 1989*). The *Borello* test is a form of the economic reality test, examining the extent to which an employer controls the manner and means of another's work (Department of Industrial Relations, 2018). Lawson claimed that GrubHub controlled his role, work dynamics, and the means by which he completed his tasks. Lawson argued that (a) his work assignments related to GrubHub's core business; (b) GrubHub offered him incentives, including higher hourly pay and preferred scheduling, if he would maintain a high worker acceptance rate; (c) GrubHub controlled the work through scheduling policies creating employee/employer relationships with drivers; (d) GrubHub evaluated his performance with the use of "ghost order" acceptance testing; (e) GrubHub encouraged drivers to wear company attire and utilize supplies with their company's logo, providing incentives when drivers donned the company's brand; (f) GrubHub tracked and monitored drivers' movements; and (g) GrubHub holds a quarter of the market on food delivery services in the U.S., second only to Domino's Pizza.

GrubHub countered that Lawson was an IC, arguing that food delivery did not constitute part of GrubHub's primary business purpose. GrubHub claimed its primary mission was to connect diners with restaurants, and the delivery service was merely tangential and peripheral to its core mission (Moore, 2017).

Instructor Guidance for GrubHub

In this activity, we ask students to classify Lawson, using both the economic reality test and the ABC standard.

The court in GrubHub's case applied the Borello test and ruled in February 2018 that Lawson was properly classified as an IC (*Raef Lawson v. GrubHub, Inc., 2018*). The court based its determination on several key elements: (a) Lawson made deliveries for other companies, not just GrubHub; (b) he often elected not to wear GrubHub's logo; (c) he was in control of the timing, volume, location and process by which work was accepted and completed; and (d) he was not required to participate in mandatory employee training. The U.S. District Court for the Northern District of California concluded:

> Under California law whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. If Mr. Lawson is an employee, he has rights to minimum wage, overtime, expense reimbursement, and workers compensation benefits. If he is not, he gets none. With the advent of the gig economy,

and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy. In the meantime the Court must answer the question one way or the other. Based on what the Court observed at trial and the facts found, and after applying the test, the Court finds that during the four months Mr. Lawson performed delivery services for Grubhub he was an independent contractor (*Raef Lawson v. GrubHub, Inc., 2018, p. 33*).

Whereas the economic reality standard generated an IC classification, the ABC standard should generate an employee classification. It is arguably very difficult for GrubHub to satisfy Part B of the ABC test because food delivery (Lawson's job) was integral to GrubHub's mission and primary service.

Within this case, students likely are adept at recognizing the economic advantages GrubHub assumes by classifying their drivers as ICs rather than employees. An IC classification allows GrubHub to save money and improve its profit margin. Follow-up discussions that instructors can offer regarding this case should center on (a) the economic advantages of businesses who pay less taxes and employee benefits when classifying workers who meet the IC standard as well as (b) the economic disadvantages of ICs not covered by an employer's health, retirement, and paid vacation plans.

GrubHub and Dynamex, another case examined within this paper, both involved California worker classification standards for wage hour complaints. When the GrubHub case was decided in February of 2018, California used a version of the DOL economic reality test. Dynamex, decided just a few months after GrubHub, drastically changed worker classification determinations in California by adopting a more stringent ABC standard. We use GrubHub and Dynamex, in tandem, to demonstrate that (a) the ABC standard is a more stringent classification standard, (b) states opposed to IC classification for gig workers might use the ABC standard to protect workers, and (c) the common law can address societal change, in the absence of legislative action.

Dynamex Case Overview

In the case involving GrubHub, a federal court applied California law to render its decision. However, on April 30, 2018, approximately two months after the GrubHub decision, the California Supreme Court issued a landmark decision that adopted the three-prong ABC test as the new standard for worker classification issues impacting wage order disputes with a case involving Dynamex (Eidelson, 2018; Nelson, 2018). This case did not render a decision as to the workers' ultimate classification, but is included within our analysis because it demonstrates how common law can unilaterally alter the regulatory environment. The Dynamex decision generated significant outcry from employers, with businesses lobbying state officials to override the decision via statute or executive power (Eidelson, 2018).

Though limited to wage order disputes, such as minimum wage determinations, the new ABC test significantly changes the worker classification standard in California (Nelson, 2018). Per the ABC test, employers now bear the burden of proving IC status for workers; thus, workers are automatically presumed to be employees, and businesses bear the legal burden of alternate classification. Applying the ABC test, the Supreme Court of California concluded that unless a

business could establish that (a) workers were free to control and direct their own work performance under their contract; (b) workers performed work which was outside the usual course of the hiring entity's business; and (c) workers were routinely engaged in an independently established trade, occupation, or business, they should be considered employees (Kim, 2018; Siegel, 2015).

Dynamex Inc., a subsidiary of TForce, Inc., provides fleet, outsourced same day delivery and pickup, as well as other expedited and scheduled transportation services to businesses and the public within the United States and Canada. Formerly known as Parcelway Systems Holding Corp., Dynamex was incorporated in Dallas, Texas in 1992 and changed its name in July 1995 (TForce Final Mile, 2018). Prior to 2004, Dynamex classified its California drivers as employees; however, beginning in 2004, Dynamex converted its delivery drivers to ICs, saving labor costs (Kim, 2018; Siegel, 2015). After being classified as ICs, Dynamex drivers were required to provide their own vehicles and pay for transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance. In addition, they were required to obtain and pay for a Nextel phone to maintain contact with the company. Dynamex created the customer base, established delivery service rates, and negotiated individualized driver fees for its drivers.

According to *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* (2018), on-demand drivers were assigned delivery at the sole discretion of Dynamex and had no guarantee as to the number or type of deliveries offered. Drivers set their own hours and were paid a fee based on the type of delivery, the scheduled route, and a percentage of the delivery fee received from the customer. Drivers were not required to make all deliveries assigned to them but were liable for any losses which resulted from a failure to reject a delivery or failure to complete a delivery in a timely manner. Drivers were expected to wear company shirts and badges and may have been required to attach a temporary company decal to their vehicle. They could determine their own sequence of delivery routes, but drivers had to comply with all customer requests and complete all accepted assignments. Drivers were hired indefinitely and were free to work for other companies; however, they were prohibited from diverting deliveries to work for industry competitors. Dynamex controlled the number of deliveries offered to drivers and could terminate any contract agreement without cause.

In January of 2005, Charles Lee signed an IC agreement with Dynamex agreeing to provide delivery services for the company. In 2005, within three months of leaving Dynamex, Lee filed a wage and hour class lawsuit claiming that Dynamex misclassified drivers as ICs, in violation of the California Industrial Welfare Commission (IWC) Wage Order and other state labor codes (Kim, 2018).

Instructor Guidance for Dynamex

In this case study, we ask students to evaluate Dynamex workers under both the economic reality test and the ABC standard. For both GrubHub and Dynamex, students should consider whether the workers' jobs were integral to the hirer's business. Considering the court ruling in GrubHub, Dynamex, and Uber, how influential is this factor when the economic reality test is applied? In other words, even if the workers' performance is integral to the business purpose,

courts may still assign IC classification because the economic reality standard grants subjective latitude to holistically evaluate the work relationship. Conversely, the ABC standard is more objective. Under ABC, if the worker's performance is an integral component of the business, the worker must be classified as an employee. Students should identify that the court's ABC test casts a wider net for employee classification.

Discussion questions within the Dynamex case should focus on how businesses maintain or relinquish control over employees' hours, wages, and working conditions as well as workers' economic dependency on employers, thus creating a common law employment relationship. Workers are considered employees if they complete tasks considered to be a critical part of the business, assume a permanent employment relationship, and are provided resources by the organization to do their job (*Lilley v. BTM Corp., 1992*). The courts use of the ABC test in Dynamex's case permits a wider definition of who is an employee, prompting more workers to be classified as an employee rather than an IC. However, confirming the continued confusion regarding this subject, in December of 2018, legislation was proposed in the California Assembly to clarify worker classification standards and relax the ABC criteria that was used in Dynamex's case (LaSusa, 2018).

Dynamex also allows students to contemplate the broader consequences of misclassification. Misclassified workers not only suffer the loss of economic benefits, they also lose legal protection from civil rights-based legislation that punishes discrimination and harassment (De Stefano, 2015). For example, ICs are not covered by Title VII, the Family and Medical Leave Act, or the Pregnancy Discrimination Act, leaving them less protected than employees.

Misclassification poses several issues; it creates an unfair competitive advantage from reduced operational costs, business tax expenses, and employee benefit obligations (DeRoss, 2017; Kelsay & Sturgeon, 2010; McGee, Goodof, Bandyopadhyay, & Christensen, 2016). Misclassification of workers as ICs rather than employees, allows businesses to avoid verifying citizenship and to benefit from reduced worker compensation and unemployment insurance costs (Kelsay, Sturgeon, & Pinkham, 2006). Additionally, state and federal governments can lose significant revenue each year when businesses misclassify workers as contractors (Bauer, 2015).

Uber Case Overview

Uber's business concept began in 2009 when two entrepreneurs, Travis Kalanick and Garrett Camp, were stranded on a cold night in Paris, unable to locate transportation. The two began to formulate a plan to make transportation services more widely available to the public (Uber, 2018). Originally called UberCab, the company's platform was built on the desire to allow interested customers to request a ride using their mobile device. The cornerstone of their mission is the use of on-demand transportation technology to quickly match available drivers with customers. Eventually dropping "cab," Uber feels that they are making transportation services more accessible, reducing the congestion that plagues larger cities, and creating job opportunities where interested workers can work on their own terms (Uber, 2018). The first Uber ride was offered in San Francisco in 2010; in May of 2017, the company celebrated its 5 billionth trip (Uber, 2018).

Uber's worker classification case involves UberBLACK, their luxury car service, which allows riders to reach their desired destination in a premium vehicle, with a professional driver (Uber, 2018). Ali Razak, Kenan Sabani, and Khaldoun Cherdoud claimed that Uber Technologies, Inc., and its wholly owned subsidiary Gegan, violated federal minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA) (*Razak v. Uber Technologies, Inc., and Gegan, LLC, 2018*).

According to *Razak v. Uber Technologies* (2018), to drive with UberBLACK, operators must provide their own equipment and tools and access the Uber mobile application via their own mobile device. Drivers log on to Uber's online service indicating that they are available to accept requests and are free to determine the time and length of their driving availability. Uber does not control drivers' service area, inform drivers of high demand areas, insist that drivers wear company logos or uniforms, or require drivers to accept trip requests; however, drivers can provide services in the geographic area of their choosing, engage in personal or other business (including transportation) activities while online, and reject requests for any reason, except for unlawful discrimination. Requests which are not accepted within 15 seconds will be offered to another available driver. If the driver fails to respond to three consecutive trip requests, the Uber app automatically switches the driver to an offline mode and will not offer additional requests for a period. This operational policy stems from Uber's philosophy that unresponsive drivers slow the system for customers. Drivers which have been switched to offline can revise the change by logging back into their app and selecting their availability again. Drivers are automatically moved to offline for a six-hour rest period after operating 12-hours online. Additionally, drivers pay Uber a transaction fee, which compensates for the use of Uber technology and must maintain their own workers' compensation insurance.

Razak, Sabani, and Cherdoud, along with other UberBLACK drivers, contend they should be classified as employees under FLSA (*Razak v. Uber Technologies, Inc., and Gegan, LLC, 2018*). UberBLACK drivers maintain that they are extensively controlled by Uber while online and it is stamina, not managerial skill that allows drivers to earn a profit or loss. Driving for Uber does not require operators to have special skills or certified training. Razak, Sabani, and Cherdoud drove for Uber between seven to 12 hours per day, performing what they feel was an integral role of Uber's business. The drivers also argued that Uber maintained control over operators by deactivating drivers who cancel trips, fail background checks, fell short of a 4.7-star rating, or solicited payment outside of the Uber mobile app. Additionally, because Uber limited consecutive hours worked, terminated driver's access to the app, blocked drivers who manipulated lines at major transportation hubs, and made deductions against a driver's earning, drivers felt they should be classified as employees. A portion of the UberBLACK drivers, including the plaintiffs, operate under Gegan's Pennsylvania Parking Authority's (PPA) licensing requirements, allowing Uber/Gegen and its drivers to operate a limousine company. Additionally, approximately 75% of UberBLACK drivers subscribe to Gegan's auto insurance.

Uber countered that their drivers met the standard and should be classified as ICs because they were not prohibited to work for other transportation or gig companies, drivers pay their own expenses, including gas and car expenses, invested in their own companies, hired other workers to work for their companies, and set their own working hours (Razak v. Uber Technologies, Inc., and

Gegan, LLC, 2018). While Razak, Sabani, and Cherdoud drive for UberBLACK, they also own and operate separate luxury transportation companies including Lux Limousine Services, Inc, Freemo Limo, LLC, and Milano Limo, LLC. Drivers could work as much or as little as they wanted, given the company's standards, and could reject work based on their availability. Uber also contended that it was business acumen not stamina, which facilitated drivers to earn a profit or loss. Uber concluded that UberBlack was a modernized telephone directory, providing a resource to locate a transportation service and driver.

Instructor Guidance for Uber

Of the three cases reviewed in this paper, Uber is the only case which interpreted the federal work classification standard (the DOL economic reality test). This case was heard in federal district court in the 3rd Circuit. The court utilized the economic realities test to determine worker classification. The U.S. Supreme Court provided guidance on the economic reality test in *Rutherford Food Corporation v. McComb* (1947) and drew from *Donovan v. DialAmerica Marketing, Inc*. (1985), but each circuit has adopted its own judicial test for analyzing worker status. *In Donovan v. DialAmerica Marketing*, the court created six standards for analyzing economic reality: (a) the degree of the alleged employer's right to control the manner in which the work is to be performed; (b) the alleged employee's opportunity for profit or loss depending upon his/her managerial skill; (c) the alleged employee's investment in equipment or materials required for completing work or employing helpers; (d) whether the service rendered requires a special skill; (e) the degree of performance of the working relationship; and (f) whether the service rendered is an integral part of the alleged employer's business.

The Uber court concluded that the drives were ICs. First, Uber lacked the right to control the worker's performance. Uber could not control the time of work or whether drivers worked at all; had no right to determine driver's length of affiliation with Uber, no right to require drivers to use company logos or colors; and lacked control to require drivers to wear a standardize uniform. The court concluded that the issue was not whether Uber chose not to exercise control, but rather, whether Uber ever had the right to exercise control, regardless of the right being exercised. In addition the examining control, the Uber court also found that IC status was warranted because the drivers provided their own vehicles and could determine their own profit by working for other companies. Although the court assigned IC status, students should note that several factors weighed in favor of employee classification. The low degree of skill and fact that driving was integral to Uber's business practice weighed in favor of employee status, but were not sufficient to change the IC determination.

We use this case to teach the two federal standards (IRS control test and DOL economic reality test). Students are asked to evaluate the case under each standard, and identify how the standards differ in terms of the determinative factors.

Conclusion

Whereas gig work appears to be a growing labor model, business students and emerging business professionals stand to benefit from instruction on emerging labor law concerns, applicable standards, and recent court rulings. Worker classification requires a holistic determination; thus,

familiarizing students with federal, state, and local policies, and applying multiple classification criteria to authentic business cases strengthens students' understanding of worker classification compliance efforts. GrubHub, Dynamex, and Uber's cases offer three unique human resource learning activities, which allow students to compare current worker classifications standards, suggest their own classification determinations, and consider how the courts are currently interpreting classification policies.

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Appendix A: IRS Common Law Rules for Worker Classification

CATEGORY 1: BEHAVIORAL CONTROL (Does employer control how worker completes work tasks?)	EMPLOYEE STATUS	IC STATUS
1. Type of Instructions Provided to Worker		
When to perform work		
Where to perform work		
What tools to use		
What assistants to hire		
Where to purchase supplies		
Where to purchase services		
Type of work to be performed by specific person		
Order/sequence to follow when performing work		
2. Degree of Instruction		
Detailed instructions		
Employer retains right to control worker's performance, even if the right is not exercised		
Employer has given up right to control worker's performance		
3. Evaluation System		
Evaluates details of HOW work was performed		
Evaluates end result		
4. Training		
Training on how to do work		
On-going training on workplace procedures		
CATEGORY 2: FINANCIAL CONTROL – Can business control economic aspects of worker's job?		
1. Significant Investment		
Significant financial investment in equipment used for job		
Lack of financial investment in equipment for trades that don't require tools/equipment		
2. Unreimbursed Expenses		
Unreimbursed employee expenses		
Fixed, perpetual costs, unrelated to current task		
3. Opportunity for Profit or Loss		
Possibility of loss		
Possibility of loss, particularly where also coupled with significant financial investment and unreimbursed expenses		

4. Services Available to Market		
Legal option to pursue external business opportunities		
Advertise services to market		
Available to accept work in relevant market		
5. Method of Payment		
Guaranteed wage (weekly, hourly, salary)		
Flat fee		
CATEGORY 3: TYPE OF RELATIONSHIP – Using objective evidence, how do the parties perceive their relationship?		
1. Written Contracts		
Written contract states worker is EE (can't contract out of common law rules)		
Written contract states worker is IC (can't contract out of common law rules)		
2. Employee Benefits		
Business pays worker's health insurance		
Business pays worker's pension plan		
Business provides paid vacation		
Business provides sick days		
Business pays worker's disability insurance		
Business does NOT provide any of the benefits listed above		
3. Permanency of Relationship		
Worker hired on at-will basis		
Worker hired for specific term/project		
4. Services Provided as Key Activity of Business		
Worker's contributions/service is a key aspect of business		
Worker's contributions are incidental to main purpose of business		

Employment Relationship Factors to Consider:	Employee	IC
1. The services rendered are an **integral pa**rt of the business.		
2. The business and worker maintain a **permanen**t work relationship.		
3. The worker invests in his/her own **facilities and equipment.**		
4. The business **controls** the nature, process, and degree of work.		
5. The worker has **opportunities** for profit and loss.		
6. The worker success is influenced by the degree of **initiative, judgment, or foresight** within open market competitions with others.		
7. The worker maintains an independent business **organization and operation**.		

Appendix C: ABC Test of Worker Classification

A worker should be classified as an employee unless ALL of the following three conditions are satisfied:

1. The worker is free from the control and direction of the business, in relation to the performance of the work, both under the contract and in fact;

2. The worker performs work that is outside the usual course of the hirer's business; and

3. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hirer

Appendix D: GrubHub Case

GrubHub Case Overview:

GrubHub, Inc.'s mission is to be "*the nation's leading online and mobile food ordering company dedicated to connecting hungry diners with local takeout restaurants*." As of 2018, GrubHub held 25% of the U.S. food delivery service, second only to Domino's Pizza. GrubHub hired Raef Lawson in 2015, to serve as a driver. His task was to deliver food orders placed by customers through the GrubHub app. Lawson provided his own vehicle and phone. GrubHub provided no formalized employee training, but the company did provide him access to the driver's app. The driver's app allowed Lawson to track and accept deliveries, but also allowed GrubHub to track Lawson's work productivity, including the number of customer requests he accepted and successfully delivered. GrubHub encouraged, but did not require drivers to wear GrubHub apparel. In fact, GrubHub offered financial and nonfinancial incentives to drivers who wore the GrubHub logo. Lawson reported that he would occasionally wear the company's logo. While he could control when and where he would deliver food, GrubHub offered him financial and preferred scheduling incentives to maintain a high acceptance rate. Raef Lawson worked for GrubHub in California, for a short, four-month period. He sued GrubHub, alleging that the company had misclassified him as an independent contractor and seeking $585.56 in overtime pay and business expense reimbursements.

Lawson's Arguments:

Lawson proposed several arguments for why he should be classified as an employee. Lawson felt his work, delivering takeout food to customers, constituted a core component of GrubHub's business. GrubHub offered Lawson incentives to maintain a high worker acceptance rate, resulting in higher hourly pay or preferred scheduling and controlled the work through scheduling policies, creating employee/employer relationship with its drivers. GrubHub evaluated his performance with the use of "ghost order" acceptance testing. In addition, GrubHub encouraged drivers to wear company attire, utilize supplies with the company's logo, and even provided incentives to drivers who donned the company's brand. The company tracked and monitored drivers' movements. Finally, GrubHub holds a quarter of the market on food delivery services in the U.S., second only to Domino's Pizza.

GrubHub's Arguments:

GrubHub argued in favor of independent contractor classification by contending that food delivery was not a primary element of their core business purpose, and Lawson made deliveries for other companies. Lawson was not required to wear their log and often elected not to, and controlled the timing, amount, location of accepted work, as well as the process by which work was accepted and completed. In addition, Lawson was not required to participate in training.

Appendix E: Dynamex Case

Dynamex Case Overview:

Dynamex Inc., a subsidiary of TForce, Inc., provides fleet, outsourced same day delivery and pickup, as well as other expedite and scheduled transportation services, to businesses and the public within the United States and Canada. Formerly known as Parcelway Systems Holding Corp., Dynamex was incorporated in Dallas, Texas in 1992 and changed its name in July 1995. Prior to 2004, Dynamex classified its California drivers as employees; however, beginning in 2004, Dynamex converted its delivery drivers to ICs, saving the organization in employee costs.

Lee's Arguments:

After being reclassified as ICs in 2004, Dynamex drivers were required to provide their own vehicles and pay for transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance. In addition, they were required to obtain and pay for a Nextel phone to maintain contact with the company. Dynamex obtained its customers, established delivery service rates, and negotiated fees paid to drivers on an individual basis. In January of 2005, Charles Lee signed an IC agreement with Dynamex agreeing to provide delivery services for the company. In 2005 and within three months of leaving Dynamex, Lee filed a wage and hour class lawsuit on his own and other drivers' behalf claiming that Dynamex misclassified drivers as ICs, which violated the definition of an employee based on California Industrial Welfare Commission (IWC) Wage Order, as well as other state labor codes. The IWC based its definition of employee based on Martinez v. Combs (2010), which concluded that to employ means (a) to exercise control over the hours, wages, or working conditions; (b) to suffer or permit to work; or (c) to engage and therefore create a common law employment relationship.

Lee argued that drivers were assigned delivery at the sole discretion of Dynamex and had no guarantee to the number or type of deliveries offered. Drivers were not required to make all deliveries assigned to them but were liable for any losses which resulted from a failure to reject a delivery or failure to complete a delivery in a timely manner. Drivers were expected to wear company shirts and badges and attach a temporary company decal to their vehicle. Dynamex could terminate any contract agreement without cause.

Dynamex's Arguments:

Drivers set their own hours and were paid a fee based on the type of delivery, the scheduled route, and a percentage of the delivery fee received from the customer. They could determine their own sequence of delivery routes, but drivers had to comply with any customer requests and had to complete all deliveries accepted each day. Drivers were hired indefinitely and were free to work for other companies; however, they were prohibited from diverting deliveries to work for industry competitors. Dynamex argued that Martinez's definition to employ did not apply to their case as it applied to a joint employer of an undisputed employee.

Appendix F: Uber Case

Uber Case Overview:
Uber begin in 2009, when two entrepreneurs Travis Kalanick and Garrett Camp could not find a ride one snowy night in Paris and began to formulate a plan to make transportation services more available. Originally called UberCab, the company's platform was built on the desire to allow interested customers to request a ride using their mobile device. The cornerstone of their mission is the use of on-demand transportation technology which matches available drivers with needing riders. Eventually dropping "cab," Uber feels that they are making transportation services more accessible, reducing congestions in larger cities, and creating job opportunities where interested workers can work on their own terms. The first Uber ride was offered in San Francisco in 2010; in May of 2017 the company celebrated 5 billion trips and counting. Uber's worker classification case involves UberBLACK, their luxury car service, which offers riders the option of arriving at their desired destination in a premium ride and with a professional driver. Within Uber's case, Ali Razak, Kenan Sabani, and Khaldoun Cherdoud claimed that Uber and its wholly owned subsidiary Gegen, violated federal minimum wage and overtime requirements under the FLSA.

Plaintiffs' Arguments:
Razak, Sabani, and Cherdoud, contended they should be classified as employees under FLSA. UberBLACK drivers maintained that they were extensively controlled by Uber while online and it was stamina, not managerial skills, that allows drivers to earn a profit, or loss. Drivers must login to Uber's online service, indicating that they are available to accept request. Requests which are not accepted within 15 seconds will be offered to other drivers. Drivers who fail to respond to three consecutive trips will be automatically switched to offline and not offered additional requests. Drivers are automatically moved to offline for 6 hours after operating 12-hours online. Drivers pay a transaction fee, which compensates for use of Uber's app. Plaintiffs drove for Uber between 7-12 hours per day, performing an integral function of Uber's business. Uber maintained control by deactivating drivers who canceled trips, failed background checks, fell short of a 4.7-star rating, or solicited payment outside of the Uber mobile app. Uber also terminated driver's access to the app, blocked drivers who manipulated lines at major transportation hubs, and made deductions against a driver's earning.

Uber's Arguments:
Uber driving does not require operators to have special skills or certified training. Operators provide their own equipment and tools and accessed the Uber mobile app via their own phone. Interested drivers logged on to Uber's online service and accepted requests. Uber did not control drivers' service area, inform drivers of high demand areas, insist that drivers wear company logos or uniforms, or require drivers to accept trip requests. Drivers maintained their own workers compensation insurance, provided services in the geographic area of their choosing, engaged in personal or other business (including transportation) activities while online with Uber, and rejected requests for any reason, except for unlawful discrimination. Drivers were not prohibited to work for other companies, paid their own expenses, invested in their own companies, hired other workers to work for their companies, and set their own working hours. While the plaintiffs drove for Uber, they also own and operate separate luxury transportations companies including Lux Limousine Services, Inc, Freemo Limo, LLC, and Milano Limo, LLC. Uber also contended that it was business acumen not stamina, which facilitated drivers to earn a profit or loss and concluded that Uber was a modernized telephone directory, providing a resource to locate a transportation services and drivers.

Appendix G: Case Study Instructions

1. Distribute cases (Appendices D, E, and F) to students and give students time to review the case narratives.

2. Instruct students to apply the IRS, DOL, and ABC tests (Appendixes A, B and C) to determine worker classification for each scenario.

3. Possible Discussion Questions:

    a. What elements of the organizations' and plaintiffs' perspectives were relevant to your worker classification determination?

    b. Are there any facts or circumstances that are missing that, if present, would have resulted in a different classification of worker status?

    c. What are the similarities and differences among the three cases?

    d. If you were responsible for managing these companies, what kinds of human resource practices or strategies could be adopted to mitigate litigation risk, while also preserving competitive advantage?

    e. Do you agree with the court rulings for each case? Why or why not?

    f. Do the court rulings impact operational strategy for other organizations or industries? If so, how?