

FIRM NEWS

NEMETH LAW ATTORNEY CONSIDERS THE NEED FOR NEW CLASSIFICATION OF ON-DEMAND WORKERS

Detroit, Michigan
December 3, 2015

PROFESSIONALS

Patricia Nemeth

Patricia Nemeth, founder of Detroit-based management side labor and employment law firm Nemeth Law, P.C., is closely following the on-demand work force and questioning whether a new worker classification, *dependent contractor*, should be considered to cover workers who operate in the gray area between traditional worker and independent contractor within the sharing economy.

“The phrase ‘contingent workers’ has morphed into new phrases such as on-demand workers or micro-entrepreneurs. Regardless of the wording, these workers are a powerful and growing force in the labor market and a key component in the labor strategy of app-based companies operating in the sharing economy,” Nemeth said. “Companies like industry giant Uber classify this emerging work force almost exclusively as independent contractors rather than employees- and backlash is increasing because of it.”

Nemeth notes there are a host of lawsuits against Uber and other sharing economy companies, with on-demand workers arguing they are employees entitled to greater benefits under the law.

“These disputes have forced the legal system to examine the relationship between on-demand workers and sharing economy employers under traditional legal tests of employment, yet these tests don’t adequately address the impact of changing technology on the modern workplace or the changing dynamics of the traditional concept of an employer-employee relationship,” Nemeth said.

The Government Accountability Office (GAO) estimates that as the number of contingent workers has grown from 35 percent of all employed workers in 2006 to nearly 41 percent in 2010 so too has worker misclassification. In March 2015, the Administrative Office of the U.S. Courts reported that 8,160 Fair Labor Standards Act (FLSA) cases were filed in 2014, an increase of almost 9% from 2013 and an all-time high for FLSA cases filed in one year. This misclassification has led to lower tax revenues for state and federal governments. The IRS estimates the federal government does not receive approximately \$1 billion per year due to worker misclassification.

This growth may be driven in part by a millennial workforce seeking flexibility and greater work-life balance, with on-demand work platforms offering such advantages. Smart phone apps, especially, allow workers to log in or out at any time and perform tasks for consumers such as driving passengers to a location, performing handy-man services, cleaning homes or completing odd-jobs based on their own schedule. The consumer pays for the service via the app, the company takes a cut of the fee, and the rest is passed on to the worker.

Still, courts find the on-demand work relationship inherently difficult to classify under the current independent contractor/employee approach which uses two primary tests:

1. The common law control test: analyzes how much control an employer has over the manner and means of work performed by an individual
2. The economic realities test: analyzes whether a worker is in business for him or herself or is economically dependent upon the employer.

On-demand workers fall into the gray area between these two tests, with the freedom to choose when and what apps to log into to perform work; however, when logged in, they are often subjected to significant control by the employer on pay rates, how to interact with consumers and other qualifiers.

A new dependent contractor classification, already in place in Germany and Canada, may capture many U.S. workers in this gray area. The primary characteristic of a dependent contractor worker classification is economic dependence on a single employer. Legal protections for dependent contractors could be some, or many, of the same benefits that employees receive, reducing their susceptibility to economic volatility. In turn, employers would have greater certainty as to their legal obligations.

“Such clarity would likely lead to a decrease in costly litigation for employers,” Nemeth said. “Additionally, the creation of such a classification would provide some structure for sharing-economy companies to survive and for the United States to compete in a global economy where other countries are benefiting from recognizing a third worker classification. However, creating a new classification of workers is not a guaranteed solution; there is still the overarching issue of what legal protections a dependent contractor would receive.”

In Germany, dependent contractors have the right to receive annual leave, access to the country’s labor courts, are covered by anti-discrimination laws and are able to collectively bargain. In Canada, dependent contractors only have the right to reasonable notice of termination or severance pay and, in some instances, the right to collectively bargain.

“If the dependent contractor classification were adopted, lawmakers, rather than judges, would have to determine the type and breadth of legal rights such a classification would receive,” Nemeth said. “These are not easy problems to solve and, given the current political climate, it is unlikely that an entirely new classification of workers will be adopted anytime soon.”

Learn more about the on-demand economy via Nemeth Law’s video series covering timely topics in employment law. Videos can be viewed on the Nemeth Law YouTube channel.

About Nemeth Law, P.C.

Nemeth Law specializes in arbitration, mediation, workplace investigations, employment litigation, traditional labor law and management consultation/training for private and public sector employers. It is the largest woman-owned law firm in Michigan to exclusively represent management in the prevention, resolution and litigation of labor and employment disputes.