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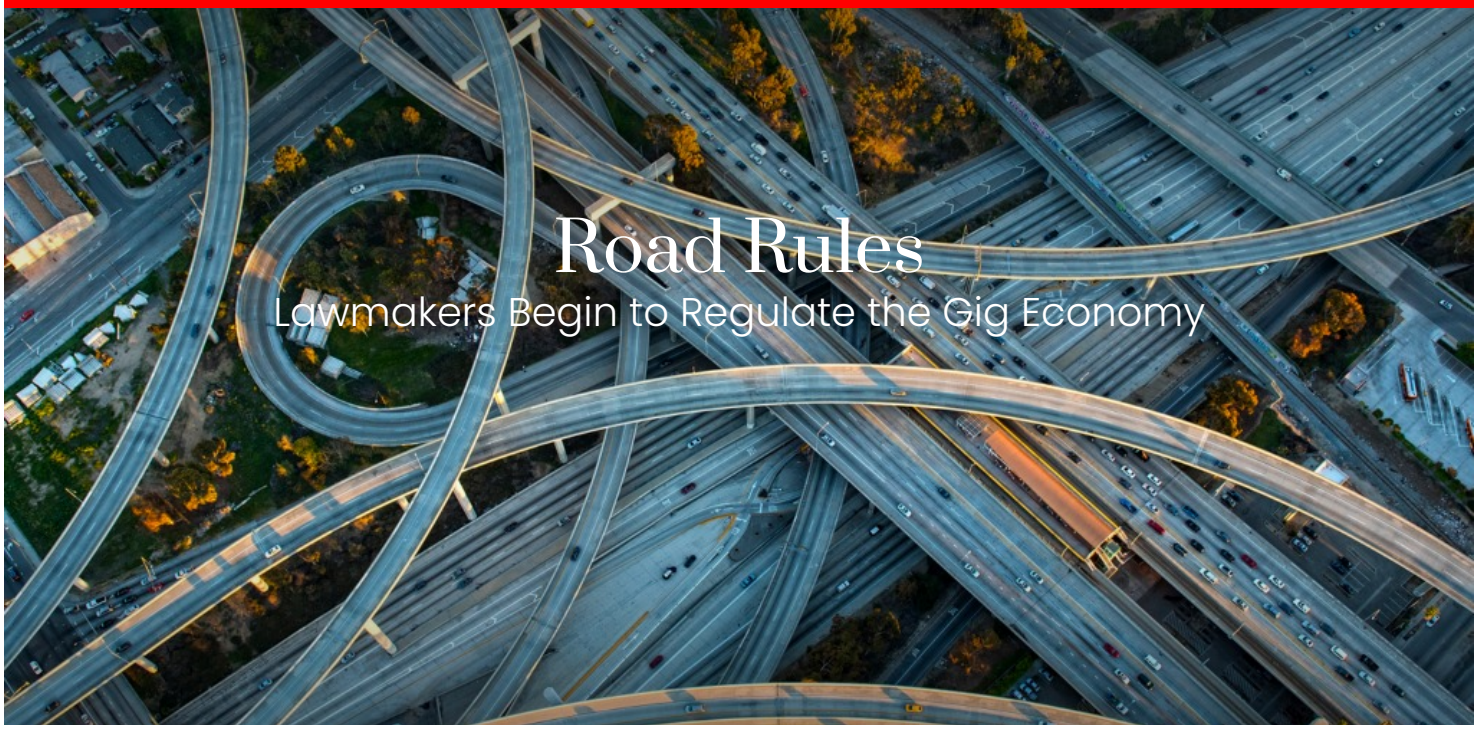

Road Rules

Lawmakers Begin to Regulate the Gig Economy

Featured Story

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By Matthew A. Steinberg and Raymond J. Berti

The rise of the gig economy, alternatively termed the "on-demand" or "peer-to-peer" economy, has received heavy scrutiny in recent years. Many pundits have lauded the freedom, flexibility, and entrepreneurial opportunities afforded by such work. Yet, others have been less sanguine, noting gig workers face financial uncertainty and insecurity and lack critical benefits and protections.

Indeed, the most salient — and controversial — aspect of the gig economy is that it is chiefly comprised of independent contractors, as opposed to fulltime employees. This is no niche issue; the gig economy presently employs about 20 to 30 percent of the American workforce, with that estimate increasing to 40 or even 50 percent in the next three years, according to various studies.

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> Pundits laud the freedom, flexibility, and entrepreneurial opportunities afforded by such work as ridesharing, programming, delivery services, and consulting.

Despite such significant statistics, lawmakers have been extremely slow to address this radical shift in the labor market. Until now.

NYC's Freelance Isn't Free Act

This past year, gig economy workers scored their first legislative victory to date in New York City, which implemented the Freelance Isn't Free Act (FIFA) on May 15, 2017. The law, which is the first of its kind in the country, requires the parties of almost every engagement of work to enter into a written agreement if that work is valued at $800 or more over a four-month period.

FIFA is written broadly; so long as the $800 aggregate threshold is reached, it appears to apply with equal force both to large corporations hiring sophisticated software developers and to parents hiring a babysitter.

The law further requires the hiring party to deliver payment to the freelance worker within the time specified in the written agreement, or within 30 days of completion of the work, if the agreement is silent on this point. The law further prohibits hiring parties

from retaliating against freelancers for exercising their rights under FIFA.

40-50%

Projected share of the American workforce employed by the gig economy in 2020

Moreover, the New York City Department of Consumer Affairs recently promulgated rules prohibiting hiring parties from including class or collective action waivers, mandatory arbitration provisions, or confidentiality provisions which preclude the disclosure of the terms of the agreement to the Director of the New York City Office of Labor Standards.

Finally, and perhaps most significantly, the law creates a private right of action for freelancers, allowing them to commence a civil action for FIFA violations to recover damages, attorney fees and costs.

FIFA Portends a National Trend

The Freelancers Union, which helped champion FIFA in New York City, has publicly expressed its intent to help enact similar laws across the country.

Additionally, over the past year, there has been a flurry of state and federal legislative activity designed to extend benefits to gig economy workers.

For instance, there has been a strong push to provide “portable benefits” to independent contractors, which would allow these workers to maintain employment benefits, regardless of where they work.

> Lawmakers have only recently begun to engage the unique social and economic challenges presented by the gig economy.

At least two states—New Jersey and Washington—have introduced legislation that would implement portable benefits programs, and another two states—New York and California—are reportedly soon to follow.

Meanwhile, over the summer, Sen. Mark Warner (D-Va.) and Rep. Suzan DelBene (D-Wash.) introduced legislation that would provide federal grants to state and local governments, as well as nonprofit organizations, to experiment with portable benefits programs. At the time of this writing, these measures are all still pending.

Criticism From All Sides

Unsurprisingly, these recent legislative efforts have not gone unchallenged in the court of public opinion.

FIFA critics have expressed concerns about the law being overbroad in scope (as noted above, it could plausibly apply to traditionally informal arrangements like babysitting or dog-walking) ; counterproductive (to avoid liability, New York based companies may seek to hire freelancers beyond city limits); and unduly burdensome on employers (a dispute over $800 could potentially cost an employer tens of thousands of dollars).

Nevertheless, it is still too early to evaluate whether these criticisms will prove to have merit. On the other hand, many have argued these recent legislative measures do not go far enough, contending that the vast majority of workers in the gig economy cannot plausibly earn enough to make a living wage or to obtain the health insurance and retirement benefits available to their fulltime counterparts.

Accordingly, these critics have called for more sweeping solutions like the elimination of the legal distinction between fulltime employees and independent contractors, or, in the alternative, the creation of a third category of worker akin to a "dependent contractor."

In addition, advocates of the universal basic income have also entered the fray, arguing that providing every citizen with a guaranteed, standardized paycheck can offset the negative aspects of the gig economy. Similarly, proponents of a single-payer healthcare system have relied upon the rise of the gig economy to make their case that tying healthcare benefits to employment is outdated and an ineffective means of providing such benefits to Americans.

Still others have observed that the increasing use of digital labor platforms, which rely heavily on data transparency, may soon render laws like FIFA largely unnecessary, at least to more skilled and/or sophisticated freelancers, such as software developers.

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The reasoning behind such criticism is that these technology-based platforms deliver precisely the accountability sought to be imposed by legislation like FIFA, by providing freelancers the ability to review and compare potential employers. For instance, should an employer fail to pay a freelancer, or pay late, that information will become public on the platform, and freelancers will be less likely to work with that employer in the future. In short, the argument is that the same technologies that created the gig economy may be able to solve the very problems it produced.

(It should be noted that, if this technology- based critique proves to be correct, then going forward, FIFA may be used primarily not to resolve disputes between corporations and fulltime freelancers, but to settle conflicts arising from traditionally informal agreements between unsophisticated individuals, i.e., lawsuits filed by babysitters against parents.)

Looking Ahead

In sum, the rise of the gig economy, along with the increasing number of independent contractors in the workforce, presents unique social and economic challenges. Although these challenges have been widely covered by the media over the past few years, lawmakers have only recently begun to engage with them, and with limited success. Nevertheless, as calls for reform inevitably grow louder, we can expect to see more legislative action across the country. Though it remains uncertain just how sweeping such reform may be, one thing is clear: the gig economy is here to stay.