

The Legal Landscape of the Global Gig Economy

by Ruben J. Garcia



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Ruben Garcia explains the global uncertainties of work in the “gig economy.”

- The question of who is an employee and who is a contractor becomes more complicated jurisdictionally in the global economy.
- Immigration restrictions and tariffs incentivize American companies to outsource work to other countries.
- “Until governments and courts answer . . . questions, there will continue to be regulatory uncertainty about the use of technological platforms.”

The “gig economy” has led to a number of controversies and disputes within the borders of the United States. Legal actions have been filed against companies such as Uber, Postmates, and Grubhub in several jurisdictions over nonpayment of wages, unemployment insurance, and local ordinances designed to give collective bargaining rights to ride-share drivers. Technology, however, has facilitated the growth of the global gig economy across borders, raising a number of issues for governments, regulators, and workers.

Of course, there are workers abroad who are working for multinational gig companies such as Uber or Airbnb in their home countries. The focus of this article, however, is the legal and policy implications when the global gig economy crosses borders through technology but the putative employers and employees have never met in person. For example, there are individuals in the United States who hire workers in other countries for a particular job or task. There are also employers in some countries who want workers delivered to them across borders on demand. Even without face-to-face interaction, there can be a number of legal issues that implicate local law, international law, and federal law.

As technology allows workers to more easily be called up on demand, the possible legal issues and potential liabilities could make global outsourcing of labor more complex than expected. This article identifies some of the complications of this cross-border work and also discusses how reductions in lawful immigration in developed countries incentivize greater use of labor through technology platforms.

The “Platform Economy”

The platform economy has attracted a great deal of attention from scholars and researchers. In a recent article, “What the Gig Economy Looks Like around the World,” Annie Lowery interviewed researchers at the University of Oxford who have attempted to quantify the growing prevalence of this platform work (Lowery 2017). Platforms such as Guru allow people to outsource small programming tasks throughout the world. Oxford professor Mark Graham and his co-authors estimate that the global economy is growing by more than 25 percent a year. Other scholars, such as Miriam Cherry and Orly Lobel, have discussed the legal issues involved in Amazon’s “Mechanical Turk.” This is a platform run by Amazon to distribute small tasks to workers throughout the world.



An Uber driver in Bogotá, Colombia, running the Uber app on his dashboard-mounted smartphone.

The International Labour Organization (ILO) has also weighed in on the perils of the informal worker. A 2016 report by the ILO on nonstandard employment around the world found that even in developed economies such as Australia's, the percentage of workers in nonstandard employment approaches one-quarter of the labor force.

The usual model of multinational employment is for a U.S.-based corporation to contract with a corporation in another country, ostensibly to avoid higher wages for labor in the developed world. Typically, these transnational corporations have the capital to contract for goods in the global production chain. The Trump administration's propensity for increasing tariffs will make producing goods outside the United States more expensive. More and more, employers will look to ways that reduce costs to get work done. Further, where transfer of services becomes as

important as the manufacture of goods, the matching in other countries is often facilitated through technology.

As the number of workers looking for nonstandard employment increases, then, the number of potential issues under existing laws will also increase. Also,

the (re)negotiation of trade agreements might have implications for the increased transfer of services across borders, an outcome that should be measured. Possible

policy limits on the migration of persons into developed countries like the United States will likely lead to a greater number of potential employers and employees transferring pay for services through technological platforms.

Employee or Independent Contractor?

As with the rest of the gig economy, the question of who is an "employee" or "independent contractor" will be the

keystone determining what the respective rights and obligations are. But the test is different state to state and even country to country. In countries that have a dependent-worker category that the United States does not have, there might be a greater argument that obligations are owed to the employee. Generally, though, platforms are used to put separation between the entity needing service and the worker providing the service. Platforms like Uber and Guru serve an intermediary function that generally shields the employer from liability. As the ensuing discussion reveals, however, theories of joint employment may not shield consumers of services from liability.

Assuming there is a possibility of employment status, a number of legal issues arise in the global information economy.

Joint Employer

The Joint Employer Doctrine has caused concern among the employer community, particularly when the U.S. Depart-

ment of Labor was run by the Obama administration. This doctrine, enacted by the Department of Labor during that period, acknowledges that for any employee “there can be more than one employer.” Generally, the test of control is the one used. Although these new forms of work often involve only two contracting parties, there are other questions about the involvement of technology firms or other intermediaries. And then there are potential connectors on the ground.

If a U.S. employer uses technology to direct the work of an employee in another country, the potential exists for joint employment liability. The U.S. Department of Labor and its Bureau of International Labor Standards may be less inclined to push this envelope under the Trump administration. Private parties, however, may use the regulation as a way of assessing responsibility throughout the labor chain, as they did in the Thai worker slave case in Southern California in the 1990s (see *Bureerong v. Uvawas*, a 1996 federal trial court decision). Thus, application of the Joint Employment Doctrine could continue to be a risk for potential employers.

Minimum Wage and Overtime

When paying workers as “employees,” employers must take into account minimum wage and overtime laws. Under the U.S. Fair Labor Standards Act (FLSA), the minimum wage is \$7.25 per hour, and employees must be paid at one-and-one-half times their regular rate for all hours in excess of forty in a work

week. The studies that exist of wages in the platform economy suggest that these rates are not often met. One study, “A Data-Driven Analysis of Workers’ Earnings on Amazon Mechanical Turk,” led by Singapore Management professor Kotaro Hara, found a median hourly wage of less than \$2 per hour, with only 4 percent earning more than \$7.25 per hour (Semuels 2018).

The wage-and-hour rules of the minimum-wage law generally follow the locus of where the work is done. But the virtual economy creates ambiguities in the virtual space that raise questions for governments and workers alike.

If the FLSA were applied to the work done in the virtual economy, it would be treated much like agriculture, where workers are paid based on the number of crops they pick in an hour. Even then, workers would be entitled to the minimum wage. Without a legal requirement to monitor the hours of employees, however, there is hardly a way to determine whether the piece rate indeed equals the minimum wage.

Slavery or Involuntary Servitude?

The Thirteenth Amendment to the U.S. Constitution prohibits slavery or involuntary servitude in the United States or any place subject to its jurisdiction. This is the only part of the Constitution that does not require governmental action.

If a company or person allows slavery or involuntary servitude in their employment, they can be liable for the violations under U.S. federal law. But what about slavery that takes place across the oceans? Doctrinal hurdles to extraterritoriality of the

Thirteenth Amendment would have to be addressed, but there could be laws in the country where the work takes place that criminalize this conduct.

International human rights instruments may apply. For example, there can be Alien Tort Statute (ATS) litigation in the United States if a U.S. person commits a tortious act in violation of fundamental international law. The U.S. Supreme Court has recently limited the ability of aliens to sue under the ATS,

but individuals can still be sued in U.S. courts if their conduct can be said to be in violation of the law of nations. The case *Jesner v. Arab Bank*, decided by the Supreme Court in

early 2018, may limit the kind of claims that can be brought against corporations, but there are certainly consequences that most Americans would like to avoid—such as being embroiled in an international human rights controversy. In the end, though, litigation is unlikely, and that is why the incentives for cross-border outsourcing have increased.

Antidiscrimination Law

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, sex, color, national origin, or religion in hiring or the terms and conditions of employment. As previously discussed, coverage of antidiscrimination law depends on the worker’s being considered an employee. Also, the law only applies to workers outside the United States if those workers are U.S. citizens. Further, the alleged “employer” must have fifteen or more “employees.” If the workers are in other countries, for many in the potential employer economy who will not reach the threshold, possibilities of actions still exist under local or state law, which may be broader than Title VII. Researchers are beginning to find that algorithms used to find workers in a purportedly nondiscriminatory way are susceptible to bias (Miller 2015).

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Contract Issues

Even if there are no “employment” issues because the party seeking services does not exercise sufficient control over the manner and means of work, the purported independent contracts might require enforcement, either for the worker to sue for payment or for the party seeking services to compel specific performance of those contracts. Again, it is unlikely that such a remedy would be enforceable, but there may be transaction costs that negate the benefits of the gig economy.

And while employees are generally considered to be “at-will” in most of the United States, the doctrine of wrongful termination in violation of public policy would apply if the reason for breaking the contract is one that public policy condemns, such as whistleblowing against violations of anticorruption laws.

Choice of Law and Dispute Resolution

In theory, some of arrangements and terms of service for the transfer of work could include “choice of law” provisions. These are provisions where parties attempt to affix the location of the reso-

lution of any disputes. Even where there is a choice-of-law provision, there is a possibility that it could be difficult to honor terms in particular jurisdictions if the tribunal finds a public policy reason against it. Certainly, there is the possibility that workers in any country might enforce their rights in their own country. In either case, the enforceability of rights would be difficult.

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Then, as is the case with contracts entirely in the United States, there can be mandatory dispute resolution procedures such as arbitration

and mediation in the standard form contracts. As with the choice of law provisions, there are greater limits on the international stage to enforcing arbitration than currently exist in U.S. courts, and so the parties' expectations about the forms of dispute resolution used may be frustrated.

Limited Migration Opportunities

As it stands now, the existing immigration visa programs in the United States are not meeting employer demand. Technology firms have long lamented that there are not adequate visas for technology workers. To the extent that those needs go unmet due to the policies of the Trump administration, there will

be greater demand for technology services across borders that do not require immigration to the United States.

Conclusion

The tech economy offers new opportunities to match workers to those in need of their services across the globe. As I have explained, legal issues certainly complicate the cross-border transfer of services. Until governments and courts answer some of these questions, regulatory uncertainty about the use of technological platforms will continue. As with the rest of the global economy, the speed of technology is outpacing the social policy needed to address the world of work.

References

- Miriam Cherry and Orly Lobel.
- Graham and his co-authors.
- Hara, Kotaro. "A Data-Driven Analysis of Workers' Earnings on Amazon Mechanical Turk."
- International Labour Organization. 2016. *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects*. Geneva, Switzerland: International Labour Office. Retrieved from http://www.ilo.org/wcmsp5/groups/public/dgreports/@dcomm/@publ/documents/publication/wcms_534326.pdf
- Lowery, Annie. 2017. "What the Gig Economy Looks Like around the World," *Atlantic* (March 13).
- Miller, Claire Cain. 2015. "When Algorithms Discriminate," *New York Times* (July 9).
- Samuels, Alana. 2018. "The Online Hell of Amazon's Mechanical Turk," *The Atlantic* (January 23).