

**Morgan Lewis**

# **THE CHANGING GLOBAL WORKFORCE: MANAGING RISKS IN EMPLOYEE, INDEPENDENT CONTRACTOR, AND GIG WORKER RELATIONSHIPS**

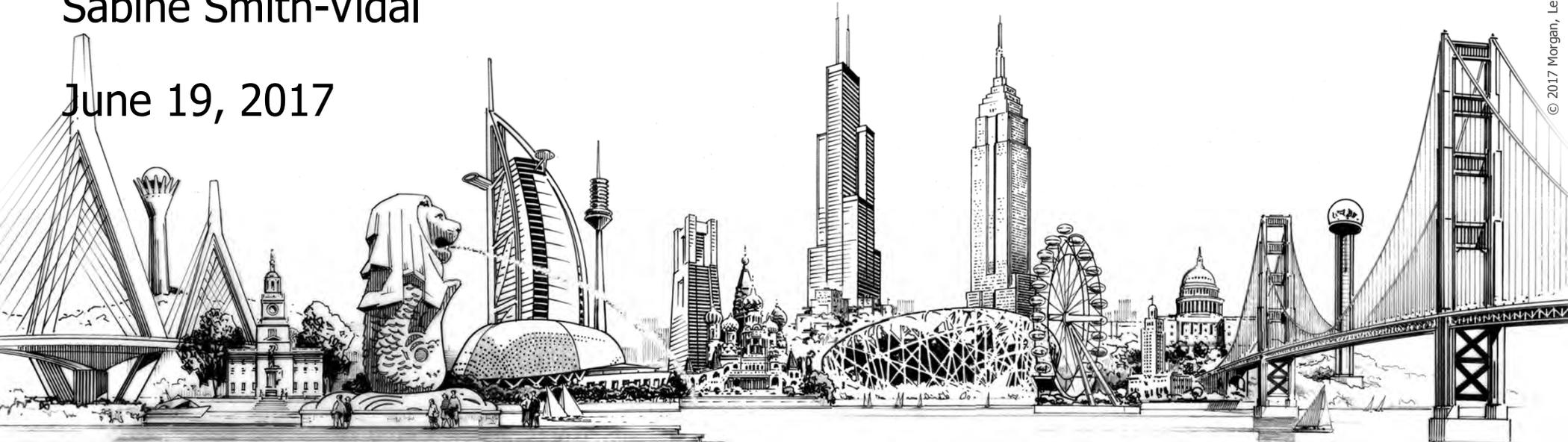
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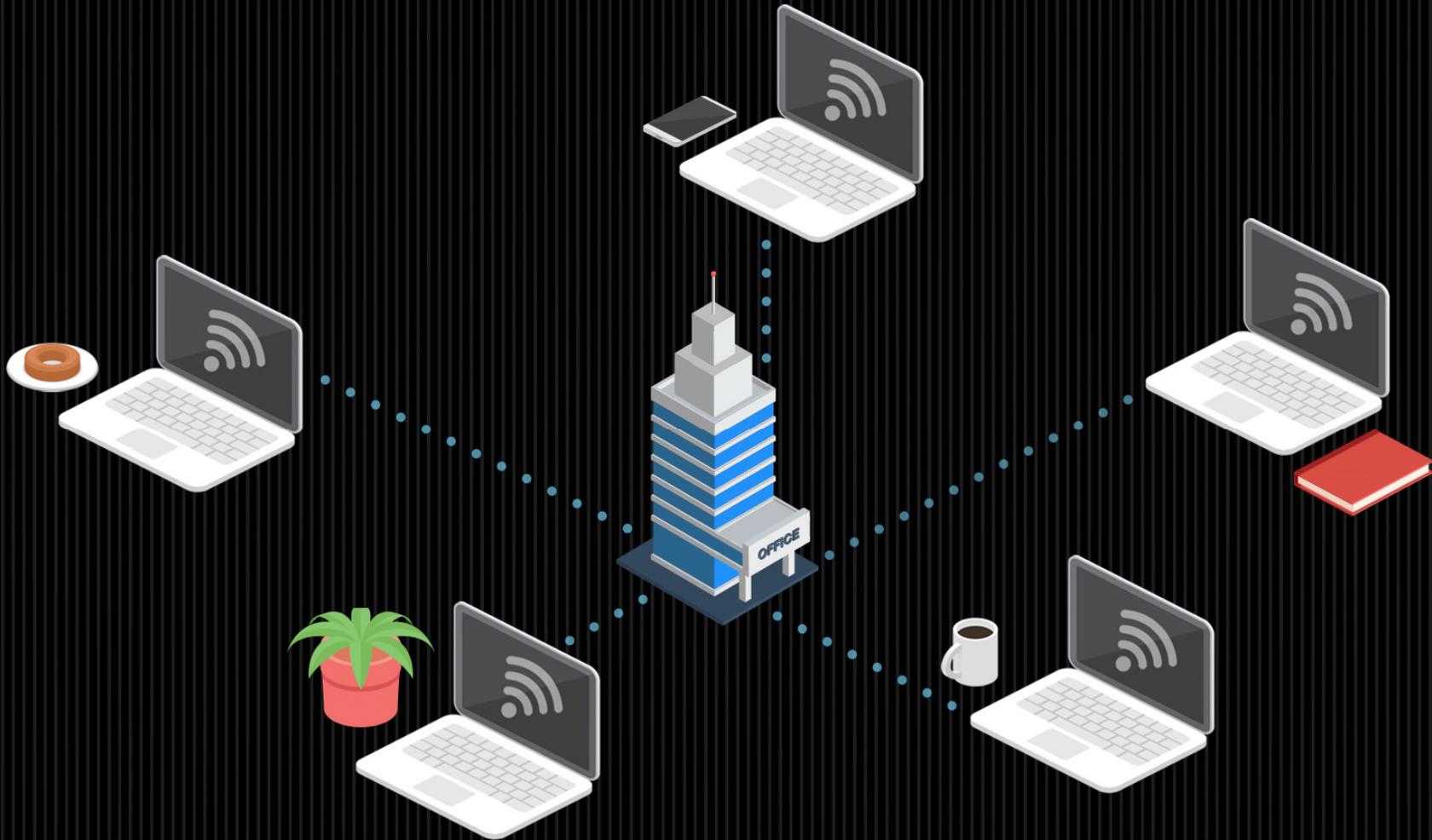
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## **OVERVIEW**

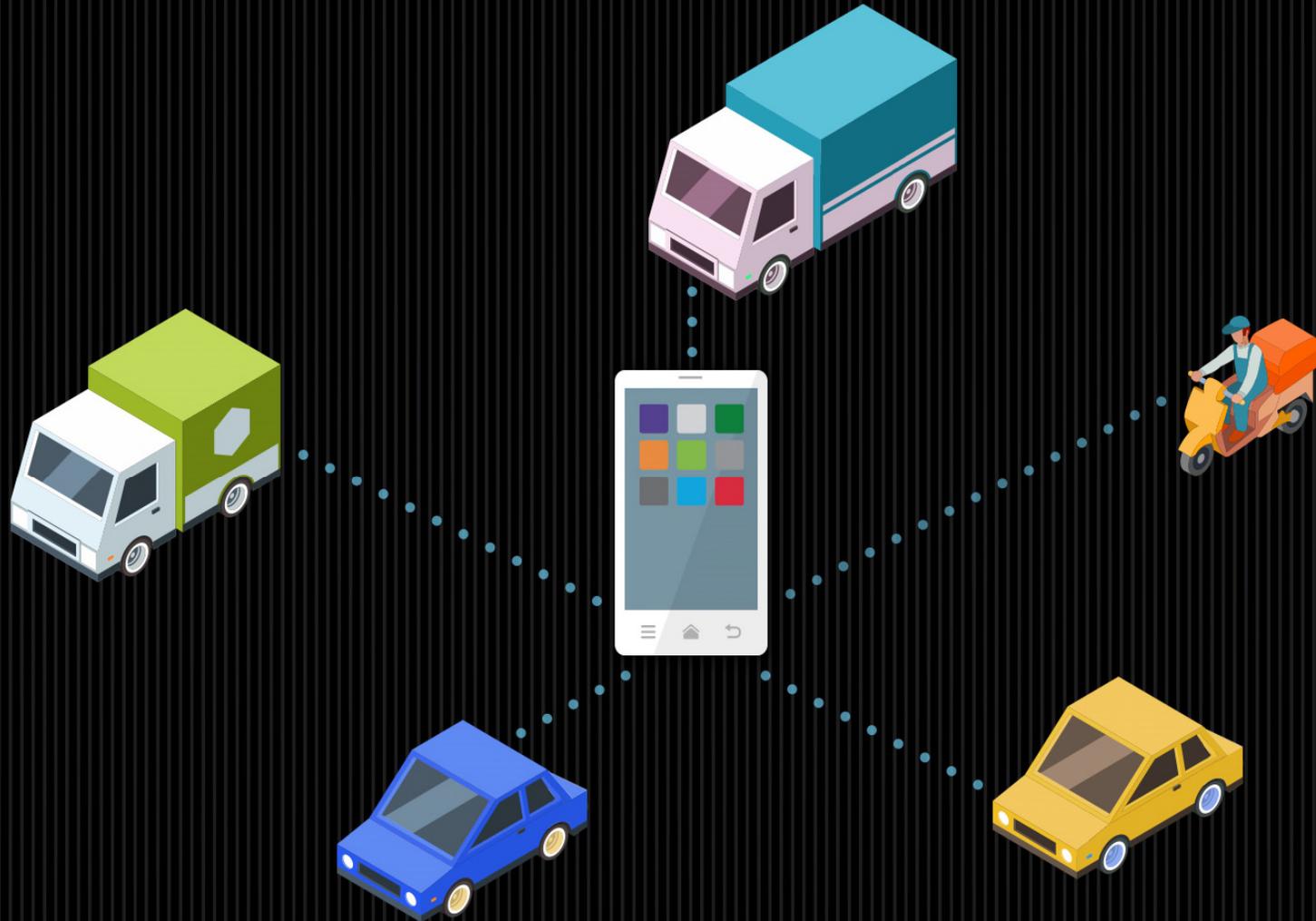
# The Gig Economy Defined

- Market model in which workers contract with organizations for temporary, short-term engagements. Typically, a worker has the ability to pick and choose when he or she will work and how often.
- The on-demand or “gig” economy is economic activity created by companies (generally technology-related) that fulfill consumer demand via the immediate provision of goods and services.
- Types:
  - Personal services
    - Examples: Uber, Lyft, Handy, Instacart – intermediary connects consumer with service
    - Accountants? Lawyers?
  - Goods and impersonal services
    - Examples: Airbnb, Etsy – intermediary connects buyers and sellers
    - Personal shoppers
    - Secret shoppers
    - Brand ambassadors/social media monitors/moderators

# Evolution of the Gig Economy



# Evolution of the Gig Economy



# Statistics

- Number of workers impacted
  - “Independent workers” are those workers regularly engaged in freelancing, contract work, consulting, temporary assignments, or on-call work each week for income, opportunity, and satisfaction.
  - Independent workers 21 years and older = 40.9 million in 2017 (16.2 million full-time independents, 11.8 million part-time, and 12.9 million occasional).\*
  - Around one in seven workers in the UK is now self-employed, up 45% since 2008.
- Amount of money at issue
  - In 2015, independent workers generated more than \$1.1 trillion of revenue. This is equal to nearly 6% of US GDP.

\*Source: [MBO Partners State of Independence in America 2017](#)

Additional statistics regarding joint employment included in DOL 2015 Administrator's Interpretation, DOL 2015-1 [Administrator's Interpretation](#)

# The Industrial Revolution Meets the New Economy

- The Social Compact
  - Workers work
  - Employers provide pay, benefits, and insurance
  - Employers withhold taxes
- Independent Contractors (ICs) are businesspersons who work and receive pay, but are left to own devices regarding benefits, insurances, and payment of taxes
- The Question: Where do gig workers fit?

# Primary Risks and Exposure

- Companies are increasingly interested in entering the gig economy, but the legal uncertainties pose some discouraging risks
- Employee vs. IC Misclassification/Finding of Joint Employment have numerous repercussions:
  - Timekeeping and payroll – “Employers” are responsible for minimum wage, overtime pay, tax withholding, etc.
  - Expense reimbursement in certain jurisdictions
  - Discrimination and retaliation laws
    - Gig economy is “new priority” in EEOC Strategic Enforcement Plan for 2017-2021
    - Not clear whether that will change under Trump Administration
  - Traditional labor issues – Can gig workers unionize?

# Additional Risks and Exposure

- WARN Act
- Workers' Compensation – Only provided to employees, but failing to provide to “employees” can constitute a criminal violation.
  - Some states have broader definition for “covered workers.” See Washington State.
- Unemployment Compensation – If you “employ” someone on a gig basis and deactivate him or her, then he or she might attempt to seek unemployment compensation.
- Fair Credit Reporting Act (FCRA) – Failure to provide employees a disclosure of rights to request copies of credit checks and background reports.
- OSHA – ICs are responsible for their own health and safety protections.
- Motor Vehicle Registration – Some states permit a business entity to obtain driving reports for “employees.”

# US Department of Labor: Economic Realities Test

- Administrator's Interpretation No. 2015-1 (rescinded)
- To determine whether a worker is an employee or IC for FLSA purposes, focus on whether the worker is economically dependent on the employer or in business for himself or herself.
- The FLSA's definition of "employ" is "to suffer or permit to work." It was designed to broadly encompass many workers and provide comprehensive statutory coverage.
- "Economic reality" factors to consider:
  - the extent to which the work performed is an integral part of the employer's business;
  - the worker's opportunity for profit or loss depending on his or her managerial skills;
  - the extent of the relative investments of the employer and the worker;
  - whether the work performed requires special skills and initiative;
  - the permanency of the relationship; and
  - the degree of control exercised or retained by the employer.

# Traditional State Tests

- Right to Control Test
  - The primary question – Does the worker have the right to control the manner in and means by which he or she carries out the job?
  - Factors to consider:
    - Whether the person performing the services is engaged in an occupation or business distinct from that of the principal;
    - Whether the work is a part of the regular business of the principal or alleged employer;
    - Whether the principal or the worker supplies the instrumentalities, tools, and place for the person doing the work;
    - The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;

# Traditional State Tests (cont.)

- Whether the service rendered requires a special skill;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job; and
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

# Legislative Solutions?

- Congress has recognized the fact that the gig economy may require legislative action to ensure that 20th century laws are updated to reflect a 21st century reality.
- Whether and what any new law looks like is anyone's guess at this point.
- Federal preemption?

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**UNITED KINGDOM**

# Employment Status: Statutory Tests

- **Employee** – section 230(1) of the Employment Rights Act 1996 (ERA)
  - An employee means “an individual who has entered into or works under (or, where the employment contract has ceased, worked under) a contract of employment.”
  - A contract of employment means “a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.”
- **Worker** – section 230(3) of the ERA
  - A worker generally means “an individual who has entered into or works under (or, where the employment has ceased, worked under)”:
    - a contract of employment, or
    - “any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally and work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”

# Employment Status: Statutory Tests (cont.)

- No statutory definition for a self-employed contractor.
  - An individual who provides services to another person but is not an employee or worker is considered self-employed.
- All employees are workers, but not all workers are employees.
- A contractor cannot also be a worker/employee.

# Employment Status: Court Discretion

- The courts take various factors into account when deciding whether an individual is an employee, a worker, or self-employed.
- No one factor is determinative—the matters to be taken into account and the weight to be given to them vary depending on the circumstances.
- Labels used by the parties are just the starting point—the courts will assess the substance, not the form, in determining the true relationship.
- Broadly, the greater the number of tests that are satisfied on the next slide, the greater the likelihood that an individual will be considered an employee. Conversely, the fewer the number of tests that are satisfied, the more likely it is that an individual will be considered a contractor. A worker is an intermediate category between these two extremes.

# Employment Status: Key Tests

- The key tests include:
  - **Mutuality of obligation:** If an employer is obliged to provide work and an individual is obliged to undertake such work offered, there will be mutuality of obligation and evidence that the individual may be an employee.
  - **Personal service:** If an individual is required to personally perform work, without the ability to send a substitute to work for the employer, this is evidence that the individual may be an employee.
  - **Level of control:** If an employer has a high level of control over how, when, where, and on what terms the employee carries out his/her work, this is evidence that the individual may be an employee.

# Employment Status: Other Factors

- Courts will also consider:
  - **Integration:** Is the individual integrated within an employer's business, such as having management responsibilities or being subject to disciplinary policies?
  - **Bargaining power:** Is the individual offered terms on a "take it or leave it" basis (rather than being able to negotiate key terms such as price)?
  - **Business risk/reward:** Does the individual take any risk (such as investing tools or capital) and/or have the opportunity to make a profit?
  - **Nature/duration of engagement**
  - **Pay/benefits received by individual**

# Employment Status: Protection and Rights

- Different statutory protections and benefits of each employment category:
  - **Self-employed** – **least protection**: Health and safety, data protection, discrimination, and whistleblowing
  - **Workers** – **intermediate protection**: Same rights as self-employed plus rights under Working Time Regulations (such as rest breaks and paid annual leave), national minimum wage, no unlawful deductions from wages, automatic enrollment, etc.
  - **Employees** – **most protection**: Same rights as workers plus unfair dismissal, redundancy pay, statutory notice, family-friendly leave (subject in some cases to satisfying service requirements)

# Employment Status: Tax Considerations

- HMRC uses employment status to determine, among other things, amounts/timings of income tax and National Insurance Contributions (NICs).
- HMRC recognizes employees and the self-employed, but **not** workers. It is therefore possible to be self-employed for tax purposes but classed as a worker for employment law purposes.
- Separate regimes for determining tax and employment status
  - The HMRC online employment status indicator tool can be relied on as evidence of an individual's status for tax purposes.
- The government has established a working group that is considering a potential move to a uniform test on employment status across tax and employment law.

# Key Case Law

- ***Aslam v. Uber***: Degree of control exercised by Uber over drivers was key to showing they were workers.
- ***Dewhurst v. CitySprint***: Cycle courier was integral to the business, had little autonomy over work, and only a conditional right of substitution.
- ***Pimlico Plumbers v. Smith***: No unfettered right to substitute someone else to perform the work meant a plumber was a worker and an employee for discrimination purposes.
- ***Deliveroo***: Expected claim will argue that Deliveroo couriers are employees.

# Engaging Casual Workers

- No precise legal meaning
- Individuals who are called to attend work “as and when required”
  - Used in businesses where the need for workers is not constant
- Casual workers may be engaged in a number of ways:
  - Through an agency
  - On a “zero-hours contract” —employer is not obliged to provide a minimum amount of work, and workers are not obliged to accept any work offered
  - Under an “umbrella contract”—worker is engaged on a series of individual contracts, but there is an overarching contract (express or implied)
  - On a consultancy basis

# Engaging Casual Workers: Issues

- Agency workers
  - May be employees/workers of the agency or the client (or neither).
  - Day 1 rights: access to collective facilities, information on employment vacancies.
  - Week 12 rights: same pay and other “basic working conditions” as permanent staff.
- Employment status
  - Casual workers may in fact be employees or workers.
  - Keep a clear distinction between casual workers and employees (application of internal labels, benefits).
- Continuity of employment in “umbrella contracts”
  - Umbrella contract may continue to exist in the gaps when a casual worker is not working.
  - Continuity of employment only if there is a continuing mutuality of obligation.
- Tax treatment
  - If a casual worker is classed as an employee, follow same payroll procedures as for permanent employees; if classed as self-employed, worker must account to HMRC.

# What to Expect?

- Case law developments, including ***Uber*** and ***Pimlico Plumbers*** appeals
- Future world of work:
  - In October 2016, the Business, Energy & Industrial Strategy Select Committee launched inquiry into the future world of work and rights of workers.
  - Definition of “worker”; balance of benefits between workers and employers; protection for flexible contracts; minimum wage enforcement; role of trade unions.
  - Law Society response: Default employment status (up to the employer to disprove status, not for the worker to prove it).

# What to Expect? (cont.)

- Taylor review
  - In November 2016, the government launched an independent review of employment practices, including implications of new working models on workers' rights and employers' freedoms and obligations.
- Work and pensions
  - In December 2016, the Work and Pensions Committee launched an inquiry into how the UK welfare system can support self-employed and gig economy workers.
- Impact of Brexit
  - More legislative freedom to reform employment rights?

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**FRANCE**

# France: General Principles

- The standard practice has been, and still is, to work under an unlimited-term full-time employment contract.
- Fixed-term employment contracts and temporary contracts are strictly supervised.
- Independent work/consultancy agreements are subject to suspicion and control.
- The gig economy is still at an early stage.
- The figures speak for themselves: of a total of 25.8 million workers, only three million are independent workers (including employers). The gig economy currently represents about 10,000 to 20,000 individuals.

# France: Employee Versus Independent Worker

- The border between an employee and an independent worker is not always very easy to draw.
- The French Labor Code presumes that a worker has an independent status when he/she is registered as an independent worker with the French administration. More important, an independent worker generally carries out work for his/her own benefit and under his/her own control, and assumes the risk inherent in the work as he/she also benefits from the profits relating to the work.
- On the other hand, there are three elements that characterize an employment contract: (i) the carrying out of work; (ii) the payment of remuneration; and (iii) the existence of a relationship of subordination between the employer and the employee (this last criterion is decisive in characterizing the existence of an employment contract).

# France: Employee Versus Independent Worker (cont.)

- The distinction between an independent worker and an employee is undoubtedly a question of fact.
- The main risk is that the relationship between a company and an independent worker could be characterized as an employment contract.
- In such a case, the company will have to apply French Labor Law regulations and pay any severance indemnity/notice period indemnity due to employees.

# France: Employee Versus Independent Worker (cont.)

- If the relationship is qualified as an employment contract, then:
  - all of the payments made to the worker will be subject to the social security contributions (if he/she has not paid them as an independent contractor); and
  - penalties will be added to these contributions. The rate of penalties is fixed at 5% for unpaid social contributions, and at 10% in case of undeclared work. A percentage of 0.4% shall be added to this rate per month for each contribution due.
  - Finally, there is a risk of criminal conviction for **undeclared work**. The legal representative of the company can be liable for a maximum fine of up to €45,000 and a three-year imprisonment. Companies, as legal entities, can be liable for a maximum fine of €225,000.
- **Tip: when working with an independent worker, a company should not provide him/her with a company email address, a secretary, a company business card, etc.**

# France: The Obligation of the Ordering Company Vis-à-vis Subcontractors

- Under French law, an obligation of care exists for ordering companies. This obligation is set up by the French Social Security Code and French Labor Code.
- The ordering company must require a document certifying the registration of the subcontractor (extract of the commercial registry or of the trades register and a certificate of vigilance issued by the Urssaf (Social Security Authorities)), which mentions the number of employees and the total remuneration that the subcontractor pays.
- This document also certifies the subcontractor's compliance with the obligations to report and pay social security contributions. The verifications resulting from the employer's obligation of care must be renewed every six months. The ordering company must verify the validity of the certificates provided by the subcontractor. In the event of breach of its obligation of care, the ordering company may be prosecuted and jointly and severally ordered to pay the taxes, social security contributions, compensation, and other expenses of its subcontractor.

# France: The Obligation of the Ordering Company Vis-à-vis Subcontractors (cont.)

- Furthermore, the ordering company has a safety obligation regarding employees, even if they are a subcontractor's employees. The ordering employer may be held criminally liable for the breach of the aforementioned obligation.
- It may also be held criminally liable if it knowingly uses a subcontractor:
  - That conceals its activity or its employees. Maximum penalties include:
    - For the company manager: three years of imprisonment and €45,000 fine,
    - For the company: a €225,000 fine;
  - That uses foreigners not authorized to work in France. Maximum penalties include:
    - For the company manager: five years of imprisonment and €15,000 fine,
    - For the company: €75,000 fine.

**Tip: the rules mentioned above should be carefully followed. There are more and more controls.**

# France: The Gig Economy

- Currently, French courts have to rule on the question of requalification of certain independent status in employment contracts. Thus, an independent worker obtained the requalification of his status in an employment contract due to the existence of an exclusivity clause in his contract (*Labor Court of Paris, 20 December 2016*).
- Furthermore, the French social security authority has initiated legal proceedings against an actor of the gig economy in order to obtain the requalification of the status of the independent workers working for it in an employment contract due to the existence of a subordinate relationship.
- In order to try to respond to the renewal and diversification of the labor market, the French Parliament has adopted several provisions specific to workers using a linking platform by electronic means in the framework of a law effective as of August 8, 2016. The purpose of these provisions is to provide some form of social protection for the independent workers (i.e., insurance against industrial accidents, benefit of professional training, right to strike, and trade union right).

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**PUERTO RICO**

# Puerto Rico: Independent Contractors

**Puerto Rico Labor Transformation and Flexibility Act** (Law 4 of January 26, 2017) (the Act):

- Article 2.2: Excludes from employment relationships and the definition of “employee,” unless expressly provided otherwise in a special law, *inter alia*:
  - independent contractors
  - franchise relationships
  - the work undertaken voluntarily and freely by mere friendship or benevolence for institutions of public, religious, or humanitarian service

# Puerto Rico: Independent Contractors (cont.)

## Puerto Rico Labor Transformation and Flexibility Act

- Article 2.3: Creates an **irrebuttable presumption** that a person is an independent contractor if:
  - He/she possesses or has requested an employer identification or employer Social Security number;
  - He/she has filed income tax returns claiming to own a business (W-2 vs. 480.6);
  - The independent contractor relationship is established by written contract;
  - He/she is contractually required to have licenses or permits; and
  - He/she meets at least three or more criteria evidencing that he/she has discretion over the engagement.

# Puerto Rico: Independent Contractors (cont.)

## Puerto Rico Labor Transformation and Flexibility Act

- Article 2.3: Tests evidencing that an individual has discretion over the engagement: the individual meets three or more of the following criteria:
  - Maintains control and discretion over how he/she performs the agreed upon work
    - **except** for the exercise of control required by the principal to ensure compliance with any legal or contractual obligation
  - Maintains control over hours of work
    - **unless** there is an agreement with the principal on a schedule to complete the work and where training is required, and when the training will take place
  - Is not required to work exclusively for the principal
    - **unless** some law prohibits providing services to more than one primary **or** an exclusive agreement is for a limited time

# Puerto Rico: Independent Contractors (cont.)

## **Puerto Rico Labor Transformation and Flexibility Act**

- Is free to hire employees/staff to assist in providing the agreed services
- Has made an investment in his/her business to provide the agreed services, including, among others:
  - the purchase or rental of tools, equipment, or materials
  - obtaining a license or permission from the principal to access the workplace of the principal to carry out the agreed work
  - renting space

# Puerto Rico: Independent Contractors (cont.)

## Puerto Rico Labor Transformation and Flexibility Act

- If the factors to establish the independent contractor presumption under the Act are not met, the “common law test” is used to determine whether there is an employee or independent contractor relationship, including:
  - what the parties expressed in their contract; and
  - the degree of direct control exercised over the manner in which the work is performed.
- The Act specifically provides that, unless required by a federal law applicable to Puerto Rico, the “economic reality” test should not be used to evaluate whether an independent contractor relationship exists.

# Puerto Rico: Temporary Employees

## Puerto Rico Labor Transformation and Flexibility Act

### Temporary employment: No “just cause” requirement or severance obligation under PR Law 80 for terminations upon expiration of temporary period

- The Act expands the definition of temporary employment by identifying some of the situations where it may exist:
  - Specific project (*proyecto específico*)
  - Fixed work (*obra cierta*)
  - Replacing a regular employee during a leave or temporary absence
  - Extraordinary or short-term project (including, without limitation, equipment or facility repairs, cargo loading or unloading, seasonal work, temporary order for production increases, annual inventories, or any other particular project or activity).
- Written temporary agreements are not required (but we recommend them).
- Temporary employees who become regular employees may be required to pass a probationary period;
  - However, the employee has to be credited with the time worked as a temporary employee for up to a maximum of six months as part of the probationary period.

# Puerto Rico: Fixed-Term Employment Contracts

## Puerto Rico Labor Transformation and Flexibility Act

### **Fixed-term contracts: No “just cause” requirement or severance obligation under PR Law 80 for terminations upon expiration of contract term**

- The Act recognizes a fixed term employment contract, defined as a contract for a specific period of time **or** for a particular project.
  - No need to have a special project for a fixed-term contract.
- Written fixed-term agreements are not required (but we recommend them).
- While fixed-term contracts may be renewed, if the practice creates an expectation of continuity, the relationship will be interpreted as not being for a fixed term.
- Fixed-term contracts not exceeding three years will be presumed to be valid and bona fide.
- In the case of exempt executive, administrative, and professional employees, fixed-term contracts will be interpreted by the parties' will as expressed in the contract.

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**SO WHAT TO DO?**

# What Are Plaintiffs Saying?

- The work performed by the gig worker is the same as that done by the company's own employees.
- The business trains the gig workers in a way that true ICs would not need to be.
- ICs being required to report to the premises of the business.
- The business dictates work schedules and workload.
- Work schedules and workload effectively create an exclusive working relationship.
- ICs with company business cards/email.
- The gig workers wear company logos or drive logoed vehicles.
- The business supervises and disciplines gig workers for poor performance.

# Practical Tips for Engaging Self-Employed Contractors

- Document the relationship in writing – this helps to evidence the parties' intentions to enter into a contract for provision of services.
- Avoid having gig workers performing tasks routinely performed by actual employees of the company.
- As much as possible, limit IC workers to performing tasks outside the normal course of the business and away from the business site.
- Implement measures to reduce the risk that workers are forced, or effectively required, to work exclusively for one business; the more true latitude that they have to work for others, including competitors, the more likely they are to fall on the IC side of the spectrum.
- If possible, there should be no obligation for the company to provide work and no obligation for the individual to carry out the work.

# Practical Tips for Engaging Self-Employed Contractors

- If possible, include an unfettered right for the individual to substitute someone else to carry out the work.
- Reduce restrictions on how, when, and where the services are provided.
- Avoid exclusivity clauses and post-termination restrictive covenants.
- Avoid provision of employee benefits such as sick pay, holiday pay, and company cars.
- ICs should not hold self out in same manner as company employees.
- Ensure individual provides own tools and bears own expenses.
- Require individual to indemnify the company for unpaid taxes.
- Consider engaging individuals through a personal services company as an additional firewall against potential claims.

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