

# Gig Economy, Independent Contractors, and New York Law

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The gig economy (on-demand work) is a disruptive factor in many industries, including the housing market (**Airbnb, Homeaway**), transportation services (**Uber, Lyft, Juno, Via**), delivery services (**Postmates, Caviar, Instacart**), and beauty services (**Glamsquad, The Glam App**). Time Magazine conducted a study which revealed that more than 90 million U.S. adults have participated in the gig economy, with at least 45 million U.S. adults earning income as a provider of The Gig Economy, Independent Contractors, and New York Law such goods or services.

Creating a business in the gig economy is advantageous for startups because when they are able to classify their workers as independent contractors, the startups can avoid paying benefits, such as sick days, health insurance, pensions, and vacation time. The startups also will not be mandated to pay payroll taxes, unemployment insurance, workers' compensation, and disability. Startups, however, need to carefully classify their workers as misclassification can lead to investigations, penalties, and lawsuits, which are becoming increasingly common. Additionally, misclassifying workers can eventually require a restructuring of a startup's business model.

Startups in New York need to be especially careful because New York is aggressive in investigating and identifying independent contractor misclassification. In July 2016, Governor Andrew Cuomo signed an executive order that established a permanent joint task force to fight worker exploitation and employee misclassification. If a company misclassifies its workers, it will be subject to huge penalties: fines by the IRS, U.S. Department of Labor, and state agencies can exceed millions. Startups can be penalized for (1) failing to pay overtime and minimum wage, (2) failing to withhold state or federal payroll taxes, (3) failing to comply with I-9 requirements, (4) failing to pay fees to the state unemployment insurance funds, (5) violating worker's compensation laws, and (6) not providing benefits.

There are basic benefits that employees receive that independent contractors typically don't have the luxury of receiving, including being paid in a reasonable time. That, however, changed in New York City when Mayor de Blasio signed the Freelance Isn't Free Act (FIFA) in November 2016. One of the biggest aspects of FIFA is that an independent contractor can be awarded double damages for failure to be paid for services on a timely basis. Under FIFA, startups and independent contractors need to have a written agreement with specific terms, including a list of services to be provided, the rate and method of compensation, the value of services to be provided, and a payment for services date (or, if no date is specified, it is mandated to be within 30 days of completion of services).

The New York State Department of Labor defined factors that will help companies determine if their workers are employees or independent contractors. The factors include whether workers are free from supervision, direction, and control. Unfortunately, there is no “magic combination” for ensuring the factors will weigh in favor of the workers being classified as independent contractors.

The amount of supervision, direction, and control varies from company to company – and even within a company – and is one of the reasons there is no exact test. For example, on the one hand, Uber sets the fee per mile that drivers can earn and Uber can disable drivers’ access to the software for getting low customer ratings. On the other hand, however, drivers can turn the application on and off whenever it is convenient for them. In an ongoing lawsuit between Swift Transportation Company and its workers, the workers insist they are employees partly because Swift controlled every aspect of their schedules, including where and how the workers delivered their cargo and which routes the workers had to use.

Whether workers provide their own tools and/or if they are reimbursed for business expenses should also be taken into account in the determination. Many gig economy startups run on an app, so owning a smart phone is required to participate. While Uber insists its drivers are independent contractors, Uber works with cell phone providers to offer discounts on its drivers’ monthly phone bills that can be extended to their immediate families. That is a benefit that is often offered to employees at companies where using a phone is necessary to perform the work. This is another example of how grey the classification of workers can be.

The relationship between startup and worker is not defined by what they call their relationship; it can only be defined by evaluating the level of supervision, direction, and control exercised by the startup. While there is no perfect classification structure, startups have likely misclassified employees as independent contractors if there is (1) more than minimal training for their workers, (2) a requirement that their workers perform contract work only for them, and (3) excessive control over how their workers perform the services.

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