

## Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees

### Facing the challenges to employment law presented by seemingly intermediary platforms of the modern on-demand economy

*The on-demand economy involves a business model in which workers contract for the opportunity to provide services directly to customers or users as independent contractors, as opposed to employees, through various technology platforms. The classification and treatment of these workers as independent contractors has raised issues relating to the application of traditional labor and employment laws. While this business model allows greater innovation for companies and flexibility for workers, it has faced challenges from government agencies and some workers who have sought to apply longstanding workplace protections to these arrangements. Their efforts resemble trying to fit a square peg into a round hole. In particular, businesses like Uber have received significant attention as a result of class action lawsuits in the United States challenging the classification of workers as independent contractors. This article will address some of the nebulous standards applied to determine whether someone is an independent contractor or an employee entitled to traditional workplace protections, the issues raised by the use of independent contractors in the growing on-demand economy, and the need to modernize labor and employment laws to reflect the nature of the 21st century workforce.*

#### I. CREATION OF A NEW APPROACH TO BUSINESS: ON-DEMAND SERVICES

In recent years, advances in technology have led to a new business model premised on what is known as the "on-demand," "sharing," or "gig" economy. This business model typically uses some type of technology platform (often through an application on a smartphone or computer tablet) to connect users with desired goods or services that are furnished by independent contractors or freelancers. Perhaps the most well-known example of this is Uber Technologies Inc., the service that competes with taxicab companies and other driving services, allowing customers to summon cars by using a mobile app on their smartphones. Uber was founded in California in 2009 and now operates in more than 60 countries.<sup>1</sup> Uber has come under scrutiny for classifying its drivers as independent contractors instead of employees. It faces a number of alleged class action lawsuits in the United States, including a wage and hour class action filed by drivers in U.S. district court in California that was recently approved to proceed as

a class action.<sup>2</sup> And Uber is not alone. Issues with freelancers or independent contractors have surfaced for other transportation-related companies, such as Uber's competitor Lyft Inc.,<sup>3</sup> and companies in various other lines of business, such as Wash.io Inc., a dry cleaning and laundry delivery service operated through a mobile app that allows customers to call on freelance Washio "ninjas" to pick up and deliver their laundry.<sup>4</sup>

All signs seem to indicate that the on-demand economy is growing, particularly with younger workers, and that individuals who work in this area are largely those who want greater flexibility, those who want to supplement their wages from a full-time job, those who are in transition between jobs, and entrepreneurs.<sup>5</sup> One projection estimates that global revenue from the on-demand economy, currently at approximately US-\$ 15 billion, could grow to US-\$ 335 billion by 2025.<sup>6</sup> However, statistics on the actual number of workers who participate in the on-demand economy are varied and are said to range from 3 million to 50 million workers in the U.S. alone, depending on how the scope of "on-demand economy" is defined.<sup>7</sup> It has been

<sup>2</sup> *O'Connor v. Uber Technologies Inc.*, No. 3:13-cv-03826, Order Granting In Part Motion For Class Certification (N.D. Cal. Sept. 1, 2015) (certifying class of Uber drivers in California to proceed on claims for employee status and recovery of tips), *appeal denied*, No. 15-80169 (9th Cir. Nov. 17, 2015). The case is set for trial in June 2016.

<sup>3</sup> *Cotter v. Lyft Inc.*, No. 3:13-cv-04065 (N.D. Cal.) (filed on Sept. 3, 2013).

<sup>4</sup> *Luqman v. Wash.io Inc.*, No. BC592428 (Los Angeles Super. Ct., Cal.) (filed on Aug. 25, 2015).

<sup>5</sup> See panelist remarks from *The 1099 Economy: Exploring a New Social Contract for Employers, Employees, and Society*, Aspen Institute panel discussion (Sept. 10, 2015), recording available at <http://www.aspeninstitute.org/events/2015/09/10/1099-economy-exploring-new-social-contract-employers-employees-society> (last visited Nov. 5, 2015).

<sup>6</sup> *The sharing economy: how is it affecting you and your business?*, PricewaterhouseCoopers, available at <http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy.html> (last visited Nov. 5, 2015) (basing figures on revenue from the five main sharing sectors of peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music video streaming).

<sup>7</sup> See panelist remarks from *The 1099 Economy: Exploring a New Social Contract for Employers, Employees, and Society*, *supra* n.5. See also *Intuit Forecast: 7.6 Million People in On-Demand Economy by 2020*, (Aug. 13, 2015) (estimating 3.2 million U.S. workers currently in the on-demand economy and projecting that the number will more than double, to 7.6 million workers, by 2020), available at <http://www.businesswire.com/news/home/20150813005317/en/Intuit-Forecast-7.6-Million-People-On-Demand-Economy#.VedGWE3bJon> (last visited Nov. 5, 2015).

<sup>1</sup> See [www.uber.com](http://www.uber.com) (last visited Nov. 5, 2015).

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more than a decade since the last survey by the U.S. Department of Labor's Bureau of Labor Statistics collecting information on contingent workers and independent contractors across all industries.<sup>8</sup> At that time, as of February 2005, there were estimated to be approximately 10.3 million independent contractors in the United States, which was an increase of 6.4% since the previous survey that had been conducted four years earlier.<sup>9</sup> As of February 2005, 82 % of all independent contractors reported that they preferred their work arrangement to that of traditional employment.<sup>10</sup>

A recent survey conducted by information technology firm Softchoice shows that flexibility as to when and where work is performed is increasingly important to workers.<sup>11</sup> This survey, focusing on employees in the U.S. and Canada, found that 70% of employees surveyed would leave their current jobs for one that offers greater flexibility.<sup>12</sup>

As technological developments, such as smartphones and remote computer access, make telecommuting and flexible schedules more feasible and common, new generations of workers have come to value, if not expect, flexibility in connection with their work. Moreover, in the United States, health care reform enacted under the Obama administration (known as the Affordable Care Act),<sup>13</sup> makes workers less dependent on their employers for health insurance benefits. These circumstances, and the consumer desire for goods and services at the tap of a smartphone, may all play a role in the apparent prevalence of independent contractors and movement toward on-demand business models that are based on the use of independent contractors. Although society (customers and workers) are calling for expansion of the on-demand economy, government agencies and plaintiffs' attorneys (who hope to profit from litigation) are fighting against this movement and clinging to the

anachronistic past. It is thus necessary for businesses to assess the risks and implications of adopting these business models and using independent contractors. Do the benefits outweigh the risks?

## II. OVERVIEW AND NATURE OF RELEVANT LAW

### 1. United States

In the United States, labor and employment laws apply to those individuals with whom there is an employment relationship (*i.e.*, employees) as defined under each applicable law, and not to independent contractors. These laws establish workplace protections and a range of employee rights, including requirements relating to payment of wages, hours of work, employee benefits, workplace safety and health, non-discrimination and collective bargaining. Some of these laws were enacted many years ago and reflect a desire to address workplace and economic issues present at the time.

#### a) Wage and Hour Laws

For example, the Fair Labor Standards Act ("FLSA") was one of the earliest federal efforts to regulate the work environment.<sup>14</sup> The law was enacted in 1938 as part of President Franklin D. Roosevelt's New Deal legislation, a series of laws and programs put in place in response to the Great Depression. At the time, President Roosevelt described the law as "the most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any other country."<sup>15</sup> The law established requirements for minimum wages, overtime pay, recordkeeping, and child labor standards that are still in effect today. The FLSA's rigid requirements and punch-clock mentality were easier to apply in a factory of the 1900s than in many of the modern, non-traditional workplaces and work arrangements encountered today. As a result, there is considerable (and continually increasing) litigation surrounding the wage and hour requirements of the FLSA and similar state laws. Statistics from last year show an average of almost 157 FLSA lawsuits filed each week in federal court alone.<sup>16</sup> Many (but not all) of the lawsuits and government agency enforcement initiatives challenging the classification of independent contractors are premised on alleged violations of wage and hour laws like the FLSA.

<sup>8</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Contingent and Alternative Work Arrangements, February 2005* (released July 27, 2005), available at <http://www.bls.gov/news.release/conemp.toc.htm> (last visited Nov. 5, 2015). See also U.S. Department of Labor, Bureau of Labor Statistics Monthly Labor Review, *Rising to the challenge of a 21st century workforce* (July 2015) (noting the need for data to explore the changing nature of work and urging funding for a survey on contingent and alternative work arrangements since such a survey has not been conducted for a decade), available at <http://www.bls.gov/opub/mlr/2015/article/rising-to-the-challenge-of-a-21st-century-workforce.htm> (last visited Nov 5, 2015).

<sup>9</sup> *Contingent and Alternative Work Arrangements, February 2005*, *supra* n.8, at p. 1 and Table 8, available at <http://www.bls.gov/news.release/conemp.nr0.htm> (last visited Nov. 5, 2015).

<sup>10</sup> *Id.* at p. 3.

<sup>11</sup> See *Death of the Desk Job* (released Oct. 13, 2015), available at <http://blogs.softchoice.com/itgrok/death-desk-job/> (last visited Nov. 5, 2015).

<sup>12</sup> *Id.*

<sup>13</sup> The Patient Protection and Affordable Care Act, Public Law 111-148, 110 Stat. 2033 (Mar. 23, 2010).

<sup>14</sup> Public Law 75-718, ch. 676, 52 Stat. 1060 (June 25, 1938), 29 U.S.C. § 201 *et seq.*

<sup>15</sup> See Remarks of President Franklin D. Roosevelt, *subsequently quoted in, inter alia*, Congressional Record of the 105th Congress – Senate, vol. 144, part 10 at 14149 (June 25, 1998).

<sup>16</sup> See Report of Administrative Office of the U.S. Courts, Table C-2A – U.S. District Courts – Civil Cases Filed, by Nature of Suit, available at <http://www.uscourts.gov/statistics/table/c-2a/judicial-business/2014/09/30> (last visited Nov. 5, 2015) (showing 8,160 FLSA actions initiated in fiscal year 2014, an increase of approximately 9 % from the previous year and an increase from 6,825 FLSA actions initiated in fiscal year 2010).

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### b) Factors of "Economic Realities Test"

Under the FLSA, the determination of whether someone is an employee or an independent contractor is based on an assessment of various factors known as the "economic realities test." Recently, the U.S. Department of Labor's Wage and Hour Division, the agency responsible for enforcing the FLSA, set forth its interpretation of that test, describing the standard in a way that favors finding an employment relationship and expressly stating the agency's view that "most workers are employees."<sup>17</sup> This interpretation and the agency's related enforcement efforts have generated a lot of discussion (and criticism) in the U.S. and have put a spotlight on the issue of independent contractor classification. The Department of Labor articulated the factors to be weighed and balanced under the economic realities test as follows:

#### (1) Is the work an integral part of the employer's business?

If someone's work is integral to the business of the purported employer, that can be an indication of an employment relationship.

#### (2) Does the worker's managerial skill affect his or her opportunity for profit or loss?

The potential of not only making a profit, but also suffering a loss, which often extends beyond a single job, can be an indication of an independent contractor relationship. One way for a contractor to face the risk of loss is to use its own employees to perform at least part of the contracted work.

#### (3) How does the worker's relative investment compare to the employer's investment?

A worker's investment, and thus undertaking of risk, can be an indication of an independent contractor relationship. The recent focus on comparative investments, however, may make it impossible for large, multinational companies to maintain independent contractor relationships.

#### (4) Does the work performed require special skill and initiative?

A worker's business skills, judgment, and initiative can be an indication of an independent contractor relationship.

#### (5) Is the relationship between the worker and the employer permanent or indefinite?

A worker's permanent or indefinite relationship with a purported employer can be an indication of an employment relationship.

#### (6) What is the nature and degree of the employer's control?

If the worker, as opposed to the purported employer, actually controls meaningful aspects of the work performed, that can be an indication of an independent contractor relationship. The key question is whether the

worker controls the manner, means, and methods of performing the work.<sup>18</sup>

### c) Factors Concerning Degree of Control and Independence

While wage and hour issues involving misclassification have received a lot of attention, the misclassification of workers as independent contractors can also implicate compliance with a number of other labor and employment laws and other legal requirements. Government agencies, such as the U.S. Equal Employment Opportunity Commission, U.S. National Labor Relations Board, U.S. Internal Revenue Service ("IRS"), and a variety of state agencies also monitor independent contractor relationships. For purposes of different laws enforced by other agencies (or individuals seeking to vindicate their own rights under various laws), there are different tests that place different emphasis on the concepts of control, economic dependence, and the relationship between the parties.

The IRS, for example, considers the following three factors focused on the degree of control and independence in determining whether someone is an employee or independent contractor for employment tax purposes:

- ▷ **Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?
- ▷ **Financial:** Are the business aspects of the worker's job controlled by the payer? (These aspects include things like how the worker is paid, whether expenses are reimbursed, who provides tools or supplies, etc.)
- ▷ **Type of Relationship:** Are there written contracts or employee-type benefits (*i.e.* pension plans, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?<sup>19</sup>

### d) Conflicting Classifications

To make matters even more complicated, workers may be properly classified as independent contractors under one law and required to be treated as employees under another.

<sup>18</sup> *Id.* This article cites the foregoing "economic realities" factors as articulated in the U.S. Department of Labor's interpretive guidance, released as Administrator's Interpretation No. 2015-1. For a recent federal case describing the economic realities factors, see *Dang v. Inspection Depot, Inc.*, No. 14-61857, 2015 WL 6104333, \*2 (S.D. Fla. Oct. 16, 2015) (quoting *Scantland v. Jeffrey [sic] Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013)).

<sup>19</sup> *Independent Contractor (Self-Employed) or Employee: Common Law Rules*, Internal Revenue Service, available at <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee> (setting forth the above-cited three-factor test published by the IRS) (last visited Nov. 5, 2015). See also IRS Private Letter Ruling 200835025 (May 21, 2008) ("In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or autonomy must be considered.").

<sup>17</sup> See Administrator's Interpretation No. 2015-1 (July 15, 2015).

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Indeed, some laws (like state unemployment and workers' compensation statutes) reach beyond employee status and cover any worker performing under a personal services contract.

### e) Benefits of Independent Contractor Arrangements

With that background, one may wonder why a company would want to classify workers as independent contractors and would not, instead, take the more conservative and straightforward approach of treating all workers as employees. Companies may want to avoid being an "employer" of certain individuals for a variety of reasons, including that the individual may want to be treated as an independent contractor instead of an employee. In addition, if an individual is an employee, the company may have additional burdens and liability in the form of minimum wage and overtime pay; fringe benefits (including vacation and other paid and unpaid leave); break-time requirements; compliance with various recordkeeping and reporting requirements; withholding of income taxes, unemployment taxes, Social Security and Medicare contributions; workers' compensation insurance; potential collective bargaining obligations; potential liability under employment statutes such as the Occupational Safety and Health Act and discrimination and harassment laws; and vicarious liability for a worker's negligent conduct. Undoubtedly, financial savings associated with independent contractors can be significant, although that is not (or, at least, should not be) the only consideration.

Companies often indicate that independent contractor relationships give them greater staffing flexibility, and independent contractors likewise enjoy greater flexibility and autonomy than employees. Thus, businesses often engage individual workers as independent contractors, either because the company prefers that arrangement or because the individual does. Nevertheless, the relationship is defined by the relevant facts and circumstances, and the parties' agreement to establish an independent contractor relationship is not dispositive.

## 2. European Union

Similar themes emerge in the EU, where only employees benefit from the full range of employment protection rights offered by law. Although some EU countries provide more limited protection to other categories of, for example, "workers" or "agency workers," independent contractors receive very little in the way of employment rights or protection.

The determination of employment status in the EU is not an area of the law where harmonized EU-wide legislation exists, and so it is up to each member state to determine what constitutes an employee. For example, in the UK the question of whether a person is an employee is often

determined according to case law and is often a question of fact and a question of law.<sup>20</sup> Tests commonly applied by courts in the EU include the following:

- ▷ **Mutuality of obligation:** Is there a legal obligation on the company to provide work to be done, and a legal obligation to do that work? Self-employed contractors can refuse work, employees cannot.<sup>21</sup>
- ▷ **Personal service:** Employees agree to provide work personally. If they are able to freely provide a substitute to do the work in their place, then they will not be an employee.<sup>22</sup>
- ▷ **Control:** To what extent does the recipient of the services control the work to be done, how it is to be done, the means used to do the work and when and where it is to be done? Employers exercise a high degree of control over their employees, but much less over self-employed contractors.<sup>23</sup>
- ▷ **Pay and financial risk:** Employees take virtually no risk, whereas self-employed contractors will typically bear more financial risk. An individual who seeks payment from a third party in respect of services provided rather than from the recipient of those services will not be an employee of the recipient.<sup>24</sup>
- ▷ **Integration:** Employees often have involvement in the business beyond the work being performed. For example, employees might manage or supervise others, attend internal meetings, have a desk or office space, use company equipment for their work, have a company phone extension and email address, and avail themselves of and be subject to internal grievance or disciplinary procedures. Self-employed contractors typically do not have such a level of involvement, and run the risk of being re-classified by tax authorities if they do.<sup>25</sup>
- ▷ **Other activities:** Employees are often restricted from working elsewhere (although part-time employees can of course have more than one job). Self-employed contractors are often in business on their own account and provide services to several clients at once.<sup>26</sup>

<sup>20</sup> *Ready-Mixed Concrete (South East) Limited v. the Minister of Pensions and National Insurance* [1968] 2 QB 497.

<sup>21</sup> *Carmichael v. National Power* [2000] IRLR 43.

<sup>22</sup> *Express & Echo Publications Ltd v. Tanton* [1999] IRLR 367; *Real Time Civil Engineering Ltd v. Callaghan* UKEAT/0516/05/ZT.

<sup>23</sup> *Motorola v. Davidson & another* [2001] IRLR 4 and *Brook Street v. Dacas* [2004] EWCA Civ 217.

<sup>24</sup> *Stringfellow Restaurants Ltd v. Quashie* [2012] EWCA Civ 1735; [2013] IRLR 99.

<sup>25</sup> *Clarkson v. Penser Security Doors Ltd* UKEAT/0107/09.

<sup>26</sup> *Hall (HM Inspector of Taxes) v. Lorimer* [1993] EWCA Civ 25 (05 November 1993).

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- ▷ **Label applied by parties:** Similar to the U.S., how the parties set up the relationship is relevant but not determinative, and often a self-employed contractor will seek employment protection rights despite the express terms of the contract in place.<sup>27</sup>

Similar to the U.S., national tax authorities in the EU take an active role in ensuring that self-employed contractors are appropriately designated, especially in those industries where the use of contractors is widespread. Enforcement and re-classification actions are common. However, if used correctly, the self-employment model continues to carry financial and administrative benefits for both the individual and end-user recipient of services and so continues to be commonly used.

### III. IMPLICATIONS AND OPTIONS FOR BUSINESSES

The desire of a business and an individual to have an independent contractor relationship is not controlling, and a business can still be subject to employment-related liability even if both parties are content with the arrangement. In one of the class-action lawsuits against Uber in the U.S., more than 400 independent drivers submitted declarations in support of Uber's business model, which did nothing to sway the judge (nor would it be dispositive of whether there is an employment relationship under the current legal standard).<sup>28</sup> The following section addresses some of the risks, challenges and options for businesses in the United States, and it considers legislative reform that could resolve some of the issues associated with independent contractors.

#### 1. Risks and Legal Challenges Associated with the Classification (or Misclassification) of Independent Contractors

Challenges to the independent contractor arrangements that underlie the on-demand economy can arise from a variety of sources. Challenges can be advanced in private lawsuits. All it takes is a single disenchanted former contractor to bring any of a vast array of claims based on employee status on a class or collective action basis. A worker can pursue such actions on a contingency-fee basis with no cost to the worker unless wages, benefits, or other damages are recovered. Moreover, plaintiffs' lawyers have been aggressive in seeking out and filing such lawsuits. Many of the relevant statutes allow for the recovery of attorneys' fees if any claim is successful and, if a class is certified, multi-million dollar settlements are common.

In addition to private litigation, government agencies have been actively pursuing enforcement actions, which can be initiated by the government on its own, even if no

contractor has complained of the classification. The U.S. Department of Labor's Wage and Hour Division has embarked on a nationwide initiative aimed at eliminating the misclassification of workers as independent contractors when they should be classified and treated as employees. As part of that initiative, the U.S. Department of Labor has entered into memoranda of understanding with the U.S. Internal Revenue Service and about half of the states, to share information and work together in their common goal of identifying and eliminating purported misclassification so that workers receive employee benefits to which they are allegedly entitled.

One U.S. city is considering a novel approach to bring certain employment-type rights to independent contractors. Rather than challenging the classification of individuals as independent contractors, the city of Seattle, Washington, is considering a law that would give freelance drivers collective bargaining rights. A committee of the Seattle City Council voted unanimously in favor of legislation that would allow independent contractors who drive for companies like Uber and Lyft to unionize and that would require those companies to collectively bargain with organizations representing the independent-contractor drivers. If enacted, this law giving collective bargaining rights to non-employee contractors would be the first of its kind in any jurisdiction of the United States. Currently, the National Labor Relations Act (NLRA), the longstanding federal law that governs collective bargaining in the private sector, applies only to workers who come within the statute's definition of "employee."<sup>29</sup> The Seattle law is likely to confront legal challenges to its validity based on the theory that the law is preempted by the NLRA; however, because the NLRA only covers employees, preemption arguments may not succeed.<sup>30</sup>

#### 2. Options for Businesses

Businesses that use independent contractors in the United States, including businesses providing on-demand services, have several options to address the increasing challenges and potential liability associated with independent contractors. The first is to take the conservative approach and treat any questionable independent contractors as employees; the second is to build in protections to decrease the likelihood that independent contractors will be found to be employees; and the third involves political action urging that archaic legislation and regulations as well as government agency attitudes be revised and updated to allow for modern business models that use independent contractors.

<sup>29</sup> See 29 U.S.C. § 152(3) (excluding "any individual having the status of an independent contractor" from the definition of "employee" for purposes of the NLRA).

<sup>30</sup> See generally 29 U.S.C. § 151 *et seq.* (NLRA) and U.S. CONST. art. VI, cl. 2 (Supremacy Clause of U.S. Constitution under which certain state and local laws may be preempted by federal law).

<sup>27</sup> *Young & Woods Ltd v. West* [1980] IRLR 201.

<sup>28</sup> *O'Connor v. Uber Technologies Inc.*, *supra* n.2.

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### **a) Contractual Arrangement**

A company that treats all workers as employees, and does not engage any independent contractors, can avoid the expansive and evolving attacks on the classification of independent contractors, thereby avoiding the risk of government enforcement actions or litigation on that issue. However, avoiding the use of independent contractors altogether might not be practical - and, in the case of certain on-demand companies, could be incompatible with the nature of the business.

A company that wants to engage independent contractors in the U.S. can take proactive measures to make it more likely that its independent contractor relationships will withstand scrutiny. At the outset, an intake process for screening bona fide independent contractors can be very helpful. As part of that process, a company can require that any independent contractors it hires have valid business licenses, engage in business with other entities, have a history of paying their own state and federal taxes, have proof of liability insurance, have employees to whom certain work can be delegated, have a separate place of business and their own equipment, and have separate business accounts. While these characteristics are not required, they can be helpful in demonstrating to regulators or courts that the individuals are bona fide contractors in business for themselves, as opposed to employees who are economically dependent on an employer.

When a company hires an independent contractor, it is important to have a negotiated written agreement that defines the relationship as a contract for services and does not include terms of a traditional employment agreement. For example, non-competition clauses and similar restrictive covenants can be indicative of an employment relationship and inconsistent with independent contractor status. Contractors should be permitted to work with different entities and not be dependent on just one company. Indeed, it is advisable to hire contractors for short, specific job tasks, to have a hiatus between projects, and to avoid relationships that are permanent or indefinite.

### **b) Degree of Work Control**

During the term of the independent contractor relationship, the company should also refrain from exerting control over the contractors and the manner in which they (or their employees or subcontractors) perform the work. By way of example, independent contractors should be free to set their own hours, assign work to others, and work at their discretion, including the freedom to take vacations and time off when desired. Contractors should not be integrated into the business like employees: they should not fill in for employees, perform the same work as employees, or participate in employee training or benefit plans. Contractors should not be included in company organizational charts, directories, phone books, websites or

advertisements, nor should they use company letterhead, e-mail addresses or business cards. Contractors are not employees, thus they should not be permitted to hold themselves out to the public as employees or representatives of the company.

### **c) Modalities of Pay**

In terms of pay, it is advisable that bona fide independent contractors not receive overtime, vacation or holiday pay or other additional pay beyond payment for work completed or invoiced. Payment should be based on the work completed or a fixed fee, preferably for a mutually-predetermined amount. The independent contractor should submit invoices (and receive an IRS Form 1099 for tax purposes) and should not seek reimbursement for incidental expenses like travel costs, training or licensing fees. The expenses in executing the work, including expenses for tools, equipment, maintenance and repair of equipment, computers, mobile phones and vehicles, should be borne by the contractor.

## **3. Lack of Guarantee and Legislative Reforms**

While these suggestions can help minimize risks associated with independent contractors in the U.S., it is important to note that they do not guarantee independent contractor status. Likewise, they merely illustrate some recommended practices, and the absence of any of these characteristics does not mean that an employment relationship exists. The determination of whether someone is an employee or a bona fide independent contractor requires a fact-specific analysis that varies based on a myriad of facts and circumstances and on ever-changing legal developments.

One way to bring clarity and definitiveness to this issue - and perhaps the best long-term solution - may be legislative reform. As noted by one commentator,

"[G]overnments will have to rethink institutions that were designed in an era when contract employers were a rarity. They will have to clean up complicated regulatory systems. They will have to make it easier for individuals to take charge of their pensions and health care, a change which will be more of a problem for America, which ties many benefits to jobs, than Europe, which has a more universal approach."<sup>31</sup>

Relaxed regulation and portable health benefits could be part of a legislative solution for U.S. independent contractors. U.S. Senator Mark Warner, a former technology industry executive, has spoken out on this issue, urging lawmakers to think about the issue in ways

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<sup>31</sup> *The 'On-Demand Economy' Is Reshaping Companies And Careers*, The Economist (Jan. 4, 2015), available at <http://www.businessinsider.com/the-on-demand-economy-is-reshaping-companies-and-careers-2015-1> (last visited Nov. 5, 2015).

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that do not inhibit flexibility and innovation, but that provide a safety net for workers who do not have access to employee-based government programs.<sup>32</sup> While he has not introduced any specific legislation, Senator Warner has suggested further data collection and discussed ideas like a joint health and welfare fund model, similar to the system used by some building trades, where many employers can pay employees' health and retirement benefits into a joint fund.<sup>33</sup>

The 2016 presidential candidates have also started to weigh in on this topic. Some of the Republican presidential candidates seem to be more critical of overregulation as it relates to independent contractors in on-demand businesses, and one has suggested a new worker tax classification.<sup>34</sup> And, while seemingly aligned with the anti-contractor sentiment of current U.S. government agencies, Democratic presidential candidate and former U.S. Secretary of State Hillary Clinton has candidly admitted that the on-demand economy is "raising hard questions about workplace protections and what a good job will look like in the future."<sup>35</sup>

Yet modern society's view of a "good job" is not necessarily an employee-employer relationship with one company and with the protections and constraints associated with traditional employment.<sup>36</sup> Many of the "protections" put in place for employees (and government efforts to shoehorn independent contractors into an employment relationship to apply those protections) do not necessarily reflect what modern workers want. In the end, this paternalistic approach may stifle new, innovative business models and work opportunities that technology has made possible. Companies that participate in the growing on-demand economy, or that otherwise use independent contractors, should be part of this dialogue and should lobby for updated legislation that meets the needs of the modern workforce.

## **IV. CONCLUSION**

The classification of a worker as an independent contractor, as opposed to an employee, has never been a black-and-white determination, and any distinctions are becoming

more blurred by changes in the type of work contractors perform and the interpretations of government agencies. Rigid, one-size-fits-all labor and employment laws, in particular wage and hour requirements, were not designed to address the nature of today's workplaces or the desires of today's workers. Nevertheless, companies that try new business models face significant risk of challenge to their independent contractor classifications, especially with the increased government attention now placed on this issue. Companies that engage independent contractors, in particular those in the on-demand economy, should be aware of the issues and implications associated with the use of independent contractors, should consider whether they really want or need to engage independent contractors, and should implement processes to mitigate risk if they do. In addition, companies should be active in advocating for, and helping to shape, new laws that meet the needs of a new era of technology, that allow for new types of business opportunities, and that reflect the types of arrangements workers in today's economy seek.

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<sup>32</sup> *Warner Says New Economy Demands New Policies*, Roanoke Times (Aug. 20, 2015).

<sup>33</sup> *See Id.*

<sup>34</sup> *See Guy Bently, Marco Rubio Champions Uber and Slams Government Crackdown On The Sharing Economy*, The Daily Caller (Oct. 7, 2015), available at <http://dailycaller.com/2015/10/07/marco-rubio-champions-uber-and-slams-government-crackdown-on-the-sharing-economy/> (last visited Nov. 5, 2015).

<sup>35</sup> *Hillary Clinton's speech at The New School*, New York, New York (July 13, 2015).

<sup>36</sup> *See The 'On-Demand Economy' Is Reshaping Companies And Careers*, *supra* n. 31 ("The idea that having a good job means being an employee of a particular company is a legacy of a period that stretched from about 1880 to 1980.").