

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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The 21st Century: Peer-to-Peer and Gig Economies

Congress is not in session; but, members' voices are not silent. New bills continue to be introduced and existing bills attract new co-sponsors. In this issue, we review legislation addressing the peer-to-peer economy as well as observations on the gig economy.

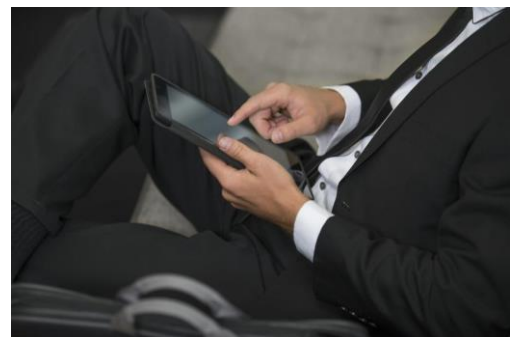
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Peer-to-Peer Economy

Last month, Rep. David Schweikert (R-AZ) introduced legislation ([H.R. 5918](#)) addressing the classification of workers who perform services in the so-called “peer-to-peer” economy. Although the bill currently has no co-sponsors, it proposes a new framework to determine worker status — as independent contractor or employee — in such an economy for purposes of the Fair Labor Standards Act, Family and Medical Leave Act, and National Labor Relations Act.

Under the bill, the peer-to-peer economy is the business of facilitating transaction between service providers and their users via an online platform or mobile application. If the bill were enacted, individuals providing services in the peer-to-peer economy would be treated as independent contractors, not employees, if they:

- Set their own hours
- Use their own “tools or assets” to provide the service
- Provide their service user with an electronic description of the transaction and amount paid for the service
- Are subject to a quality-of-service evaluation by the service recipient on a user-based rating system



Comment. This bill is somewhat of a departure from the IRS framework for determining whether a common law employer-employee relationship exists and whether a worker has been misclassified. Indeed, the bill whittles down the [historical approach taken by the IRS](#), which relied on a “twenty-factor” test, to a four-factor

test. Likewise, the bill takes a very narrow view of the relationship between a worker and a business to determine worker status, whereas the current IRS approach takes a broad view and looks at whether:

- A worker is subject to the behavioral control of the business
- A worker is subject to the financial control of the business
- A worker and a business perceive there to be the existence of an employer-employee relationship

Gig Economy

The so-called “gig” economy has garnered attention from both Republican and Democrat lawmakers. Although there is no agreed upon definition of the gig economy, it appears to be broader than the peer-to-peer economy, at least as defined in Rep. Schweikert’s [legislation](#).

Importantly, there’s an interest in how gig workers are classified (e.g., as independent contractors or employees) and what, if any, workplace protections they are entitled to. At this time, some believe that current rules do not adequately or appropriately support businesses or workers in the evolving gig economy. While we continue to keep an eye on this developing area, please see below for highlights on the topic:

- In May 2015, Reps. Eric Swalwell (D-CA) and Darrell Issa (R-CA) created the bipartisan [Sharing Economy Caucus](#) to “explore the opportunities made possible by the sharing model, and how Congress can foster innovation and address challenges posed by this emerging sector.”
- Rep. Steve Chabot (R-OH) noted that he believes that the current tax code is “outmoded” and “not designed to accommodate” the new generation of entrepreneurs and small businesses in this economy. (See our [May 31 Legislate](#) for more on this House Small Business Committee hearing — The Sharing Economy: A Taxing Experience for New Entrepreneurs.)
- Sen. Mark Warner (D-VA) is concerned that many gig workers do not have “traditional safety net protections” associated with being an employee, such as “unemployment insurance, workers’ compensation for injuries, or pension and retirement planning.” (See our [February 8 Legislate](#) and Sen. Warner’s [website](#) for more background.)
- Sen. Elizabeth Warren (D-MA) wants to make sure that gig workers don’t “fall through the cracks” and have “basic protections” (including paid family and medical leave). She also wants to ensure that they have access to “fully portable” health and retirement benefits — ones that will stay with a worker as he or she changes jobs or platforms. (See our [February 1 Legislate](#) for additional information on efforts to expand access to retirement plans; see Sen. Warren’s [website](#) for her [speech](#) on the gig economy.)
- Rep. Jan Schakowsky (D-IL) has voiced unease about the transfer of work-related risks to gig workers while eliminating coverage for traditional employer-sponsored benefits, as well as workers’ compensation and unemployment benefits. (See the House Energy and Commerce Committee [website](#) for more information on her [position](#) at a subcommittee hearing.)
- Hillary Clinton has expressed concern with workers being misclassified as contractors and questioned whether the gig economy provides workers with appropriate workplace protections. On the other hand, she supports the

DOL Survey

Please see our [February 8 Legislate](#) for background on the gig economy and the DOL’s upcoming efforts to understand more about the depth and breadth of contingent and alternative employment arrangements.

creation of new policies — to replace “outdated” ones — that reflect today’s 21st century economy and provide “basic protections.”

- Although the [Democratic Party Platform](#) does not speak specifically about the gig economy, it reflects the view that the economy should foster “innovation and entrepreneurship,” and that we should leverage “technologies [that] are already transforming our economy ... so that they create higher-paying jobs across the country, bring more people into the workforce, and reduce inequality.”
- Donald Trump does not seem to have addressed the gig economy directly. However he has [said](#) that he will be “the greatest job-producing president” ever and his tax plan would help small “businesses, entrepreneurs and freelancers grow and prosper” by ensuring that “no business of any size, from a Fortune 500 to a mom and pop shop to a freelancer living job to job, will pay more than 15% of their business income in taxes.”
- The [Republican Party Platform](#) has made clear that its vision for the future includes a vibrant gig economy. Specifically, the platform notes that the government should “encourage the sharing economy and on-demand platforms to compete in an open market,” and public policies should encourage essential innovation and competition.

Comment. One perspective of workers in the gig economy is that they should not be treated as traditional employees or independent contractors. Rather, they should be treated under a new worker category — “independent workers” — that recognizes their uniqueness in how they provide services or goods and provides them with certain traditional workplace protections and access to certain benefits. To learn more about this proposal, please see [The Hamilton Project’s December 2015 discussion paper](#).

Looking Ahead

This week, congressional primaries will be held in Connecticut, Minnesota, Vermont, Wisconsin and Hawaii. In the meantime, with control of the House and Senate up for grabs in November, lawmakers from both sides of the aisle will continue their focus on the upcoming presidential and congressional elections.

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