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UBER: and the New ‘Gig' Economy: What are the Implications for the Future?

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In the last few months all of us have become aware of Uber and its entrance into the “passenger courier” business. In many cities throughout the world including Toronto, Uber has established a network of allegedly independent drivers who receive orders from Uber, pick up clients in their own personal vehicles and deliver them in very much the same way a taxi would. The traditional taxi drivers have attempted to prevent this from happening, but as it is becoming clear everywhere in the world, including in Toronto, these kinds of services are probably here to stay.

The term ‘gig’ has traditionally referred to short term - often entertainment related - services. However, Uber, and other similar services are based on a similar ‘episodic’ basis and they raise some very interesting labour and employment issues. Not just Uber drivers, but a whole host of emerging service industries have created a new category of workers that pose very difficult questions. This development has been facilitated essentially by smartphones and the internet. Many services can now be obtained by customers using smart phone Apps similar to that used by Uber. These include everything from dog walking, drink delivery, grocery services, couriers, home cleaning and many other “on demand” services that are performed by individuals who are usually characterized as ‘self-employed’. These individuals often have other full-time jobs, and are providing all sorts of personal services through an internet-based and smartphone initiated system.

The United States has seen a number of court cases dealing with whether or not individuals who provide these services are employees or independent contractors within the meaning of the applicable legislation in whatever jurisdiction is involved. As far as some commentators are concerned, this new on demand ‘gig’ marketplace is unleashing innovation. However, other commentators have suggested that it is raising extremely difficult questions concerning workplace protections: what a job will look like in the future, whether or not these individuals

should have minimal protection under employment standards legislation, and other similar important employment-related questions.

Currently the Ontario government has mandated the Minister of Labour to look into these issues and several other questions involving both the *Employment Standards Act, 2000* (the "ESA") and the *Ontario Labour Relations Act* (the "OLRA"). Whether these individuals are employees within the meaning of either or both of these Acts is a question which has significance not only to the individuals who provide these services, but also to those for whom they are provided. Traditionally, employees of an organization can create liability for that organization in the event that in the course of their employment they do harm to someone else. This is usually referred to as vicarious liability. In several cases before the courts including a fairly recent decision before the Supreme Court of Canada, courts have determined that generally individuals who are self-employed, but who are acting on behalf of a particular entity do not create vicarious liability for the entity that originally engages them (Uber in this case), whereas employees do. It is therefore, not only significant for the individuals involved, but for the public generally, whether or not these individuals are self-employed as they are purported to be, or employees.

Several cases in California have been wrestling with this issue. However, the fundamental employment laws upon which the decisions in California are based are very different from the laws in Ontario and indeed in all of Canada. It is not at all clear that decisions from California or other jurisdictions outside Canada will have very much influence here in Canada with respect to these fundamental issues.

In Canada, most jurisdictions recognize a class of engagers usually referred to as 'dependent contractors'. Dependent contractors are usually able to unionize and be treated as 'employees' with respect to the various labour relations statutes. However, in most cases they are not considered employees for purposes of the employment standards legislation in the various provinces or for purposes of income tax, employment insurance, or Canada Pension Plan. Recent changes to the *Employment Insurance Act* have allowed independent contractors to voluntarily contribute and be covered for employment insurance purposes however, because there is no 'employer', all contributions must be made by the individual in question. With the advent of this new "gig economy", and in the context of the current re-evaluation of employment statutes here in the Ontario, it remains to be seen whether or not the current rules will continue to apply.

Several organizations including unions have made representations to the Task Force appointed by the Minister of Labour with respect to changes that they suggest ought to be made. These would include minimum 'wages', limitations on the hours of work and other standards, similar to the standards currently found in the current ESA. The difficulty of course is determining what employer is expected to regulate the employment standards. In addition, there have been recommendations for changes in the way in which these workers, as well as others, gain unionization rights in the emerging economy. In the private sector in Ontario unionization has dropped from about 20% to now hovering around 14%, although the public sector remains unionized at a rate of over 70%. Unions have suggested to the Task Force that changes in the

gig economy combined with the elimination of the card-based certification process, have significantly reduced unionization and this has had an adverse effect on the welfare of workers in the Province of Ontario. While card-based certification applications were reinstated in the construction industry, in all other sectors, a secret ballot vote is currently a necessary part of any successful attempt to unionize. This becomes more difficult in the “gig economy”. On this and other bases, some argue the “new economy” has lessened the protection afforded to workers in the more traditional manufacturing jobs of a few decades ago, and the “new economy” is having a deleterious impact on the welfare of workers today.

While many applaud the emergence of these new services and the “gig economy” they have created, it remains to be seen whether or not major changes will come to our labour and employment laws as a result.