NEW YORK COURT OF APPEALS RULING ON POSTMATES'S WORKERS OPENS DOOR TO UNEMPLOYMENT RELIEF FOR GIG ECONOMY WORKERS

Hodgson Russ Labor & Employment Alert
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On March 26, 2020, New York State's highest court, the Court of Appeals, upheld the decision of the Unemployment Insurance Appeals Board that the couriers for the food-delivery application Postmates are employees, and not independent contractors, for purposes of unemployment benefits. Matter of Vega, 2020 NY Slip Op 02094, at * 1 [Ct App Mar. 26, 2020]. Applying the multi-factor control test, the Court reasoned that Postmates exercises more than "incidental control" over its couriers. The implications of this decision extend beyond the context of New York Unemployment Insurance obligations for this one employer, and require employers, especially gig economy companies, to reexamine whether they have correctly classified their workforce. Reclassification of gig economy workers would expand the number of workers in New York State for whom companies must: (1) provide workers' compensation insurance, paid family leave, paid sick leave, and other employee benefits, (2) track hours worked, and (3) pay overtime, as well as significantly reduce their economic advantage over traditional competitors. The New York decision likely has consequences beyond the State's borders as other jurisdictions address similar suits.

The Vega Case

Postmates is a delivery business that uses its website and smartphone application to dispatch couriers to pick-up and deliver goods from restaurants and stores to its customers. Postmates pays couriers 80% of the delivery fee that Postmates charges its customers. Luis Vega performed courier work using the Postmates's app on 12 occasions in June of 2015. Mr. Vega filed for unemployment insurance benefits after Postmates blocked him from using the app due to negative customer reviews.

A number of Postmates's arguments as to why its couriers were independent contractors have been raised by other gig companies in similar cases, including, that the couriers were free to decide when to logon to the Postmates platform, free to accept or reject delivery jobs, and free to choose their route and method of transportation between pick-up and delivery locations. In rejecting these arguments, the Court of Appeals dismissed Postmates's assertion that it was merely a technology

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company "that created and operates a web-based and mobile Platform" which "facilitates a marketplace of deliveries from local businesses through a network of freelance Delivery Providers." Matter of Vega, at *10 (J. Rivera, concurring).

In holding that Postmates employed its couriers, the New York Court of Appeals stressed that couriers are low-paid workers, performing unskilled labor, who possess little discretion over how to perform their work because Postmates: (1) determines which couriers had access to each assignment, (2) sets the delivery fee charged to the customers, (3) pays couriers a non-negotiable percentage of the delivery fee, (4) bears the risk of loss by paying couriers for deliveries regardless of whether customers pay, (5) pays a portion of the couriers' business expenses through prepaid debit cards, (6) does not permit customers to select specific couriers for deliveries on its platform, (7) tracks the courier's location and provides customers with estimated delivery times on its platform, (8) assumes responsibility for replacing couriers who become unavailable after accepting a delivery, and (9) handles customer complaints, and in some cases retains liability to customers for incorrect or damaged deliveries.

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While the tests for determining the existence of an employer-employee relationship vary from state to state and law to law, most legal tests assessing the status of persons as employees weigh significantly the amount of control exerted over workers, among other factors. Employers that misclassify employees as independent contractors risk claims and liabilities such as federal, state and local tax claims, wage and hour lawsuits, employee benefit plan issues, issues relating to mandatory insurances and programs such as workers' compensation, disability and statutory leave laws, and other employment-related claims. Businesses working with independent contractors should seek counsel to ensure that they are properly classified.

A Revised Test Coming?

In her extended concurring opinion, Judge Rivera argued that the multi-factor control test for determining an employment relationship may be insufficient for the "electronically mediated work arrangements" that are the hallmark of the gig economy. Judge Rivera called for adoption of "the Restatement of Employment Law's test for determining employee status, which alternatively considers the worker's entrepreneurial control over their services and the extent to which the employer 'effectively prevents' such worker control (*see* Restatement of Employment Law § 1.01)." Matter of Vega, at *4 (J. Rivera concurring). No other member of the Court joined the concurrence, but two members dissented, calling upon the legislature to replace the multi-factor control test and stating that the "complete overhaul of our common-law employment test to adapt it to the present and future economy is not a task to which courts are well suited." Matter of Vega, at *20 (J. Wilson dissenting)

If you have any questions regarding this decision or its impact on employers, please contact a member of Hodgson Russ's Labor and Employment Practice.

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