

The Future of Work:

Litigating Labour Relationships in the Gig Economy

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The world of work is changing, and lawyers have a key role to play in shaping its future. The rise of new business models using smartphone technology, along with companies' habitual drive to keep labour costs low, are combining to make work more precarious, temporary and irregular. However, this is increasingly being challenged in the courts, as workers file lawsuits against their employers' attempts to misclassify them as independent contractors, thus denying them the basic labour rights and protections afforded to employees.

The rapidly expanding gig economy - with high-profile digital platforms such as Uber, Lyft (transportation), and TaskRabbit (freelance labour) - erodes the traditional concept of employment, using unconventional working arrangements such as casual, temporary, freelance, on-demand, or "gig" work, to increase productivity and profit.

While such flexibility may suit some workers, the misclassification of workers as "independent contractors", as opposed to employees, allows companies to enjoy the profits that come with being in charge, without the responsibilities required under labour law protections. According to [recent estimates](#), it would cost companies an average of 20 to 30% more to classify drivers and other gig workers as employees, rather than as independent contractors.

Yet it is only when workers are legally classified as employees that they have access to the internationally recognised rights and protections, such as permanent or secure work; minimum wage and overtime pay; and contributions to social protections, such as extended health and maternity benefits, employment insurance, and retirement savings. Absent such protections, workers are often faced with poor pay, labour exploitation and overall economic insecurity.

As a result, an increasing number of non-conventional workers are attempting to assert their labour rights in courtrooms, suing employers to redress grievances and improve working conditions. These lawsuits, brought in jurisdictions around the globe, create important opportunities to develop new employment standards through caselaw. Courtrooms are playing an increasingly important role in clarifying, interpreting, and defining new labour relationships, critically testing legal norms against labour realities, and prompting

governments to amend and fill the gaps in existing legislation.

2018 was a year of key victories but also major defeats for workers. As detailed in the report and the overview of lawsuits annexed to it, courts around the world have used different criteria and come to different conclusions about whether workers have been misclassified by the companies they are suing.

Many cases against gig companies were settled outside of court, while other lawsuits were vigorously challenged in appeals to higher courts. The companies' objective is to prevent courts from creating binding legal precedents which may open the floodgates for other gig workers to bring similar claims.

Often individual plaintiffs cannot afford the costs of lengthy legal proceedings, making them more vulnerable to accepting a settlement. However, gig workers are increasingly banding together to bring class action lawsuits against their employers, thereby sharing the cost of litigation among multiple plaintiffs.

Another advantage of class action lawsuits is that the court's ruling allows all similarly-situated plaintiffs to benefit from the remedy granted. However, as recent caselaw shows, many companies are actively preventing workers from organising and bringing class action lawsuits, by introducing forced arbitration clauses in their contracts, which typically prevent workers from pursuing or joining class actions.

Companies have also sought to counter such lawsuits by trying to prevent the passing of pro-labour regulations. Gig companies in the US are lobbying state legislatures to re-write state employment laws and to overrule local regulations. However, lawmakers around the globe are addressing the protection gap to varying degrees, and through diverse initiatives, including legislative bills, executive

orders and task forces. Workers and civil society organizations are focusing on redefining legal employment terms, and reconsidering union strategy in light of changing labour relations.

To create a future of shared prosperity instead of greater inequality we must put human rights at the heart of labour negotiations and relationships.

Together, government and business have the opportunity to harness technology to create more inclusive economies. By sharing the burden of risk and seeking to achieve greater equality of outcome and opportunity, it is possible to have an economy that provides workers with income security, workplace protections, and the right to collectively design and define the future of their work.

Going forward, three key opportunities must be seized to create a better future of work for all:

1. Corporate Responsibility to Respect Human Rights

Companies must live up to their responsibility to respect human rights, and labour rights in particular, in accordance with the UNGPs. At a minimum, this means that companies should:

(a) Correctly classify workers to ensure full enjoyment of labour rights and social protections and refrain from challenging policies and legislation that afford such protections.

(b) Put in place human rights policies and processes, remediation and human rights due diligence processes; and

(c) Provide for or cooperate in legitimate remediation processes and abolish forced arbitration clauses in workers contracts.

2. Legislative Reform

Lawmakers around the world should ensure that their legislative proposals adopt a presumption in favour of employee status and afford gig workers the same rights and protections as employees, including minimum wage, paid overtime, unemployment insurance, workers' compensation, family and medical leave, and the right to collective bargaining.

Companies should refrain from lobbying against these needed legislative reforms.

3. Business Incentives

Governments should shift the current paradigm from one that incentivises business to classify workers as "independent contractors" or "non-employees", by creating incentives for businesses to classify workers as "employees"; thereby strengthening the bargaining power that workers hold in the workplace.