

Gig Workers in the Tree Care Industry

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Issues:

- ▶ What is a gig worker?
- ▶ Prevalence of gig workers
- ▶ Advantages/disadvantages
- ▶ Distinguish gig workers from employees
- ▶ Dangers of misclassification

DISCLAIMER

- ▶ This presentation is a broad overview of federal laws regarding employee classification.
- ▶ I am not your attorney and do not know the specifics of your situation. This presentation covers general legal principles for informational purposes only and is not legal advice.

What is the “gig economy?”

Hiring contract or freelance workers for finite jobs in place of regular employees

Good fit for work involving limited tasks that can be performed on-demand

How common are gig workers?

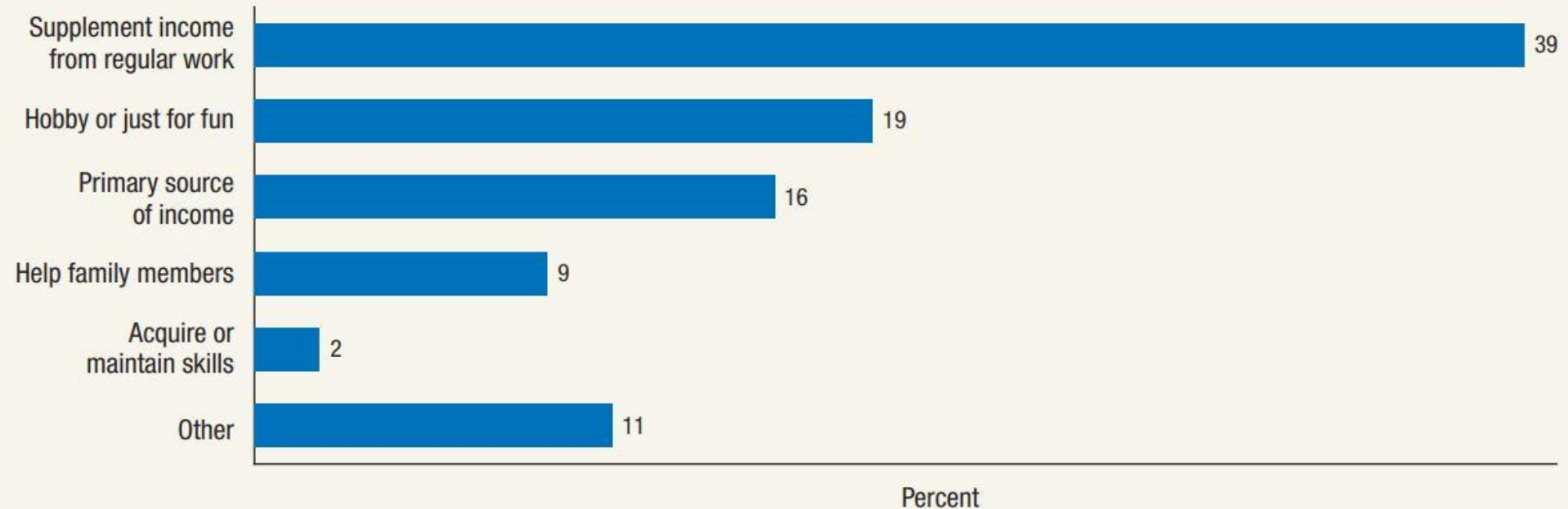
Chart 6. Nonagricultural self-employed, unincorporated
Seasonally adjusted, 1990–2018



- ▶ New statistics from BLS (June 2018)
 - ▶ The BLS found that gig workers made up 10.1% of workforce in 2017.
 - ▶ Slight *decline* from 2005 (~1%)
 - ▶ Includes only those who exclusively gig
 - ▶ Federal Reserve survey found 31% of adults do *some* gig
 - ▶ 43% of workers age 25-34

*US Bureau of Labor Statistics: <https://data.bls.gov/timeseries/LNS12032192>

Figure 9. Main reasons for gig work



Note: Among gig workers in the past month.

*source: Federal Reserve Report on the Economic Well-Being of U.S. Households in 2017, May 2018
<https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>

Old concept, new tools

- ▶ Term used since mid-90's
- ▶ Companies have always subcontracted out for specialized skill or equipment, like crane work, accounting, etc.
- ▶ Differences are:
 - ▶ Convenience (apps)
 - ▶ Prevalence

Advantages for companies

- ▶ Staffing flexibility
 - ▶ Numbers
 - ▶ Specialties
- ▶ Potentially lower cost
 - ▶ Payroll taxes, worker's comp, employee benefits, PTO, etc.
- ▶ Potential liability shift
 - ▶ Hiring an expert for technical work
 - ▶ Additional insurer on job

Disadvantages for companies

- ▶ Liability risk
 - ▶ Training/techniques differ
 - ▶ New/unproven workers
- ▶ Risk of losing trained workers
- ▶ Less control over customer service

From the worker's perspective

Advantages

- ▶ Flexible schedule, work location
- ▶ Control over workload
- ▶ Greater autonomy and sense of ownership

Disadvantages

- ▶ Lack of steady income
- ▶ Lack of traditional employee benefits
- ▶ Requires self-marketing

Industry examples

Brute force

- Large brush removal jobs
- Climber(s) for big jobs or crane work

Special equipment/operators

- Crane
- Vibratory plows
- Clam truck

Special Skills

- Advanced climber
- Receptionist
- Bookkeeping/legal

Making a gig worker

- Independent contractor
 - Beyond 1099
 - Determination, not decision
- Company controls result, worker controls “manner and means”
- IRS test
- DOL test
- State tests

Making a gig worker

DOL “economic realities” test (FLSA)

- ▶ Nature and degree of the company’s control over the worker
 - ▶ Responsible for own training
 - ▶ Right to determine work schedule
 - ▶ Right to hire/fire workers
- ▶ Is the work integral to the company’s business?
- ▶ Opportunity to control profit/loss?
- ▶ Capital investment
- ▶ Special skills
- ▶ Permanence of the relationship

Making a gig worker

IRS “control” test

Behavioral control

- ▶ Type of instructions given
- ▶ Degree of instruction
- ▶ Whether evaluation systems measure how work is done or just end results
- ▶ Training needed or given

Financial control

- ▶ Significant investment in the equipment the worker uses in working for someone else
- ▶ Expense reimbursement
- ▶ Opportunity for profit/loss
- ▶ Method of payment

Relationship

- ▶ Written contracts
- ▶ Benefits
- ▶ Permanence of the relationship
- ▶ Whether the worker provides key services

Example: *In Re Arndt* (Florida, 1996)

- ▶ Mr. Arndt owned a landscaping business. One division installed sod.
- ▶ Involved graders, sodlayers, truck drivers, secretaries, and bookkeepers
- ▶ Treated all workers as independent contractors
- ▶ IRS claimed all workers were employees.

In Re Arndt summary

- ▶ Arndt provided no instruction or training
- ▶ Workers not paid on regular basis
- ▶ No employee benefits
- ▶ Did not pay workers' expenses
- ▶ Workers all had contractor agreements signed
- ▶ Supplied trucks, a trailer, and a forklift
- ▶ Paid to maintain equipment
- ▶ Sometimes supplied tools to workers who didn't have them
- ▶ Sometimes gave rides to workers who needed them

In Re Arndt (cont'd)

Sod installers

- ▶ Decided on a day-to-day basis whether they wanted to work
- ▶ Non-exclusive employment
- ▶ Paid by the pallet
- ▶ Could hire and pay their own workers
- ▶ No set work schedules
- ▶ Arndt sometimes provided tools, rides to work

- ▶ Gig or Not Gig? GIG

In Re Arndt (cont'd)

Truck Driver

- ▶ Delivered sod from farms to job sites
- ▶ Paid by the load
- ▶ Worked with bookkeeper to coordinate deliveries
- ▶ Didn't work for other companies
- ▶ Arndt provided the truck and fuel
- ▶ Arndt specified working hours
- ▶ Gig or Not Gig? NOT GIG

What if an employer treats an employee as a gig worker?

IRS penalties

- ▶ For unintentional misclassification:
 - ▶ 1.5% of the wages paid
 - ▶ 3% if the employer did not file a 1099 for the worker
 - ▶ 20% of the employee's share of Social Security and Medicare taxes
 - ▶ 40% if the employer did not file a 1099
- ▶ For intentional misclassification
 - ▶ Full amount of federal income tax that should have been withheld
 - ▶ Employee's and employer's full shares of Social Security and Medicare taxes
- ▶ For Arndt, penalties were originally ~\$57k

What if an employer treats an employee as a gig worker?

DOL penalties

- ▶ Back pay for:
 - ▶ Overtime
 - ▶ Breaks
 - ▶ PTO (where applicable)
- ▶ Can relay to States for enforcement
- ▶ Jan. 29, 2015—Specialty Painting & Wall Covering Inc. in Texas paid more than \$108,000 in overtime back wages after a DOL investigation found that some workers were misclassified as independent contractors.

Summary

- ▶ Gig workers are on the rise in every industry
- ▶ Used properly, can provide:
 - ▶ Flexible labor force
 - ▶ Lower overall costs
 - ▶ Greater levels of expertise
- ▶ Set up for success:
 - ▶ Workers control means & method
 - ▶ Provide their own tools
 - ▶ Ability to work for others
 - ▶ Limited scope

Questions?



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