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**NONSTANDARD WORK AND WORKERS
IN THE GIG WORKFORCE:
AN INTRODUCTION AND PENNSYLVANIA
WORKERS' COMPENSATION DOCTRINE**

FOUNDATION & REFERENCES

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I. Introduction

Individuals laboring in “nonstandard work” – temporary/staffing company workers, gig workforce actors like Uber and Grubhub drivers, and other freelancers – are said to reflect a population on the rise.¹ This growth, and the phenomenon of businesses aggressively classifying their workers as independent contractors, has been ascribed to at least three factors: enhanced competition due to globalization; pressure from investors (capital markets) that corporations maximize profits; and, of course, the revolution in information and communications technology.²

The growth of nonstandard work is apparent in the realm of workers’ compensation law (and the related field of health and safety), and to those who administer, and practice under, the law. Legislatures and agencies, for example, have taken action against widespread

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¹ See John Howard, M.D., J.D., *Nonstandard Work Arrangements and Worker Health and Safety*, 60 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE 1 (2017) (commenting on size of the nonstandard workforce).

² DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

misclassification of employees as contractors³; OSHA has promulgated a rule to leverage safe work practices when the contracting-out phenomenon results in multiple employers being present on a single worksite⁴; and regulators in the state of Alaska at one time advised Uber, proactively, that it considered its drivers to be employees for workers' compensation purposes.⁵ (Notably, the legislature in 2017 reversed that position.⁶) Meanwhile, cases have been reported where:

(1) a business enterprise, which previously utilized its own employees, instead retained an employee leasing firm to "lease it" its own workers; a worker thereafter sustained an injury, the employee leasing firm was uninsured and insolvent, and a dispute over employer identity and insurance responsibility ensued⁷;

(2) a worker, laboring as an independent contractor via an app-based intermediary, was killed and then left with no apparent workers' compensation – or any – remedy⁸; and

(3) a business had contracted out an integral aspect of its work; the subcontractor failed to insure, a worker was injured, and a complex workers' compensation action unfolded, involving the Uninsured Employers Guaranty Fund. The case generated significant disruption for multiple parties, extensive litigation, and potential tort and "statutory employment" liability.

Legal and other professionals in the field encountering such situations will appreciate at least four major issues. Some implicate everyday practice – and some go to the *core reasons* we have workers' compensation in the first place.

- First is the fundamental issue of the work relationship – the newer work arrangements reflect relationships which depart from the standard model of employer and employee

³ Pennsylvania's Construction Workforce Misclassification Act is an example. See 43 P.S. §§ 933.10-933.17. See also DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 2:9.10 (Supp. 2017).

⁴ See Howard, *supra*.

⁵ See Bradley Smith, *Holding a Square Peg and Choosing Between Two Round Holes: The Challenge Workers' Compensation Law Faces with Uber and the Sharing Economy*, LEX & VERUM, p.17 *et seq.* (May 2016), www.NAWCJ.org.

⁶ Suzanne Downing, *Ridesharing Bill Passes, Making Way for Uber, Lyft*, www.mustreadalaska.com (May 17, 2017).

⁷ See, e.g., 3D Trucking, Inc. v. WCAB (Fine & Anthony Holdings Int'l), 921 A.2d 1281 (Pa. Commw. 2007) (concluding that joint employment existed).

⁸ Fisher Phillips, *Safety Concerns Arise after Tragic Death of Young Gig Worker*, (Internet) Legal News Report (December 22, 2017), <https://www.jdsupra.com/legalnews/safety-concerns-arise-after-tragic-39913/>.

upon which workers' compensation laws have traditionally been based.

- Second, when an injury occurs in the context of one of these new arrangements, and no employer-employee relationship can be found, the work-injury victim will be left without a workers' compensation remedy. Exclusions have, of course, always existed, but the irony will exist that in the past, the worker would have been undertaking similar labor in a traditional employer-employee relationship and would have *had* access to this basic benefit.
- Third, persuasive evidence exists that work via temporary services and other gig work (like the intermittent work of many platform-based drivers), is attended by reduced attention to safety. Indeed, gig-workforce workers have been characterized as “taking their safety into their own hands.”⁹
- Fourth is the issue of fairness and what has been called the “social compact” reflected by workers' compensation schemes. Arrangements that, by design, leave workers who used to be covered by workers' compensation without such social protection, or that result in lax practices in safety and insurance coverage, are antithetical to the principle of social insurance for work accidents. Specifically, such results are inconsistent with (1) the humanitarian ideal that workers who sustain injury and disability due to their labor should have available to them insurance for medical treatment and wage replacement; and (2) the idea that mandatory no-fault insurance (workers' compensation) should be broadly in place to leverage employers to implement top-down safety practices.

This paper discusses the issue of nonstandard work and workers in the true gig workforce. A focus of this paper is on how many workers are engaged in this type of labor and what type of work is implicated. Next is a review of the health and safety concerns surrounding such work. This paper also provides resources for further reading. The intent of this paper is to provide a foundation for considered analysis of the legal issues presented by nonstandard and gig-workforce work.

II. Workers Undertaking Nonstandard Work and Labor in the Gig Workforce

The number of workers laboring in nonstandard work is not perfectly established. Dr. John Howard, Director of NIOSH, reports that his agency, in 2013, found that 18.7% of adults work in nonstandard arrangements. Most of these workers are in the temporary/employment staffing categories. As to true gig-workforce workers, the number “remains very small. Workers who provide services through online intermediaries make up less than one percent of

⁹ Roger Rabb, *Examining Occupational Risks for the Gig Worker: Is Enough Being Done to Protect this Growing Segment of the Workforce?*, in THOMAS A. ROBINSON, ED., *WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS* (LexisNexis 2017).

the workplace”¹⁰

Accounts of how many workers labor in these categories can vary widely. A recent media account announced, improbably, that the “gig economy ... is now estimated to be about 34% of the workforce,”¹¹ but an examination of the source of this statement shows that the figure refers not to *true* gig workforce members but temporaries and subcontracted labor as well. On this point, Dr. Howard notes that “there is no single taxonomy to uniformly describe standard and nonstandard work arrangements ..., making occupational health and safety surveillance and research challenging.”¹²

Types of jobs that are often contracted out in the present day (in contrast to the past) include security work, housekeeping, grounds maintenance, and wholesale/retail materiel logistics. The rise of sub-contracting in these four fields has been well documented in the comprehensive 2014 book by Professor David Weil, *The Fissured Workplace*. In Pennsylvania, particularly, outsourcing of home health care can be detected in reported cases.¹³

Of course, workers’ compensation law has dealt with subcontracting in the trucking industry for decades, and analyzing relationships for employment/independent contractor status is hardly new.¹⁴ What is new, as Weil explains, is (1) the volume of jobs that are arranged, in the present day, in this fashion; and (2) the perverse or, at least unfortunate, result that the highly-leveraged bottom tier of subcontractors can be inattentive or oblivious with regard to such basics as workplace safety and securing insurance coverage.

With regard to workers in the true gig workforce – that is, those laboring through app-based intermediaries – analyzing the demographics can be a special challenge. For example, occupational health physicians seeking to analyze health and safety concerns remark:

Many work for more than one platform, patching together a living via multiple gigs, and others perform gig work in addition to holding a traditional-economy job. A recent survey found over 40% of on-demand workers work for two or

¹⁰ See John Howard, M.D., J.D., *Nonstandard Work Arrangements and Worker Health and Safety*, 60 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE 1 (2017) (commenting on size of the nonstandard workforce).

¹¹ Patrick Gillespie, *Intuit: Gig Economy is 34% of U.S. Workforce*, CNNMoney (May 24, 2017), <http://money.cnn.com/2017/05/24/news/economy/gig-economy-intuit/index.html>.

¹² Howard, *supra*.

¹³ See the unsatisfactory case, *Edwards v. WCAB (Epicure Home Care. Inc.)*, 134 A.3d 1156 (Pa. Commw. 2016) (home health aide was held to be an independent contractor, not an employee, even though her “referral agency,” which assigned her to work full-time with a disabled or elderly individual, exercised significant control over her labor; case features a compelling dissenting opinion).

¹⁴ See, e.g., *J. Miller Co. v. Mixer*, 277 A.2d 867 (Pa. Commw. 1971). See TORREY & GREENBERG, *supra*, § 2:11 *et seq.* (3rd ed. 2008 & Supp. 2017).

more companies in a given week, and one in seven work for three or more companies.¹⁵

This same commentary, notably, remarked that many such workers are “generally younger and more highly educated” than those laboring in standard work. Other jobs referenced in discussions of nonstandard work are those of the true “freelancers.” These workers (not believed to be a large part of the workforce) include artisans selling crafts on line and/or in their own locality.¹⁶

A social critique of the contracting-out aspect of the gig-workforce centers on a concern over unfair distribution of wealth. The critique is, specifically, that intermediaries, benefitted by information and communication innovations, become enriched while the subcontracted individuals who actually do the work are left with depressed pay, imperiled occupational health, and lack of traditional social protections that are linked to employment. An April 2017 editorial in the *Journal of Environmental and Occupational Medicine*, for example, admonished, “to the extent that most gig platforms concentrate wealth into the hands of the very few while driving down wages through direct competition, the resultant increase in income inequality itself fuels health disparities, while depriving the individual workers of meaningful voice.”¹⁷

Competing with this critique are the comments from at least some Uber drivers who say that they enjoy the flexibility of their jobs – enabled, in this regard, to work when and as they please. While surely such comments are those of the part-timers referenced above, others have also written about the virtues of freelancing and corresponding control over their own work. In a 2016 essay, *Liberated as Hell: The Autonomous Worker and the Hollowed Workplace*, a historian challenges the common wisdom and suggests that many workers *enjoy* the freedom that labor in the gig workforce has brought. He asserts that the current and developing landscape of work “resulted not simply from economic dictates but also from cultural forces that encourage people to imagine and pursue new ways of work.” The author invokes the 1974 book by Studs Terkel, *Working*, in which a series of workers complained of the deadening effects of the eight-hour workday and the boredom of regimented office and factory life. In the present day, “across the precarious economy, workers identify control over their work and non-work time as a signal virtue.”¹⁸

¹⁵ Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59 JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE 63 (Editorial, April 2017).

¹⁶ See Charles Heying, *Portland’s Artisan Economy*, in THE HEDGEHOG REVIEW (Vol. 18, No.1, Spring 2016) (urban studies professor stressing the importance of the burgeoning activities of local artisans and crafters, who have often started off small and grown into and with the global economy; and asserting that too often the efforts of local artisans are “dismissed as a sideshow to the real economy” – he admonishes: “Urban economies in the early part of the 21st century will look more like an artisan economy than they will the industrial economy of the century past.”). See Liz Carey, *Legislators, Businesses: The Time to Work on Gig Economy Protections is Now* (February 8, 2018) (quoting a congressman, proposing protections to gig workers, as saying, “Whether you make a living through mobile care services or by selling crafts online, workers deserve access to benefits.”).

¹⁷ Tran & Sokas, *supra*.

¹⁸ Brent Cebul, in *Liberated as Hell: The Autonomous Worker and the Hollowed Workplace*, THE HEDGEHOG

When considering true gig work, the largest enterprises include Uber and Lyft (transportation, often termed “transportation networking companies”); Handy and Taskrabbit (home services); and Postmates (food and merchandise delivery). Another app-based enterprise, Grubhub (restaurant food delivery), has become well-known in the legal community in light of a February 2018 federal court decision in which one of its drivers was unsuccessful in proving that he was an employee – he was, instead, held to be an independent contractor.¹⁹ Grubhub, notably, now has a competitor, Uber Eats, in this category; indeed, many McDonald’s franchisees now advertise Uber Eats as their exclusive delivery service. Care.com, meanwhile, facilitates workers for childcare, senior care, and pet care.

A widely-disseminated white paper that suggests a third category for such workers (beyond employee and independent contractor), authored by Seth D. Harris and Alan B. Krueger, features a thorough appendix describing several prominent online intermediary companies. Among these are Instacart (shopping and delivery from stores such as Costco); and Thumbtack (an “online marketplace for services,” such as wall painting and wedding officiating).²⁰

III. Health and Safety Concerns

Many nonstandard jobs consist of labor work, and thus workers undertaking the same bear significant risk of injury. Workers doing housekeeping, grounds maintenance, loading and unloading of trucks, and home health, are all frequent applicants for workers’ compensation. The risk of injury of workers in this category who have been contracted-out have a higher risk of workplace injury and illness than in conventional employment.²¹

Evidence exists, in particular, that *temporary* workers have a higher incidence of injury than permanent employees.²² Their experience can likely be transferred to the highly intermittent work of on-demand workers. Dr. John Ruser, head of the Workers’ Compensation Research Institute (WCRI), summarizes the likely reasons that temporary workers are subject to this phenomenon:

REVIEW (Vol. 18, No.1, Spring 2016). Yet some aspects of new work patterns seem troubling to him. Indeed, his depictions of workers engaged in “hoteling,” that is, workers reporting to work without any fixed, personal space, are appalling.

¹⁹ *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC (U.S. Dist. Ct. N.D. California filed February 8, 2018).

²⁰ SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE “INDEPENDENT WORKER” (The Hamilton Project, Discussion Paper 2015-10, December 2015).

²¹ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

²² John W. Ruser, Ph.D., *Implications of Nonstandard Work for Worker Safety and Health*, Powerpoint Slides for Conference, “Nonstandard Work and Social Insurance: Designing Risk Protections for a Changing Workforce,” <https://www.nasi.org/civicrm/event/info?reset=1&id=228>.

- (1) Less experience and familiarity with operations, due to their short tenure at the worksite;
- (2) Lack of close relationships with longer-term workers who could help navigate worksite hazards;
- (3) Fewer hours of safety training relevant to the specific job assigned;
- (4) More hazardous work is assigned to temporary workers and outsourced to independent contractors;
- (5) Temporaries are less likely to report unsafe conditions; and
- (6) Supervisory lines and responsibility for occupational safety and health become blurred.²³

Vocational rehabilitation and the transition-back-to-work processes for the injured temporary worker are major challenges. Most temporary services, by their very nature, are not in the light-duty business. In a state like Pennsylvania, which has no vocational rehabilitation benefit, effective return-to-work processes in the temporary employment context are nearly impossible.

Meanwhile, flexible work schedules and varying work locations – a hallmark of gig workforce labor as well – can pose significant risks. Ruser reports that non-traditional work sites may be less safe because they lack commonplace safety controls and can fall outside the scope of OSHA responsibilities. Non-traditional work hours, meanwhile, may be less safe owing to worker fatigue and unsatisfactory work conditions such as poor lighting.²⁴

Another researcher, Dr. David Michaels, has stressed that new workers in particular are at a greatly increased risk of injury. He emphasizes that this fact has been known for years, and he cites as an example a 1918 study of the “metal trades” (iron and steel machining) that showed that press hands and similar workers experienced a “very great excess of accident occurrence on the first day on the machine....”²⁵

Both Michaels and Weil, the latter in *The Fissured Workplace*, also stress that workers are at an increased risk of harm when multiple employers are at work on the same industrial site. Lack of coordination and desultory attention to safety can often unfold in such situations. Dr. Howard, NIOSH Director, has commented on this issue as well:

²³ *Id.*

²⁴ *Id.*

²⁵ David Michaels, Ph.D., M.P.H., *Protecting the Safety and Health of Workers in Nonstandard Work Relationships*, Powerpoint Slides for Conference, “Nonstandard Work and Social Insurance: Designing Risk Protections for a Changing Workforce,” <https://www.nasi.org/civicrm/event/info?reset=1&id=228>.

A blended workforce can pose challenges for safety managers. Temporary and permanent employees may differ in the training they receive for the job, the protective equipment they are provided, the dangers associated with the tasks they are assigned, and their perception of safety practices.... Perception of the organizational culture, including safety climate, may not be uniform across standard and nonstandard work arrangements. To account for this, safety managers need to take employee heterogeneity into account when developing workplace safety practices....

Some host or client employers incorrectly behave as if they do not share safety and health responsibilities to protect temporary agency and leased workers in their workplaces. Rather, they act as if the safety and health responsibilities for workers lie with the agency or with the employee leasing company. OSHA has historically relied upon its multi-employer citation policy to ensure shared safety and health responsibilities to protect all workers at a site....²⁶

With regard to workers laboring in the true gig workforce (that is, via intermediaries), occupational medicine physicians have posited that “[h]ealth and safety risks could be anticipated to be worse in gig work because of the loss of the protective effect of working in a public workplace, as much gig work is transacted in private automobiles or homes.” Meanwhile, “younger age is a well-known independent risk factor for occupational injury.”²⁷

The archetypical gig workforce worker, the Uber or Lyft driver, seems particularly at risk, as are delivery drivers: “Even among professional, trained drivers, transportation is a dangerous field – it is unknown how much more it will be for non-professional drivers and for other drivers and pedestrians encountering these untrained-drivers-on-a-schedule.”²⁸

Indeed, the ubiquitous drivers of Uber and Lyft find themselves at risk of motor vehicle accidents and, given their interface with the public, assaults. A group sympathetic to workers, the National Employment Law Project (NELP), notes that on-demand jobs are among the most dangerous in the nation, with most work focused on transportation, delivery, and home services – well-known as traditionally hazardous industries. The largest segment of on-demand, for-hire transportation, proves to be particularly dangerous. Statistically, taxi drivers are killed on the job at a rate five times higher than the average for all other workers and face a risk of homicide over twenty times greater than other workers. These drivers often work with cash, alone and in isolated areas, at night, in high crime areas, and with people under the influence of alcohol. Taxi drivers also suffer an increased risk of musculoskeletal injuries, including back and neck injuries

²⁶ John Howard, M.D., J.D., *Nonstandard Work Arrangements and Worker Health and Safety*, 60 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE 1 (2017).

²⁷ Tran & Sokas, *supra*.

²⁸ *Id.*

from handling passenger luggage and spending long hours behind the wheel.²⁹

Workers engaged in on-demand domestic work also perform hazardous tasks. A national survey found that 38% of these workers had suffered work-related wrist, shoulder, elbow, or hip pain in the prior 12 months. A study of bike messengers in Boston found that 70% had suffered an injury resulting in medical attention or lost work.³⁰

Occupational health physicians posit that little is known about injury rate in the realm of gig workers, but plainly on-demand gig workers sustain both injury and death in the course of their labors. In November 2017, for example, a bicyclist delivering groceries for an app-based delivery service, in Boston, was struck and killed by a dump truck in the midst of his work. An account of this tragedy remarks, “Because of Wright-Davis’ status as an independent contractor, his estate was not eligible for any kind of workers’ compensation benefits. Unable to pay for his funeral, his family started a GoFundMe page to help with expenses.”³¹

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³⁰ *Id.*

³¹ Fisher Phillips, *Safety Concerns Arise after Tragic Death of Young Gig Worker*, Internet News Report (December 22, 2017), <https://www.jdsupra.com/legalnews/safety-concerns-arise-after-tragic-39913/>.

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