The gig economy
Introduction

Welcome to the new modern work structure: the gig economy. Where temporary positions are prevalent, freelance work is the norm and organisations contract with individuals on a short term basis. Offering greater individual freedom but also ripe for exploitation – for many the ultimate in customer-centric service but at what or whose expense?

Since 2015, the gig economy has grown in media currency and affects thousands of individuals who carry out work on behalf of or with companies such as Uber and Deliveroo, where current UK employment law does not adequately provide for this new model of work practice.

This report considers the gig economy from an employment perspective: what it is and how it affects lawyers and their clients. Containing analysis and insight from a range of industry experts, compiled by the LexisNexis Current Awareness team, this report also looks at the case for reform and regulation.

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The history and the essentials of the gig economy

The gig economy raises a number of interesting questions about the future direction of employment law. Advocates argue that the gig economy offers boundless innovation and empowers both workers and entrepreneurs, while critics suggest that it disenfranchises the workforce and undermines workers’ rights. Denise Cheng, affiliate of Massachusetts Institute of Technology and former innovation fellow with the San Francisco mayor’s office, suggests that historical precedents and future trends both point towards a world of opportunity that will nevertheless require careful management.

The term gig economy is becoming increasingly common, but what does it describe?

The gig economy is a popular label to capture the idea of short-term and unpredictable work arrangements. It’s part of a spectrum of terms that describes peer-to-peer marketplaces that enable people to monetise their skills and assets.

Despite its common usage, the gig economy is an ambiguous and perhaps non-ideal choice to describe recent economic shifts because musicians, freelancers, and other creative professionals have long described their work in the same terms. The gig economy is laced with assumptions about worker welfare, but the term ‘gig’ is technically neutral. This casual usage obscures the nuance and gravity of the issues at hand. It is misleading and takes focus away from the real problem—precarity.

The gig economy is a popular label to capture the idea of short-term and unpredictable work arrangements.

What are the origins of the gig economy?

It really depends on how far back you want to go—we could trace the gig economy back to domestic workers in aristocratic homes. As cities developed and populations moved, so did employment patterns. Since the workplace was often in the domicile, governments refused to intervene. Because these workforces were predominantly female, exploitation was largely invisible. The distinctions in employment norms between public and domestic realms—who holds authority, where, and why—offer early examples of some debates currently being revisited in discussion of the gig economy.

We could also say that the gig economy has its roots in piece work. As new machines came online during the industrial era, managers scrambled for new ways to measure efficacy. This was especially evident in the garment trades, where workers were paid a fixed rate for every piece of clothing they produced. Workers were at a disadvantage due to the strictly quantifiable nature of the relationship. While it may be more than a century later, there is an uneasiness about the levels to which taskers on Taskrabbit, or drivers on Uber mirror domestic work and piece work.

Is this approach to employment being seen internationally and across all sectors?

In my conversations with journalists and researchers both in America and Europe, it seems like many countries are struggling with what to do. To be clear, this sort of work has always existed, but gig economy platforms have forced it into the light—this is in part because the workforce is visibly white and better-educated than what we typically assume of low-wage workers. Part of the reason it feels so unprecedented is because countries are openly dealing with informal employment for the first time, and so we are trying to figure out culturally appropriate ways to bring it into the formal economy.

To what extent will it alter or threaten traditional jobs and employment law as it stands?

Certainly US labor laws have long-needed a tune-up. Gig economy workers fall under the independent contractor classification, one of only two labor classifications in the US. In comparison to employees (the other classification), rights and support for independent workers are weak, and independent contractors are both their own employer and employee. Besides higher taxes, it also means that if an independent contractor requires benefits like occasional sick leave, they have to find that income themselves.
One major problem is the lack of a clear definition of what ‘low income’ means for independent contractors. Welfare eligibility is based on an assumption of employment income, and because of this, struggling independent workers don’t qualify for certain types of public assistance. The precarity associated with the gig economy underscores that having only two classifications to capture the nearly 160 million Americans in the labor force is not enough. At the very least, it’s time to confront the job of amending the independent contractor status—a requirement that is at the core of the issue internationally.

The truest believers in peer-to-peer, meanwhile, will argue that disruption is part of a natural cycle that increases quality and efficiency.

What are the main advantages and disadvantages in the informal approach to employment?

As the ‘peer-to-peer’ label denotes, the use of profile pictures and rating systems is humanising, and this encourages trust in transactions. On the flip side, people of colour are at a disadvantage and have a harder time as both buyers and sellers on peer-to-peer platforms. Implicit bias is not always obvious—it might mean that an Uber driver gets lower ratings because of general implicit bias against people of colour or people who speak with accents. Ultimately, implicit bias can’t be eradicated, but it can be minimised.

Critics will say that the proliferation of space-sharing platforms such as Airbnb are cutting into job markets that provide real benefits to employees. The truest believers in peer-to-peer, meanwhile, will argue that disruption is part of a natural cycle that increases quality and efficiency—although technology destroys jobs its affordances will also create new ones (‘creative destruction’, as economic theory would put it). While the volume of jobs might stay the same, however, the people who lose low-wage jobs due to creative destruction aren’t often the ones rewarded with new jobs when they are created. Those typically go to workers with higher education levels.

The core proposition of the gig economy is its flexibility—the handicraft-trading platform, Etsy, surveyed their sellers in 2015 and found supporting evidence for this. The nature of working whenever you want, often from wherever you want, makes it possible for people to earn income without compromising on childcare, family obligations, medical schedules, and many other priorities. Gig economy opportunities can help people build up emergency savings or fill in the gaps when their income falls short.

During my research into the gig economy, one hopeful theme was the leveraging of gig economy opportunities for professional development. One interviewee was a freelance designer who instructed a graphic arts course on a peer-to-peer teaching platform—she included the class in her portfolio to signal her expertise to potential clients.

Another interviewee worked casually in different fields using TaskRabbit and, through odd jobs, found that she had a talent for event production. Yet another interviewee used a short-term staffing platform to find temporary work at different start-ups. The flexibility allowed her to experience what she didn’t want in her next employer.

Approached thoughtfully, the diversity of platform companies provides opportunities to learn new skills. Approached carelessly, precarity will spread.

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Examining the gig economy

The gig economy, which comprises short-term and unpredictable work arrangements negotiated on online peer-to-peer marketplaces, raises a number of interesting questions about the future direction of employment law. Advocates argue that the gig economy offers boundless innovation and empowers both workers and entrepreneurs, while critics suggest that it disenfranchises the workforce and undermines workers’ rights. Annie Powell, solicitor at Leigh Day, examines the accuracy of the term gig economy and looks at the potential interventionist role for the government.

What are the benefits and risks for companies of setting up a business in the gig economy?

I’m not sure that the expression ‘gig’ economy has a precise meaning, but gig economy is increasingly used to describe people who:

- do not work fixed shifts
- are not required to carry out a minimum number of hours each day, or
- who, in theory, can work as much or as little as they choose

Somewhat misleadingly, the word gig suggests a type of work that is casual and inessential. However, work done in the gig economy is often the main source of a person’s income. For that person, delivering a takeaway meal, for example, or working a shift on the warehouse floor is not doing a gig in any normal sense of the word.

Technology also seems to feature heavily in the gig economy. The internet, smartphones and sophisticated programmes mean that companies can reach a wider pool of workers than before. Further, when companies receive a request from a customer—for the delivery of a takeaway meal, for example—the company can use its technology to communicate that request to its workforce in almost real time.

In this way technology allows companies to have a large workforce on standby ready to respond to changes in demand, which can obviate the need to pay workers to carry out fixed shifts.

What legal issues have arisen for those companies working in the gig economy?

A significant legal issue that some companies are facing is whether those who work for them are genuinely self-employed, as the companies claim, or whether they are in fact workers or employees.

The genuinely self-employed do not have employment rights. Workers enjoy fewer rights than employees but have certain key entitlements, including the right to receive at least the national minimum wage (NMW) and to take paid holiday.

Failure to pay the NMW is a criminal offence and can lead to claims for arrears in pay.

Similarly, workers can claim for arrears of holiday pay, which can be very costly for an employer when a large number of workers make such a claim.

What legal responsibilities do they have for those working for their business? Are there issues surrounding the adherence to health and safety laws? Pension requirements? Data protection?

There are no special exemptions for companies operating in the gig economy. The rules in relation to workers and employees who work for such companies are the same as for any other company.
How are companies attempting to navigate these legal issues in the context of the gig economy? Have there been any notable cases dealing with these issues?

There have been several notable cases on the question of employment status. In October 2016, the Employment Tribunal ruled that a group of 19 Uber drivers represented by Leigh Day were workers and therefore entitled to receive at least the National Minimum Wage and holiday pay. Uber has appealed against this judgment.

Other notable cases include those brought against the courier companies CitySprint, Excel, Addison Lee and eCourier in which four couriers are challenging the companies’ classification of them as self-employed contractors.

How do you see this area developing in the coming years?

The recent government pronouncement in relation to Deliveroo suggests that one potential development is that government takes an interventionist role in tackling companies who may be wrongly classifying their workforce as self-employed.

In the summer of 2016, some of Deliveroo’s workforce carried out protests against Deliveroo’s proposal to change their contracts so that they would only be paid per delivery rather than by the hour. Deliveroo riders were concerned that this would lead to them being paid less than the NMW.

Deliveroo’s position is that all of its delivery riders are self-employed. Interestingly, after the protests received significant press attention, the Department for Business, Energy and Industrial Strategy issued a statement which included the following:

‘An individual’s employment status is determined by the reality of the working relationship and not the type of contract they have signed. Individuals cannot opt out of the rights they are owed, nor can an employer decide not to afford individuals those rights. Employers cannot simply opt out of the NLW by defining their staff as self-employed.’

Interviewed by Julian Sayarer. The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.
Regulating the gig economy

Professor Jeremias Prassl of Oxford University explains how technology, existing law and practical measures could be used to solve a number of the social and legal problems created by new platforms.

With the number of self-employed people continuing to rise, do we need to examine the legal framework in this area?

That the legal framework surrounding employment and self-employment needs to be re-examined is beyond dispute. For a long time we thought of as atypical those categories of work which did not feature a single employer, full-time employment, standard legal protections and open-ended contracts. At a rapid rate, and with a proportionate rise in flexible and precarious employment, that traditional arrangement might one day become the atypical rather than typical approach to employment.

Has the law failed to keep pace with these developments?

Yes and no. Particularly at EU level, there is a lot of labour law attempting to respond to fixed-term, temporary, agency-employed and part-time workers. While this is welcome, it struggles to respond to all the characteristics and prevalence of gig economy employment we are now seeing.

The use of technology as a means of intermediation is new and different but the underlying problems with ascribing responsibility are nothing unfamiliar.

There are a number of suggestions for new regulations—however, a lot of the current legal problems in fact relate to old problems. Businesses inserting self-employment clauses into contracts has been a legal problem seen since the 70s, with some rogue employers trying to structure employment in such a way that they are able to avoid basic legal norms. The use of technology as a means of intermediation is new and different but the underlying problems with ascribing responsibility are nothing unfamiliar. In response to the growing legal headache there is no need to reinvent the wheel.

What legal problems have arisen so far as a result of the expansion of businesses operating in the gig economy?

The first key issue is employment classification—are cleaners at TaskRabbit or drivers at Uber employees or not? This is precisely the sort of question that is familiar to an employment lawyer—the businesses are different but the problems are not.

The Hamilton Project, a US think-tank, featured a recent report authored by Seth Harris and Alan Krueger, in which it was proposed that gig economy workers are neither employees nor self-employed and so an intermediate status must be created in order to address the problem of workers and give them a basic set of rights.

The UK experience suggests, however, that this might not solve the problem, either. UK law already has an intermediary category between the role of employee and contractor—the ‘worker’—yet we have not escaped the problems of the gig economy.

The role of ‘worker’ is one in which a person can expect to receive basic protection such as minimum wage entitlement and protection against discrimination, yet as litigation between Uber and its drivers in the Employment Tribunal shows, this third category of employment is no panacea, either. Italian and German law likewise hold additional categories, and many nations have their own legal equivalent of the worker, with none fully addressing the questions thrown up by companies such as Uber, TaskRabbit and Mechanical Turk.

Identifying the employers is of great significance. With some of these platforms it is unclear who is the actual employer. Mechanical Turk by Amazon is a task apportioning platform, though many of the people advertising on MTurk are actual businesses, without their own workforce, but distributing labour. Who is responsible for this? MTurk, the company posting the work, or a combination of the two?
From a legal perspective this is not necessarily novel—my recent book, ‘The Concept of the Employer’ outlines how we could hold employers in multilateral situations to account—so whoever sets the wage level, for example, should be the employer responsible. If one platform sets the wage level then it is the employer—if another platform merely connects the client to the worker and the client retains responsibility for wages, then the client is the employer.

But we have to be careful that ‘disruptive innovation’ is not in danger of becoming a code word for breaking the law, with exploitation masked by technology.

What areas are currently suffering from gaps in the law? Is anything being done to fill these?

One very important issue is that we cannot think of gig economy employment issues as independent from consumer protection, tax law, the welfare state and other traditional legal issues. When we reduce gig economy issues to employment issues, we are missing a large part of the picture. Some platforms are not only avoiding employment law but also consumer protection duties—old employment-related doctrines such as vicarious liability protect us all.

Are any jurisdictions approaching this issue in a particularly innovative way? Has any jurisdiction been successful in adapting to these changes?

It is still very much work in progress, but interest in solutions is growing as many jurisdictions are experiencing the same issues. Some gig economy platforms and their proponents suggest that they should be left alone. Alternatively, industry-specific regulation is being encouraged, such as ride-sharing laws to help govern transportation network companies. But we have to be careful that ‘disruptive innovation’ is not in danger of becoming a code word for breaking the law, with exploitation masked by technology. This is not to oppose innovation—but we must ask is this value creation provided in the business model of the service, or is it value extraction through regulatory arbitrage.

How do we future-proof any laws in this area? Are there existing models of regulation that might be adapted to the gig economy?

What we have to do is carefully develop existing laws and frameworks, looking at specific protection for individual groups of workers and adding them to existing frameworks. Do not reinvent the wheel, make sure people are classified as workers, receiving minimum wage and basic protections. Thereafter look at what the specific problems are.

One of the issues here is the ratings function by which workers are locked to particular platforms—if the rating becomes the property of the worker, and an Uber driver can move to Lyft with that rating, then you enable the worker to have some more bargaining power. This is an element of true entrepreneurship. The technology is there for such solutions to be put in place, they simply require the right regulatory culture and oversight.


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The gig economy—Uber for lawyers

Mary Bonsor, who set up the on-demand paralegal recruitment platform F-LEX, and Jimmy Vestbirk, founder of the Law Tech community Legal Geek, offer their thoughts on how companies resembling ‘Uber for lawyers’ are changing the legal industry.

Mary Bonsor: When I started F-LEX, the market for LawTech was very small. Rocket Lawyer and Lexoo, offering online legal services, had just arrived but F-LEX was otherwise part of a very small number of law-focussed start-ups. The work we do, matching paralegals with firms on an on-demand basis, shows the obvious space for an Uber-like platform within the legal industry.

Lawyers have been a little resistant (due to their risk-averse nature) to shifting technology, but as that change increasingly takes place in the workplaces of their clients (for example, the financial sector and FinTech), in daily life through the use of apps like Uber or Airbnb, or the very presence of tablets and devices, change becomes harder to resist.

One would hope that tech will help clients by reducing fees and increasing efficiency, but that drive will come from the client side. Law firms will have to adopt tech according to the changes their clients are making, and according to the demands of their clients. Technological efficiency creates an expectation that prices should come down—there is now tech throughout all of society and law cannot remain outside of that trend.

Jimmy Vestbirk: Uber for paralegals is already an example of one area where this exists. At the entry point of the legal profession, the artificial intelligence technology coming through is reducing the need for thousands of fixed contract paralegals, making it more efficient to bring them in, on-demand.

An Uberisation is happening across the tech world and it would be strange were law to be immune to this. The black cabs of London feel like a good example for lawyers to take note of, as cabbies had high billable hours.

The Uber example extends further in that it was always a B2C business, whereas a rival such as Addison Lee was B2B. As Uber extends into the B2B market with a pre-book service, it is hard to imagine them not further colonising the Addison Lee share of the market. The customer-facing perspective is important here.

As well as knowing the detail of the law, lawyers also need to be more commercially aware of their clients and of how to promote their own strengths.

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The future of the legal industry knows no bounds

Simon Harper, Co-Founder of LOD (Lawyers on Demand), examines the ways in which new work practices can challenge and complement the traditional business model of the firm.

Is cloud-based file sharing and easy communication bringing about the beginnings of the remote law firm? Is the traditional law firm well-suited to the ‘gig’ economy?

Cloud-based file sharing and easy communication is just part of the evolution of communication technology. It is not really new to law firms who can generally adapt to this by adopting the new technologies. What is more difficult for them is to adapt to new ways of working (whether gig economy or otherwise) because this challenges the traditional legal model which has been well-honed over the years and revolves around expectations of face-to-face time and institutions such as hourly billing.

How might staple features of the law firm be made compatible with remote working? Can more flexible working improve cost-competitiveness?

Originally with LOD (Lawyers on Demand) we achieved this compatibility by redesigning the working model. More recently we have helped other law firms to achieve this by partnering with them. Done well, it undoubtedly improves cost effectiveness by allowing teams to be staffed for their core baseline of work and then just flex as needed.

What sort of arrangements did BLP put in place when starting LOD?

The most important element when originally starting LOD was a philosophy rather than any one particular process. We set about trying to establish an openness to new ways of working—a focus on the personal needs and motivations of individuals and a willingness to experiment and iterate in an agile way.

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What have you found to be the pros and cons of the model?

Remote and flexible working allows organisations to source the very best talent in an efficient way. It improves job satisfaction, reduces attrition rates and helps diversity. This not only assists the attraction and retention of excellent lawyers, it also helps to ensure that a team is able to function effectively and in a responsive fashion.

For this to work well, there needs to be a willingness to communicate with the right medium. Sometimes that might be email but phone and video chat is often better for more nuanced issues. It’s important to have processes and habits that build trust without the usual in-person interactions.

Does the flexible working environment help alleviate stress in the law industry? Does this measurably improve business for the lawyer and client?

Studies have shown that a flexible work environment increases job satisfaction, it can also help with unaddressed issues such as high stress levels within the legal profession. This can only be beneficial for both the lawyer and client.

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