Future Work: Are your gig-workers contractors or employees?

29 June 2017

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In brief

Australia's enthusiasm for the sharing economy and disruptive technology has captured the attention of businesses seeking to harness agile gig-workers as an alternative to the traditional employment model. However, these workers may still be regarded as employees, impacting on how businesses and workers engage around new technology and the future of work. Our Alert delves into some best practice approaches that you can consider now to prepare yourself for this future.

In detail

Australia's enthusiasm for the sharing economy and disruptive technology has captured the attention of businesses seeking to harness agile, just-in-time workers as an alternative to traditional employment models. But not everyone is enthusiastic about the shift.

Labour regulators have their eye on a number of disruptive technology and labour supply businesses, and class action lawyers are jostling for pole position as contract workers seek to establish a right to employment-related entitlements. Just this week, the Fair Work Ombudsman has confirmed an investigation into ride-share service arrangements.

Emerging technologies may appear to generate new forms of working relationship. However, Australian regulators and Courts may still view individual working relationships in a binary manner, where workers are employees or contractors, with little capacity to categorise beyond this model. International litigation involving ride-share services suggests that Courts will continue to apply existing control and organisational tests to working relationships in the new, digital economy.

Contractors versus employees and the risk of misclassification

Courts will generally assess the true nature of working relationships through applying tests that focus on the level of control held over a worker, or the level of the worker's integration within a business. Workers who are subject to a high degree of control over their work product, working hours, location and performance standards are more likely to be viewed as employees, not contractors. Likewise, workers who are highly integrated into an organisation's operations are more likely to be employees. Exclusive service

is not required to show an employment relationship. A worker who works on an ad hoc basis, or for a number of different businesses, can still be regarded as a casual employee.

Failure to properly classify workers as employees can have serious consequences in terms of liability for unpaid entitlements (minimum wages, award benefits, superannuation, leave) and may impact on taxation arrangements (PAYG withholding, payroll taxes). More broadly, misclassifying workers as contractors when they are really employees can seriously impact on an organisation's assumptions about labour costs.

To date, 2017 has produced a number of high-profile sham contractor prosecutions and enforceable undertakings in the labour supply, hospitality and other industries for the Fair Work Ombudsman. At the time of writing, the Federal Court has reserved judgement on whether a group of contractors is able to bring class action proceedings against a national charity collection organisation over allegations that contractor workers were misclassified and should have been paid as employees.

Applying tests to disruptive technologies

When put to the test, a number of technology businesses have argued that their models do not lead to engaging workers. Rather, they argue that they merely provide technology platforms that link small businesses to third parties that need their services. The workers in this scenario are described as entrepreneurial small businesses, rather than staff. Digital platforms provide these small businesses with a gateway to an infinite pool of customers that was not previously accessible.

Whilst this narrative is helpful, and may genuinely reflect an underlying business proposition, Courts won't necessarily see things this way. Businesses need to be mindful that the law is a living beast that will bend and twist to try and keep up with changes in our economy, sometimes in ways that are awkward and not obviously intuitive.

In *Aslam & Others v Uber B.V & Others* (2202550/2015), the English Employment Tribunals found that Uber drivers were employees, not self-employed contractors, due to the level of control over bookings, quality and customer complaint rectification, amongst other things. This case has been appealed, but for now serves as an example of the way in which Courts may apply existing law to new types of working relationships. The appeal is due to be heard later this year. In the meantime, the Fair Work Ombudsman has now confirmed that it has commenced a review of Australian ride sharing services.

Best practice approach to establishing a contingent worker engagement model

1. *Be thoughtful about your worker engagement model, and document it correctly*

Organisations still need to consider working relationships against a 'contractor versus employee' matrix. Where contingent workers are providing services to a business directly (rather than through an intermediary, such as a labour hire company), the risk that they will be regarded as employees at law is higher. Where workers are providing services directly to third parties through a business, there is still a reclassification risk.

Businesses need to consider what level of control will be exercised over workers, the revenue model in place (who will collect and distribute fees paid), quality control measures and who is giving quality guarantees to third parties.

2. *Consider casual or short-term employment as an alternative to contracting*

New businesses engaging workers for the first time, or even established businesses trialling a new working model may be reluctant to engage permanent employees. However, engaging workers on a short-term basis can be achieved through established employment concepts such as casual or fixed-term

employment. Businesses should consider whether contractor (as opposed to fixed-term or casual employment) arrangements are appropriate, again, having regard to levels of control and organisational integration.

3. *Regularly review engagement models for appropriateness*

Genuine contracting arrangements may change into employment relationships over time. For example, new digital businesses may benefit from genuine contracting arrangements with skilled contributors during incubation. However, as a brand matures, there may be a greater need for control over products and services being delivered to ensure brand consistency. It is possible that the required level of control over contingent workers and increasing integration of these workers into a businesses over time will lead to them being classified as employees at law.

The takeaway

We expect that this narrative will continue to evolve as the convergence of people and technology continues to set the scene for the future of work. Our three tips:

1. Be thoughtful about your worker engagement model, and document it correctly,
2. Consider casual or short-term employment as an alternative to contracting, and
3. Regularly review engagement models for appropriateness,

are a useful framework to think about when considering how this applies to your business or industry. Businesses should be considering these impacts proactively – both from the perspective of where they can harness and engage these new models, and also in ensuring compliance with labour and tax laws.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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