XpertHR Podcast

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Bar Huberman: Welcome to this week's XpertHR podcast with me, Bar Huberman. This week we're discussing a very hot topic in the news recently, the gig economy. We'll look at the highly publicised employment tribunal claims against Uber and a number of courier companies. We'll also discuss the increasing use of freelancers through web applications, which poses risks to organisations that HR could help to address.

Joining me today is XpertHR Employment Law Editor, Qian Mou. Before we delve into the cases, Qian, can you first explain what we mean when we say 'the gig economy'? [0:00:45.9]

Qian Mou: So there isn't yet a set definition for the gig economy, but generally from a labour market perspective the media's been treating as referring to freelance work that's facilitated through technology, such as web platforms or mobile apps.

Bar Huberman: So this covers some of the larger businesses we might be familiar with, including Uber, Deliveroo and Upwork, which is the freelance platform to hire professionals such as accountants and web developers. [0:01:12.9]

Qian Mou: Right. The companies you've just mentioned are apps or web platforms that facilitate a service or that match clients with individuals who provide a service. So depending on the framework, the process can be completely managed on the app or the site.

The individuals providing service are supposed to have more flexibility in determining their work schedule, so the idea is that technology helps fill a demand with flexible labour.

Bar Huberman: And I'd say that the overall impression you get from reading tech, business or labour market news is this sector with its workforce is growing in the UK? [0:01:44.7]

Qian Mou: I agree, although because this type of contingent work is hard to define and track, that impression may not be accurate in terms of overall labour market distribution. But certainly this type of work being facilitated by technology exists in significant numbers today. So for example *The Guardian* said that as of April 2016, there were about 25,000 Uber drivers in London alone.

Bar Huberman: Well that's quite significant. So I understand that a large controversy in this industry is the employment status of the individuals providing services through these platforms. [0:02:19.7]

Qian Mou: Yes. So as a bit of background, in the UK we have three types of employment classification – employees, workers and self-employed individuals, also known as contractors.

So at one end of the spectrum, employees receive full legal rights and protections but are subject to a high level of control by their employers and have significant obligations to them. At the other end, self-employed individuals have control over their own work but don't get employment rights and protections. For example, they're not entitled to minimum wage, paid holiday, redundancy pay or protection from unfair dismissal.

Bar Huberman: And then there are workers, aren't there? And they fall between employees and the self-employed. [0:03:00.5]

Qian Mou: Right. The definition of 'workers' covers those who don't meet the more strict requirements of employment. Workers are entitled to basic rights such as for minimum wage and paid holiday, but workers don't receive full employment rights such as for redundancy pay or protection against unfair dismissal.

Bar Huberman: So where does the controversy come in? [0:03:20.7]

Qian Mou: Well much as the gig economy's workforce is classified as self-employed because technology platforms claim that they facilitate services by matching drivers, cleaners, programmers etc. with clients, rather than employing them. And by doing this the tech platforms don't have to deduct taxes or National Insurance Contributions. They don't pay a guaranteed hourly minimum wage or a holiday pay or cover contractor expenses.

But in several high-profile cases, claimants are arguing that they are personally required to perform the services and are subject to a lot of control by the technology platforms, and as a result they want to be classified as workers in order to receive basic entitlements.

Bar Huberman: So can you tell us about the cases that are currently making their way through the employment tribunals? [0:04:08.5]

Qian Mou: Sure. So in July the employment tribunal heard two test cases by Uber drivers, claiming that they were workers and not self-employed. The test cases will determine seventeen claims lodged against the company. We're currently awaiting judgement in these cases, which usually takes several months to be delivered.

Separately, bike couriers have lodged claims against City Sprint, Excel, Addison Lee and eCourier, claiming that the courier companies have significant control over their schedules, deliveries and uniforms. They say that they should be classified as employees or workers, but not as self-employed. And the first of these claims will be heard in November.

Bar Huberman: And I understand that GMB is also supporting former Addison Lee drivers in their claims of unfair dismissal after a protest in London in May? [0:04:53.8]

Qian Mou: That's right. So the Addison Lee driver claims were just announced last week, so we'll be waiting to hear more about when they're to be scheduled.

Bar Huberman: And all of these cases have the potential to have a huge impact on the gig economy, don't they? [0:05:06.6]

Qian Mou: Right. Some of these businesses are quite reliant on using independent contractors. If they had to switch over to using employees it would be a huge cost and an administrative burden.

Bar Huberman: Is this the reason why these cases are receiving so much media attention? [0:05:20.3]

Qian Mou: That's part of it, definitely. Another factor is that the legal employment categories have been criticised as not reflecting the reality of how companies engage workers today. These cases will have to apply the legal categories to the gig economy, so many people are hopeful that the cases will provide useful guidance.

Another reason behind the public scrutiny is the concern that many of the people supplying services to these platforms are being misclassified in order to be exploited. They're working for low wages in poor labour market conditions and have little power to negotiate terms of work. At the end of the day they might not even be making the minimum wage.

Bar Huberman: Well yes, we've seen the protest by Deliveroo and UberEATS couriers in London demanding to be paid the National Living Wage. [0:06:04.7]

Qian Mou: Those are really good examples of exactly this concern surfacing in public spaces.

Bar Huberman: Okay, so the outcome of these cases will be really interesting.

Now aside from cases where individuals are making claims against tech platforms, it's also important to be aware that the employment classification issue can crop up between contractors and the end client as well, can't it? [0:06:23.6]

Qian Mou: What we're seeing is that large organisations are using these platforms to find and hire freelancers for all sorts of jobs. Larger companies seem to like that the process is quicker than traditional recruitment channels and that it helps them find people for short-term work.

The issue is depending on how the relationship is structured, there's a risk that the client company could be considered the freelancer's employer as well. So for example, if a freelancer is hired repeatedly, has to comply with very comprehensive requirements on how she does the work, and is expected to always take up work that's offered, she could be classified as an employee of the organisation.

Bar Huberman: It's actually a classic employment law issue, isn't it? [0:07:03.8]

Qian Mou: Absolutely. And what you would traditionally see in large organisations is HR and procurement working together to ensure that protections are in place to prevent misclassification of freelancers.

But because these web platforms are making it easier and faster to source freelance work, this contracting can take place off the radar of HR and procurement, so without proper oversight or protections in place.

Bar Huberman: And even in cases where we're not concerned about misclassification – so say there is a very clear self-employed contractor relationship, even in these scenarios – the speed and ease of contracting through these platforms could cause issues as well? [0:07:41.0]

Qian Mou: Yes. Depending on the nature of the tech platform, it might facilitate the entire process of engaging, managing and paying for a freelancer. And while this is an easier and faster end-to-end process, it can often leave gaps that an organisation's regular procurement process would cover.

Bar Huberman: So what are some of the areas where issues might crop up when engaging a freelancer? [0:08:04.2]

Qian Mou: Well starting at the beginning of the process, when researching a freelancer's background and qualifications, usually freelancers are vetted through HR or procurement. On these new tech platforms, though, individuals who are unknown to the company, and from all over the world, can be engaged to work, with the person engaging perhaps unaware of the usual checks that need to take place before they bring someone on.

Bar Huberman: And that's an interesting point, isn't it, because quite often freelancers are hired where a manager, for example, knows somebody and knows their reputation, so if they're engaging somebody from the other side of the world, it would be a completely different issue.

Qian Mou: Right.

Bar Huberman: So when it comes to engagement, one of the issues to be mindful of is putting together the right documentation, isn't it? [0:08:48.3]

Qian Mou: Absolutely. So once a freelancer has been chosen, a contract is usually prepared, including terms on confidentiality, intellectual property rights, insurance and indemnity requirements. These terms are often carefully tailored to the freelancer and the type of work to be done. But with the tech platforms, either no support is made for setting out the terms of the engagement, or very generic terms might be adopted, which could leave big gaps in protection for the company.

Bar Huberman: Are there any issues that come up after a freelancer's been engaged? [0:09:20.4]

Qian Mou: Sure. So sometimes freelancers will need to undergo the same type of training that employees need, such as for health and safety, or for bribery, depending of course on the type of role they'll have.

Another issue is quality concern. If an organisation isn't satisfied with the services or end product, there might not be a good process to resolve disputes. Really this issue should be dealt with on the front end, through checks of the freelancer's past work, or by building in a strong dispute resolution mechanism.

Bar Huberman: The HR team need to be clued up about the issues relating to the gig economy, as they're likely to be one of the first groups to become aware of these platforms that are being used within the organisation. [0:10:03.2]

Qian Mou: That's right. So for example, when someone has engaged a contingent worker and has questions about the process, they're very likely to contact HR.

Bar Huberman: If I'm working in HR at a large organisation, how should I approach the issue? [0:10:16.4]

Qian Mou: Well we would recommend that first, be alert to freelancers being hired through tech platforms that might circumvent the usual engagement process. So if you do receive queries about freelancers, it's worth looking into whether this is taking place through a website or an app, and to what extent the engagement complies with your company's usual safeguards, both in terms of employment classification and contractual terms.

In the event that use of the platforms is widespread or if it's anticipated that the practice would increase, it's also worth flagging the issue up with, for example, procurement, compliance and legal, in order to agree an organisational approach.

It may be that you decide that the process provided by a particular platform is fine, or that you decide that a platform can only be used if supplemented by additional documents and checking. Your organisation would have to decide who would be in charge of developing, implementing and overseeing any additional safeguards to be put into place.

Bar Huberman: Thanks, Qian. That's a really helpful introduction to the gig economy. If you want to learn more about employment classifications, a good starting point is to check the Contracts of employment section of the Employment law manual.

We'll be closely following the gig economy employment tribunal cases, so look out for case report updates on those.

That brings us to the end of this week's XpertHR podcast, which you've been listening to with me, Bar Huberman. We're back next Friday with another podcast but until then, it's goodbye from us.