

insights

TYPES NOT MAPPED YET July 06, 2018 | TTR not mapped yet | Lori W. Jones

Is it time to address benefits for alternative work arrangements?

Reprinted with permission of the Employee Relations Law Journal, Summer 2018.

On February 6, 2018, the Subcommittee on Primary Health and Retirement Security of the U.S. Senate Committee on Health, Education, Labor and Pensions held a hearing on “Exploring the ‘Gig Economy’ and the Future of Retirement Savings.” Although the title would suggest a focus on gig workers only, some of the testimony addressed the retirement security of a broader group of individuals engaged in alternative work arrangements, i.e., all workers employed other than as common law employees.

Gig Workers and Other Alternative Work Arrangements

Who are gig workers? Although there is no generally accepted definition, according to the United States Governmental Accounting Office (GAO) a gig worker is a self-employed individual providing labor services and completing single projects or tasks on demand for pay. A common example would be Uber or Lyft drivers.

A variety of terms have been used, somewhat inconsistently, to describe the broader category of individuals engaged in alternative work arrangements (which group includes, but is not limited to, gig workers). For example, a report issued by the Brookings Institute has referred to “independent workers” as the grey area between employees and independent contractors. In contrast, legislation introduced in the United States Congress in May 2017 by Senator Mark Warner and Representative Suzan DelBene described independent workers as including independent contractors, and temporary, self-employed, and contingent workers. Other commonly used terms for individuals engaged in alternative work arrangements include “nonstandard workers,” “contingent workers” and “self-employed workers.”

Regardless of the terminology, it is clear that retirement security for individuals engaged in alternative work arrangements is a topic of concern for economists and politicians. Likely this is because this category of workers is the fastest growing segment of the United States workforce. According to a study by economists Lawrence Katz and Alan Krueger, the percentage of individuals providing services via an alternative work arrangement in the United States rose from 10.7% in February 2005 to 15.9% in late 2015. Katz and Krueger also concluded that 94% of the net job growth in the United States during this time period was attributable to the independent workforce.

These workers are not faring well economically. A 2015 GAO report concluded that contingent workers earn about 47.9% less annually than standard workers and are two-thirds less likely to have a work-provided retirement plan. Scholarly articles have noted the lack of financial security for these workers. Now even the mainstream press is beginning to highlight concerns with respect to the unavailability of benefits for workers in alternative work arrangements.

February 6, 2018 Hearing

The Subcommittee on Primary Health and Retirement Security has jurisdiction over a wide range of issues including private retirement plans. The first witness to testify before the Subcommittee on February 6, 2018 was Camille Olson, an attorney with Seyfarth Shaw LLP, who testified on behalf of the U.S. Chamber of Commerce. Ms. Olson emphasized the importance of supporting the “entrepreneurial spirit of the gig economy” and suggested that the general approach should be the creation of opportunities for gig workers to save within the “existing private voluntary system. Ms. Olsen further suggested that the issue of retirement security for gig workers could best be addressed via programs that:

- increase the availability and access to education regarding existing retirement vehicles (e.g., Keoghs and IRAs);

- allow companies employing gig workers to (i) provide benefit information, (ii) assist with the administration of direct deposit of gig worker contributions into retirement vehicles, and (iii) make company contributions to retirement vehicles on behalf of gig workers, all without jeopardizing the legal status of their business models (i.e., without being characterized as “employers”);
- promote the development of portable retirement products and services that allow for contributions from multiple organizations and workers; and
- provide monetary incentives to save for retirement.

The second witness before the Subcommittee was Vikki Nunn, a CPA, small business owner and consultant to small business owners. Ms. Nunn’s recommendations were as follows:

- improve education with respect to solo 401(k) plans and simplify the documentation and process for adopting such plans;
- raise the catch-up limitation for solo 401(k) plans and/or remove the catch-up limitation for Roth contributions to solo 401(k) plans;
- eliminate the top heavy rules for small plans; and
- encourage the availability and use of Roth retirement options.

The third witness before the Subcommittee was Troy Tissue, President of TAG Resources, LLC. Mr. Tissue suggested that Congress make retirement savings plans available to the contingent workforce through an open multiple employer retirement plan (“Open MEP”). Mr. Tissue suggested two ways for structuring an Open MEP. First, a company contracting with contingent workers could sponsor the plan for its contingent workers. Each contingent worker would be treated as a co-sponsor of the Open MEP. A second alternative would be to have an independent organization establish the Open MEP and contract with contingent workers to make contributions to the Open MEP on their behalf. Mr. Tissue noted that the following legislative changes that would be necessary for the development of Open MEPs:

- delete the current requirement that only employers with a “common interest” can participate in the same MEP; and
- protect contracting companies and contingent workers from liability for acts and omissions of other contracting companies and contingent workers that participate in the Open MEP.

The final witness to testify before the Subcommittee was Monique Morrissey, an economist from the Economic Policy Institute, a nonprofit, nonpartisan think tank created in 1986 to ensure that the needs of low and middle income workers were considered in economic policy discussions. Ms. Morrissey addressed how nonstandard work affects retirement security. She defined the term “nonstandard workforce” as including part-time workers, on-call workers, temporary workers, and contingent workers. Ms. Morrissey noted the following:

- nonstandard workers are more likely to face financial insecurity, including retirement insecurity; and
- although Social Security should compensate for their lower income, nonstandard workers are more likely to be paid “under the table” or to underreport their income, thereby reducing Social Security benefits.

Ms. Morrissey expressed concern that reliance on a voluntary system would do too little to address the issue of retirement security for nonstandard workers. She listed the following alternative courses of action that should be considered to address the retirement income security of nonstandard workers:

- expand Social Security via increased contributions by workers and employing entities;
- address tax avoidance by nonstandard workers; and
- expand the Earned Income Tax Credit.

As the testimony from the Subcommittee hearing illustrates, the solutions for the issue of retirement security for individuals under alternative work arrangements depend, in large part, on a person’s vantage point. The U.S. Chamber of Commerce views the issue from the point of view of the entity contracting with the independent worker. On the other hand, an economist views the issue of retirement security for the alternate workforce from the standpoint of the overall cost to individuals and society.

Gig Workers in the U.K.

It is interesting to note that this issue is not particular to the United States. On April 24, 2017, the Work and Pensions Committee of the House of Commons of the United Kingdom issued a report titled “Self-Employment and the Gig Economy.” The report notes that 15% of all workers in the United Kingdom are now self-employed. Because welfare benefits in the United Kingdom are based, in large part, on a contributory system, the issues with respect to the alternative work force are different than the United States. In 2016 the New State Pension was adopted in the

United Kingdom which removed many of the differences in entitlement to pension benefits between employees and self-employed individuals. However, the level of national insurance contributions required of self-employed workers was not equal to that of employees. As a result, the national insurance contributions of employees are, to some extent, being used to subsidize the benefits of self-employed workers. One of the recommendations of the report is a plan for equalizing the national insurance contributions made by employees and self-employed workers.

Conclusion

Although the proposed solutions differ, all those testifying before the Subcommittee on Primary Health and Retirement Security on February 6, 2018 acknowledged that the retirement security of workers in alternative work arrangements needs to be addressed.

It is clear that the United States workforce has changed significantly in the last two decades and that the issues described in this article cannot be ignored. As Congress crafts long-term solutions for these issues, it may be that companies that reduced employee benefit costs in the short run via outsourcing and the use of independent workers will have merely traded one set of costs for another.

ⁱDOL Can Better Share Information on Services for On-Demand, or Gig, Workers, GAO-17-561: Published: Sep 26, 2017. Publicly Released: Oct 26, 2017.

ⁱⁱHarris, Seth B. and Allen B. Krueger, A proposal for modernizing labor laws for 21st century work: The “independent worker.” <https://www.brookings.edu/research/a-proposal-for-modernizing-labor-laws-for-21st-century-work-the-independent-worker>, December 8, 2016.

ⁱⁱⁱThe Portable Benefits for Independent Workers Pilot Program Act introduced by Sen. Mark R. Warner (D-VA) and Rep. Suzan DelBene (D-WA) on May 25, 2017.

^{iv}Katz, Lawrence F. and Alan B. Krueger, 2016. “The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015.” https://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_resubmit_clean.pdf

^vId. at p. 7.

^{vi}Contingent Workforce: Size, Characteristics, Earnings, and Benefits. GAO-15-168R. Washington, D.C.: April 20, 2015.

^{vii}Carlton, Abigail Rachel Korberg, Daniel Pike & Willa Seldon, *The Freedom, Insecurity, and Future of Independent Work*, *Stanford Social Innovation Review*, https://ssir.org/articles/entry/the_freedom_insecurity_and_future_of_independent_work.

^{viii}See for example, Nova, Annie, “*Here’s What You Lose If You Join the Gig Economy*,” <https://www.cnbc.com/2018/02/12/gig-economy-workers-lose-certain-employee-perks.html> (Feb. 12, 2018).

^{ix}<https://www.help.senate.gov/imo/media/doc/Olson3.pdf> (Feb. 6, 2018)

^xId.

^{xi}<https://www.help.senate.gov/imo/media/doc/Nunn.pdf> (Feb. 6, 2018).

^{xii}“Open MEP” is a registered trademark of TAG Resources, LLC.

^{xiii}<https://www.help.senate.gov/imo/media/doc/Morrissey.pdf> (Feb. 6, 2018).

^{xiv}Self-employment and the Gig Economy, House of Commons Work and Pensions Committee, <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf> (April 26, 2017).^{xv}Id.

authorsTest

lori

Lori W. Jones