

The Gig Economy:

The Increasing Use of Contingent or Temporary Workers and What it Means for OFCCP Compliance

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About Lynn

As Director of Regulatory Affairs for Berkshire Associates Inc., **Lynn Clements** serves as a strategic advisor on AA/EEO compliance issues and oversees Berkshire's audit defense practice. Previously, Lynn served in senior-level positions at the OFCCP and EEOC, and as a shareholder at a management-side law firm where she advised clients on the full range of employment issues, including large-scale class discrimination investigations.

A frequent speaker to HR professionals, Lynn has testified before Congress on EEO and pay equity issues and regularly assists industry organizations, including SHRM and CUPA-HR, in understanding and responding to regulatory proposals.



About Michelle

Michelle Duncan is a shareholder in the Affirmative Action Compliance and OFCCP Defense practice group at Jackson Lewis P.C. Michelle focuses her practice on representing employers in affirmative action and employment discrimination matters before OFCCP. Since joining Jackson Lewis, Michelle has assisted employers in numerous OFCCP audits and compliance investigations throughout the country.

Michelle joined the firm after working nearly fourteen years as a trial attorney with the U.S. Department of Labor, Office of the Solicitor. During her tenure with DOL, Michelle was widely regarded as a leading expert on OFCCP litigation.



Introductory Statement

The materials contained in this presentation were prepared for the participants' reference in connection with ILG National Conference. Attendees should consult with their dedicated consultant or counsel before taking any actions and should not consider these materials or discussions about these materials to be legal or other advice.



Agenda

I. Introduction to the Gig Economy

II. Who is an employee? Why does it matter?

III. OFCCP Examples

IV. Practical Tips & Takeaways



I. What is the Gig Economy?



POSTMATES



TaskRabbit



What is the Gig Economy?

- **GIG ECONOMY:** an economic sector consisting of part-time, temporary, and freelance jobs
- Often thought of as services provided through applications like Uber, but also *includes:*
- **On-Call work, On-Demand work, Contingent work, Freelance work, Fractional employment, Temp-to-regular workers, Non-traditional workers**



How Big is the Gig Economy?

➤ It depends how you count It.

- Estimates are that between 12%-22% of Americans have offered services in the Gig Economy
 - ✓ 22% of American adults have offered services through the Gig Economy
 - ✓ 51% of workers aged 18-34 have offered services through Gig Economy
 - ✓ 42% of American Adults have used services Gig Workers



Positives and Negatives for Employers

Positives

1. Flexibility for small projects like consultants
2. Allows for quick “staffing-up” for temporary increased demand
3. Decreased labor costs, especially benefits

Negatives

1. High worker turnover
2. Workers not trained into the company culture
3. High-skilled worker hired for short-term projects may require high compensation



II. Who is an employee? Why does it matter?



Who Counts as an Employee?

- How is “Employee” Defined?

It isn't!!

- **Definition of employee may change based upon jurisdiction (Federal/State/Local) or statute (NLRA/FLSA/ADA/EO 11246).**



Who Counts as an Employee?

- “OFCCP *generally* uses the common-law agency” test
- Also known as the “Darden” Analysis*
- To determine if there is an employment relationship consider *all circumstances* in the relationship such as:
 1. Skill required for job
 2. Whether it is same type of work as contractor
 3. Source of the instrumentalities or tools
 4. Location of the work
 5. Duration of relationship between parties
 6. Whether Contractor has the right to assign additional projects
 7. Extent of the individual’s discretion over when and how long they work
 8. Method of payment (W-2 or 1099)
 9. Contractor’s role in hiring and paying
 10. Etc.

*Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992).



Who Counts as an Employee?

Why does it matter?

All employees must be included in your AAPs



Hypothetical: Employee or Not?

Darden Factors

Your company, an Office Supply Distributor, with a large federal contract, hires a Software Consultant to develop its new HRIS. The Consultant signs an agreement prior to starting work that specifies a list of deliverables and the amount the company will pay him upon completion of each phase. You provide the Consultant with office space in your building and require him to attend a weekly planning meeting with HR Staff. However, the Consultant has discretion to work offsite when he chooses and may generally select his hours. The Consultant can use an office computer when he is present, but he primarily uses his own computer equipment for coding the software he is developing. Your company also allows him to participate in work/life programs available to employees, such as the use of an in-house gym and free shuttle service to the subway station. Your company does not provide health benefits or withhold federal and state taxes.



Hypothetical: Employee or Not?

Darden Factors

Your company, an **Office Supply Distributor**, with a large federal contract, hires a **Software Consultant** to develop its new HRIS. The Consultant **signs an agreement prior to starting work that specifies a list of deliverables** and the amount the company will pay him upon completion of each phase. **You provide the Consultant with office space** in your building and **require him to attend a weekly planning meeting with HR Staff**. However, the Consultant **has discretion to work offsite when he chooses and may generally select his hours**. The Consultant **can use an office computer when he is present**, but he **primarily uses his own computer equipment** for coding the software he is developing. Your company **also allows him to participate in work/life programs available to employees**, such as the use of an in-house gym and free shuttle service to the subway station. Your company **does not provide health benefits or withhold federal and state taxes**.



Is the Consultant an Employee?

Employee

1. Provided office space
2. Required to attend weekly meetings
3. Provided with computer
4. May participate in “employee work-life programs”

Not an Employee

1. Software Consultant is a different business
2. Signed an agreement before starting
3. Discretion to set own hours
4. Often uses his own computer
5. Company doesn't provide healthcare
6. Taxes not withheld (1099)



Who is an Employee? Why does it matter?

- If, after analyzing all of the *Darden* factors, the contractor determines that the individual is not an employee, the individual does not need to be included in AAP
- As a best practice, an OFCCP FAQ recommends that contractors document the analysis and retain this documentation
 - Are there risks involved in creating this document?
- OFCCP will conduct its own analysis to make the final determination
- Generally, this will only occur in the context of an audit



III. Strategies & Examples



DOL's Guidance

- **During Obama Administration a crackdown of “misclassification of employees under FLSA”**
 - **BUT in June 2017, DOL rescinded joint employment and independent contractor guidance issued by Obama administration**
- **Interest by OFCCP on employment of temporary workers and the use of staffing agencies**



OFCCP Guidance

2000 EEO Survey Proposal

OFCCP did not intend for this provision to be read as including only full-time employees. The request for information about full-time employees in the Survey was not intended to signal any change in OFCCP's requirement for reporting part-time, temporary and full-time employees in written AAPs now or in the future.

- **This is from 17 years ago!**
- **Finding clear OFCCP Guidance is not easy**

* 65 FR 68022 Vol 65 No. 219, Part III, Nov. 13, 2000



OFCCP Guidance

Internet Applicant Rule FAQs: Can a contractor ask a recruiting firm to keep, on its behalf, the records required by the Internet Applicant Final Rule?

- “A contractor may ask that a recruiting firm keep records on its behalf so that the contractor can use the records to monitor its personnel practices and demonstrate compliance to OFCCP. . . . [U]nder the Internet Applicant Final Rule, the recordkeeping obligations belong to the Federal contractor . . . A contractor cannot delegate its obligations to another firm and would be held accountable if required records were not maintained.”

Internet Applicant Rule FAQs: If a covered employer contracts with an employment agency to screen and refer job seekers using the employer’s selection procedures, what records must be maintained?

- “The contractor’s recordkeeping obligations are the same whether it screens job seekers itself or whether it contracts with an employment agency to screen job seekers on its behalf with the employer’s selection procedures.”



OFCCP Guidance

2017 Scheduling Letter Item 19:

19. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees) as of the date of the organizational display or workforce analysis. Provide gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group in a single file.¹¹ Provide all requested data electronically, if maintained in an electronic format. See Note 1, below.

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OFCCP Examples

- **Pacific Region OFCCP Director, Summer 2016:**

“Office is regularly asking whether all employees are on the Item 19 submission, including temporary workers.”

- **OFCCP Audit Request for Information, Pacific Region, June 2017:**

“We observed large pay differences in three women acting as Public Outreach Specialists or Sr. Public Outreach Specialist who made significantly less than the male counterpart, even though the male is a newer temporary hire employee working in Alabama, which generally is a lower locality area. Please provide supporting documentations and justification for the large difference in pay.”



OFCCP EXAMPLES

- **Southeast Region, April 2017:**

Do you use employment agencies to hire for entry-level positions? Are these temp to hire?

- **How long do the individuals work as a temp?**
- **Are positions posted anywhere? If job is posted, where is it posted? Who applies?**
- **How long is the position advertised internally?**
- **How does a temporary employee apply for these entry-level positions?**
- **If there is no interest or a qualified candidate is not found, do you post externally?**
- **Please provide me the agreement with the temporary agency.**



OFCCP Examples

Pacific Region, 2017 OFCCP Audit Request for Information (RFI)

10. Provide a database of all workers who provided a service to [REDACTED] location and/or who reported to supervisors at the [REDACTED] location. Only include persons providing services which lasted longer than a period of 30 days, who were under the direction of [REDACTED] supervisor, required similar competency as [REDACTED] employee, and who performed similar duties as [REDACTED] [REDACTED] employees. For each worker, provide name; personal contact information (address, phone number, email); entity employing the individual, dates of work, type of work performed, and dates of service.





OFCCP Examples

Pacific Region, 2017 OFCCP Audit Request for Information (RFI)

INFORMATION REQUEST (PRE-ONSITE)



1. Submit the following additional columns for employees identified in the provided excel spreadsheet (refer to excel spreadsheet tab 1 titled “Info Request #1” columns X through AI):
 - a. Home/Cell Telephone
 - b. Home Address
 - c. Termination date
 - d. Email
 - e. Temporary workers
 - f. Contingent workers
 - g. Contract workers
 - h. Visa status workers

OFCCP Enforcement: The Risks??

Risks of Including Contingent Workers in your AAP

- 1) Potentially large job groups**
- 2) Adverse Impact**
- 3) EEO Data may not have been collected**
- 4) Held liable for decisions of others**
- 5) Can you explain pay differences between contingent and regular workers?**

Risks of Leaving Contingent Workers out of your AAP

- 1) Will OFCCP notice?**
- 2) OFCCP may assume adverse inference**
- 3) OFCCP could create its own labor pool**
- 4) Technical non-compliance**
- 5) Lose proactive opportunity to review EEO problem areas**



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OFCCP Enforcement: The Risks??

Experiences... and Pitfalls to Avoid:

- 1. OFCCP Compliance Officer asks: Are all workers at the establishment in the plan?**
- 2. OFCCP Compliance Officer looks at EEO-1 Report which clearly shows more or fewer employees than are at the facility**
- 3. Interviews with managers and employees discuss use of temporary or contract workers**



Hypothetical: Plan Structure for a Gig Workforce

Dealing with locations with fewer than 50 employees or virtual employees

You have a work location in Alabama with 15 employees. About 30 sales team members and 10 contract workers report work remotely from their homes and report to a manager at this location.

- (1) Do you consider the 10 contract workers when determining plan structure?**
- (2) Do you create a separate AAP for this location?**
- (3) If not, in what AAP do you include these individuals?**



Hypothetical: Temp-to-Employee

During the holiday season, your company, a large retailer, hires temporary seasonal employees to meet increased customer demand. Two months later when the busy season ends, you decide to offer regular employment to a couple of temporary hires.

- 1) When do you include these hires in your AAP?
- 2) If you wait until you offer regular employment, what is the appropriate applicant pool for this selection decision?



Hypothetical: Staffing Agencies

You enlist the help of a staffing agency to pre-screen new applicants before they are sent to you for interviews.

1. What is the appropriate applicant pool for these workers?
2. How is the EEO data collected?
3. Can OFCCP obtain applicant data from the staffing agency if you don't have it?



Hypothetical: VEVRAA Listing Compliance

You fill some of your entry-level manufacturing jobs through a temporary agency. The temporary agency sends you a list of five candidates for each opening and you choose the best candidate. You record these selections in your AAP as 1 hire – 5 applicants each time. After 90 days, the temporary employees are eligible to bid on permanent employment openings. You record any selections in your AAP as a promotion/transfer.

- (1) Is this the right way to record these transactions in your AAP?**
- (2) How and when do you satisfy the VEVRAA listing requirement?**



IV. Practical Tips & Takeaways



Strategies for Dealing with Staffing Agencies

1. **Staffing agency likely doesn't collect EEO Data; may not want to share "proprietary recruitment lists"**
2. **Include collection of EEO Data in the contract with the staffing agency**
3. **Indemnification clause**
4. **Should you be collecting EEO data on non-employees?**



Other Key Takeaways

- 1. Regularly monitor number of temp to perm conversions and staffing firm placements**
 - Beware of steering issues
 - Consider impact on placement goals
- 2. Monitor pay equity considerations when contract and regular employees perform same or similar work**
- 3. Don't forget VEVRAA listing requirements!**
- 4. Develop a plan for gathering applicant flow for positions filled by staffing firms and temporary agencies**



Questions???

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