



Gagging on gig-economy food delivery

Some food-delivery companies bring home a bad deal for their workers and the public

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Gig economy food-delivery companies may provide convenience, but the cost to customers, workers, and society is much higher than just the delivery fee. Many of these companies “make” money by shifting employers’ labor costs onto workers by classifying them as independent contractors instead of employees. Some gig companies also attempt to contract out of liability for third-party injuries arising from their operations. And a number of gig economy companies specify that disputes should be resolved in individual arbitration, which provides fewer protections for claimants than courts of law.

What services do gig economy food-delivery companies provide?

Gig economy food-delivery companies offer home delivery of food from local supermarkets or restaurants. (See, e.g., <https://www.instacart.com/>; <https://www.postmates.com/>.) Typically, customers use a gig company’s smartphone app or website to select and pay for products (that may be priced higher than in-store. (See https://www.instacart.com/store/costco/about_pricing.) The gig companies hire workers to deliver the goods. However, instead of classifying some of these workers as employees, many companies require drivers to sign agreements that label them “independent contractors.” (As discussed below, Instacart classifies its shoppers (workers who shop for the food and select it from the shelves) and cashiers as employees, but workers who both shop and deliver or only deliver are classified as contractors.)

Gig-economy contractors may not be so independent

Do gig food-delivery companies retain control over details of their contractors’ work?

No one factor determines whether a worker is an employee or independent contractor, but a critical issue is whether an employer has the right to control the “manner and means” of performing the work. (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946; see *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 349.) Courts evaluate the totality of the circumstances (*Germann v. Workers’ Comp. Appeals Bd.* (1981) 123 Cal.App.3d 777, 783), not just the parties’ relationship specified in a contract, or whether a worker is issued a 1099 instead of a W-2 tax form. (*Toyota Motor Sales v. Sup. Ct. (Lee)* (1990) 220 Cal.App.3d 864, 877.) And even if the employer does not control the details of the work, an employment relationship may be found if the employer “retains pervasive control over the operation of the whole, the worker’s duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary.” (*Yellow Cab Cooperative v. Workers’ Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288 [“*Yellow Cab Cooperative*”].)

In determining the extent of an employer’s control, the California Employment Development Department asks several questions, including whether:

- a worker is “required to follow company procedure manuals and/or is given specific instructions on how to perform the work”; and
- “a necessary part of the regular trade or business is normally done by employees.

For example, a sales clerk is selling shoes in a shoe store,” because “a shoe store owner could not operate without sales clerks to sell shoes.” (Emp. Dev. Dept. Form DE 38 Rev. 4 (1-16).)

Instacart notes that “without our shoppers, Instacart is just a website.” (https://www.youtube.com/watch?v=pVetvpgC8v0&index=1&list=PLRs7bwgUPh1cku_FkwE_KG_pU62zXp_0N.) And many shoppers are required to follow the company’s instructions for performing the work. An Instacart training video notes that “there are a lot of specifics” to selecting the best produce. (https://www.youtube.com/watch?v=bMozCZI2uj0&list=PLRs7bwgUPh1cku_FkwE_KG_pU62zXp_0N&index=3.) Shoppers should buy produce that is “perfectly ripe,” with no cuts or bruises. (*Id.*) Organic products should have an organic label. (*Ibid.*) They should not buy perishables with fewer than three days until their expiration date. (*Ibid.*) This is likely one reason why as far back as June 2015, Instacart started classifying its shopper-only workers as employees. (<https://www.recode.net/2015/6/22/11563762/as-uber-feels-regulatory-heat-instacart-reclassifies-some-contractors>.) However, workers who both shop and deliver remain classified as independent contractors (<https://shoppers.instacart.com/>), even though those workers apparently follow the same food selection instructions as the shopper-only employees. A number of class actions allege that gig economy workers, including drivers for various industries, also are or remain classified as independent contractors instead of employees. (See, e.g., *O’Connor v. Uber Technologies Inc.*, 13-cv-03826 [stayed pending appeal].)



Do some gig food-delivery companies fire workers for no reason?

Many gig economy food-delivery drivers remain labeled as contractors, because they supposedly have the freedom to choose whether or when to accept a delivery request. However, the extent of this flexibility may be uncertain. Some workers have alleged that gig food-delivery companies have fired them for little or no reason.

Some anecdotal social media postings from gig food-delivery workers allege that they have been deactivated or “fired with no explanation.” (See, e.g., <https://www.glassdoor.com/Reviews/Employee-Review-GrubHub-RVW9830211.htm>.) Some of these workers have alleged that company managers complain when drivers choose not to accept money-losing delivery requests, which they contend “doesn’t sound very independent.” (<https://uberpeople.net/threads/drivers-needed-drive-less-make-more-guaranteed-74321/>.) Perhaps this is why some workers have expressed dismay about the benefits of their working relationship with gig economy food-delivery companies: “they’ve gotten college-educated adults to accept day labor . . . Except you’re being told you’re self-employed.” (<https://www.recode.net/2016/3/11/11586878/instacart-a-startup-worth-2-billion-slashes-pay-of-some-of-its-lowest>.)

Why classify workers as contractors?

Gig food-delivery companies shift business expenses to workers and apparently compete with restaurants’ own delivery employees

Why do gig-economy companies classify workers as “independent” contractors instead of employees? Because some of them save 30 percent on labor costs by hiring contractors. (<https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg43758/html/CHRG-110hhrg43758.htm>.) However, these costs do not disappear; they are just shifted to workers themselves. Contractors pay self-employment taxes (i.e., both

the employer and employee contributions to Medicare and Social Security). And unlike employees who must be reimbursed for work expenses under Labor Code, section 2802, contractors pay for their own gas, cell phones, and other work-related costs.

The gig companies’ “contractors” may also compete for deliveries with the restaurant’s own delivery driver employees. (See <https://www.eater.com/2015/7/31/9074491/postmates-delivery-problems>.) And some gig food-delivery companies allegedly accept orders and deliver food from restaurants that do not want to provide delivery at all, because, inter alia, they are concerned about customers complaining about problems outside of the restaurants’ control. (<https://www.eater.com/2015/7/31/9074491/postmates-delivery-problems>; <https://ny.eater.com/2015/11/6/9678206/door-dash-delivery-nyc>.)

Gig food-delivery companies shift health-care costs to injured workers and society

Independent contractors do not enjoy workers’ compensation coverage for work-related injuries. (https://www.dir.ca.gov/dlse/faq_independentcontractor.htm.) Similarly, no known gig companies provide health insurance benefits to contractors. The workers, their insurers, or the public pay these costs.

Some companies may attempt to shift risks of third-party injuries

Respondent Inferior

Under the doctrine of respondent superior, employers are usually vicariously liable for their employees’ actions that result in third-party injuries. (CACI 3701.) Three public policies provide the underpinning for this indirect liability: preventing future harm, providing more compensation for the injured, and shifting the risk of loss to those who profit from the activity that caused the harm. (CACI 3701 cmt.

[citing *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208].)

Some gig food-delivery companies may try to contravene these policies by attempting to shift these risks to their drivers, customers, and the public. Some companies require delivery workers not just to buy insurance, but to indemnify and defend the gig company against personal injury claims. (<https://fleet.postmates.com/legal/agreement>.) Other companies have changed their policies as a result of class action litigation, but they still apparently attempt to shift costs and risks to workers. If approved, Instacart’s recent settlement will provide clearer disclosures to its shopper workers that the company does not provide car insurance, and that some locations may require them to buy commercial insurance to cover claims arising from their work. (<https://techcrunch.com/2017/03/23/instacart-has-agreed-to-settle-a-class-action-lawsuit-for-4-6-million/>.) Although these terms might provide more compensation to the injured, do they promote the public policies of preventing future harm and shifting the risk of loss to those who profit from the activities that cause the harm?

Gig companies may attempt to limit liability for themselves

Some gig food-delivery companies apparently attempt to limit liability not just for themselves, but upstream defendants that may have profited from making, distributing, or selling defective food products. Instacart’s lengthy terms and conditions attempt to shift to customers “the entire risk arising out of” the use of Instacart’s services “or any products requested . . . or delivered.” (<https://www.instacart.com/terms>, ¶ 7.) This release purports to disclaim liability for itself and its “retail partners,” “suppliers,” “personal shoppers,” or “third-party providers” for “bodily injury” or death. (<https://www.instacart.com/terms>, ¶¶ 7, 8.)

Instacart’s release also apparently attempts to disclaim liability “even if” the



company has notice that the products it profits from delivering may cause injury. (*Ibid.*) The purported waiver also expressly covers claims regarding “quality, suitability [and] safety” of “personal shoppers, third party providers, or retailers.” (<https://www.instacart.com/terms>, ¶ 7.)

Although California law proscribes limiting strict products liability claims with contractual disclaimers (6 Witkin, Summary 10th Torts § 1434 (2005)), it appears that at least some gig food-delivery companies may attempt to test these limits. These terms raise a question about whether gig food-delivery companies are attempting to contravene the public policy of preventing future harm.

Gig economy food-delivery companies profit from the sale or delivery of goods, so they should be considered to be part of the stream of commerce and subject to the same consumer protection rules as other companies for at least three reasons. (Civ. Code, § 3511 [“where the reason is the same, the rule should be the same”].) First, like retailers (who are subject to strict liability), the gig companies appear to be “engaged in the business of distributing goods to the public.” (See *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 726; see CACI 1200, cmt.; Civ. Code, § 3521 [“he who takes the benefit must bear the burden”].) Notably, the doctrine of strict liability was first developed in a claim involving “unwholesome food products.” (6 Witkin, Summary 10th Torts § 1429 (2005).)

Second, gig economy food companies do more than just *deliver*; they appear to be “in the business of selling food.” (CACI 1233; Com. Code, § 2103(d) [a “seller” is a “person who sells or contracts to sell goods”].) At least some of these for-profit companies charge for their services by marking up the price of products from some stores. (See https://www.instacart.com/store/costco/about_pricing; <https://www.eater.com/2015/7/31/9074491/postmates-delivery-problems>; <https://eat24hours.com/join>.) So if “they are an integral part of the

overall producing and marketing enterprise,” then they “should bear the cost of injuries resulting from defective products.” (*Ibid.*)

Finally, it appears that some gig food delivery companies “may play a substantial part in insuring that the product is safe,” so strict liability would provide “an added incentive to safety.” (6 Witkin, Summary 10th Torts § 1495 (2005).) Their drivers have control over the food while delivering it from the retailer to the customer. And some gig companies already offer restaurants advice on how to “keep hot food hot and cold food cold.” (https://get.grubhub.com/wp-content/uploads/2016/10/GH_Food-delivery-training-101.pdf.)

Strict liability would fill a safety vacuum because public health authorities in most jurisdictions do not or cannot regulate gig food-delivery companies. Neither gig food-delivery companies nor county health departments apparently regulate delivery drivers to determine that they are following safe practices in delivering food: “Postmates isn’t a food establishment as defined in the food code, so it isn’t under the FDA’s jurisdiction.” (<https://www.eater.com/2015/7/31/9074491/postmates-delivery-problems>.) And even if health departments did inspect gig food-delivery drivers’ vehicles and regulate their practices, many departments may not have sufficient personnel to keep up with demand, especially with the fast-growing workforce. (<https://www.thedailymeal.com/news/eat/are-speedy-delivery-apps-skipping-food-safety/011116>.) Some companies also attempt to disclaim any warranty about the reliability, timeliness, or quality of their deliveries. (See, e.g., <https://about.postmates.com/legal/terms>, ¶¶ 11-13.)

Gig food-delivery companies use arbitration

While some courts have found that risk-shifting liability releases are unenforceable in some circumstances ([\[issues/item/new-year-s-resolution-defeat-a-liability-release\]\(https://fleet.postmates.com/legal/agreement\)\), most gig food-delivery companies’ terms and conditions require resolving disputes by arbitration. \(See, e.g., <https://fleet.postmates.com/legal/agreement>.\) Arbitration creates uncertainty regarding the enforceability of these releases for at least two reasons. First, arbitration is a private forum with very limited grounds for appellate review. Aggrieved parties cannot determine whether arbitrators have determined these liability releases are unenforceable \(much less identify the extent of a company’s wrongdoing\) if pleadings, motions, and their supporting evidence are not available to research. \(\[https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0\]\(https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0\).\) Similarly, there is a risk of inconsistent rulings regarding enforceability of the same release under the same facts.](http://www.plaintiffmagazine.com/recent-</p>
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Second, arbitration imposes financial risks that may deter the filing of valid claims. Some agreements with gig food-delivery companies specify that the company will pay arbitration fees for claims of \$75,000 or less and that are not “frivolous” under Fed. Rules Civ. Proc., rule 11(b). (<https://www.instacart.com/terms>, ¶ 10.) Delivery companies’ terms and conditions also usually require waiving the right to class or collective actions, which imposes a prohibitive cost for litigating modest but valid consumer claims. (See, e.g., <https://about.postmates.com/legal/terms>.) And in employment disputes, even if the company pays all of the fees, worker win rates in arbitration “are much lower than in either federal court or state court.” (<http://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-15>.) The magnitude of worker awards is also often far lower in arbitration than in a judicial proceeding. (<http://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-15>.)

Conclusion

Gig food-delivery companies should be required to follow the same rules as



other businesses in the stream of commerce. This will promote safety and justice for consumers, workers, and the public.

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