

# Is Irish employment law keeping up with the gig economy?

By Derek McKay

**Much has been made about the protection of gig economy workers but what should companies using self-employed contractors be doing to protect themselves?**



Since the emergence of the “gig economy” over a decade ago, there has been a lot of debate about the evolution of work and how it will continue to change into the future. There is a clear reality that certain types of jobs and roles are changing and with the introduction of new technology platforms, such as Uber and Deliveroo, we are seeing the creation of roles that were never there previously.

Despite concerns that there would be a surge in those working in the gig economy, the numbers are relatively low and have not shown signs of dramatic increases. In 2018, the Workplace Relations Commission sponsored a report by the Economic and Social Research Institute that put the figure at between 8 and 9%<sup>1</sup>.

The informal structure of this type of employment suits many people. The general consensus is that those working in the gig economy do so out of choice rather than necessity. The ability to choose when you want to work and for how long, suits some peoples’ lifestyles, especially students or those looking to make some additional income. But there is a trade-off; with this flexibility comes a lack of security and benefits for employees. And for employers, there can be some unintended consequences as well.

One thing is for certain, employment relationships will continue to evolve and be challenged particularly given the Government’s aim to heavily

penalise those involved in bogus self-employment, where employers are wrongly classifying workers as self-employed rather than direct employees, thus avoiding or evading their obligations, including tax and PRSI.

In October 2019, the Oireachtas Committee on Employment Affairs and Social Protection heard that bogus self-employment could be costing the Irish State €1 billion each year in lost tax and PRSI<sup>2</sup>, which results in savings of up to 30% for the employer and a loss to the Social Insurance Fund. Trade Unions have also described the situation as a massive fraud being perpetrated against the State.

## Employed or self-employed... or bogus self-employed?

As it stands there are only two classifications of employment status – employed or self-employed. To help provide some guidance and clarity, the Revenue Commissioners published its Code of Practice for Determining Employment or Self-Employment Status of Individuals. The criteria set out to identify if an individual is an employee includes:

- That the individual is under the control of another person who directs as to how, when and where the work is to be carried out.
- The individual receives a fixed wage and works set hours or a given number of hours per week or month.

- Their work cannot be sub-contracted to another individual.
- The person does not supply materials for the job or the necessary equipment to do the job other than the small tools of the trade.
- They are not exposed to personal financial risk in carrying out the work.
- Does not assume any responsibility for investment and management in the business.
- They do not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements.
- The individual receives expense payments to cover subsistence and/or travel expenses.
- They are entitled to extra pay or time off for overtime.

And, the criteria set out by Revenue on whether an individual is self-employed include:

- The individual owns their business.
- They are exposed to financial risk by having to bear the cost of correcting faulty or substandard work carried out under the contract.
- They assume responsibility for investment and management in the enterprise.
- The individual has the opportunity

<sup>1</sup> “Measuring Contingent Employment in Ireland”, ESRI, August 2018.

<sup>2</sup> “Bogus Self-Employment Presentation to the Social Welfare Committee”, Martin McMahon, October 2019.

to profit from sound management in the scheduling and performance of engagements and tasks.

- Has control over what is done, how it is done, when and where it is done and whether he or she does it personally.
- Has the freedom to hire other people, on his or her terms, to do the work which has been agreed to be undertaken.
- They can provide the same services to more than one person or business at the same time.
- They provide the materials and equipment necessary for the job, other than the small tools of the trade.
- Has a fixed place of business where materials and equipment can be stored.
- They are responsible for costing and agreeing a price for the job.
- They are responsible for providing their own insurance cover e.g. public liability cover, etc.
- And, they control the hours of work in fulfilling the job obligations.

These guidelines are pretty straightforward and self-explanatory and, if necessary, all easy to demonstrate. However, there are circumstances where it isn't always clean-cut. Our advice is Employer Beware.

### High Court rules delivery drivers are employees

In December 2019, the High Court ruled that delivery drivers for a company in the Domino's Pizza franchise are to be treated as PAYE employees. The ruling came following an appeal by the pizza company against the Tax Appeals Commissioner's finding, which found that its drivers working in 2010/11 under contracts "of" service were taxable workers paying PAYE and national insurance.

Karshan (Midlands) Ltd., t/a Domino's Pizza had argued that the drivers operated under contracts "for" services, were therefore self-employed and responsible for their

own tax deductions. The company argues that the Commissioner's reliance on a UK case (*Weight Watchers v Revenue and Customs Commissioners*, 2011) was wrong and that the Commissioner failed to follow Irish law in relation to mutuality of obligation and also failed to give proper consideration to the terms and conditions of the contract with the driver.

Mutuality of Obligation exists where an employer is obliged to provide work for an employee and the employee is obliged to perform or fulfil that work as would be considered normal employer/employee relationship.

The Commissioners had argued that the contract required the driver to initiate an agreement in relation to availability to work. When confirmed, a roster was then drawn up based on this availability and it found that once a driver was rostered for one or more shifts, there was then a contract of "mutual obligation".

The High Court agreed, finding that the contracts operated by Domino's Pizza included Mutuality of Obligation; once a driver was rostered by the company, there was a contract that retained mutual obligations.

Interestingly, in the UK, a trade union failed in its High Court bid to represent and lobby Deliveroo, the popular food delivery platform, on behalf of its riders on pay and conditions. The High Court case came on the back of an appeal of a decision by the Central Arbitration Committee, which has previously found that riders could not be recognised for collective bargaining because they were not classed as "workers". Because riders could freely pass jobs to other people to do on their behalf, they couldn't be classed as employees.

### Review and analyse employment contracts

While the Domino's Pizza example is specific to the contracts operated by the company and their delivery drivers, employers should take note of the findings and assess their own

contracts with any self-employed contractors they may be working with.

For example, an individual who is working on the basis of commission may still be regarded as an employee, even if they are not working from the employer's premises – there is clearly a Mutual Obligation in this situation.

Or if the self-employed contractor is required to use company branded materials or equipment in the process of completing their work, they may be considered employees – the company is providing direction on how the person should be completing their task.

### Employers beware – if in doubt, review contracts and get advice

The gig economy, contractors, self-employed workers, agency workers – all these categories of workers bring about questions for Companies about how they manage these workers and remain compliant.

Until such time as Irish legislation has caught up with the changing face of work, our advice for employers is assess their contracts and working relationships with individuals through the lens of being compliant with both Revenue and the Employment Fora such as the Workplace Relations Commission.



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