

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <https://www.djreprints.com>.

<https://www.wsj.com/articles/moonlighting-could-lift-a-threat-to-uber-11596061893>

OPINION | COMMENTARY

Moonlighting Could Lift a Threat to Uber

Letting drivers work for competitors demonstrates that they're contractors and not employees.

By *Sean Higgins*

July 29, 2020 6:31 pm ET



A driver works for both Uber and Lyft in Chicago, April 10.

PHOTO: SCOTT OLSON/GETTY IMAGES

If you use Uber regularly, you've probably climbed into a car that displays a sticker for its rival Lyft —and vice-versa. That's good for drivers because it increases their opportunities to make money and set their own schedule. Permitting drivers to work for competitors may be a smart move by those "gig economy" companies, too. It may prove crucial in allowing them to retain their preferred business model.

The Labor Department is gearing up for a formal rule-making later this year on the controversial question of when workers are traditional employees or independent contractors. Most gig-economy companies rely on contractors, arguing that the flexibility that arrangement provides is crucial. Workers are treated as independent businesses, which allows them to set their hours and work as much or as little as they want. Since

most ride-share drivers do it on the side for a few hours a week to earn extra income, the flexibility that comes with being a contractor is appealing.

Critics like California Gov. Gavin Newsom say that's a smoke screen companies use to avoid complying with federal and state regulations like minimum-wage and overtime rules, which don't apply to contractors. California passed its AB5 law last year to force gig-economy employees to classify workers as employees.

The issue is ostensibly covered by the Fair Labor Standards Act, but the law does not provide a clear definition of "employee." Rather, it looks at the totality of the circumstances. Hence the need for the department's rule-making.

The department hasn't said what the rule will look like, but a guidance letter released last year by its Wage and Hour Division to an online company offers insight into its thinking.

The letter gives significant weight to whether workers may take jobs with rival companies. One of the clearest traditional tests for being an employee is having to work exclusively for one company, whereas "independent contractors are often characterized by their ability to, for example, regularly negotiate working conditions or simultaneously work for another business." The department noted that the online company, whose name wasn't publicly released, allowed workers "the right to 'multiapp' " and that they "often make use of this ability." The department determined that the company's workers were contractors.

There's a good chance then that department's final rule will give leeway to gig-economy companies that allow workers similar freedom.

There's a lesson here that traditional employers should heed: Everyone can benefit if the market for labor is as open as possible. It's good for workers because they get more options and more ways to earn money, while employers can get more access to the labor they need when they need it.

Many employers don't stop at forbidding employees from moonlighting for competitors. An estimated 16% to 18% of businesses also force workers to sign noncompete clauses, which limit employment options after they leave. It's a dubious practice that's unfair to employees, who rely on their talent and skills to make a living and should be able to offer them to the highest bidder.

A company that uses noncompete agreements might be able to prevent a rival from luring away, say, a talented engineer. But such provisions also prevent the same company from hiring talented engineers away from a rival. As a result, the pool of available workers becomes shallower and job openings are more likely to go unfilled—something employers were complaining about before the Covid-19 pandemic.

Allowing workers the maximum opportunity to sell their skills should be part of the agenda for policy makers who want to help workers. Allowing workers to tell their bosses “I just got an offer from your rival” is one of the best ways to improve their negotiating position.

Mr. Higgins is a research fellow with the Competitive Enterprise Institute.

Copyright © 2020 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit <https://www.djreprints.com>.