

NEW YORK'S HIGHEST COURT DEEMS CERTAIN GIG WORKERS "EMPLOYEES" ENTITLED TO UNEMPLOYMENT BENEFITS

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On March 26, 2020, the New York Court of Appeals issued an opinion, holding Postmates food delivery drivers, and potentially thousands of other "gig" or "app-based" workers, are employees and not self-employed independent contractors, thus entitling them to certain benefits such as unemployment.¹

The lawsuit involved a Postmates courier who was fired after one week as a result of customer complaints. He then brought a claim for unemployment, which was granted by the Unemployment Insurance Appeal Board (UIAB), and ultimately overturned by a lower court.

The case was then brought before the New York Court of Appeals where Postmates argued the former courier was not entitled to unemployment benefits because he was a contract worker. The Court of Appeals rejected this argument, holding the courier was an employee because Postmates controlled all aspects of his duties. "Customers cannot choose, nor do they have reason to choose, a particular individual to perform the delivery and thus ... Postmates' couriers do not have the ability to create a following or generate their own customer base." "Instead, Postmates has complete control over the means by which it obtains customers, how the customer is connected to the delivery person, and whether and how its couriers are compensated. Therefore, there is record support for the Board's conclusion that Postmates exercised more than incidental control over the couriers."²

The Court of Appeals further explained that the application of the "control" test "will necessarily vary depending on the nature of the work," noting that Postmates' couriers perform unskilled labor and have little input over how to do their jobs.

Of further note, two members of the Court dissented, calling upon the legislature to replace the "control" test and to develop a new modern worker classification framework. The dissenters explained the "complete overhaul of our common-law employment test to adapt it to the present and future economy is not a task to which courts are well suited."³



ABOUT THE AUTHOR

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¹ See *Matter of Vega* (Postmates Inc. – Commissioner of Labor), 2020 NY Slip Op 02094 (NY Ct. App. March 26, 2020).

² *Id.* at *3.

³ *Id.* at *17 (J. Wilson, dissenting.)

For its part, Postmates' spokesperson stated: "We fully support designing a responsible framework that allows New Yorkers to choose if, when, where, and for how long they work, while also providing them access to the benefits and services they deserve."⁴

Impact of the Decision in the Current Economic Climate

While it varies by state, employees are entitled to any array of benefits that are not otherwise available to independent contractors, such as unemployment, workers' compensation, overtime, rest breaks, mileage reimbursements and sick leave. There are also general principles of liability that differ depending on whether an individual is an employee or independent contractor. For example, employers are typically responsible for the negligence of their employees, but not for the negligence of independent contractors. Thus, how a worker is classified has major implications for the employer and its insurance carriers, not to mention the potential for incurring substantial financial penalties for misclassifying its workers.

It cannot be ignored that the New York Court of Appeals decision in the *Vega* matter came out at a particularly apt time—just days after New York instituted a shelter in place order in response to the COVID-19 pandemic. As a result of the unprecedented closure of businesses both in New York and across the country, the issue of whether gig workers should be considered employees and entitled to benefits has been thrown into the national spotlight.

Under the CARES Act, the federal economic relief plan in response to the COVID-19 pandemic, independent contractors are eligible for unemployment benefits. Although this program is temporary, it could lead to a growing trend across the country, and at the national level, for overhauling the scope of benefits available to gig economy workers and creating a new framework for providing benefits to gig economy workers, as suggested in Justice Wilson's dissent in the *Vega* matter.

Voters in California will be voting on this very issue in November. There is a ballot initiative called the Protect App-Based Drivers & Service Act, which is intended to "preserve certain gig economy workers' independence, and establish earnings and benefit guarantees."⁵ The proposal is in response to a new California law, AB 5, which set a new standard for hiring independent contractors, resulting in many being reclassified as employees. The proposal essentially allows certain app-based transportation and delivery drivers to qualify as independent contractors so long as they retain certain freedoms, while also being entitled to various benefits such as mileage reimbursement, health care stipends, occupational accident insurance, auto accident and liability insurance, and protection against discrimination and sexual harassment.⁶

While the *Vega* decision in New York and the Protect App-Based Drivers & Service Act ballot initiative in California were not motivated by or in response to the CARES Act or the economic ramifications of COVID-19, the current climate resulting from the pandemic will likely create a heightened sense of urgency for states and the federal government to enact permanent legislation regarding the availability of benefits for gig economy workers. Employers and insurers should be on the lookout for such legislation.

For now, employers and insurers of gig workers in New York must reevaluate how its workers are classified in response to the *Matter of Vega* opinion. If you have any questions related to the classification of your workers in light of *Matter of Vega*, Tyson & Mendes's Labor and Employment attorneys can assist with your needs.

⁴ <https://www.newsday.com/news/region-state/app-based-workers-new-york-court-of-appeal-1.43459619>

⁵ <https://www.law360.com/health/articles/1260757/cares-act-may-propel-gig-economy-employment-law-shift>

⁶ *Id.*

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