

INDIA AND THE GIG ECONOMY

1. Gig Economy: An overview

'Gig' – a word, coined several decades earlier, seems to have gained prominence in today's time. In the present context, a 'gig economy' involves a temporary contractual job or short-term contract or freelance work that a person may take, on a project-to-project basis, for which the payment is made once the task is completed. The gig economy gets its name from each piece of work being akin to an individual 'gig'.¹ The Merriam Webster Dictionary defines a 'gig economy' as an "economic activity that involves the use of temporary or freelance workers to perform jobs typically in the service sector." A gig economy encompasses all platforms that hire independent contractors, consultants and workers in different sectors, such as information technology, content creation, social media marketing and communications, food and beverages, creative fields such as art and design. A gig economy, hence, means an existence of temporary or part-time workforce instead of a conventional workforce.

A gig economy is not a new concept on the global front. In Europe and in the United States of America ("USA"), hiring part-time workers or independent contractors has always been prevalent. It eventually leads to employment generation and overall skill development.

The evolution of the digital age can be considered one of the major reasons for the growth of the gig economy. Workers or independent contractors get paid for each gig or job they do, and this very principle is the basis of all internet applications that involve this temporary workforce. Several companies pay their partners, be it drivers or delivery executives or other such personnel, according to the number of deliveries and/or customers they serve in a day or in a month, or as per the schemes that these companies put in place. These partners can undertake various tasks of similar or different nature with different companies since they are not in the permanent employment of any establishment. It is possible that the amount earned by these partners, in a month, may be equal to or higher than the amount earned by an individual in full-time employment in an establishment.

2. Implications of the Gig Economy

People who are part of the gig economy may have several benefits, including the independence to choose their hours of work, workdays, holidays and preferred organisations.

However, the key disadvantages in a gig economy may include instability in a job, uncertain pay schedules, unsteady workload, and a lack of social benefits and/or any statutory protection akin to a worker in permanent employment. The market may not always be favourable to a particular industry and, therefore, freelancers are expected to be prepared for more than one type of skill. Due to the lack of permanent employment, there is no certainty pertaining to the pay scale and its continuity. Hence, people

¹ Nicole Kobie, Wired UK, 11 July 2017 < <https://www.wired.co.uk/article/what-is-the-gig-economy-meaning-definition-why-is-it-called-gig-economy>>

who choose such open work environments need to constantly keep updating their knowledge base and skillset to remain in business at all times.

The more important downside of a gig economy is that, unlike traditional employment, workers in a gig economy do not seem to be eligible for any social benefits such as insurance, medical benefits, employees' provident fund, bonus or gratuity. These gig workers also do not have any employment-related rights, except in some cases involving any breach under their respective contracts. Not being a full-time employee of an establishment implies that an organisation is not mandated to provide any social security or statutory benefits to an independent worker.

Given the absence of any codified Indian laws in this space currently, the persons working in the gig economy, based on the nature of their engagement, are categorised as *independent workers* or *independent contractors*.

3. Developments in the USA and Europe

In a case involving persons in a gig economy, the California Supreme Court in the USA, in the landmark judgment of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*,² has clarified certain relevant aspects.

Dynamex Operations West, Inc. ("**Dynamex**"), an entity in the USA, was engaged in providing nationwide courier delivery services and employed several delivery personnel, or drivers, and categorized them as independent contractors instead of employees. This change led to no obligation from complying with the mandate of the wage orders of the Industrial Welfare Commission which provided for several welfare benefits to employees, including minimum wage, proper working conditions and established working hours.

Prior to 2004, Dynamex classified these personnel as employees. However, in 2004, it entered into a new form of contractual arrangement with these personnel, by virtue of which they were supposed to arrange for their own vehicles, and pay for transportation charges, taxes and fuel. The drivers were free to choose a suitable time to work for Dynamex. Dynamex would negotiate with the clients for the charges to be paid to these drivers. There was no set standard of payment which was followed for these drivers. Some were paid in terms of percentage of the delivery fee, and some received a flat fee. One such driver was Charles Lee, who had signed the independent contractor agreement. After three months of leaving Dynamex, he filed a petition on behalf of himself and similarly situated persons, accusing Dynamex of violating the USA labour code and the wage order issued by the International Welfare Commission.

After several levels of litigation involved in this matter about the status of these workers, the California Supreme Court finally ruled in favour of the petitioners, rejecting all previous tests for recognising workers as employees or independent contractors. The court laid down a new test called the 'ABC Test', it imposed the burden on an employer to prove that the persons employed by it are independent contractors, not entitled to any social benefits. According to the court, this can be proven only if all three criteria of the ABC Test, as mentioned below, are fulfilled:

² *Dynamex Operations West, Inc. v. Superior Court of No. S222732* (Cal. Sup. Ct. Apr. 30, 2018)

- A. The hiring entity does not control and direct the worker with regard to the performance of his work in terms of a contractual right or in actual practice;
- B. The worker performs work that is outside the usual course of the hiring entity's business or the worker would not ordinarily be viewed as one of the employees of the hiring entity with respect to the kind of work he performs for the hiring entity; and
- C. The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.³

Recently, the European Union (the "EU") issued The Directive of the European Parliament and of the Council on transparent and predictable working conditions (the "Directive")⁴ for workers (in EU member states) who undertake short-term employments, on-demand contracts or similar contracts, to regulate the transparency of working conditions and recognise minimum rights for on-demand, voucher-based and platform jobs, provided that they fulfil the criteria of working 3 hours per week or 12 hours per 4 weeks on average.⁵

The Directive, which acknowledges a set of minimum rights in these on-demand contracts and zero-hour contracts, is not applicable to self-employed persons. This can be attributed to the fact that, in most scenarios, self-employed persons regulate their own working conditions. The Directive states, "*Workers with no guaranteed working time, including those on zero-hour and some on-demand contracts, are in a particularly vulnerable situation. Therefore, the provisions of the Directive should apply to them, whatever the numbers of hours they actually work.*" The Directive also discusses how the employment relationship should be determined by the facts in each case with respect to the actual work performed, and not by how the parties describe their relationship. This clarification was provided to address the situation of bogus self-employment, where a person is declared self-employed even though he fulfils all criteria of an employment relationship, only to facilitate non-compliance of legal and fiscal obligations by the hiring entity.

By virtue of the Directive, an employer is mandated to inform the employee about all aspects that will cover his or her employment, including the job description, starting date, modes of payment, probationary period (allowed up till 6 months) and conditions for having other employment.⁶ The EU member states are obligated to ensure that employers do not prohibit workers from taking up employment with any other employer and do not confer adverse treatment in such scenarios.⁷ The EU

³ Marks, T. (2019, March). The California Supreme Court Deals A Blow to Independent Contractors. Forbes <<https://www.forbes.com/sites/tonymarks/2018/05/29/the-california-supreme-court-deals-a-blow-to-independent-contractors/#e06036770a18>>

⁴ Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European union <<https://data.consilium.europa.eu/doc/document/ST-6188-2019-ADD-1/en/pdf>> February 12, 2019

⁵ <https://www.bbc.com/news/world-europe-47947220>

⁶ Article 3, Directive of The European Parliament and of The Council on transparent and predictable working conditions in the European Union

⁷ Article 8, Directive of The European Parliament and of The Council on transparent and predictable working conditions in the European Union

member states which allow on-demand or similar contracts must undertake measures to ensure that there are no abusive practices against such workers.⁸

4. Gig Economy and India

India constitutes about 40% of the freelance jobs offered globally, with 15 million skilled professionals fuelling the ever-so-increasing demand of contract-based jobs or the freelance industry.⁹ Freelancers are attracted to the gig economy because they can follow their niche and, at the same time, leverage the flexibility and independence that comes with it. A worker or independent contractor has the choice of selecting his or her work hours and at times, even the mechanism through which he or she wishes to complete the work. Such workers or independent contractors can work from home, especially when the project is related to arts and design, information technology or creative writing. This also leads to freedom of choice for both, the employer as well as the worker or independent contractor, to look for other suitable options due to no restriction with respect to proximity to the workplace.

A gig economy is also cost efficient for companies, given that they can accommodate temporary workforce, according to the customer requirements or business needs, leading up to saving administrative and compliance costs that they would otherwise incur if they choose to hire full time or regular employees, especially in cases where business models do not involve the engagement of permanent workforce. It may not be possible for companies and start-ups to afford skilled professionals as full-time employees. In such situations, companies may choose to enter into contracts with the professionals for a specific time period. This relationship is rather symbiotic, and both parties have equal freedom to look for options that cater to their needs. Meanwhile, both parties simultaneously spend their energy in cultivating connections and building relationships with their respective demographic.

According to John Bluedorn, a senior economist at the International Monetary Fund, youth inactivity in India is at 30%, the highest amongst developing countries.¹⁰ Several websites, such as www.guru.com, www.truelancer.com and www.elance.com, have taken steps to provide a platform for employers to find the right human resource for their work. Freelancers offer a plethora of skills for prospective hirers to choose from, and are given the opportunity to source different projects globally.¹¹ The Online labour Index, which was published under the iLabour project of Oxford University, presented the online gig economy equivalent of conventional labour standards by analysing availability of online labour across different countries in various fields.¹² As per the results, the information technology and software

⁸ Article 9, Directive of The European Parliament and of The Council on transparent and predictable working conditions in the European Union

⁹ <<https://www.linkedin.com/pulse/indias-freelance-economy-booming-2016-rupak-das>>

¹⁰ Bhati, N. (2019, March 7). Youth inactivity in India at 30%, highest among emerging markets: IMF economist. Centre for Monitoring Indian Economy. <<https://cmie.com/kommon/bin/sr.php?kall=warticle&dt=2019-03-07%2009:52:02&msec=686>>

¹¹ Kathuria, R., Kedia, M., Varma, G., Bagchi, K., Khullar, S. (2017, December). Future of Work in a Digital Era: The Potential and Challenges for Online Freelancing and Microwork in India. ICRIER <https://icrier.org/pdf/Online_Freelancing%20_ICRIER.pdf>

¹² Kassi, O., Lehdonvirta, V (2016, November 3) Online Labour Index: Measuring the Online Gig Economy for Policy and Research. Munich Personal RePEc Archive <https://mpra.ub.unimuenchen.de/74943/1/MPRA_paper_74943.pdf>

industry were the most targeted in terms of a gig economy in India.¹³ This was further established when PayPal surveyed and published gig economy insights about India, and found that gig economies dominated the information technology domain, with 50% percent of the freelance workforce engaged in this sector.¹⁴

From time to time, Indian courts have adjudicated industrial disputes involving questions with respect to employers and contract labourers, and employers and independent contractors. One of the earliest judgements in this field, *Dhrangadhara Chemical Works v. State of Saurashtra*,¹⁵ laid down that the primary test for establishing an employer-employee relationship is the *supervision and control test*. This means that if the employer controls and supervises the type and manner of the work that will be undertaken by the worker, there exists an employer-employee relationship. This must be assessed on a case-to-case basis, taking into account all relevant facts and circumstances.

However, subsequent judgements also dealt with questions on whether an individual, who is working directly as a contractor or is deputed by a vendor who, in turn, has a contract for supply of manpower with an ultimate hiring entity, qualifies as an employee. In these cases, it was held that *supervision and control* are not the sole determining factors in deciding these questions. In fact, the Supreme Court of India (the “**Supreme Court**”) adopted an integrated approach, which included, among other things, the right of the employer to select or dismiss workers, pay remunerations and deduct insurance contributions. If the employer exercises control over the means and modes according to which the contractor will finish his work, it may be said that an employer-employee relationship exists between the employer and the workers engaged by the contractor.¹⁶

The Supreme Court, however, emphasized the relevant determining factors in another case,¹⁷ where it held that only because the management of the company exercises control to ensure proper execution of work or exercises control over dismissal and disciplinary proceedings, does not automatically make the workers the employees of such company. In the case of *Group 4 Securitas Guarding Ltd. v. Employees Provident Fund Appellate Tribunal and Ors.*,¹⁸ where the petitioner was engaged in providing security personnel to its clients, an issue arose with respect to the obligation of making provident fund contributions for such security personnel. For this purpose, the court discussed the definition of ‘*employer*’ under Section 2(e)(ii) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, which suggests that an employer is a person who has the authority and ultimate control over the affairs of an establishment, where such an establishment is not a factory. Additionally, the clients had no say in fixing the terms and conditions on which such security personnel were employed by the petitioner. The court ultimately held that the security personnel were not provided to the clients as contractors, but on a

¹³ < <https://ilabour.oii.ox.ac.uk/where-are-online-workers-located-the-international-division-of-digital-gig-work/>>

¹⁴<<https://www.businesstoday.in/current/economy-politics/gig-work-india-contributes-1-in-4-freelancers/story/267601.html>>

¹⁵ *Dhrangadhara Chemical Works v. State of Saurashtra* 1957 LLJ 478

¹⁶ *Ram Singh and Ors. v. Union Territory, Chandigarh and Ors* 2004(1) BLJR 490

¹⁷ *Haldia Refinery Canteen Employees Union and Ors. v. Indian Oil Corporation Ltd. and Ors.* AIR 2005 SC 2412

¹⁸ *Group 4 Securitas Guarding Ltd. v. Employees Provident Fund Appellate Tribunal and Ors* 184(2011) DLT591

principal-to-principal basis, therefore, casting an obligation on the petitioner to make provident fund contributions as per Section 6 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

5. Conclusion

Gig workers control their employment with respect to the type of job they want to undertake and the time they wish to put in towards such a job. Therefore, a gig economy bestows upon these workers, the flexibility and independence to be able to expand into new markets and create a talent pool for employers to choose from.

Industries like information and technology, art and design, and content creation see a high demand of gig workers and freelancers, and have relatively better-educated and trained persons who have access to better network infrastructure and more growth avenues. Over a period of time, the gig economy in India has brought under its purview several other occupations, as well. Further, independent workers working in the gig economy are paid according to the schemes that a company has put in place. In the absence of an employer-employee relationship, such workers are mostly not entitled to any social benefits, such as provident fund, gratuity, annual leaves, sick leaves and overtime, besides a severance compensation. Hence, irrespective of no restrictions on the number of employments they might take, such workers may not be eligible to any basic rights at all.

The Dynamex judgement by the California Supreme Court has set a precedent which limits the scope of protection that may be extended to workers who are part of a gig economy in the state of California, USA. A noteworthy step is taken by the EU in framing the Directive, bearing in mind that existing laws will need to be complementary to the current dynamic workforce. The Directive has a wide scope for its application since it covers all workers in every kind of employment, including those which are non-standard forms of employment, such as zero-hour contracts, atypical contracts and on-demand contracts, essentially covering all such employments which give flexibility to workers.

The labour legislations in India have been enacted to ensure that the employees (and certain eligible workers, including contract workers) are entitled to all the benefits they require to sustain themselves. Cases in India have, time and again, dealt with situations where an employer-employee relationship could or could not be established.

While the current focus of the central and state governments in India may be to deal with the larger challenges posed by the organised sector, it is possible that government(s) may start focusing on the gig economy and aspire to extend the applicability of certain statutes to them, taking into account the growing strength of gig workers. The Directive may also prove to be helpful, if it is determined that the intent of labour and employment statutes is to grant protection to workforce and identify minimum rights for gig workers, as well.

Given the nature of the engagement or relationship, gig workers, at this stage, may not be eligible to avail any legal or statutory claim. However, given the continuous growth of the gig economy, it is possible that some benefits may be extended to them even if not at par with the regular or contractual employees of an organisation.

It is certainly an area to watch out for, in times to come.

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