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Uber Retirement

Paul M. Secunda
Professor of Law
Marquette University Law School
Milwaukee, Wisconsin USA

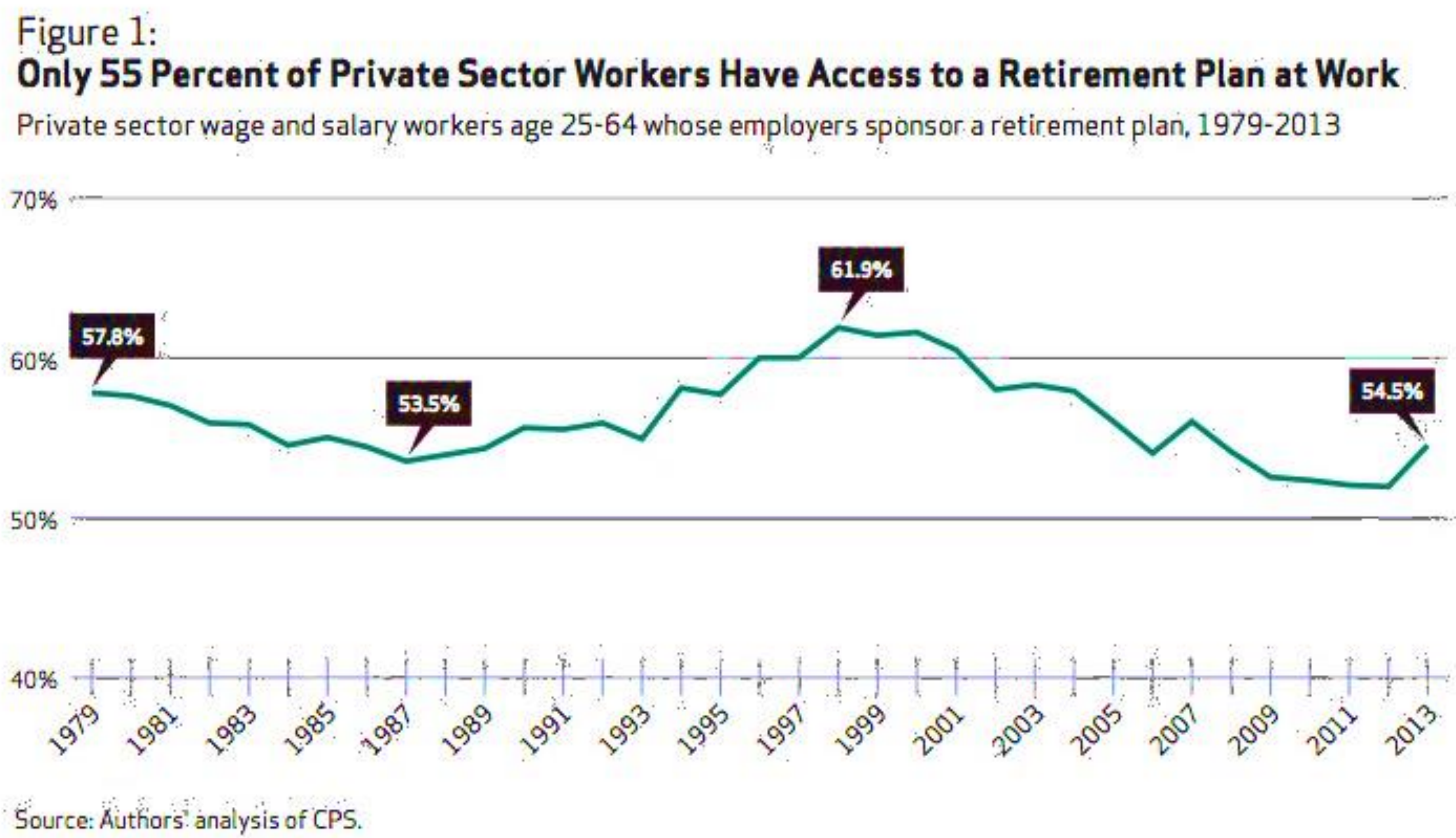
The Gig Economy

- Gig companies rely on web-based platforms or smartphone “apps” to match buyers and sellers of services
- Gig workers enter into formal agreements with on-demand gig companies to provide services to the companies’ clients

- When a prospective client requests a service, the gig worker engaged by the on-demand company provides the requested service and is compensated for the job – usually through the app (with or without tipping ability)

Lack of Access to Retirement Plans

A significant number of gig workers want – and need – employer-based retirement plans



Source of chart: Nari Rhee, *The Continuing Retirement Savings Crisis*, NAT'L INST. ON RETIREMENT SEC. 4 (Mar. 2015), http://www.nirsonline.org/storage/nirs/documents/RSC%202015/final_rsc_2015.pdf.

State and Municipal Level "Solutions"

- Automatic-IRA Retirement Savings Plans
  - Automatic-IRA plans for workers without access to employer-provided retirement plans
  - Disadvantages
    - Concern payroll deduction saving programs preempted?
    - Actively opposed by recent Trump Admin guidance, though state responses (CA)

- Black Car Fund Model
  - Fund created by statute that treats independent contractors as employees under workers comp
  - Disadvantages
    - No federal precedent to treat ICs as employees for the purpose of one law, but not for others
    - Adequate retirement security is not as simple

TheBlackCar Fund

Private-Sector "Solutions"

- Private-sector companies providing service directly to gig workers or in cooperation with gig companies
  - E.G., Peers, Honest Dollar, and Betterment

- Disadvantages:
  - Employer has no responsibility for maintaining or administering as fid
  - Less than 10% of uncovered workers will contribute
  - 1 in 3 workers does not have access to workplace retirement at all

Gig Workers as Employees

- Most of the current proposals *concede a critical factor* – that gig workers are *not* employees
  - Gig companies classify workers as independent contractors
- Considering gig workers as common-law employees under the *Darden* test of ERISA would qualify them for ERISA protections

- Under *Darden*, a hired party is an employee if the hiring party has the right to control the manner and means of the hired party's work
- Central Question: whether the hired party is truly in business for herself

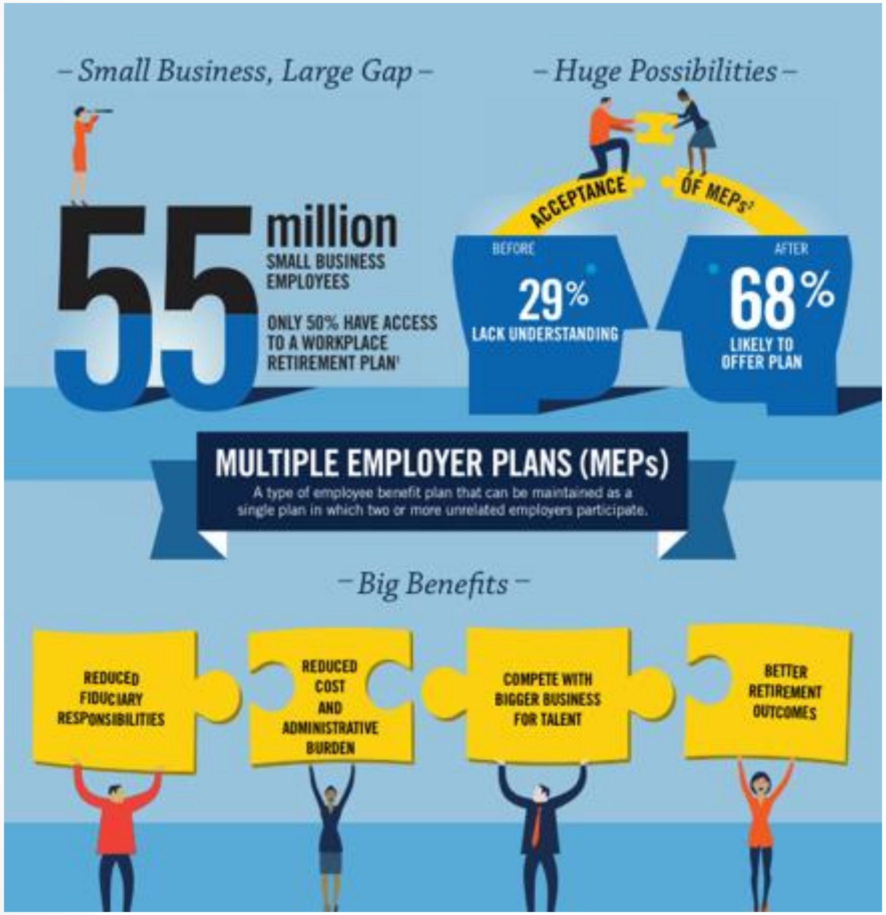
Recent Gig Employee Cases

- Tide is turning toward finding gig workers to be common-law employees
  - United Kingdom – Uber drivers were found to be employees for purposes of British minimum wage laws
  - Switzerland – Uber driver found to be an employee for whom the company must pay social security contributions
  - United States (California) – Uber driver found to be an employee for purposes of unemployment eligibility
- Reasonable to argue that some gig workers qualify as common-law employees under ERISA

Advantages of ERISA Protections for Gig Employees

- Reporting and disclosure requirements help participants know and enforce their rights under a Plan
- Plan assets are held in trust with those that discretionarily operate, manage, or administer the plan acting as fiduciaries and/or trustees of the plan
  - Four general fiduciary duties and a litany of prohibited transactions regulating fiduciaries and parties in interest
  - Plan fiduciaries must put their own self-interest aside, and act in sole interest of the plan participants and beneficiaries
  - Plan participants and beneficiaries may recover equitable damages for breaches of duties

Open Multiple Employer Pension Plans



Allow unaffiliated employers to pool their resources and offer retirement plans to their employees under the statutory protections of ERISA

Benefits of the Open MEP Model

- Tax incentives for gig companies to voluntarily join plans and tax deduction for employer-match contributions
- Allows employers and employees to get the best investment options at the lowest prices.
- Gig companies can off-load most of their fiduciary liability by co-sponsoring such a plan

Benefits of the Open MEP Model

- Employees can:
  - Receive advantage of tax-exempt retirement savings
  - Contribute a portion of their salary without being bogged down in complex retirement decisions
  - Default into highly-diversified, low-fee pension account or opt-out and place in other funds offered
  - Easily move between gig companies

DOL NEW MEP Regulations

- Corporate MEPs
- Association Retirement Plans (ARP) MEPs
- PEO MEPs
- No Open MEPs
- Pending Legislation

Recent Legislation in Favor of MEPs

- Current legislation requires employers to demonstrate a "common interest" to form a multiple employer plan
- Retirement Enhancement and Savings Act of 2016
  - Would permit open MEPs for private sector-employees and allow multiple employers to pool retirement funds into a single 401(k) retirement plans without a "common interest"
  - Would not disqualify the MEP from favorable tax treatment if "one-bad-apple" does not meet the applicable tax rules
  - Outsources the myriad fiduciary duties and limits exposure to potential fiduciary liability
  - Reintroduced in 2019, passed House, stalled in Senate
- Not far-fetched that the Open MEP bill will succeed in the Trump presidency without the common interest requirement

Retirement Security for Gig Employees

- PEO Open MEP model is well-suited for gig employees
  - Would allow various gig companies to pool their contributions to a common retirement fund and outside fiduciary liability
  - Employees’ retirement funds would have the advantage of :
    - Diversification
    - Low costs
    - Reporting and disclosure requirements
    - Fiduciary protections
    - Vesting protections
    - Sophisticated investments
    - Access to experts
    - Automatic enrollment
    - Auto—escalation
    - Less dependent on SS