
"Employeeification" of a Sharing Economy? Uber Ruling Highlights Independent Contractor Classification Debate

By Stephanie K. Rawitt / Jun 19, 2015

In *Berwick v. Uber Technologies Inc.*, Case No. 11-46739-EK (June 3, 2015), the California Labor Commission ruled that an Uber driver was an employee and not an independent contractor of the ride-sharing company. The decision challenges the very core of Uber's "sharing economy" business model, commonly called "Uberfication."

The Plaintiff claimed that she was an employee, not an independent contractor of the company and was entitled to mileage and toll expenses incurred in the performance of her job duties. Uber argued that Plaintiff was an independent contractor and that it did not exert any control over the Plaintiff. Uber claimed that Plaintiff used her own car, determined when she would work and the number of trips she would accept. Uber paid the Plaintiff an agreed-upon service fee for every completed request.

The Commission evaluated Plaintiff's claims by utilizing the state's independent contractor test, which was set forth in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989). The Commission noted that where the question arises as to whether an independent contractor or employment relationship exists, there is an inference of "employment" if personal services are performed as opposed to business services. The Commission considered the following factors:

- Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
- Whether or not the work is a part of the regular business of the principal or alleged employer;
- Whether the principal or the worker supplies the instrumentalities, tools and the place for the person doing the work;
- The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
- Whether the services rendered require a special skill;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The alleged employee's opportunity for profit or loss depending upon his or her managerial skills;
- The length of time the person performs the services;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or job; and
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question but it is not determinative since there is a question of law based upon objective tests.

Generally, one factor alone is not determinative and the courts and administrative agencies conduct a balancing test to determine a worker's status. *Id.*

Utilizing these factors, the Commission determined that Uber was involved in every aspect of the operation and the Plaintiff was an employee, not an independent contractor. In support of this conclusion the Commission noted: (1) the Company vets prospective drivers, and conducts background and DMV checks; (2) the Company controls the tools the drivers use (drivers are required to register their cars with Uber and none of the cars can be more than 10 years old); (3) Uber monitors the drivers' approval ratings and terminates access to Uber's software if a driver's ratings fall below a specific level; (4) while Uber "permits" its drivers to hire others to drive for them, no one other than Uber's approved and registered drivers are allowed to use the Uber's software; (5) drivers do not pay Uber to use its software; (6) passengers pay a set price for a trip and in turn Uber pays its drivers a non-negotiable service fee; and (7) aside from the car, Plaintiff had no investment in the business - Uber provided the iPhone software, which is essential for the work. The Commission awarded the Plaintiff \$3,878.08 in reimbursable expenses and \$274.12 in interest. Uber has appealed the decision.

Whether a worker is an independent contractor or an employee is critical when it comes to numerous employment-related issues including wage and hour laws, pension eligibility, employee benefits, workers' compensation coverage, unemployment and tax liability. At its most basic level, independent contractors are exempt from wage and hour and other employment laws and their "employers" do not pay employment taxes or withhold federal, state and/or local taxes from their payments. The economic and tax advantages associated with the independent contractor status are significant. These benefits lead many companies to pursue independent contractor relationships in lieu of employer/employee relationships.

The Federal Department of Labor, the Internal Revenue Service and various other federal and state agencies continue to focus upon independent contractor relationships with the belief that many workers who are classified as independent contractors are truly employees. The goal of the DOL's Misclassification Initiative is to restore employee rights to those who are denied them. In fact, within the past few weeks, the DOL announced that it will soon publish guidance on independent contractor status.

The publicity surrounding the Uber decision and appeal in California, coupled with the federal and state focus upon the independent contractor classification itself are likely to spawn other legal challenges from workers and potentially new regulations from cities and states. These challenges will affect not only those working in the ride sharing business, but any business operating under the sharing economy model. Additionally, companies who utilize independent contractors to perform services should pay close attention to this issue. Employers should also review their present employee and independent contractor classifications to make certain that they comply with all applicable federal, state and local laws.

If you have any questions about the Uber decision, the independent contractor classification or any other employee classification issue, you may contact Stephanie K. Rawitt at (215) 640-8515, srawitt@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.