THOMSON REUTERS

Westlaw®

# Workers in Ridesharing Businesses: Employees or Independent Contractors?

**Daniel A. Cotter,** ***Butler Rubin Saltarelli & Boyd LLP***

**JUNE 2017**

Over the last few years, the sharing economy has expanded from an informal business method to a robust arena of commerce. One of the challenges presented by the sharing economy is the treatment of the workers and the question of whether they are employees or independent contractors. This article addresses some of the arguments raised by workers, including those raised in several class action lawsuits against Uber and the positions taken by the Department of Labor, on this question. In addition, this article addresses some of the recent developments in other jurisdictions throughout the world. Because **the issues contested to date have arisen only in the rideshare context**, this article does not address home sharing arrangements.

## A. RIDESHARING AND DRIVERS

Ridesharing has exploded in recent years. Uber and Lyft, the two largest rideshare companies by market share, designated their drivers as independent contractors, so that they would not be liable for the actions of their drivers, nor would they have to pay them wages or benefits. In response, drivers began to challenge their designation as independent contractors. There is much at stake for Uber and Lyft—if their drivers are ultimately deemed to be their employees, then the companies may be liable in personal injury cases for the drivers' actions under a theory of respondeat superior.

In 2013, drivers filed two class action lawsuits against Uber Technologies, Inc. ("Uber"), in California alleging they were Uber's employees, the first being *O'Connor et al v. Uber Technologies, Inc.* (the "O'Connor Litigation"), C.A. No. 13-03826-EMC (N.D. Cal. 2013) and the other is *Ghazi v. Uber Technologies, Inc., et al.* (the "Ghazi Litigation"), No. CGC-15-545532 (Superior Court of California, County of San Francisco 2013). Each case is discussed in greater detail below.

### *1. The O'Connor Litigation*

The O'Connor Litigation was filed by four drivers against Uber seeking to represent a class of all drivers who used the Uber application (the "Uber App") in California. The Uber App is the technology used by Uber to connect drivers with passengers, and displays available fares in the area near the driver (based on an algorithm). The plaintiffs alleged that they and the other putative class members should be treated as Uber's employees, and that Uber's misclassification of drivers as independent contractors resulted in violations of the California Labor Code. In particular, the plaintiffs asserted that Uber violated the Labor code by failing to: (i) reimburse drivers for certain expenses they incurred; and (ii) pass along to the drivers a portion of the fare that the drivers alleged represented their tip.

The District Court for the Northern District of California certified a class with respect to the reimbursement claim, limiting the expense reimbursements in question to those that are vehicle-related or phone expenses and excluding all other expense reimbursements sought by the plaintiffs. The District Court also certified a class with respect to the tips claim, including the question of whether the drivers have been misclassified by Uber as independent contractors.

In April 2016, Uber announced that it had reached a potential global settlement with 385,000 drivers for a settlement payment of up to $100 million, with Uber initially paying the class $84 million and the giving the drivers the potential for receiving an additional $16 million if Uber's valuation increased after going public or being bought. In August 2016, United States District Court Judge Edward Chen rejected the settlement, finding the settlement, on the whole, was "not fair, adequate, and reasonable." Chen noted that the amount of the settlement payment was far smaller than the $850 million claimed by the plaintiffs.

### *2. The Ghazi Litigation*

Uber driver Abdo Ghazi was attacked by a passenger who broke Ghazi's nose. Because Uber treated its drivers as independent contractors, Ghazi was not covered by any workers' compensation insurance. Ghazi filed a class action lawsuit against Uber in San Francisco Superior Court, alleging that Uber misclassified drivers as independent contractors, giving Uber "an unfair advantage over competing transportation companies." Ghazi sought both to have Uber's drivers classified as employees rather than independent contractors, and to have coverage under workers compensation insurance.

The proposed $100 million settlement in the O'Connor Litigation would have settled a number of other pending lawsuits against Uber, including the Ghazi Litigation. After Judge Chen rejected both that settlement and Uber's argument that the drivers had failed to arbitrate this dispute, as required in each driver's contract with Uber, Uber appealed to the United States Court of Appeals for the 9th Circuit. In late March, plaintiffs in the O'Connor Litigation filed a Motion to Remand, which Uber has opposed. In the Motion to Remand, the plaintiffs raised the issue that the lead plaintiffs rejected arbitration and that the lead plaintiffs "have opted out of arbitration on behalf of the putative class." Plaintiffs argue that the enforceability of the arbitration agreement is immaterial to the scope of the class, and that the district court should rule on this matter. Given the interest in the litigation, the 9th Circuit has created a special page, available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000823, to track developments.

## B. CALIFORNIA LABOR COMMISSIONER RULING

In addition to the lawsuits discussed above, in September 2014 Uber driver Barbara Ann Berwick filed a wage complaint with the California Labor Commissioner, alleging that Uber owed her $4,000 in reimbursable business expenses. Berwick alleged she was an employee of Uber, based both on the terms of the written agreement she entered into with Uber and the multi-factor test that the California Supreme Court outlined in S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal 3d. 342 (1989). The California Labor Commissioner derived eleven factors based on the *Borello* decision, listing:

- Whether the person performing services is engaged in an occupation or using distinct from that of the principal;
- Whether or not the work is 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 on his or her managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job; and
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

*Berwick v. Uber Technologies, Inc., et al.*, Labor Commissioner of the State of California, Case No. 11-46739 EK (June 3, 2015), pages 6-7, available at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical.

In applying these eleven factors, the Labor Commissioner concluded that Berwick was an employee and Uber owed her the reimbursable expenses. The Labor Commissioner's order makes it clear that this ruling is only applicable to Berwick and not to all Uber drivers. Nonetheless, many have followed this case to see how California views rideshare drivers.

## C. DEPARTMENT OF LABOR "SUFFER OR PERMIT" GUIDANCE

In July 2015, the United States Department of Labor issued Administrator's Interpretation No. 2015-1, which sought to provide clarification on the misclassification of employees as independent contractors. The Interpretation, available at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical, outlines six questions or factors that should be considered by companies such as Uber or Lyft in determining whether a worker should be classified as an employee. Of particular importance is the final question about control over worker's schedules. The Interpretation clarifies that the worker's ability to control her schedule alone is not determinative, stating that technological advances have permitted greater flexibility in worker schedules, but that control may still be exerted by a variety of indicia.

## D. OTHER COUNTRIES

The issue of whether drivers are employees or independent contractors is not unique to the United States but has been raised in other countries. For example, in Ontario, Canada, a plaintiff filed a putative class action against Uber, asserting that drivers are Uber's employees and seeking $200 million in damages, alleging that drivers are entitled to minimum wage, overtime, vacation pay, and protections of employment. In October 2016, Suva, a Swiss insurance agency, concluded that a particular Uber driver was Uber's employee in the particular ruling made by Suva. Suva provides required on-the-job accident insurance in Switzerland and is involved in determining which workers are employees and which are independent contractors. Although Suva noted that its finding for the particular facts of the particular driver was limited to the one driver who requested the determination, Uber objected to Suva's decision, citing prior Suva rulings in other sharing economy matters before Uber entered the market that found the sharing economy workers were independent

contractors and not employees. Finally, in October 2016, a British employment court ruled that the Uber drivers are employees subject to minimum wage and holiday pay.

This issue will likely come up in more countries as Uber and other rideshare companies expand across the globe. The resolution of this issue, both in the United States and globally, will likely have a significant economic impact should rideshare drivers (and potentially other sharing economy laborers) be deemed employees rather than independent contractors.

## E. FEDERAL TRADE COMMISSION ACTION AGAINST UBER

In addition to the issue of whether its drivers are to be considered its employees, Uber has faced an action by the Federal Trade Commission (the "FTC") in which the FTC sought a permanent injunction and other equitable relief, alleging that Uber:

> participated in deceptive acts or practices in violation of Section 5 of the FTC Act...in connection with its false, misleading, or unsubstantiated claims regarding driver earnings and its Vehicle Program.

The "Vehicle Program" at issue related to a program where Uber offered motor vehicle financing or leasing to its drivers. In January 2017, the FTC and Uber entered into a Stipulated Order, a common end result of FTC enforcement actions, which required Uber to:

- Refrain from making any misrepresentations regarding:
  - Potential income of a driver;
  - Financing or leasing options terms and conditions available to drivers through Uber or a third party; or,
  - Vehicle Programs terms and conditions.
- Pay the FTC $20,000,000 as equitable relief

### F. Conclusion

The sharing economy has grown in the last several years. With the growth comes new labor questions and challenges that will be sorted out over the next several years through potential regulatory and litigation solutions.

*This article first appeared in Westlaw's Secondary Source Analytical Content, Emerging Areas of Practice Series in June 2017.*

## ABOUT THE AUTHOR

**Daniel A. Cotter** is a Partner at **Butler Rubin Saltarelli & Boyd LLP**, where he is Chair of the Insurance Regulatory and Transactions practice group and a member of the Privacy and Cyber practice group. Prior to that role, he was Vice President, General Counsel & Secretary of Fidelity Life Association, and before that Dan was in private practice, the last two years in a firm he co-founded. His clients include a number of insurers and reinsurers and other insurance-related organizations. Dan is an adjunct professor at The John Marshall Law School, and has taught Insurance Law, Accounting for Lawyers and SCOTUS Judicial Biography. Dan graduated summa cum laude from The John Marshall Law School and received his B.A. in Accounting from Monmouth College, magna cum laude. Dan is a frequent writer and presenter on various substantive topics, including big data and privacy, and has spoken at various industry events. This article contains his opinions and is not to be attributed to Butler Rubin or any of its clients.