SCHELDRUP BLADES

Uber Drivers Seek Classification as Employees

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I. Introduction

The sharing economy is an emerging economic-technological phenomenon that is fueled by developments in information and communications technology, growing consumer awareness, proliferation of collaborative web communities, as well as social commerce.[1] The sharing economy is a phenomenon in which broad segments of the population can collaboratively make use of under-utilized inventory through fee-based sharing. This sharing is most often utilized through software applications such as Uber, Lyft, and Airbnb. Consumers typically benefit from the sharing economy by obtaining the use of a good at a lower cost; most often this lower cost is a result of the lower transactional overhead or elimination of a middleman. On the supply side of the equation – specifically in the case of Uber – are individuals like you and I who can provide short-term rentals of the vehicles we own that would otherwise be sitting idle. To illustrate the surge in popularity, the two co-founders of Uber, Travis Kalanick and Garrett Camp, in addition to the three co-founders of Airbnb, Brian Chesky, Joe Gebbia, and Nathan Blecharczyk, were recently inducted to Forbes' Billionaires List.[2]

Uber Technologies Inc., (hereinafter "Uber") is an international technology or transportation company (depending on which side of the "v" you're on) headquartered in San Francisco, California. Originally founded as "UberCab," in 2009, the company develops, markets, and operates the Uber mobile app. This application allows consumers to submit a trip request that is in turn routed to the nearest Uber Driver. Uber Drivers then utilize their own car, SUV, or limousine to complete the cycle and make the trip possible. Uber receives a credit card payment from the rider at the end of the ride; a significant portion (around eighty percent) of which it then remits to the driver who transported the passenger.

Uber now operates in more than 150 U.S. cities and 57 countries around the world.[3] In January, Uber Technologies, Inc., reported that nearly fourteen percent of its 160,000 U.S. drivers worked at least 35

hours per week. In its top 20 markets, Uber partners averaged more than $19 per hour in earnings, compared to $12.90 in average hourly wages for cab drivers based on the Occupational Employment Statistics data.[4]

The company's expansion has been met with its fair share of resistance. State and local governments, taxi companies, and other facets of public transportation alike have challenged the legality of such an application, alleging that Uber's use of drivers who are not licensed to drive taxicabs is unsafe and illegal.

II. O'Connor v. Uber Technologies, Inc.

Stepping away from the safety aspect of the application, this article will examine the potential workers' compensation issue presented: Uber's exposure to liability for its "employees." Until recently, Uber has classified its drivers as independent contractors. This classification, as we know all too well in the workers' compensation realm, limits an employers liability for workplace injuries. Plaintiffs Douglas O'Connor, Thomas Colopy, Matthew Manahan, and Elie Gurfinkel filed a class action lawsuit against Uber Technologies on August 16, 2013, alleging that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code.[5]

A recent study from consumer finance site "NerdWallet" purports that if Uber provided its drivers with the same benefits as its full-time employees, Uber drivers could receive paid holidays and healthcare benefits worth an average of $5,500 per year, plus thousands more in mileage reimbursement.[6] In fact, two recent rulings have already paved the way for O'Connor v. Uber Technologies, Inc. In June, the California Labor Commissioner ruled that one Uber driver was an employee of the company. The ruling ordered Uber to reimburse the "employee" $3,878 for mileage and tolls plus $274 in interest.[7] Similarly, in May, the Florida Department of Economic Opportunity held that a former Uber driver was an employee of the company and thus eligible for unemployment insurance.[8] It should be noted these decisions are narrowly tailored to the individual drivers filing the complaints and are not binding to all. Uber has appealed both decisions.

The insurance industry, specifically the National Council on Compensation Insurance (NCCI), is watching the recent cases closely. NCCI identified ride-sharing services as one of the top emerging comp issues for 2015.[9] A ruling against Uber could create a multitude of problems for technology companies and the sharing economy alike, including unpaid workers' compensation insurance benefits, health insurance, and Social Security and Medicare taxes. A ruling against Uber, could disrupt Silicon Valley start-ups that have virtually redefined the relationship between companies and workers and hinder their entrepreneurial spirit.

Named plaintiffs Douglas O'Connor and Thomas Colopy drive principally for Uber's "UberBlack" service. UberBlack drivers transport passengers in black sedans or other limousine-like vehicles. Both parties had arrangements with third-party limousine companies that provided them with a vehicle necessary to work as an UberBlack driver. Named plaintiffs Matthew Manahan and Elie Gurfinkel drive principally for Uber's "UberX" service. UberX drivers transport passengers in their own personal

vehicles, which are typically hybrids or other mid-range cars. The four plaintiffs loosely represent the two types of Uber's drivers – the commercial side, with drivers hired out by established transportation businesses; and the small business side, with drivers utilizing their own cars.

The United States District Court for the Northern District of California recently released an order denying defendant Uber Technologies, Inc.'s motion for summary judgment on the matter of employee classification. The Court held Uber is not entitled to summary judgment because material facts remain in dispute and a reasonable inference of an employment relationship may be drawn. More importantly, the court concluded that Plaintiffs are Uber's presumptive employees because they "perform services" for the benefit of Uber; thus, satisfying the first prong of the California employee/independent contractor test. Following this determination, the Court held that whether an individual should be ultimately classified as an employee or an independent contractor under California law presents a mixed question of law and fact that must be resolved by a jury. Both parties in the case argued that the employee/independent contractor question is one of law for ultimate resolution by the Court. However, according to the California Supreme Court, the determination of employee or independent contractor status is one of fact if dependent upon resolution of disputed evidence or inferences. Thus, we have a two-prong test that employs both questions of law and fact.[10]

III. Borello and the Test for Employment

Generally, an independent contractor is not an employee and, therefore, is exempt from workers' compensation coverage. In an attempt to avoid the costs of providing protection to their workers, employers historically have tried to establish an independent contractor relationship for their workers. Under California law, determining whether an individual is an employee or an independent contractor is a two-act show. First, if an employee can show he or she provided services for an employer, the employee has established a prima facie case that the relationship was one of employer-employee, and the burden shifts to the employer to prove otherwise.[11]

For the purpose of determining whether an employer has successfully rebutted a prima facie showing, the California Supreme Court enumerated several indicia of an employment relationship in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations* (*Borello*).[12] In *Borello*, the court held the most significant consideration is the putative employer's right to control;[13] however, the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not preclude a finding of employment status.[14] The California Supreme Court has further emphasized that the pertinent question is not how much control an employer exercises, but how much control the employer retains the right to exercise.[15]

Similar to Larson's Workers' Compensation Law, the California Code acknowledges that the right to control work details is not the only relevant factors, and the control test cannot be strictly adhered to.[16] Thus, the California Supreme Court and virtually every workers' compensation code in the United States have embraced a number of secondary factors relevant to the employee/independent contractor classification. No single factor is determinative, and the label placed by the parties on their

relationship is not dispositive.[17] The list of secondary factors outlined in *Borello* is a carbon copy of the list detailed in the *Restatement of Agency (Second)*:

(b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant;

IV. Application

As previously alluded to, the principal test of an employer-employee relationship is whether the entity to whom service is rendered has the right to control the manner and means of accomplishing the result desired.[18] For it's defense, Uber regards three factors as dispositive for its Drivers' classification as independent contractors: 1) Drivers cannot be fired at-will; 2) Drivers can work as much or as little as they like; and 3) The manner and means of a Driver's transportation services are not limited.

While no one factor is determinative, courts have held that the strongest indicium of an employer's right to control is their ability to terminate the employment relationship at-will.[19] Uber claims the company is only justified in terminating drivers after proper notice has been given, or upon a material breach of the governing contracts. Despite this testimony, the plain language of Uber's contracts say otherwise: "Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit, or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App."

Uber claims the right to control element is not met because drivers can work as much or as little as they like.[20] This is not technically accurate, and Uber's own motion acknowledges such; UberX drivers must give at least one ride every 180 days, and UberBlack drivers must give at least one ride every 30 days. Further, according to Uber, drivers are never required to accept any leads generated by the application. For example, if a driver is pinged with a potential rider request, there is not an automatic acceptance feature on the application; each driver is theoretically allowed to observe the request, assess the star rating of the rider, and make a decision on whether to accept or reject the request. At first glance, this requirement seems only minimally intrusive, and provides the driver with a great amount of control is rider selection. It is not until one reads the Driver Handbook that it becomes less apparent that drivers have control over their acceptance: "We expect on-duty drivers to accept all requests . . . we consider a dispatch that is not accepted to be a rejection" and we "will follow-up will all drivers that are rejecting trips." Returning to the at-will termination discussion, the Handbook also holds that rejecting too many trips is considered a performance issue that could lead to termination. Nonetheless, the Court acknowledges the lack of any hard schedule as a significant point in favor of a finding of independent contractor status. In an attempt to leave interpretation open to the

jury, the Court opines the more relevant inquiry is how much control Uber has over its drivers while they are "on duty" for Uber.

Lastly, Uber contends it does not have, or utilize the right to control the manner and means of its drivers' transportation services. Plaintiffs cling to employment documents containing language loosely suggestive of command, i.e. "make sure you dress professionally" and "make sure the radio is off or on soft jazz or NPR." Uber responds it simply provides suggestions for its drivers to help improve their rating and ensure riders have an enjoyable "trip." Given the nature of a summary judgment, in the light most favorable to Plaintiffs it could not be concluded that the language was merely suggestive. Additionally, Plaintiffs presented evidence of drivers being admonished by Uber for failing to comply with said "suggestions." One of the quality control mechanisms used by Uber is their "star rating." Following every ride, drivers and riders alike are provided with the opportunity to rate their rider/driver and leave comments. Documents presented to the court made it clear Uber uses these ratings to monitor drivers' adherence to their suggestions and while it is apparent that drivers' adherence to every suggestion may not be specifically discernible through rider ratings, the facts viewed in a light most favorable to the plaintiffs suggested monitoring ratings may be a generally effective enforcement mechanism.

The court in O'Connor v. Uber Technologies determined the Plaintiffs are Uber's presumptive employees because they provide a service to Uber. First, the central premise of Uber's argument is the contention that it is merely a technology company that generates leads for its transportation providers through its software, not a transportation company. The court held Uber's definition as a technology company focuses exclusively on the mechanics of its platform, rather than on the substance of what Uber actually does; much in the same way John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers.[21] If Uber were to focus on the substance of what it actually does, it is clear that Uber is a transportation company.

Second, the court pointed out Uber's revenue stream does not depend on the distribution of its software, but on the generation of rides by its drivers; thus, Uber would not be a viable business entity without its drivers.[22] Uber's Service Agreement expressly provides that it will retain a fare amount in the event of a successful delivery. This service fee clause confirms Uber only makes money if drivers transport passengers to a final destination. As the sole entity that dictates the fare charged to riders; Uber exercises significant control over the amount of any revenue it earns. Further, Uber acts as more than a mere passive intermediary between riders and drivers as it dictates drivers may not solicit any other companies or services in their vehicle, and drivers may not arrange future rides.

As further indicia of its role as a transportation company, the court cites Uber's substantial control over the selection of its drivers. Before earning the title of "partner" with Uber, aspiring drivers must first complete Uber's lengthy application process. Applicants are required to upload their current driver's license information, as well as information about their vehicle's registration and insurance. Typically, and depending on state specifics, all vehicles must be from model year 2000 or newer. Applicants must also pass a background check conducted by third-party company Accurate and/or Checkr. In some of the major metropolitan hubs, would-be drivers are further required to pass a "city knowledge" test and

attend an interview with an Uber employee. Once a prospective driver successfully completes the application and interview stages, the driver must sign contracts with Uber or one of Uber's subsidiaries. These contracts explicitly provide that the relationship between the transportation providers and Uber "is solely that of independent contracting parties" and the parties "expressly agree that this Agreement is not an employment agreement or employment relationship."

V. Conclusion

On paper, the case against Uber and the classification of its drivers as independent contractors looks strong; however, as anyone who has used the application will note, the drivers seem to meet the criteria of true independent contractors. They relish in owning their own business and setting their own schedules. Although the Court in O'Connor points to Uber's suggestions and classifies them as mandatory, I personally have never had a well-dressed, properly groomed Uber driver open the door for me only to have the sweet, soothing sounds of smooth jazz wash over me like the opening notes of a Kenny G concert. If Uber drivers were to be classified as drivers, entitling them to workers' compensation benefits, the company would shift overnight from a technologically advanced transportation service, to one of the nation's largest employers. A shift of this magnitude would come with multiple losses to the consumer; a workers' compensation bill with over 160,000 employees will surely result in a decrease in drivers, meaning less availability and slower ride response time.

As expressed by Adam Smith in The Wealth of Nations, and professed in economics classrooms throughout the United States, the marketplace is best left unregulated. Overbearing regulations suffocate small-business owners - the rich, the poor, and everyone in between. Competitive markets allow civilians to enter into private, peer-to-peer contracts without the need for the government to act as arbitrator. Likewise, the services provided by Uber act only as an intermediary between two private citizens to facilitate a mutually beneficial exchange of goods and services.

Moreover, regulations imposed on Uber will take a vibrant, free-market exchange of goods and services and erode the quality of the services; the Uber experience will be robbed in terms of its creative advantage and tarnished in terms of its self-regulating standards until it is no better than the average ride in a taxi. The unintended consequence is a more costly yet less rewarding experience for the inevitably dissatisfied consumer.

The class action certification hearing occurred on August 6, 2015 and may very well be decided by the time of this publication. Regardless of the outcome, one thing is for certain: while a majority of insurance companies and state legislatures alike try to regulate the insurance issues surrounding ride-sharing services, workers' compensation acts will inevitably need to evolve and adjust to accommodate the surging "sharing economy." The application of the traditional employment test to Uber and other collaborative peer-to-peer applications create significant challenges that need to be addressed by legislative bodies.

[1] Botsman R., & Rogers, R. (2010). *Beyond Zipcar: Collaborative Consumption*. Harvard Business Review, 88(10), p. 30.

[2] Forbes, “The World’s Billionaires” (March 2, 2015).

[3] Uber, “Our Cities” *available at* www.uber.com

[4] Lawler, Ryan “Uber Study Shows its Drivers Make More Per Hour and Work Fewer Hours than Taxi Drivers” TechCrunch (Jan. 22, 2015).

[5] O’Connor v. Uber Technologies, Inc., No. 13-3826 (N.D. Cal. Mar. 11, 2015) (Order Denying Mot. Summ. J. Mar. 11, 2015).

[6] Chu, Jeffrey “*Uber Drivers Could Gain Thousands in Pay, Benefits as Full-time Employees*” NerdWallet (August 11, 2015).

[7] Berwick v. Uber Technologies, Inc., Cal. Lab. Comm’r Dec. No. 11-46739 (June 3, 2015).

[8] Hanks, Douglas “*For Uber, Loyal Drivers and a New Fight for Benefits*” Miami Herald (May 21, 2015).

[9] Harrison, Sheena “*Uber, Lyft Could be Forced to Provide Drivers with Workers Comp Benefits*” Business Insurance (February 15, 2015).

[10] *See* Hillen v. Indus. Acc. Comm’n, 199 Cal. 577, 580 (1926).

[11] Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010).

[12] 48 Cal. 3d 341, 350 (1989).

[13] *Id*.

[14] Air Couriers Int’l v. Emp’t Dev. Dep’t, 150 Cal. App. 4th 923, 934 (2007).

[15] Ayala v. Antelope Valley Newspapers Inc., 59 Cal. 4th 522, 533 (2014).

[16] Borello, 48 Cal. 3d at 350.

[17] *Id.* at 355.

[18] *See* Borello, 48 Cal. 3d at 350.

[19] *Id*.

[20] O’Connor, No. 13-3826 (Order Denying Mot. Summ. J. Mar. 11, 2015) at 21.

[21] O’Connor v. Uber Technologies, Inc., No. 13-3826 (N.D. Cal. Mar. 11, 2015) (Order Denying Mot. Summ. J. Mar. 11, 2015).

[22] *Id.* at 11.

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