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# The Impact of the Uber Ruling and Issues of Employment Misclassification

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**Uber** – the transportation networking company which, through the use of its technological platform and smart phone application, connects consumers (passengers) with transportation providers (private vehicle drivers) and facilitates the ride sharing service – may be the next victim of the continuing wave of employee misclassification lawsuits sweeping the nation. On June 3, 2015, in *Berwick v. Uber Technologies*, the California Labor Commissioner ruled that an Uber driver in California is an employee, and not an independent contractor, of the ride-hailing company. In relevant part, the labor commission found that "the minimal degree of control that [Uber] exercised over the details of the work was not considered dispositive because the work did not require a high degree of skill and it was an integral part of the employer's business" and that, in reality, Uber is "involved in every aspect of the operation." As a result, Uber was ordered to reimburse its driver's legitimate, reimbursable expenses pursuant to California Labor Code § 2802.

Though the decision of the California Labor Commission is not binding – Uber already has appealed – the lawsuit and underlying decision are significant. The decision is symbolic in that it jeopardizes Uber's contractor-based business model. Uber maintains that it is "nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation."

Given the Commissioner's ruling and the overarching and virtually universal presumption of employment, courts may not agree with Uber.

Uber is not alone. Shyp, a San Francisco based startup that picks up, packages and delivers items on demand, already has reclassified its couriers from independent contractors to employees, undoubtedly to avoid any ensuing legal melee. Just last year, Lowe's agreed to settle a class action brought by its home improvement contractors and installers who alleged they were misclassified as independent contractors instead of employees. As the issue of employee misclassification has become an increasingly hot topic nationwide, construction companies, valet service providers and many other employers have had to justify their designation of their workers as independent contractors (and not employees).

This string of misclassification lawsuits has exposed and drawn a great deal of attention to the independent contractor business model. Under appropriate circumstances, employers can classify their workers as independent contractors. This can result in an incredible cost saving to employers, as it excuses them from certain legal obligations, such as the payment of minimum wage and overtime, unemployment benefits and payroll taxes, as well as the provision of certain benefits like health insurance, wellness programs, retirement benefits and workers compensation insurance. The flip side is that a worker classified as an independent contractor and not an employee may have little legal protection if/when something goes wrong. Of course, when a worker is improperly classified as an independent contractor but should be an employee, he/she may be legally entitled to recover certain benefits, overtime pay, and other compensatory remuneration afforded under the Fair Labor Standards Act and state wage and hour laws.

Earlier this year, the New Jersey Supreme Court made it more difficult for employers to classify their workers as independent contractors. In *Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015), decided January 14, 2015, the New Jersey Supreme Court held that under New Jersey law, the "ABC" test derived from the New Jersey Unemployment Compensation Act, N.J.S.A. § 43:21-19(i)(6), governs whether a plaintiff is an employee or independent contractor for the purpose of resolving claims brought under the New Jersey Wage Payment Law, N.J.S.A. §§ 34:11-4.1 to 34:-4.14, and the New Jersey Wage and Hour Law, N.J.S.A. §§ 34:11-56a to 34:11-56a38. In the Sleepy's litigation, the plaintiff delivery drivers contended they suffered financial losses as a result of the company's misclassification of them as independent contractors, rather than employees. Although the plaintiffs signed independent contractor agreements as delivery drivers for Sleepy's, they alleged this was a ruse by Sleepy's to avoid paying them various employee benefits, which they asserted was a violation of state wage payment laws.

The Court expressed that under the New Jersey wage laws at issue, both of which are remedial, the "ABC" test "provides an analytical framework to decide whether a person claiming unemployment benefits or seeking the protection of the wage-and-hour provisions of the WHL or the wage-payment provisions of the WPL is an independent contractor or an employee" and "presumes that the claimant is an employee and imposes the burden to prove otherwise on the employer." Hargrove, 220 N.J. at 314. Thus, under the "ABC" test, an individual is presumed to be an employee unless the employer can demonstrate: (A) the individual has been and will

continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; (B) the service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business. Id. at 25.

In essence, the employer first must prove that it did not exercise control over the worker and did not have the ability to exercise such control. Notably, absolute control is not required. Next, the employer must show that the service provided was outside the usual course of the employer's business or was performed outside the places in which the employer performs its business. Third, the employer must demonstrate that it exists and would continue to exist independently of and apart from the particular service relationship, and that the worker himself/herself is engaged in an independently established business enterprise. "The failure to satisfy any one of the three criteria results in an 'employment' classification." Id.

These cases have significant wage, hour, tax and employee benefit ramifications for employers state and nationwide. Employers like Uber, Lowe's and Sleepy's, which predicated their businesses (in whole or in part) on an independent contractor model, may find themselves in violation of state and federal wage and hour laws. Perhaps even worse, employers who conduct interstate business could find themselves in compliance with the FLSA but in violation of applicable state laws. In some instances, a misclassification error is not discovered until a wage and hour audit occurs, which can expose the employer to stiff administrative fines above and beyond any potential civil penalties or remedies. For employers, advance planning and internal auditing is recommended.

The California Labor Commissioner's ruling will not be the last word on the Uber matter, and it remains to be seen whether Uber's business model will require a total overhaul. Regardless, these cases should be carefully considered and closely followed by employers and their in-house counsel, especially given the sharp uptick in employee misclassification litigation.