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Uber Ruling Puts Sharing Economy's Business Model In Limbo

By **Erin Coe**

Law360, San Diego (June 24, 2015, 10:09 PM ET) -- A recent ruling by the California Labor Commissioner's Office that a driver for Uber Technologies Inc. was an employee and not an independent contractor may push companies in the sharing economy to take a more hands-off approach with workers to avoid claims that their control over job details looks too much like a traditional employer-employee relationship, lawyers say.

A hearing officer at the Labor Commissioner's Office on June 3 **ordered** Uber to reimburse Barbara Ann Berwick for about $4,000 in expenses she accrued as a driver for the smartphone-based ride-hailing service last year.

Although Uber argued that it didn't control how many hours Berwick worked, the commissioner held that the company acted similar to an employer when it supplied her with an iPhone to access Uber's smartphone app. Uber also vets prospective drivers, who must provide their banking and residence information and Social Security number, according to the decision, which Uber appealed to a state court last week.

If the court upholds the ruling, it will continue a trend over the past few years of California courts taking a tough stance against companies that designate workers as independent contractors, according to Sean Pon of Hinshaw & Culbertson LLP.

For instance, the Ninth Circuit in August 2014 found that FedEx Ground truck drivers in California and Oregon **were misclassified** as independent contractors and should have been considered employees because the company had broad authority to dictate the way they carried out their jobs. Earlier this month, the delivery company **agreed to pay** $228 million to resolve the class action by California drivers.

"California courts seem to be very anti-independent contractor, and in a lot of cases, they are finding a way to find an employer-employee relationship," he said. "That's what we saw with this ruling. The Labor Commissioner's Office clearly wanted to find that type of relationship here."

While Uber has said the decision is nonbinding and applies only to Berwick, the analysis could be persuasive to judges presiding over misclassification cases against ride-hailing competitors and other companies in the sharing economy that tout themselves as tech-savvy go-betweens, such as Airbnb Inc., Homejoy and TaskRabbit, according to lawyers.

"Uber holds itself up as a neutral technological platform, but the Labor Commissioner's Office found Uber was in the transportation business," said David A. Lowe, a litigator at Rudy Exelrod Zieff & Lowe LLP, which represents employees. "That's really not how companies like Uber and Lyft and the so-called sharing economy companies want to be

viewed, and it suggests they would have liability as traditional employers."

Companies with full-fledged employees would be on the hook for workers' compensation and unemployment and would be subject to state Labor Code requirements and payroll tax collections — obligations they don't have to worry about when they use independent contractors — according to Lowe.

A major reason the Labor Commissioner's Office found Uber's driver to be an employee was that the driver's job duties were so integral to Uber's business of providing ride services, which could prompt businesses in the sharing economy to re-evaluate their labor models, according to Pon.

"Uber has a lot of controls with respect to how the job is performed, how the car is used, the age of the car and upkeep, and it may have to step away from those controls," he said. "The controls are somewhat in place to encourage clients to keep using the services and give clients peace of mind that they are going to get where they are going safely, but if Uber wants to continue to push the independent contractor relationship as opposed to the employer relationship, it may have to lay off those controls."

The takeaway from this decision is that employers should be extremely careful about classifying workers as independent contractors, he said. If others in the sharing economy use similar controls, such as uniforms, verifications and standards on mode of transportation, it could strengthen the argument that workers are employees.

"For any job, position or duties that are so integral to their overall business operations, employers should err on the side of caution and classify individuals as employees," he said. "They should reserve independent contractor designations to select few duties that are not related to their general business operations."

The decision is likely to spur ride-hailing companies and others to examine ways to limit any perception of control they have over users of their technology platform, according to Katherine Catlos, managing partner of Kaufman Dolowich & Voluck LLP's San Francisco office.

"Uber drivers already set their own hours and decide whether to pick up passengers," she said. "Companies are going to do what they can to take additional steps to establish drivers retain control over how their job is done, and that might include letting drivers set the price for a ride."

Because the ruling by the Labor Commissioner's Office only encourages the plaintiffs bar to look for similar independent contractors in the sharing economy to pursue class actions over misclassification, smartphone-based service providers also may take advantage of arbitration agreements, she said.

"The plaintiffs bar is looking for clients to follow in the footsteps of the Uber plaintiff," she said. "Companies in the sharing economy will likely be inserting arbitration agreements into their contracts with users or workers to prevent class actions."

While companies in the sharing economy are going to be closely following what courts have to say about worker classifications, they see their current business model as offering many benefits for workers, particularly in the freedom it gives them to plan their own work schedules.

"[Companies are] trying to create a free-market economy where individuals have more flexible options to make money," said Charles Thompson, vice chair of Polsinelli's labor and employment practice in California. "Individuals choose to drive for companies like Uber and Lyft so that they have more flexibility and control in their lives. Many of those drivers can

choose and in fact do earn their living from multiple sources."

The ruling by the Labor Commissioner's Office relied in part on a multifactor test to determine a worker's classification established by the California Supreme Court in its 1989 decision in S.G. Borello & Sons Inc. v. Department of Industrial Relations, signaling that employment laws may not be keeping pace with what is actually happening in the workplace, according to Jennifer Rubin, a member of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

"Can we use concepts from the 1980s and apply them to what is going on in the real world in employment in 2015?" she said. "It's not clear whether the law is keeping up with rapidly developing concepts in the economy, such as referral services like Thumbtack and Airbnb."

The test, which is used to determine whether workers are independent contractors in California, includes questions like whether the worker is engaged in a business that is distinct from the company, whether the company supplies the tools for doing the work, and whether the service rendered requires a special skill.

Rubin said state lawmakers should look at updating the independent contractor test to give companies more certainty and to encourage innovation.

"Businesses crave certainty, and maybe that means creating a new class of worker," she said. "Decisions like this one could create a chilling effect on business innovators who are afraid to tread into the muddy waters and be accused of misclassifying workers. It also could impact a class of people who are really desiring to pick and choose who they work for, how much they work and what their work schedules look like. That is truly a modern concept right there."

But Lowe disagreed that the rules California courts are using to decide whether workers are employees or independent contractors are outdated.

"Even though the test has been around for a long time, it has been applied in many different contexts," he said. "I think it still has the flexibility to apply in many different businesses and workplaces."

--Additional reporting by Kurt Orzeck. Editing by Kat Laskowski.