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Uber Drives Insurance Industry to Innovate

Cases in several states have the ride-sharing industry swerving to avoid a collision of the law and its business model.

By Stephanie D. Ross and Mark R. Bush

The ride-sharing service Uber was in the news again after a ruling by the California Labor Commission declared one of its drivers to be an employee and not an independent contractor, and ordered the company to reimburse her for a variety of operating expenses that must be paid by employers under California law.

Uber appealed, and also has been quick to point out that the ruling is limited to the single case decided; the company previously won the issue in five other states. Nevertheless, the ruling is garnering attention as a possible bellwether for litigation around the country and across a number of industries that utilize freelance workers to perform services on demand. While the battle so far has been fought on the employment law stage, the issue of employment relationship certainly is familiar to workers' compensation practitioners.

Most state workers' compensation statutes do not define "employee" or "independent contractor." It has been up to the courts to establish a standard for determining the nature of the employment relationship. The majority of jurisdictions have implemented some variation of the "20-factor test" utilized by the Internal Revenue Service for federal tax purposes. The fact-finder weighs a number of factors relevant to the ultimate question of control.

What Is Uber, Anyway?

The right to control the manner and means of the work per-

formed generally is analyzed by looking to the nature of the work in relation to the business of the defendant. If the services performed by the worker are an integral part of the defendant's regular business activity, the worker usually will be deemed an employee. So, in order to resolve this employee-versus-independent-contractor question, we must first ask, "What is Uber, anyway?"

Uber offers multiple services that range in price from economical to luxury, depending on the type of vehicle and driver hailed. The focus of this article is the service known as UberX, which provides a basic personal vehicle that seats up to four passengers. UberX drivers are not professional livery drivers, and a commercial license is not required.

Uber takes the position that it is merely a technology provider that matches drivers with passengers, and not a transportation company. Thus, it would argue, driving is not part of its regular business activity, which is instead reliant on the services of computer programmers, customer service agents, and the like.

Weighing in favor of Uber's argument is the fact that drivers use their own vehicles. On the other hand, Uber requires that the vehicles meet certain "industry standards" and be fewer than 10 years old. Moreover, Uber's passenger agreement allows the company to verify and recover the cost of any repairs or cleaning of the driver's vehicle caused by a passenger's use.

Uber provides the software application drivers need to transact with the company, and cell phones, if needed, though this factor cuts both ways. Provision of equipment weighs in favor of finding an employer–employee relationship, but the fact that the only equipment provided by Uber is technological in nature supports the argument that it is a technology provider and not a transportation service company.

Because Uber establishes the fare, and because driving is a regular and recurrent part of the service for which the fare is charged, Uber is in the best position to recover the overhead cost of workers' compensation by adjusting fares.

The hearing officer in the California case rejected this restrictive classification. In so doing, she relied on the standard outlined in a California workers' compensation decision, which closely aligns with the common law factors utilized by most jurisdictions. She wrote, "Plaintiff's work was integral to Defendants' business. Defendants are in business to provide transportation services to passengers. Plaintiff did the actual transporting of those passengers. Without drivers such as Plaintiff, Defendants' business would not exist."

In response to this ruling, Uber issued this statement on its website: "It's important to remember that the number one reason drivers choose to use Uber is because they have complete flexibility and control. The majority of them can and do choose to earn their living from multiple sources, including other ride sharing companies."

A Question of Control

In any given case, the particular circumstances of the driver may support a finding of an independent contractor relationship. However, the typical Uber driver generally is providing a personal service and is not operating a transportation service distinct from the company, even if she is driving for multiple ride-sharing companies. Notably, Uber prohibits a driver from sharing its software application with anyone else. Drivers must register with and be approved by Uber, and are issued a distinct identification number, which they alone may use.

Importantly, Uber sets the fare to be paid by the passenger. Uber collects payment and, in turn, pays the driver a non-negotiable service fee. Uber alone may negotiate a higher or lower fare, depending on market demands, company promotions, and the like. Tipping of drivers is discouraged, as it is counterproductive to Uber's cost-driven marketing strategy.

Thus, the driver has no independent route for channeling the cost of an injury to the ultimate consumer of the service, the passenger. Because Uber establishes the fare, and because driving is a regular and recurrent part of the service for which the fare is charged, Uber is in the best position to recover the overhead cost of workers' compensation by adjusting fares.

In contrast, a model more likely to withstand scrutiny under an independent contractor analysis would have Uber charge the driver a fee for its role in arranging the ride, and then allow the driver to set the fare ultimately paid by the passenger. Indeed, that was precisely the arrangement on which an administrative law judge dismissed a workers' compensation claim by a driver working

under an independent contract for a company that operates a horse-drawn carriage service in Northern Kentucky.

Many companies defending a workers' compensation claim are surprised to learn that an independent contractor agreement signed by both parties is not determinative of their employment relationship. While it may be considered by a fact-finder as evidence of intent of the parties, it is generally accepted that the relative lack of sophistication and bargaining power by the worker at the time of hire can result in an agreement being coerced rather than negotiated.

Nevertheless, a noteworthy comprehensive report on the contingent workforce published by the U.S. Government Accountability Office on May 20, 2015, found that over 85 percent of independent contractors "appeared content with their employment type." Thus, in debating the employment relationship issue in the context of the burgeoning freelance economy, it is important to give due respect to the parties' freedom to contract.

Bearing in mind the basic tenet that workers' compensation laws are to be liberally construed in favor of the injured worker, and considering the elements of control outlined herein, it seems likely that litigation of this issue would result in a finding of an employer-employee relationship in most jurisdictions.

California's New Law

Not surprisingly, California is one state opting for the regulatory approach. In the industry's infancy, ride-sharing companies instructed drivers to submit any auto liability claims to their personal insurance carrier first. However, most personal auto policies specifically exclude any claims arising out of such commercial driving activity. Thus, drivers were implicitly encouraged to hide the commercial nature of the activity from their carriers.

At the urging of the insurance industry, and in response to a catastrophic loss where coverage was denied, California addressed this problem through legislation that took effect July 1, 2015. In an effort to fend off such regulation, Uber voluntarily put in place primary coverage for drivers while the app was on and an Uber passenger was in the vehicle.

This model at least provided coverage for Uber passengers and third parties injured in an accident. However, it left drivers without any coverage during that period when the app was turned on but no passenger was in the vehicle, as most personal auto carriers consider that excluded commercial activity.

California's new law requires Uber to close the gap and provide commercial insurance protection from the moment the app is activated by the driver, among other safeguards. The law also encourages the auto insurance industry to develop new products to reflect the personal-commercial hybrid use of vehicles in the new ride-sharing industry. The insurance industry has accepted this invitation and new products are coming on the market all over the country.

Whether state legislatures or insurance commissions will take such a proactive approach to the problem of workers' compensation coverage for ride-sharing drivers remains to be seen. If not, the issue will be adjudicated on a case-by-case basis, and it will be in the fact-finder's discretion to weigh the relevant factors and to decide whether a given claimant looks more like an employee or an independent contractor.

It seems unlikely that Uber will voluntarily undertake coverage of its drivers, given the significant impact this would have on its workers' compensation premiums. The company reported 160,000 active drivers at the end of 2014.

Bearing in mind the basic tenet that workers' compensation laws are to be liberally construed in favor of the injured worker, and considering the elements of control outlined herein, it seems likely that litigation of this issue would result in a finding of an employer-employee relationship in most jurisdictions. One thing is certain: With some 53 million Americans now employed as freelancers, there will be no shortage of opportunities to explore these issues in the future. ■

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