

So Much Rides on Uber: One Company's Battle Against Employer Liability Drives the Fate of the On-Demand Business Model

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Is **Uber** just a software platform, or is it an employer of hundreds of thousands of drivers? Federal and state courts in **California** are considering this issue, and their ultimate findings will have implications for the new start-up economy.

On July 9, 2015, Uber made its most recent defensive play in a federal class action lawsuit brought against it by three Uber drivers claiming they were misclassified as independent contractors under California law. Uber moved to oppose class certification, seeking to prevent these three drivers from representing some 160,000 other drivers as additional plaintiffs in the same lawsuit. In its motion, Uber argued that all of its driver-partners are different, and thus they lack the typicality required of plaintiffs in a class action. Uber also took the opportunity to demonstrate the independent contractor characteristics of many drivers. For instance, Uber pointed out that some drivers also provide their services through competitor apps, while others work primarily in a different industry and only occasionally use Uber to supplement their income. Partnership terms also vary, as any driver in the putative class might have signed one or more of 17 different agreements with the company. Some drivers follow Uber's suggestions for how to carry out their services, while others do not. Some drivers even work directly for third-party transportation companies that use Uber as a referral and promotional source. To bolster these arguments, Uber also submitted an expert's declaration and a large collection of statements from Uber drivers in support of the status quo.

This move comes after the court denied Uber's summary judgment motion last March, finding that a jury must decide whether Uber can rebut the existence of an employment relationship under California's multi-factor standard. Application of this standard has become less predictable over the years, with courts initially viewing the most important factor to be a putative employer's right to control work details, but more recently finding that any combination of 13 factors could turn the results of a case. For example, while courts in some cases have relied on a worker's flexible schedule or a driver's use of his own vehicle to find an independent contractor relationship, courts in other cases have come to the opposite conclusion despite the existence of these same factors. Given the unpredictable nature of the legal standard (and the vagaries of defending class actions in general), it is no surprise that Uber seeks to avoid class certification, a path leading to its potential liability as an employer of some 160,000 drivers. The hearing on class certification is slated for August 6, 2015.

Meanwhile, on June 6, 2015, Uber appealed a California Labor Commission ruling that found one of its drivers to be an employee. The Commission held that the company must reimburse Barbara Ann Berwick for \$4,152 in driving-related expenses due to its status as her employer. Uber disputes the ruling and maintains that as a ride-share logistics company, it does not employ drivers but simply connects independent contractors to people who need rides.

This ruling is contrary to a 2012 ruling by the same Commission which found that the Uber driver in question was providing services as an independent contractor, and thus was not entitled to reimbursements and other protections required by California law for bona fide employees. Uber points out that the majority of individuals who provide rides through Uber have other income sources, including other ride sharing companies, and that these drivers enjoy great flexibility and independence in setting their own hours and working as much or as little as they want. These truths were not enough to sway the Commission, however, which arrived at its 2015 decision by looking at Uber's management practices such as its vetting and background checks of drivers, rate-setting, and paying drivers a nonnegotiable service fee. The personal (as opposed to professional) nature of the service also contributed to the Commission's decision.

Uber's appeal means the California court system will now take up the case. If the state court (or the federal court presiding over the putative class action), ultimately declares that the driver(s) are employees of the ride-sharing company, it could greatly impact the way Uber does business in the state. The company would have to consider social security, health care, unemployment insurance, workers' compensation, and other new costs for the large army of California drivers to which it is linked.

What is more, Uber's legal challenges are not limited to California. Although Uber has won important victories in some states, courts and decision-making authorities elsewhere may see Uber's structure and management as problematic. They may find, like the California Labor Commission did, that the company is "involved in every aspect of the operation." And this could have a ripple effect on the new sharing economy that includes other technology platforms like **Lyft**, **Sidecar**, **Postmates** and **Homejoy**.

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