Uber-Expensive Settlement Could Be Uber-Important To Employers

Insights
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The ride-sharing company Uber recently announced a preliminary $100 million agreement to settle claims alleging that it improperly classifies its workforce as independent contractors. Because the settlement involves the foremost business entity in the new gig economy, this is a groundbreaking agreement that could provide guidance to many other emerging businesses that take advantage of the sharing environment. For all other businesses, it serves as a stark reminder of the pitfalls that can result from categorizing your workers as contractors.

Ins And Outs Of Settlement Agreement
By now, most people are aware of the litigation filed against both Uber and competitor Lyft challenging the status of its drivers as independent contractors. A class action lawsuit filed in California covered about 240,000 current and former Uber drivers who wanted additional compensation, including being reimbursed for expenses and tips. A companion case was being litigated in Massachusetts alleging similar facts. Trial was slated to take place in June 2016, and a loss could have cost Uber hundreds of millions of dollars.

Uber recently announced that it had reached a preliminary agreement with the plaintiffs, filing a 153-page proposed settlement agreement outlining the terms of the deal. The arrangement could see the plaintiffs and their attorneys receive a guaranteed payment of $84 million, with the promise of an additional $16 million provided the company's valuation continues to grow through an initial public offering.

The non-monetary portion of the settlement is, in some ways, even more interesting. It will require Uber to alter some of its business practices in such a way that will result in workers being treated more like employees, but will expressly ensure that workers remain classified as independent contractors. Specifically, the deal assures drivers that they can only be removed from service if Uber can show "sufficient cause," and drivers have an appeals process and arbitration available if they disagree. Also, drivers can elect local leaders to meet with management to dialogue about issues impacting the workforce, and drivers will now have the opportunity to collect tips from riders.

The deal must be approved by the court in order to be finalized, and the judge is currently reviewing the agreement to ensure fairness to all involved while a group of drivers is objecting to the terms.

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However, assuming the deal is permitted, it will signal a sea change in the way gig economy employers interact with their workers.

What Does The Deal Mean For Gig Economy Employers?
Quite simply, this deal is a game-changer. It provides a blueprint for a possible path towards peaceful coexistence with workers without the specter of a class action lawsuit hanging over your heads at all times.

From a bigger picture perspective, this deal further presages the possible emergence of a new third classification of worker that reflects the reality of working in the gig economy in the 21st century. Modern businesses have long bemoaned the fact that the current legal standard is based on a 20th century legal test and calls for sorting workers in one of only two categories: either employees or independent contractors. As some legal scholars have pointed out, when it comes to sharing economy business models, this is sometimes like trying to jam a square peg into one of two round holes.

As a possible solution, some have called for the recognition of a hybrid third category, the "dependent contractor," or the "independent worker." This worker would have some characteristics of an employee while retaining the independence of a contractor, permitting both worker and business the necessary flexibility to remain nimble in the modern business environment.

While this settlement agreement does not alter existing law or create such a legally binding category, it is a definite step in the right direction. Government regulators and elected legislators will take notice of this proposed solution and could see it as a model for developing laws covering gig economy working relationships, even if the settlement is scuttled.

What Does This Deal Mean For All Other Employers?
For traditional businesses outside the sharing economy, this deal is a good reminder that the law favors workers being classified as something other than independent contractors. If it is a close call, a court or government agency examining your business will probably consider your workers to be employees, entitled to all the rights and benefits the law (and your policies) allow.

Just last year, the U.S. Department of Labor (USDOL) issued an Administrator's interpretation aimed at addressing what it characterized as the "problematic trend" of misclassification, sending a signal that these cases will be an enforcement priority for the foreseeable future (read more here).

Not surprisingly, the USDOL's guidance sets the bar high for determining whether a worker is an independent contractor, and expressly concludes that "most workers are employees under the FLSA." The basic premise has not changed, and is essentially boiled down to these inquiries: Are the workers in business for themselves? If yes, they are probably independent contractors. If the workers are economically dependent on the employer, they are probably employees.

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In reaction to this interpretation and the Uber settlement, which will no doubt attract interest from any of your workers who may think they are not properly classified, we recommend that you review your working relationships now before they are subject to challenge. Evaluate the risk with each of them and adjust as necessary, adding in more protection if need be. You should consider indemnification language and other provisions shielding you from liability.

The risks associated with misclassification are great, and most companies do not have a spare $100 million in their litigation budget that would solve a class action lawsuit. For most companies, it is better to avoid a claim in the first place than to have to negotiate an uber-expensive settlement agreement.

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