



A Blueprint For Contractor Classification Success, As Taken From The Grubhub Trial Victory

Insights

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By now, you've probably heard the good news: a federal judge yesterday [ruled in favor of Grubhub](#) and pronounced that a delivery driver who was challenging the independent contractor classification model was not, in fact, an employee. This appears to be the first time that a classification case in the gig economy reached a judicial merits determination, so it's sort of a big deal. And while it only applies specifically in California, the decision rested upon a familiar test (centered around the company's "right to control" its workers) that is commonly used in other jurisdictions across the country, and could be used by other courts looking to rule on similar cases.

For these reasons, this blog post will present a blueprint for classification success by pointing out the critical factors analyzed by the Grubhub court and offering you the opportunity to follow its lead. If you would like to read a summary of the case and the decision itself, [read our legal alert here](#). Otherwise, read on to find our checklist for success.

(A lawyerly word of caution, here, before we begin: every case is unique, and every legal analysis will be applied differently. Because most courts and agencies apply a balancing test when analyzing classification questions, it is very difficult to predict whether a court or agency will find you to have classified your workers correctly. Indeed, another court could look at this exact same set of facts and rule that the worker was an employee, and it wouldn't be all that surprising. And this is especially true given the fact that each jurisdiction has its own law, and that several legal tests sometimes exist in the same state depending on what kind of question is at issue. So, this blog post is not intended to be, and should not be construed as, legal advice for any particular fact situation. Call one of our [Gig Economy Practice Group](#) attorneys for more detail about any specific questions you have.)

This checklist presents a fairly comprehensive list of the various factors examined by the California federal court that ruled in Grubhub's favor. The judge indicated that the first category of factors—whether the company had the right to control the worker in question—is “the most important or most significant consideration” in this analysis. However, there is no mathematical standard at play here, such as having more of these factors in your favor than not. Instead, most courts would apply a balancing test where they examine all of these factors, with a special emphasis on the first category listed below.

Right To Control

- Exercise as little control as possible over your workers and the way they perform their services. For example, if your workers provide delivery services, you should have little if no regard for whether the deliveries are carried out by car, motorcycle, scooter, or bicycle.
- Do not inspect or ask to see photographs of the tools that permit them to do the job (for example, with delivery workers, their mode of transportation).
- Ignore your worker's appearance while performing their gigs. Do not maintain or enforce appearance or dress standards as you would with your employees.
- Do not require your workers to wear a specific uniform.
- If you provide an optional uniform, it's OK to provide a certain inducement (such as the free use of insulated delivery bags or another simple benefit), but don't require your workers to appear in a certain way.
- Do not provide any particular training or orientation to your gig workers.
- Do not offer a suggested script for how to interact with customers.
- Refrain from doing a side-by-side review of your workers as they perform their functions.
- Take no position on whether another person can accompany your worker in performing their services.
- If feasible, permit your worker to subcontract their services.
- Allow your worker to control whether or not they perform any work, and for how long.
- Permit them to schedule themselves whenever they want.
- If a worker has not logged on to make themselves available for a certain period of time, do not follow up with them and inquire about their unavailability.
- Do not set a minimum number of shifts that workers need to sign up for in a particular time period.
- Permit your workers to cancel the shift they signed up for right up until the moment the shift starts.
- You can maintain a right to terminate a worker for material breach, however, if the worker does not perform the work they contracted to perform.
- Do not prepare performance evaluations for your gig workers.

- Make sure that no one at your company labels themselves as the workers' boss or supervisor.
- If possible, permit your workers to negotiate their own rate of pay.
- To the extent you include a right of termination of services in your agreement, make sure it is mutual.
- Further, it will be to your benefit if your right to terminate is not "powerful." The more your workers have to make large financial and time commitments to perform work for your company (investing in necessary equipment, for example), the more likely than a court will find them to be employees.

Distinct Business Or Occupation

- Retain workers, to the extent possible, who have their own distinct business or occupation performing the services that you are offering.

Direction And Supervision

- Do not create "supervisors" for your gig workers.
- Your workers should not "report" to anyone at your company.
- In fact, if possible, it's best if they never meet with anyone from your company in person.

Skill In Performing Services

- It is best if special skills are needed to perform the work that you contract for.

Provision Of Tools And Equipment

- Require your workers to provide their own tools and equipment (smartphone, delivery vehicle, etc.).
- Do not require any specific tools to get the job done.
- Do not assist your workers by financing the purchase of such tools.

Length Of Time For Performance Of Services

- Permit your workers to stop working at any time they choose.
- In fact, it would be to your benefit to have a short-term agreement in place for the workers (60 days, for example), even if it automatically renews.
- Include a provision in your contractual agreement that classifies each block of work or each gig as a separate contractual engagement, and specifically state that it is NOT an "uninterrupted

service arrangement.”

Method Of Payment

- Pay your workers per gig.
- If possible, permit them the opportunity to collect money per gig using a daily pay app or its equivalent.

Work As Part Of Your Regular Business

- To the extent possible, retain gig workers to perform work that is not a regular part of your business. (Note: we’re all aware that this is often not feasible. Remember, these factors are part of a balancing test, not a list of necessary requirements.)

Parties’ Intent

- Solidify your intent by creating an Independent Contractor Agreement that each worker must sign (or electronically accept) that clearly describes them as contractors and not employees, and that requires your workers to acknowledge.
- Include a provision whereby the worker promises that they will notify you immediately if they change their mind and believe they are employees.

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