Good Step For Gig Companies: Advice Memo From NLRB's General Counsel Concludes That Uber Drivers Are Contractors

Insights
5.14.19

It's been a roller coaster two weeks for gig economy companies. On April 29, the U.S. Department of Labor handed gig economy companies a nice outcome by issuing an opinion letter confirming that typical gig workers are, indeed, independent contractors. Just days later, the 9th Circuit spoiled the party by saying that the California ABC test should be applied retroactively, opening the door for massive potential exposure against companies with a California presence. And on May 9, gig companies felt the second hit from a one-two punch when California's Division of Labor Standards Enforcement issued an opinion letter extending the reach of the ABC test. Today, however, gig companies are feeling the good kind of whiplash after the National Labor Relations Board's General Counsel released an advice memo concluding that a group of Uber drivers are properly classified as independent contractors and shouldn't be permitted to proceed with their labor claims. The advice memo means it is much less likely that a traditional gig economy company, structured in a typical fashion when it comes to workforce operations, will face a valid unionization effort or could be found liable for an unfair labor practice charge.

In picking through the advice memo, there are a few specific positive developments. First and foremost, it uses a flexible legal test to conclude that Uber drivers are contractors and not employees. And since most gig economy companies use the same typical structure used by Uber when it comes to their workforces, the advice letter is a good harbinger for things that might come the way of just about all such companies. The advice memo applies the legal test through "the prism of entrepreneurial opportunity," examining various factors to conclude whether the drivers are more like contractors than employees. And, as just about always happens when these kinds of legal tests are used, the examining body concludes that the factors point toward contractor status. Among the more critical factors, as always:

- The drivers have near-complete control over their schedules and location of work;
- They have the ability to work for the competition if they so choose;
- They use their own car and bear the majority of their expenses;
- There is significant opportunity for profit or loss depending on how the driver chooses to operate that day; and
- The company offers virtually no supervision over the drivers' performance.

Second, the G.C. got to this result by applying the NLRB's January 2019 *SuperShuttle DFW, Inc.* decision to the case at hand. You can read more about this case here, but the upshot is that the flexible legal standard employed in that decision was also used here to answer the misclassification question. There was some doubt about whether the *SuperShuttle* case would extend this far, and we wrote about our concerns in a blog post shortly thereafter (namely, that the business entity in question used a franchise model that is not common in the gig economy world and that the NLRB's decision might have been restricted to such situations). So the fact that the G.C. relied so heavily on *SuperShuttle* is a very positive development.

Third, the advice memo absolutely rebukes Prongs B and C of the ABC test. A quick reminder for those who haven't memorized the factors: two of the elements that a company must prove in order to establish independent contractor status under the ABC test are (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. Although the G.C. acknowledges in the advice memo that there are several factors that point toward employee status in Uber's case, "the strength of the evidence supporting independent contractor status overwhelms those factors." Specifically, the advice memo notes that the G.C. assumes for the sake of argument "that drivers did not work in a distinct occupation or business, but worked as part of the Employer's regular business of transporting passengers." But the advice memo notes that the NLRB has not deemed this to be "a strong or dispositive factor. Indeed, there are a number of decisions in which individuals were held to be independent contractors, even though their services were integral to the business of the company that engaged them, given the extent of entrepreneurial opportunity afforded them." The advice memo concludes by saying that "our assumption that drivers operated as part of Uber's regular business, and not in a distinct business or occupation, [is] of lesser importance in this factual context."

Now for the bad news: this rebuke of the ABC test does very little for gig economy companies operating in states that are controlled by this standard (such as California, Massachusetts, and New Jersey, among others). That's because state law still controls when it comes to wage and hour matters brought under state law. While this advice memo might help when it comes to unionization efforts (and perhaps some unfair labor practice charges), it changes nothing when it comes to wage and hour liability under misclassification challenges. Instead, companies continue to face the uphill battle of having to deal with conflicting sets of laws depending on whether you are looking at state or federal enforcement. It is yet another reason why this industry is in dire need of universal regulation that covers both federal and state law, spanning across the various legal fields that can be applied when it comes to workplace law.

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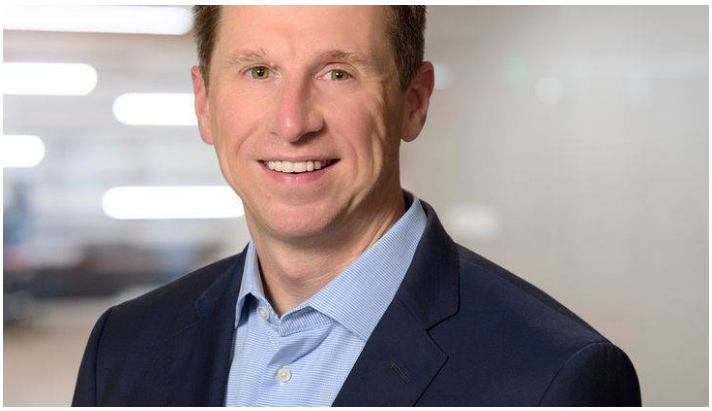

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