"To Arbitrate, or Not to Arbitrate: That is the Question" – A Potential Uber Class/Collective Action Will Proceed in the Eastern District of Pennsylvania.

Insights
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Pennsylvania recently weighed in on the increasing and developing wage violation litigation, albeit from a procedural perspective, involving Uber Technologies, Inc. ("Uber"). On July 21, 2016, United States District Court Judge Michael M. Baylson of the Eastern District of Pennsylvania denied Uber's request to compel arbitration, and Uber's separate request to stay the pending court action.

Plaintiffs are Pennsylvania drivers participating in "UberBLACK," Uber's limousine services division, who brought the action on behalf of a putative class of all persons who provided limousine services through Uber's App in Philadelphia, Pennsylvania. Plaintiffs bring claims under the Fair Labor Standards Act and Pennsylvania's wage laws, the Pennsylvania Minimum Wage Act, and the Pennsylvania Wage Payment and Collection Law.

The Plaintiffs allege that Uber misclassified Plaintiffs as independent contractors when they are actually employees. Plaintiffs also brought a claim for breach of fiduciary duty for Uber's introduction of the UberX platform – a direct (and illegal, as Plaintiffs allege) competitor – into the marketplace. Before answering these questions, however, Judge Baylson was first faced with two procedural questions – whether arbitration should be compelled and whether the court action should be stayed.

By way of background, Plaintiffs and Uber entered into four relevant contracts since June 2014, the most recent of which was on December 11, 2015. The December 11, 2015 revised Technology Services Agreement ("TSA") contained a revised Arbitration provision, which was different than the preceding contract. Section 15.3 of the TSA stated, in relevant part: "Arbitration is not a mandatory condition of your contractual relationship with Uber. If you do not want to be subject to this Arbitration Provision, You may opt out of this Arbitration Provision by notifying Uber . . . ." Plaintiffs, along with approximately 240 other drivers, sent timely opt-out notices to Uber.

Uber argued that Plaintiffs' opt-outs were "nullified" by an Order issued by United States District Court Judge Edward M. Chen on December 23, 2015 in the Northern District of California in three related cases, O'Connor v. Uber Technologies, Inc., No. 13-3826, In Re Uber FCRA Litigation, No. 14-5200, and Yucesoy v. Uber Technologies, Inc., No. 15-262 (collectively, the "Rule 23(d) Order"). The Rule 23(d) Order, which is currently up on appeal in the 9th Circuit, (1) enjoins Uber from sending out arbitration agreements to the class certified in O'Connor; and (2) requires Uber to send out a

revised cover letter and arbitration agreement to putative class members in Yucesoy and In Re Uber FCRA.

Judge Baylson disagreed with Uber and found that the language of the Arbitration provision in the December 2015 TSA "contains a conspicuous opt-out provision, which allows for the resolution of disputes between Drivers and Uber in a court of law." Because Plaintiffs complied with the opt-out procedure, there was no agreement to arbitrate issues of arbitrability.

Uber's second argument relied on Judge Chen's Order rendering the Arbitration Provision a nullity and claimed that the Court must disregard the December 2015 TSA and Driver Addendum in favor of the November 2014 and April 2015 Agreements that contained survival clauses. The Court, in rejecting Uber's arguments, pointed out that the December 2015 Arbitration provision itself contained a merger clause that superseded the original.

Finally, the Court also found that a stay pending appeal of Judge Chen's Rule 23(d) Order is not appropriate.

Overall, the Court found the fact that Plaintiff's specifically and timely opted out of Uber's Arbitration Agreement was an "important factual difference that distinguishes this case from any other and directs the Court to its decision."

As the case progresses past these procedural hurdles, it will be interesting to see how Pennsylvania will weigh in on the "independent contractor v. employee" debate in the growing "gig economy" where business models like Uber are emerging constantly. In the interim, it would be prudent for Pennsylvania employers with business models similar to Uber to review how they classify their workers and determine whether their classification decisions could withstand misclassification challenges.

Service Focus

FCRA and Background Screening