What The $100M Uber Settlement Means To All 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 which challenged 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 on June 20, 2016, and a loss could have cost Uber hundreds of millions of dollars.

On April 21, 2016, Uber announced that it had reached a preliminary agreement with the plaintiffs, filing a 153-page proposed settlement agreement outlining the terms of the deal. On the monetary side, the arrangement will 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 specifically ensure that workers remain classified as independent contractors. Specifically, the deal calls for:

- "For cause" deactivation: Currently, Uber drivers can be removed from service (or "deactivated") for just about any reason, including receiving low scores from riders. Under the agreement, Uber will need to demonstrate "sufficient cause" to release its drivers from service, and will need to provide a written explanation to the drivers. A low acceptance rate will not satisfy the standard, but reasons involving safety, fraud, discrimination, and illegal conduct will.

- Appeals process and arbitration: If a driver believes that the deactivation is improper, the settlement agreement permits an appeals process overseen by fellow drivers. If not satisfied, the driver can initiate an arbitration proceeding that Uber will pay for.

- Driver Association: Drivers will now be able to elect local leaders who will meet with Uber management at least quarterly to dialogue about any number of issues impacting the workforce. This Association will not be a union and will not have the right to collectively bargain for employment rights or pay. Although the National Labor Relations Board might not approve of this arrangement and claim it violates the Labor Act's prohibition on meet-and-confer associations, Uber can point out that the drivers are independent contractors who cannot use the NLRA as a weapon against them.

- Tips: The agreement will ensure that drivers have the opportunity to collect tips from riders. While Uber users will still be told that tipping is neither expected nor required, customers will also be told that tips are not included in payments and drivers will be able to put up signs or otherwise request tips from riders.

The deal must be approved by the federal court in order to be finalized, and the court is currently reviewing the agreement to ensure fairness to all involved. 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. While employing some variation of these same types of non-monetary provisions with your workforce may not prevent a lawsuit from landing in your inbox, they may go a long way towards demonstrating to your workers that you want to cater to some of their wishes, which could forestall legal action before it even emerges.

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 take a square peg and jamming it into either 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.

What Does This Deal Mean For All Other Employers?

For traditional businesses not in 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:

- Is the worker in business for himself? If yes, he is probably an independent contractor.
- Is the worker economically dependent on the employer? If yes, he is probably an employee.

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:

1. Be proactive and review your working relationships now before they are subject to challenge. Evaluate the risk with each of them and adjust as necessary.
2. Review your third-party outsourced services to determine whether, under the USDOL's economic realities test, these workers actually count as employees.
3. Modify contracts as appropriate, 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 a blockbuster settlement agreement.

If you have any questions about this case or how they may affect your business, please contact your Fisher Phillips attorney.

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Related People

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

John M. Polson
Chairman & Managing Partner
949.798.2130
Email

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