



Another Misclassification Win For Gig Economy Businesses

PENNSYLVANIA FEDERAL COURT FINDS UBERBLACK DRIVERS ARE CONTRACTORS

Insights

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In another victory for gig economy companies reliant upon the independent contractor business model, a Pennsylvania federal court ruled yesterday that a collection of UberBLACK drivers were properly classified as contractors and could not maintain wage and hour claims against the ride-sharing company. Here are the top 10 things you can glean from the *Razak v. Uber Technologies* decision.

1. 1. 1. 1. **This was a matter of first impression.**

The very first sentence of Judge Michael Baylson's 38-page decision says it all: "This case is the first to grant summary judgment on the question of whether drivers for UberBLACK are employees or independent contractors within the meaning of the Fair Labor Standards Act ("FLSA") and similar Pennsylvania state laws." The case involves a very common fact pattern: a group of workers operating as independent contractors filed suit against the business in hopes of being found to have been misclassified, seeking to collect minimum wage and overtime under federal and state wage and hour law.

But with the Eastern District of Pennsylvania court ruling against them, Pennsylvania now joins the ranks of states like California and Florida that have determined Uber drivers are properly classified as contractors. (For those unfamiliar with the service, UberBLACK provides luxury and limousine-type rides for users through the standard Uber app.)

2. **Uber got a boost from the recent Grubhub trial victory.**

A few months ago, in what was believed to be the first time in our nation's history that a trial court reached a judicial merits determination in a gig economy misclassification case, a federal judge in California ruled in favor of Grubhub by concluding one of its delivery drivers was properly classified as an independent contractor. At that time of that decision, many were wondering whether it would have a positive impact on cases in other jurisdictions. We now have our answer.

The judge said that the *Grubhub* decision was “clearly relevant” to his own analysis, and noted that, even when the burden is on the business to prove independent contractor status (as opposed to this case where the burden was on the drivers to prove employee status), a ruling in favor of the business was proper. It’s worth noting that Judge Baylson also took positive note of a 2nd Circuit Court of Appeals decision from last year where a group of car service drivers were held to be contractors, demonstrating that each win for gig businesses is an incremental victory in the larger misclassification fight across the country.

3. Uber did not have a “right to control” drivers to render them employees

The first factor just about any court will look to in determining whether a gig worker is an employee or a contractor is whether the business has a “right to control” the workers. This case was no different. The judge noted that controlling law in Pennsylvania requires a court to examine a six-factor test when making a misclassification determination, and the right to control is the first factor examined.

The “leading indicator” in determining whether a “right to control” exists, the judge noted, was whether the drivers are permitted to work for competing companies. In this case, as in most gig economy situations, the Uber drivers could work for competitors. Other factors the court considered included the specific language in the contractor agreement; the fact that drivers determined when, where, and for how long they would use the app to solicit business; that they didn’t need to use any sort of logo on their cars or wear a particular uniform; and that they could hire subcontractors to do the work if they wanted. The court thus concluded that this factor “weighs heavily in favor of independent contractor status.”

4. Safety-oriented driving restrictions did not transform the drivers into employees.

The drivers contended that several specific factors demonstrated a degree of control which should have led them to be considered employees. First, Uber logs drivers off for a period of six hours if they reach a 12-hour driving limit. Second, the drivers presented evidence that a specific driver was deactivated from the app following a DUI conviction. But both situations, the judge noted, demonstrated a restriction that was “generally geared towards ensuring safety and quality control,” and suggested “a sense of responsibility for the safety of passengers.” For these reasons, he did not consider either of them to tip the scales in the drivers’ favor.

5. The judge used a common-sense example to demonstrate a key distinction between contractors and employees.

The drivers also pointed to other ways in which they believed Uber “controlled” them in the performance of their services: for example, they could be deactivated for

in the performance of their services. For example, they could be deactivated for canceling trips, they were subject to a background check policy that might lead them to be deactivated, they needed to maintain a 4.7-star driving rating to continue driving, and they were not permitted to solicit payments or tips outside of the app. But the judge said that just because Uber exercised “some” control over the drivers did not convert them into employees, especially because this control occurred during the performance of the work itself and when the drivers were logged onto the app.

“The court likens this situation to a carpenter, or a plumber, who is engaged to complete a renovation project for a homeowner,” the judge wrote. “Very often, the exact date and time that the plumber/carpenter will come to the home is negotiated, but if the contractor is late or cancels, there is little the homeowner can do. The homeowner may impose certain requirements while the carpenter/plumber is in the house, such as not permitting certain fumes, footwear, music, or other conditions—but all of these conditions apply only while the carpenter/plumber is in the home—and they certainly do not suffice to conclude that the carpenter/plumber is an employee.”

6. The drivers had a sufficient opportunity for profit or loss.

The second factor the judge looked to was the ability of the drivers to affect their opportunity for profit or loss depending on their own managerial skill. The drivers argued that this factor should fall in their favor because Uber retained the ultimate right to determine how much to charge passengers. But the judge rejected this argument, noting that this factor does not require them to be “solely in control of their profits or losses.”

Instead, the court looked to the fact that the drivers could work as much or as little as they wanted, which greatly impacted their ability for profit or loss. They could also choose to work during “high times” of the day, week, month, or year and capitalize on Uber’s surge pricing model. Ultimately, the court said this factor also “strongly favors” a conclusion that the drivers were contractors.

7. The drivers sufficiently invested in equipment and materials.

The third factor examined by the court was the extent to which the drivers invested in equipment or materials required to perform their work. Again, the judge noted that this factor “strongly favored” a finding of contractor status. The major investment the drivers needed to make to be drivers is, of course, an expensive vehicle, not to mention insurance, oil changes and repairs, towing expenses, maintenance, car washes, and gas—all of which must be borne by the drivers.

8. The business relationship was not deemed permanent.

The next factor examined is the degree of permanence of the working relationship between company and driver. The drivers felt good about winning this aspect of the

legal test, pointing out how they had driven for Uber for years and could demonstrate having worked many hours per week for the company. But the court ruled in Uber's favor on this factor, too. "This fact," the judge said, "reflects the drivers' choices rather than Uber's necessity." Because the drivers could work as little or as much as they want, deemed to be "the hallmark of a lack of relationship permanence," the court concluded this factor weighed "heavily" of favor of contractor status.

9. The two factors that fell in the drivers' favor did not sufficiently sway the judge.

It is worth point out at this point that courts generally do not examine these multi-factor tests with mathematical rigor, handing a victory to whichever party has more factors that fall in their favor. The court noted that these factors need to be examined in light of the circumstances of the whole activity, and that just as no single factor is dispositive, neither is having a certain number of points in your particular column.

In this case, two of the six factors came down on the side of the drivers. The court agreed that the service rendered –driving—does not require a special skill. And it also concluded that the service rendered is an integral part of the company's business. After all, the court said, "Uber simply would not be a viable business entity without its drivers," meaning they were an essential part of the company's business as a transportation company. But these two conclusions did not alter the court's overall determination that, when examined as a whole, the drivers did not meet their burden of proving they were misclassified.

10. The judge suggested a "new" relationship status might be in order.

Echoing the same refrain that many gig economy observers have noted in the past several years, the judge noted that the gig economy has created "novel" business relationships that "did not exist at all ten years ago." In pointing this out, he highlighted the fact that he had been called upon to examine and rule upon business relationships formed through the use of smartphone apps by applying a law written in 1938. "With time," he posited, "these businesses may give rise to new conceptions of employment status."

Conclusion

2018 has seen several key victories by gig economy companies when it comes to the misclassification battle, and yesterday's decision is another step in the right direction. Companies that offer gig services through independent contractors should feel heartened by this ruling, and should work with their counsel to ensure they are utilizing contractor services in a manner that maximizes the chance of winning any misclassification fight that lands on their doorstep.

For more information on how this decision could impact your business, contact your regular Fisher Phillips attorney or any member of our [Gig Economy Practice Group](#).

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