

## Uber Hits a Speed Bump in California: Labor Commissioner Rules Driver is an Employee

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*In a decision that may signal a more stringent application of the test for determining independent contractor status and pose a threat to Uber's business model and the larger sharing economy, the California Labor Commissioner ruled in *Uber Techs., Inc. v. Berwick*, Labor Comm'n Case No. 11-46739 EK (June 3, 2015), Super. Ct. Case No. CGC-15-546378, that an Uber driver is an employee of Uber, not an independent contractor.*

On June 16, 2015, smartphone-based ride hailing service Uber Technologies, Inc. appealed a June 3, 2015 order by the California Labor Commissioner holding that former Uber driver Barbara Ann Berwick was an Uber employee rather than an independent contractor. The Labor Commissioner ordered Uber to reimburse Berwick \$4,152.20 in business expenses she incurred in fuel and tolls during the eight weeks she worked as an Uber driver. While this amount may seem like pennies to a company valued at more than \$40 billion, the ruling poses a threat to Uber's business model and that of many technology startups in the burgeoning sharing economy, which rely heavily on workers being classified as independent contractors.

Uber has long identified itself as a technological platform—a smartphone application used by independent vehicle drivers and passengers to facilitate private transactions. It has argued that it exerts no control over its drivers' hours and drivers are not required to complete a minimum number of trips. Uber's drivers have the freedom and flexibility to use their own vehicles if and when they want, are responsible for maintaining and fueling their own vehicles, and are free to make a living from multiple sources. Uber has always classified its drivers as independent contractors, thus avoiding the costs of complying with statutory and other protections provided to employees.

### **The Berwick Decision**

The California Labor Commissioner disagreed with Uber, ruling that Berwick was Uber's employee, not an independent contractor. In making her determination, the hearing officer applied the test for independent contractor status established by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341 (1989). The *Borello* test considers factors such as:

- Whether the person performing services is engaged in an occupation or business distinct from that of the principal;

- Whether or not the work is a part of the regular business of the principal or alleged employer;
- Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
- The alleged employer's investment in the equipment or other materials required by his or her task of his or her employment of helpers;
- Whether the service rendered requires a special skill;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job; and
- Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question but is not determinative since this is a question of law based on objective tests.

The hearing officer noted that although Uber exercised very little control over Berwick's activities, it was not necessary under *Borello* that the principal exercise *complete* control over a worker's activities in order for the worker to be an employee—the principal need only exercise *necessary* control. The hearing officer held that by obtaining the passengers in need of the ride service and providing the drivers to conduct the service, Uber retained all necessary control over the operation as a whole.

The hearing officer gave little weight to the fact that Berwick made her own hours, used her own vehicle to transport passengers, and paid for her own fuel and vehicle maintenance. Rather, the hearing officer held that employment should be found when the work being done is an integral part of the regular business of the employer and when the worker, relative to the employer, does not furnish an independent business or professional service. The hearing officer then determined that Berwick's work was integral to Uber's business because Uber was in business to provide transportation services to passengers and Berwick did the actual transporting of the passengers. Without drivers such as Berwick, the hearing officer reasoned, Uber's business would not exist.

The hearing officer also determined that although Uber held itself out as nothing more than a neutral technological platform, it was involved in "every aspect" of the operation—from vetting prospective drivers who must provide personal information and pass background and DMV checks, to controlling the tools drivers use by requiring drivers to register their vehicles, which must be no more than ten years old. Uber provides its drivers with the smartphone app that is essential to the performance of the work, and only approved drivers are permitted to use it. Uber also monitors drivers' approval ratings and terminates their access to the application if their ratings fall below a certain level or they are inactive for more than 180 days. In addition, drivers are discouraged from accepting tips and cannot negotiate their own fees.

## Potential to Set Precedent

The Commissioner's ruling applies only to Berwick rather than Uber's entire workforce, and is non-binding on other factfinders who may determine similar cases. In fact, the decision is contrary to an August 2012 decision, *Alatraqchi v. Uber Techs., Inc.*, Case No. 11-42020 CT (Aug. 1, 2012), in which a different hearing officer for the same Labor Commission determined that Uber is a technology company, not a transportation provider, and that the service the driver provided was not part of Uber's business. The hearing officer in that case noted that the driver set his own hours, controlled the manner in which he completed the job, did not have his work supervised or directed by Uber, provided services for others, and was only paid when he submitted an invoice. Uber's attorneys have stated that similar findings have been made by labor commissions in Georgia, Pennsylvania, Colorado, Texas and Illinois.

Although these decisions do not set precedent, Uber's appeal of the ruling to the California state court positions it to do so, especially if the case makes it to the appellate or Supreme Court level. The ruling may also have implications in other litigation, including closely-watched federal wage-and-hour putative class actions currently pending against Uber and its competitor, Lyft, Inc., in the Northern District of California. See *O'Connor v. Uber Techs., Inc.*, Case No. 13-cv-03826 and *Cotter v. Lyft, Inc.*, Case No. 13-cv-04065. The drivers in those cases claim they were misclassified as independent contractors and are entitled to minimum wage, overtime pay, and expense reimbursement. These cases may also set precedent and pose a danger for Uber and similar companies. In fact, the federal judge in the Uber class action held in his opinion denying Uber's summary judgment motion that the Labor Commissioner's finding in the *Alatraqchi* decision that Uber was engaged in the technology and not the transportation industry was "plainly wrong" and stated that the Court owed no deference to the officer's conclusion. The *Berwick* ruling could continue to push the scales in the drivers' favor, although it could also give rise to arguments that each driver's case turns on its individual merits, and thus the split in decisions by the Labor Commissioner may be used to argue against class certification. If the *O'Connor* class is certified and successful, Uber will not only face substantial liability, but will need to significantly change its business model, at least in California.

## Effect on the "Sharing Economy"

If widely adopted, the reasoning in the *Berwick* decision would affect many other businesses in the rapidly growing "sharing economy." Such companies have a similar business model to Uber that depends on independent contractors to provide driving, delivery, cleaning, shopping, or other services to consumers through an app or other virtual marketplace. The companies connect the service provider with the consumer and typically give the service provider the freedom and flexibility to use their own possessions at a time of their choosing. If these businesses are required to reclassify their independent contractors as employees, they will face significantly higher costs. The law will require that they pay minimum wage, overtime, payroll taxes, workers compensation, unemployment benefits, and business expenses for each and every employee.

## Implications for Businesses Everywhere

The *Berwick* decision may even have implications for businesses outside the sharing economy, because it creates a more stringent application of the test for determining employee status. Historically, the test turned primarily on how much control was exerted over the work by the entity for which the workers were providing services. In 2014 the California Supreme Court in *Ayala v. Antelope Valley*, 59 Cal. 4th 522 (2014) further clarified that the control test for determining employee status turns foremost on the degree of a hirer's *right* to control how the end result is achieved; not simply the control actually exercised by the hirer. *Ayala* reflects an expansive view of the control test.

But the *Berwick* decision did not address *Ayala*; instead it focused on Berwick's work being an integral part of Uber's business and all the ways in which Uber was involved in the operation. This is the standard set forth in *Borello*, which held that while the right to control work details is the most significant consideration in

determining employee status, there are several secondary indicia of an employment relationship. These were outlined in *Berwick* and are described above. After *Borello*, economic dependence became a more prominent factor when determining employment status vis-à-vis California statutes which protect worker's interests. As suggested by the differing Labor Commissioner decisions, the economic dependence of an individual Uber driver on Uber can vary. In theory, many of Uber's drivers are individuals with a vehicle and some free time, and choose to use Uber to make extra money in addition to their primary employment; other drivers may rely on Uber as a primary source of income and may be economically dependent on the company. Thus, a court may find that employee/independent contractor status turns on the individual circumstances of the driver.

The *Berwick* decision is part of a growing trend of court and agency decisions that make clear that giving a worker the freedom to determine how he or she will complete an assignment and when he or she will do so may not be enough to confer independent contractor status, even with the express agreement of the worker. Nor is it enough to allow workers to use their own equipment and provide no on-site supervision. Rather, *Berwick* shows that a court or agency is likely to drill down to see whether the worker is integral to the business and how involved the company is in the operation.

Companies choosing to classify workers who are integral to their workplace as independent contractors may thus find themselves between a rock and a hard place—they have given up much control and oversight over workers, but they are deemed employers and must contend with the numerous requirements and expenses the law imposes on employers. They may give workers the freedom to use their own possessions (such as personal computer equipment) in the performance of their duties and give up the right to monitor the use of that equipment, but find that they must reimburse the workers for the costs incurred in using that equipment. They may give the workers the freedom to decide how many hours to work and when to work, but find that they must pay the workers for overtime. The world post-*Berwick* is dangerous and unpredictable for companies that rely on independent contractors.

### Advice for Businesses that Rely on Independent Contractors

The *Berwick* decision is also likely to encourage plaintiff's lawyers to file more lawsuits on this issue and to factor it into their settlement valuations. Companies relying on independent contractors should consider whether their business model exposes them to similar litigation. They should evaluate not only the control they exercise over their workforce and the details of the work, but whether the workers are economically dependent on and integral to the business. Is the worker necessary for the business to function? Does the worker provide services to other businesses? How much control does the Company retain the right to exercise even if it rarely exercises this right? Can the company terminate a worker from using its platform? Does it set the rate for services? Does it provide the tools necessary to perform the work? Must the worker follow certain protocols? The answers to these questions are important, as *Berwick* may be part in a growing trend in which the test for independent contractor status is based more on the company's involvement in business operations and the existence of economic co-dependence, as well as more tangential assertions of control, than has been determinative in the past.

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