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Fitting a Square Peg Into Two Round Holes – Redefining the Employment Classification for Your Uber or Lyft Driver?

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Ride-sharing companies like Uber and Lyft have disrupted (and likely forever changed) the transportation industry. Now the sharing economy business model with on demand labor is challenging well-established labor and employment laws.

The Uber and Lyft business models (and exponential ascension) depend (and capitalize) on classifying drivers as independent contractors. Drivers can drive for both companies, part time, full-time, or as a side job. If they drive for Uber or Lyft, they do so without employee benefits. The ride-sharing companies use independent contractor agreements and issue 1099 tax forms to their drivers.

Two federal cases are pending in the United States District Court for the Northern District of California: *Douglas O'Connor, et al. v. Uber Technologies*, Inc. before Judge Edward Chen ("Uber Court") and *Patrick Cotter, et al. v. Lyft, Inc.* before Judge Vince Chhabria ("Lyft Court"). The cases involve current and former Uber and Lyft drivers ("Uber Plaintiffs" and "Lyft Plaintiffs") who sued claiming misclassification as independent contractors, not employees, and violations of the California Labor Code. The Lyft Plaintiffs filed a Motion for Summary Judgment. Lyft and Uber each filed a Motion for Summary Judgment. All motions concerned the issue of employment classification.

Are Uber and Lyft Merely Technology "Platforms"? – Are Drivers Just Consumers?

On summary judgment, Uber and Lyft argued the issue is moot because they are platform technology companies only. The Uber Court responded, "it strains credulity to argue that Uber is not a 'transportation company' or otherwise is not in the transportation business." The Lyft Court rejected the argument as "not a serious one."

Riders, the vast and growing user groups of these companies, would likely agree these companies are more than platforms. When selecting a car service, Riders choose Uber or Lyft based on the usability of the app, the types and availability of drivers, cost, and the overall ease of use and process. Riders associate the services provided by the Drivers with the ride-sharing companies and expect to be connected with an Uber or a Lyft, not a third-party Driver.

Moreover, lawsuits against Drivers for auto accidents have also named Uber and/or Lyft under a principal-agent, partnership, and/or employer-employee theory.

Are Drivers Independent Contractors or Employees?

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 342 ("*Borello*"), the California Supreme Court established a multi-factor test to determine classification of workers as employees or independent contractors, a test the Uber and Lyft Courts referred to as "outmoded" for Uber and Lyft.

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Does Uber or Lyft Have the Right to Control the Drivers?

The principal question under *Borello* is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the results desired." Uber argued it can only terminate drivers with notice or upon the Driver's material breach of governing contracts. Uber further argued, as did Lyft, they have no right to control Drivers because Drivers can work as little or as much as they like, never have to accept rides, and control their driving routes. Plaintiffs argued Uber and Lyft are constantly monitoring activity and the rating system, ensuring Drivers do not fall below their standards.

The Lyft Court could decide the issue as a matter of law because the most important factor, the right of control, "tends to cut the other way." Lyft retains a large amount of control of Drivers, by issuing "Rules of the Road", retaining the right to penalize Drivers for poor performance, and retaining the right to discharge Drivers without cause. The Lyft Court held the secondary factors cut both ways and the issue should go to a jury.

The Uber Court found the principal question of whether Uber retained the right to control the manner and means of Plaintiffs' services was "hotly disputed." Because the Uber Court found disputed material facts, it did not examine the secondary factors under *Borello*.

In both cases, the secondary indicia and parties' presentation of facts and argument, discussed below, will be a large focus for the jury in deciding the issue.

1. Whether the one performing services is engaged in a distinct occupation or business

Uber and Lyft argued they were in a non-exclusive relationship with the Plaintiffs because they allow Drivers to work with competing businesses and seek referrals from other sources. The companies argued the Drivers were in a distinct occupation or business, because employees have a duty of loyalty not to engage in competing business.

Plaintiffs argued Drivers are the sole basis for business. The Uber Plaintiffs argued while Uber claims it allows Drivers to work for competitors, it actively tries to lure Drivers away from competitors. Plaintiffs argue Uber and Lyft prohibit Drivers from soliciting business from Riders.

The Courts did not specifically weigh in on this issue.

2. Whether the work is usually done under the direction of the principal or by a specialist without supervision

The Lyft Plaintiffs argued because Drivers are being constantly monitored by Lyft, their work is under supervision and at Lyft's direction. The Uber Plaintiffs focused on whether Drivers are "specialists" and claimed Drivers are not as they only need to have a driver's licenses, pass a background test, and sign a work agreement.

Uber and Lyft argued the Drivers had no supervision because they set their hours and locations, and determine whether to accept fares. Insofar as Plaintiffs contend the star rating system constituted supervision, Uber argued imposing quality standards does not undermine the independent contractor relationship, and Lyft argued the ratings were given exclusively by Riders.

The Uber Court noted this type of driving is "typically done in the field without close supervision."

3. The skill required in the particular occupation

A finding of specialized skill typically favors a classification of independent contractor. Lyft did not address this argument head-on and Uber argued

driving required a specialized skill. Plaintiffs argued no special skill is required to drive a car, other than the ability to obtain a standard driver's license. The Lyft Court and the Uber Court both appeared to agree with the Plaintiffs that driving a car does not require a special skill.

4. Whether the principal or worker supplies the instrumentalities, tools, and the place of work

Uber provides Drivers with cell phones and a magnetic "U" light to place on the front windshield of the car. Lyft provides Drivers with cell phone chargers and holders, and a pink mustache. Neither company directly provides Drivers with a vehicle or any other equipment.

Plaintiffs contended the application technology provided by Uber and Lyft is necessary to perform their work. Uber and Lyft also provide Drivers with some insurance and the company's identifying symbol (i.e., the "U" symbol for Uber and a car-stache for Lyft). A likely argument the Uber Plaintiffs will make at trial is that Uber assists in providing the vehicle, by establishing partnerships with dealerships for discounts and financing. Uber plays a larger role than providing a connection as it also allows the car payments to be automatically deducted from a Driver's weekly earnings.

The Lyft Court found this to be an equivocal factor because while the car is provided by Drivers, it is not a significant investment as it can also be personally used. The Uber Court discussed drivers providing their own cars as a factor supporting an independent contractor classification.

5. The length of time for which the services are to be performed

Both Uber and Lyft acknowledged the relationship with Plaintiffs was for an indefinite period of time. Lyft argued either party could terminate, which does not support a finding of employer-employee relationship. Uber argued the work is performed and compensated on a job-by-job basis, the contracts contain a mutual termination clause, and Drivers have no obligation to log in to the app or accept any trip request. Uber argued these facts support a finding of independent contractor status, or at least are neutral.

Plaintiffs argued their work performed for the respective companies was for an indefinite period of time and they are not hired to perform a discrete task, as are typical independent contractors.

The Courts did not specifically weigh in on this issue.

6. The method of payment, whether by the time or by the job

Uber and Lyft both argued the method of payment, by the job, supported a finding of an independent contractor relationship.

Plaintiffs argued they are paid on a weekly basis at a non-negotiable rate, calculated by formulas created by Uber and Lyft.

The Lyft Court found this factor to be equivocal in that Drivers are paid by the ride, but have no ability to negotiate rates.

7. Whether the work is part of the regular business of the principal

Uber argued its principal business involved "developing mobile lead generation and payment processing software." Lyft made a similar argument, claiming it is a "technology company that operates a mobile application-based platform that facilitates transactions between third parties offering rides and individuals seeking rides."

Plaintiffs in both cases argued Uber and Lyft would not be in business without Drivers and therefore their work is a regular part of Uber and Lyft's businesses.

The Lyft Court agreed with the Plaintiffs on this issue, stating "Lyft could not exist without its drivers," and noting that the Riders are Lyft's customers, not the Drivers' customers. The Uber Court also agreed a jury could find that Drivers perform a regular and integral part of Uber's business.

8. Whether the parties believe they are creating the relationship of employer-employee

The Plaintiffs in both cases entered into an agreement stating their intent to enter into an independent contractor relationship. Uber and Lyft argue these contracts demonstrate Plaintiffs' belief they were independent contractors.

Plaintiffs argue the label used is not dispositive because the actual conduct by the parties belied the belief that Drivers are independent contractors.

Both Judges seem to agree the parties believed they were entering into an independent contractor relationship based on the parties' signed agreements.

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What Will Be the Impact of a Jury Trial (or Two)?

Analyzing the parties' arguments, there is no easy answer as to Drivers' classification. The Courts denied all motions for summary judgment and both cases are now proceeding to separate jury trials on the same issue, which leaves open the possibility for inconsistent jury verdicts. This would likely lead to an appeal and for the interim, there would be no clear directive or precedent for other sharing economy, on demand businesses, some of which are involved in similar employment classification litigation.

Lawmakers could also view these cases as a call for legislation if the cases settle before jury verdict. Other sharing economy issues gave rise to California AB2293 (insurance requirements for transportation network companies) and the recent amendments to San Francisco's Administrative and Planning Codes (allowing certain short-term rentals). The issue would arise, though, as to whether any proposed legislation would cover all sharing economy companies providing other services such as home-cleaning and food delivery, or just those providing ride-sharing services.

The question of classification might otherwise end up before the California Supreme Court, which could create a new (or updated) framework to analyze classification of workers that takes into account the modern collaborative consumption, on demand economy.

As it stands, even if one or both juries reach a verdict, the framework used to determine classification will remain outmoded in today's sharing economy. The Lyft Court compares the jury's decision in the Lyft case to trying to fit a square peg into one of two round holes – neither option truly fits the circumstances.