

(BN) Uber Case Spotlights a Challenge: When Is a Worker an Employee?

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By Jim Snyder

(Bloomberg) -- Regulators from California to Washington are trying to determine when a worker is an employee in an economy that increasingly relies on contractors and temporary hires.

The debate holds big financial consequences for companies including start-ups like Uber Technologies Inc., the San Francisco-based developer of ride-sharing software for drivers and passengers, as well as traditional businesses that perform construction, trucking and cleaning services.

Companies using contractors don't have to pay a minimum wage, reimburse expenses or contribute to Social Security. Employees, but not contractors, can form labor unions.

"This is a stealth issue; technical on the surface, but with tremendous underlying importance," said Gary Chaison, a professor of industrial relations at Clark University in Worcester, Massachusetts. "This is about classifying workers as full participants in the workforce and capable of being unionized."

Last week, California's labor commissioner ruled an Uber driver was an employee, ordering the company to reimburse her expenses. Federal labor attorneys in Boston and Chicago are reviewing a complaint brought by a driver for Uber competitor Lyft Inc. who is trying to organize a union. The U.S. Labor Department is preparing new guidance on the subject, and is spending more time investigating companies that may be misclassifying workers to avoid having to pay minimum wage or meet federal workplace standards.

On Demand

The developing "on demand" economy, which links workers -

- drivers and cleaners, for example -- directly with customers, is creating new challenges for regulators. But classification issues are broader and, analysts say, increasing as the nature of work shifts away from permanent jobs that last a career.

“It’s going to impact not just independent contractors and sharing economy stuff, but a whole range of employment relationships,” said Alexander Passantino, a partner at Seyfarth Shaw in Washington. “There are some businesses whose whole business model may be called into question.”

If upheld in court, the California labor commission ruling against Uber could lead more drivers to seek reimbursement for gasoline and other expenses, a direct challenge to its business model.

Uber spokeswoman Jessica Santillo said the decision contradicts rulings in five other states that concluded that drivers were independent contractors.

“The majority of them can and do choose to earn their living from multiple sources, including other ride sharing companies,” Santillo said in an e-mail.

### Contingent Workers

In addition, Uber and Lyft face federal lawsuits that contend their drivers should have legal protections afforded employees.

The ranks of contingent workers, including the self-employed, temporary hires and independent contractors, swelled to 40 percent of the workforce in 2010, from 31 percent in 2005, the Government Accountability Office, Congress’s investigative arm, said in an April report. Most of the growth came in part-time workers, possibly due to the recession, the report said.

The National Employment Law Project, a New York-based group that advocates for workers, said in a report last year that the 2.8 million temporary workers in the U.S. was a record.

### Labor Investigations

David Weil, who heads the U.S. Labor Department’s wage and hour division, said he’s concerned that the shift is costing workers wages and workplace protections provided to employees.

The agency has stepped up investigations into back pay violations by more than 20 percent since 2009, and has signed cooperation agreements with 21 states as part of a campaign against misclassification.

Weil said he plans to issue a new “administrative interpretation” to provide further guidance to help companies judge who’s an independent contractor and who’s an employee.

“Employment relationships in more and more industries have been broken apart,” said Weil, who as an economics professor at Boston University wrote an influential book on the subject called the “Fissured Workplace.”

In a fissured workplace, workers at a hotel may not be directly employed by the brand name on the door but a subcontractor hired by a staffing agency. Companies can reduce costs as much as 30 percent by using contractors instead of employees, Weil said.

### Reduce Costs

“As each business takes its cut, things like pensions and other benefits fall out,” said Rebecca Smith, deputy director of the employment law project.

The employer-versus-independent contractor question also is arising in labor disputes.

Attorneys with the National Labor Relations Board’s regional offices in Chicago and Boston are looking into a complaint by a driver at Lyft who is trying to organize a union at the company.

As a first step, board investigators will have to determine if the driver is an employee and therefore eligible to organize under labor law.

Shannon Liss-Riordan, an partner at Lichten & Liss-Riordan, P.C. in Boston, is representing the Lyft worker. She also represents Uber drivers in California. Liss-Riordan didn’t return a call for comment.

### ‘Not Employees’

“Lyft drivers are not employees,” said Chelsea Wilson, a Lyft spokeswoman, in an e-mailed statement. “They use Lyft, and

other on-demand services, as a flexible and reliable way to make ends meet without having to be stuck in a schedule that doesn't work for them. We hear from drivers that this flexibility is one of the main reasons they choose Lyft."

The NLRB also is reconsidering its definition of an employer. The five-member panel, which investigates worker claims and adjudicates labor disputes, soon may rule on a proposal from its general counsel to rewrite its "joint employer" standard, which could change the responsibility some businesses have over the working conditions and benefits of the contractors and temporary staff.

Business groups are challenging the shift, arguing a new classification would raise costs and slow expansion in a growing segment of the economy.

"Upending the current, well-established, joint employer standard would cause uncertainty and disruption for many small business owners, force some small businesses to close and deter aspiring entrepreneurs from opening businesses and creating new jobs," said Matthew Haller, a spokesman for the International Franchise Association, which opposes the proposed revision to the NLRB's joint employer standard.

The issues over classification are "much more visible, much more complicated and much more significant in many ways," due to the shifting nature of the workforce, Wilma Liebman, a former chairwoman of the National Labor Relations Board, said in an interview.

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