Labor Commissioner's Uber Decision: A Reminder of Misclassification Dangers

MSK Alert by Jolene Konnersman and Grant Goeckner-Zoeller
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On June 3, 2015, the California Labor Commissioner ruled that a San Francisco-based driver for the popular ride coordination service Uber Technologies, Inc. ("Uber"), was an employee rather than an independent contractor. This decision is representative of the growing incidence of independent contractor misclassification litigation in California. Misclassification litigation can be potentially costly because if a company is found to have misclassified an employee as an independent contractor, it is required to retroactively comply with various provisions of the California Labor Code, and might also be subject to claims for penalties and interest. Companies who contract with independent contractors should consult labor counsel to discuss recent trends and confirm compliance with this developing area of law.

The definitive statement of California Law regarding the distinction between employees and independent contractors comes from the California Supreme Court decision *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). In *Borello*, the Supreme Court set out the following factors to determine whether an individual is an employee or an independent contractor: (1) the "right to control" the manner and means of accomplishing the desired result; (2) whether the person performing services is engaged in an occupation or business, distinct from that of the principal; (3) whether or not the work is a part of the regular business of the principal; (4) whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; (5) the worker's investment in the equipment or materials required for the task; (6) the skill required in the particular occupation; (7) 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; (8) the worker's opportunity for profit or loss depending on his managerial skill; (9) the length of time for which the services are to be performed; (10) the degree of permanence of the working relationship; (11) the method of payment, whether by time or by the job; and (12) whether or not the parties believe they are creating an employer-employee relationship. None of these factors is dispositive, and no exact formula exists for determining employee status.

Uber is a popular ride-coordination service which connects drivers and passengers through the Uber App. As a condition of participating in the service, Uber requires drivers to comply with certain registration, insurance, and vehicle qualifications. Drivers are paid a set fee per ride, subject to a multiplier for rides during peak travel times. In all other matters, the drivers are free to set their own hours, select their vehicles, and reject ride requests received through the App. Drivers can choose to drive only at peak times, or when it is most convenient. Many drivers also accept rides from competitor driver services concurrently with Uber, often accepting a ride from whichever service supplies a ride request first.

Nevertheless, the California Labor Commissioner determined that the driver in question was an employee of Uber. The deputy commissioner focused on the fact that drivers are integral to Uber's business: "Without drivers such as Plaintiff, [Uber's] business would not exist." The deputy commissioner also highlighted the control Uber exercised over the transaction, both in registering drivers and in negotiating fees with passengers. The deputy commissioner also

found that the driver exercised no "managerial" skill over her operations, despite fact that she had complete autonomy over the hours and areas she choose to drive, and further found that other than her ownership of her car, she had no "investment in the business."

On June 16, 2015, Uber appealed the Labor Commissioner's decision to the San Francisco County Superior Court. However, this decision serves as an important reminder of the potential risks faced by companies that use independent contractors to provide services. Given the legal climate in California, companies that do not have properly drafted independent contractor agreements or that cannot establish an independent contractor relationship exists consistent with applicable legal precedents risk potentially significant liability under California law. Accordingly, as misclassification litigation becomes more common, companies should confirm that their independent contractor agreements comply with new developments in the law and assess whether an employment relationship might be a viable alternative.

ASK MSK

Q: How can a company reduce the risk of misclassification liability?

A: There are steps that can be taken to improve a company's arguments with regard to a misclassification claim. For example, the parties can enter into an agreement that expressly provides for an independent contractor relationship, as opposed to an employment relationship, and sets forth terms that are consistent with the legal tests set forth above. However, if the agreement does not accurately reflect the realities of the parties' relationship, it may be disregarded by the court.

Q: Can a company compel arbitration of misclassification claims?

A: Yes, in certain circumstances, an arbitration agreement between a company and a contractor can be enforced, such that misclassification claims would not be heard by California's courts or administrative agencies. However, California and federal law on the subject of arbitration of wage and hour disputes is rapidly evolving and there are limits on the types of claims that may be compelled to arbitration in California. Thus, you should consult with counsel before implementing an arbitration agreement in any independent contractor agreement.