

Is Your Contractor Really Independent?

Labor & Employment Law Update

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Recently, a California labor commissioner found that an Uber driver was an employee and not an independent contractor ("IC"), awarding the driver over \$4,000 in expenses (*Uber Techs., Inc. v. Berwick*, CGC-15-546378 (Cal. Sup. Ct. June 16, 2015)). Similar lawsuits, including class action matters, are being filed around the country. The implications for Uber are huge: unemployment taxes, workers' compensation insurance, minimum wage, overtime, and third-party tort liability to start.

What is so surprising about this ruling is that Uber drivers seem to epitomize the IC relationship. They enter into explicit IC agreements, work when and where they want, accept the fares they want, supply their own vehicle, pay their own gas and maintenance costs, and work for competitors (i.e., Lyft and traditional taxi services). Uber generally requires drivers to complete an application, be safe drivers, and be knowledgeable about the city's geography. Uber processes the fare, deducts its fee, and pays the remainder to the driver.

How did the IC relationship become so complex? Well, the law favors the employer-employee relationship as the default. It ensures workers receive minimum and overtime wages, are covered by workers' compensation and unemployment benefits when the relationship ends. Of course, this also means that the government receives taxes (rather than hope an IC actually pays taxes), and will not become the guarantor of an unemployed or uninsured individual through social welfare programs like Medicaid.

It's not so simple after all. Here are five tips for engaging an Independent Contractor:

- First, consider whether the IC arrangement is really best for your business. For example, if you want a lot of control versus an end product, it may be better to hire employees.
- Second, will you be engaging individuals or companies? Most employment law tests favor the IC arrangement when the two parties are independently established businesses.
- Third, have a good, tailored contract. While not conclusive, contracts are meant to provide black-and-white evidence of the parties' intent (which, by its nature, is drafted when things are going well to protect them for when things go south).

- Fourth, perform an audit of the relationship under the various substantive laws governing your industry (e.g., special rules for construction, trucking, and temporary labor to name a few) before entering into the IC relationship. The key is: would the relationship satisfy an administrative agency's test if an IC complained?
- Finally, seek the advice of counsel to ensure that the four steps above are conducted with an objective eye towards protecting your business now and going forward. While most business deals can be made, upfront review may save costly legal fees in litigation and otherwise.

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