

# Workers for On-Demand Businesses— Employees or Independent Contractors?

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“On-demand” businesses are businesses that provide immediate access to the goods and services customers are demanding. This type of business model is commonly seen with businesses that are based around mobile applications or websites. A customer seeking a service can log in to a mobile application or website and schedule the service at the push of a button. Well-known on-demand companies include Uber, a mobile app that allows customers to order cars for transportation and automatically pay, and the now-closed Homejoy, a website that allowed people to hire workers for home cleaning. On-demand businesses have become so prevalent, a Washington Post writer recently spent an entire week using their services without having to leave home.<sup>1</sup> Of course, with the creation of a new business model came the complicated issue of how to classify the workers of on-demand businesses.

In the last year, the employment law bar has seen an enormous amount of class-action litigation on whether workers of these on-demand businesses are employees or independent contractors. To determine whether a worker is misclassified under federal law, lawyers must look to the Fair Labor Standards Act (FLSA). The FLSA defines an employee as “any individual employed by an employer” and an employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>2</sup> The definition of “employ” under the FLSA also includes “to suffer or permit to work.”<sup>3</sup>

To determine who fits under this broad definition of “employee,” the courts created a multifactor test called the “economic realities test.” The factors are: (1) the extent to which the work performed is an integral part of the employer’s business, (2) the worker’s opportunity for profit or loss depending on his or her managerial skill, (3) the extent of the relative investments of employer and the worker, (4) whether the work performed requires special skills and initiative, (5) the permanency of the relationship, and (6) the nature and degree of control exercised or retained by the employer.<sup>4</sup>

## Issues in Current Litigation

In the current litigation arising from the upsurge in on-demand businesses, plaintiff and defense counsel have been battling over application of the factors in the economic realities test. The biggest factors at issue are control and whether the work performed is an integral part of the business.<sup>5</sup> The most contentious argument being raised by on-demand businesses is that these businesses are software companies merely connecting customers to the services they are seeking. In making this argument, the on-demand businesses are taking the position that the workers who perform their services are not integral to the business and are therefore not employees. On-demand businesses have even tried to position marketing materials and terms-of-service agreements to reflect that they are software companies. For instance, Homejoy stated in its terms of service that it was a “marketplace for connecting people willing to clean homes with those that want their homes cleaned.”<sup>6</sup> This software company issue is still being litigated but on-demand businesses have had little luck so far.<sup>7</sup> In the current class action against Uber Technologies, the court was not persuaded in a motion for summary judgment that these companies merely provide software to connect customers. The court explained that Uber “does not simply sell software; it sells rides” and that “Uber simply would not be a viable business entity without its drivers.”<sup>8</sup>

Another major issue in class actions against on-demand businesses is the amount of control exerted by the company. In many of these cases, plaintiffs argue that the company undertakes an extensive background check and hiring process for their alleged independent contractors.<sup>9</sup> For example, drivers for Uber must pass background checks, interviews, and city knowledge tests.<sup>10</sup> On the other hand, many of these on-demand companies give workers the flexibility to choose when they are working, and workers are paid on the basis of how many jobs they perform. However, some courts have evaluated the control factor not by how much control companies have over working schedules, but rather by how much control a

company has over the worker, when the worker is actually on duty.<sup>11</sup> For instance, courts weighing the control factor have considered what jobs the worker accepts, the pay the worker receives, termination, discipline, and how the companies monitor the work through a ratings system or feedback from customers.

### What Attorneys Should Be Looking For

The most important aspect for both plaintiff and defense attorneys to keep in mind when evaluating a misclassification case is to look at the bigger picture and determine if, in reality, the worker is really an employee or whether he or she is an independent contractor. An important resource to consult is the Department of Labor's (DOL) Administrator's Interpretation No. 2015-1, issued on July 15, 2015.<sup>12</sup> The main focus of this interpretation is that the factors in the economic realities test must be evaluated under the general question of whether the worker is economically dependent on the employer or really in business for herself or himself. The interpretation states that the factors should not be applied mechanically and should not just be totaled up as to whether more factors point toward independent contractor status or employee status. Instead, as the interpretation concludes, "[t]he factors should be used as guides to answer [the] ultimate question of economic dependence."

Another fact that is important for attorneys to note is that the interpretation states that the definition of employee under the FLSA is very expansive, so "most workers are employees under the FLSA."<sup>13</sup> While this standard makes it seem like defense attorneys and general counsel are dead in the water when faced with a classification issue, it is important to remember that the administrative interpretation is not binding on the courts.

### What Evidence Should Attorneys Be Evaluating?

Attorneys on both sides of the classification issue should first look at the worker's contract, which can be important for proving the amount of control the company has over the worker. It should be noted that even if the contract states that the worker is an independent contractor, that fact alone is not decisive. Attorneys should also look to what the contract says about the structure of the business and the job requirements. The existence of a noncompete clause can also be instructive, but not necessarily decisive, and attorneys should consider how restrictive the noncompete clause is, whether it is limited to direct competitors or an entire industry, and whether it also limits the worker's ability to find other jobs during off hours.

Tax filings are another important piece of evidence to evaluate. Many on-demand businesses now require that workers start their own limited liability companies (LLC) in order to get paid. This is done so each worker has his or her own individual business and is not an employee of the company. However, this also does not necessarily eliminate liability on the part of employers. In fact, the DOL recently obtained consent judgments against several Utah and Arizona construction companies that were using an LLC model to misclassify their construction workers as independent contractors.<sup>14</sup>

Finally, attorneys should look carefully at the company's marketing materials and company policies. For instance, Uber's slogan was "Everyone's Private Driver," and it marketed itself as the "Best Transportation Service."<sup>15</sup> Marketing materials like these can cut against on-demand businesses' arguments that they are software companies. Company policies are also important for evaluating how much control a company has over its workers. Key things to look for

are how much the company regulates what the worker does during "work hours" or while on a job, whether the company disciplines its workers for violations of the policies, and whether that company has specific hiring requirements, such as tests.

Misclassification litigation for on-demand businesses is sure to continue, as it is increasingly difficult to fit this new business model into the factors of the "economic realities test." Employer-side attorneys must be vigilant and thoroughly evaluate marketing materials and policies to make sure that they are properly classifying workers. Employee-side attorneys must evaluate every piece of evidence in a holistic way to ensure that the reality of the worker's day-to-day job demonstrates a misclassification. It will be interesting to see how case law and this business model evolve in response to the current onslaught of litigation. ☺

### Endnotes

<sup>1</sup>Lauren Ramanathan, I Spent a Week at Home Ordering Every On-Demand Delivery I Craved. *The Washington Post* (Sept. 23, 2015) [www.washingtonpost.com/lifestyle/i-spent-a-week-at-home-ordering-every-on-demand-delivery-i-craved-this-is-my-story/2015/09/23/b224ba8e-5aee-11e5-9757-e49273f05f65\\_story.html](http://www.washingtonpost.com/lifestyle/i-spent-a-week-at-home-ordering-every-on-demand-delivery-i-craved-this-is-my-story/2015/09/23/b224ba8e-5aee-11e5-9757-e49273f05f65_story.html).

<sup>2</sup>29 U.S.C. § 203(d), (e)(1).

<sup>3</sup>29 U.S.C. § 203(g).

<sup>4</sup>The number of factors and the exact articulation of the factors may vary some, depending on the court. See *United States v. Silk*, 331 U.S. 704, 716 (1947); *Brock v. Superior Car, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); [www.dol.gov/whd/regs/compliance/whdfs13.pdf](http://www.dol.gov/whd/regs/compliance/whdfs13.pdf).

<sup>5</sup>*O'Connor v. Uber Techs., et al.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

<sup>6</sup>Katy Steinmetz, Homejoy, Postmates, and Try Caviar Sued Over Labor Practices, *Time Magazine* (March 19, 2015), [time.com/3751745/postmates-homejoy-try-caviar-lawsuits/](http://time.com/3751745/postmates-homejoy-try-caviar-lawsuits/); Lyda DePillis, At the Uber for Home Cleaning Workers Pay a Price for Convenience, (Sept. 10, 2014), [www.washingtonpost.com/news/storyline/wp/2014/09/10/at-the-uber-for-home-cleaning-workers-pay-a-price-for-convenience/](http://www.washingtonpost.com/news/storyline/wp/2014/09/10/at-the-uber-for-home-cleaning-workers-pay-a-price-for-convenience/).

<sup>7</sup>*Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); *Uber Techs.*, 82 F. Supp. 3d at 1141-42.

<sup>8</sup>*Id.*

<sup>9</sup>*Cotter v. Lyft*, 60 F. Supp. 3d at 1070; *Uber Techs.*, 82 F. Supp. 3d at 1136.

<sup>10</sup>*Uber Techs.*, 82 F. Supp. 3d at 1136; Taylor Soper, Here's the City Knowledge Test Uber Drivers Take in Seattle, (Dec. 7, 2015), <http://www.geekwire.com/2015/heres-city-knowledge-test-uber-drivers-take-seattle/>.

<sup>11</sup>*Id.* at 1152.

<sup>12</sup>Administrator David Weil, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors, U.S. Dep't of Labor, (Administrator's Interpretation No. 2015-1 July 15, 2015), [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf).

<sup>13</sup>*Id.*

<sup>14</sup>U.S. Dep't of Labor, Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified, (15-0519-NAT April 23, 2015), [www.dol.gov/newsroom/releases/whd/whd20150518](http://www.dol.gov/newsroom/releases/whd/whd20150518).

<sup>15</sup>*Uber Techs.*, 82 F. Supp. 3d at 1137; U.S. Trademark No. 85,816,634.