

Keeping an Eye on Uber: Employment Law Risks Using Independent Contractors in the On-Demand Labor Economy and Environment

Ariella Feingold—**Counsel**, WilmerHale

Jonathan Rosenfeld—**Partner**, WilmerHale

 **#WHQuickLaunchU**

Attorney Advertising

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP ©



Agenda

- No Safety in Numbers
- On-Demand Labor – Setting the Stage
- On-Demand Labor – Under Attack
- Freelancer Model
- “As-Needed” Workers
- Misclassification Penalties and Consequences
- We Can Help
- Questions



No Safety in Numbers

Common industry practices \neq valid independent contractor relationship



By Frits Ahlefeldt

- Legal presumption of employment
- Misclassification enforcement is a priority for federal and state agencies



On-Demand Labor – Setting the Stage

□ Business model of many new start-ups is based on two constructs that create a novel and controversial employment law issue:

1. Online Platform

- Digital platform that allows people and entities to connect (e.g., clients with customers, companies with workers, users with drivers, buyers with providers)

2. On-Demand Labor

- Individuals perform services as freelancers (i.e., independent contractors) on an as needed (by the client) and as desired (by the freelancer) basis



On-Demand Labor – Setting the Stage

□ Such companies are in the crosshairs of the dispute about the “On Demand Labor Economy”

➤ Workers do not fit traditional concepts of independent contractors *or* employees





On-Demand Labor – Under Attack

Proliferation of lawsuits and government guidance about whether on-demand workers are independent contractors or employees

On-Demand Companies Facing Misclassification Class Action Lawsuits

- ✓ Handy – Home services and cleaning
- ✓ Lyft – Ride-sharing
- ✓ Instacart – Grocery delivery
- ✓ Postmates – Meal delivery
- ✓ Try Caviar – Independent restaurant delivery

On-Demand Companies Also Facing Individual Benefit Claims (i.e., unemployment insurance)



On-Demand Labor – Under Attack

Factors **Against** Finding Drivers Independent Contractors

- Uber *relies on contractors*
- Uber unilaterally sets rider fares
- Uber prohibits drivers from offering rides outside Uber App
- Drivers must pass background check, inspection, interview
- Uber can terminate drivers at any time
- Uber instructs drivers about how to interact with customers
- Uber requests driver ratings and uses ratings to monitor and discipline/terminate drivers

Factors **Favoring** Finding Drivers Independent Contractors

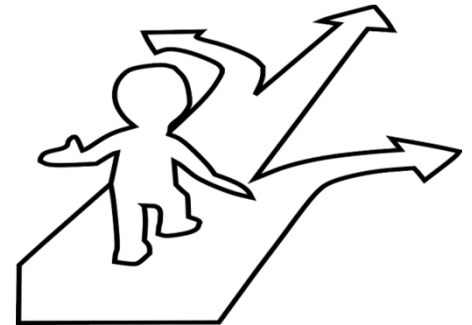
- Drivers may hire subcontractors
- Drivers use own vehicle
(BUT inconsequential for DOL)
- Drivers sign independent contractor agreement
(BUT inconsequential for DOL)
- Drivers can choose days and hours of work
(BUT inconsequential for DOL)
- Drivers' subjective understandings
(BUT inconsequential for DOL and courts)
- Drivers do not need to accept any leads – *disputed*



On-Demand Labor – Under Attack

- **Court Trend**: Leave decision to jury because traditional tests provide no clear answer

- Uber and Lyft CA Class Actions



- **Government Trend**: Classify as employees

- DOL July 2015 Guidance





Freelancer Model

❑ Companies with business models that rely, in whole or in part, on freelancers (e.g., translation company that engages freelancers to translate)

→ Impermissible in Massachusetts

→ VERY risky in other states

(particularly in wake of July 2015 DOL Guidance)





“As-Needed” Workers



- “As-needed” (including temporary, part-time, trial, and initial) workers are NOT independent contractors
- **NO** exception for start-ups

Misclassification Penalties and Consequences

▪ Wages

- Massachusetts: triple damages, interest, attorneys' fees
- California: liquidated (double) damages, fines, attorneys' fees, reimbursements
- New York: liquidated (double) damages, attorneys' fees
- FICA/Social Security/Medicare back taxes
- State and federal payroll and unemployment taxes (and fines)
- Personal injury lawsuits for workplace injuries suffered by misclassified workers
- Workers compensation insurance premiums (and liquidated damages)
- Potential criminal penalties
- Potential *individual* liability
- Potential *class actions*, particularly if using on-demand labor



Misclassification Penalties and Consequences

On-Demand Company Responses to Attacks

- ✓ Homejoy – Home cleaning company closing down after four misclassification lawsuits
- ✓ Luxe – Urban car-parking service converting hundreds of parking attendants to employees
- ✓ Shyp – Company that dispatches workers to collect and mail goods converting to employee model
- ✓ Instacart – Grocery delivery company converting some of its workers to employees



We Can Help



Contact employment law counsel to:

- ✓ Strategize use of freelancers
- ✓ Carefully structure and document freelancer arrangements
- ✓ Render advice prior to engaging new freelancers

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. Our United Kingdom offices are operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at www.sra.org.uk/solicitors/code-of-conduct.page. A list of partners and their professional qualifications is available for inspection at our UK offices. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2014 Wilmer Cutler Pickering Hale and Dorr LLP