**Uber, Lyft, and Worker Misclassification**

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Uber and other rideshare companies have taken part in a recent trend where businesses label their workers as “Independent Contractors” rather than “Employees”.[[1]](#footnote-1) Critics of this trend claim that the workers are being misclassified in order to reduce costs because it allows the companies to avoid providing the benefits that are required to be provided for “employees” but not to “independent contractors”. [[2]](#footnote-2),[[3]](#footnote-3) On the other hand, executives and proponents of such companies argue that it is beneficial for the workers to be labeled as independent contractors since they can set their own hours and only take the jobs which they want. [[4]](#footnote-4) The legal battle over whether these companies have employees or independent contractors is just beginning but the simple distinction between the two terms will have far reaching consequences for the companies, the drivers, and the public.

**I. Distinguishing Between Employees and Independent Contractors**

“Employees classically go to work at set hours while independent contractors usually determine their own hours. Employees do what their bosses want them to do; independent contractors are free to do the work in the manner in that they prefer. Employees receive regular paychecks while independent contractors get paid by the job. Employees work year-round; independent contractors are temporary.”[[5]](#footnote-5)

Clearly, trying to determine whether a worker is an employee or an independent contractor is a very fact-intensive exercise. Facts that would support Uber drivers being employees include: Uber giving detailed instructions on how the drivers should behave towards customers, not allowing them to use their cell phones except for business purposes, Uber setting the rates and pricing, and Uber occasionally paying drivers when a customer has a free ride discount. [[6]](#footnote-6) On the other hand, facts that support defining drivers as independent contractors are: drivers signing an agreement saying they are not employees, drivers providing their own cars and paying their own expenses like gas, drivers being paid by the job and not by the hour, setting their own schedules and deciding who they wish to pick up. [[7]](#footnote-7) What would initially appear to be an easy question, employee or contractor, becomes very difficult. As Judge Chhabria put it, the jury will be handed “a square peg and asked to choose between two round holes.” [[8]](#footnote-8)

**II. Consequences of the Designation Between Employees and Contractors**

The classification is very important for the companies, drivers, and the general public. For Uber and Lyft, drivers being classified as independent contractors results in the employers avoiding laws like antidiscrimination and wage/hours laws, federal and state programs like Social Security, workman’s compensation, and liability for tax and benefit contribution. [[9]](#footnote-9) Some have estimated that the price difference for Uber if the drivers were to be classified as employees is around $4 Billion a year. [[10]](#footnote-10) For drivers, the most obvious loss is the loss of the benefits listed above. Independent contractors trade those benefits, like medical leave and protection under state laws about wages and hours, for more flexibility in creating their own schedules and not answering directly to a boss. Another issue for drivers is insurance, Uber drivers are often only covered by insurance when they are actually carrying passengers in the car, which leaves the driver exposed to liability even if they are using the app but do not have a rider in the car yet. [[11]](#footnote-11) If the drivers were classified as employees, they would have more expansive coverage while they were working, regardless of whether a rider was in the car or not. Finally, the public is injured in two ways by drivers being classified as independent contractors rather than employees: first, lost payments to unemployment funds, payroll taxes, and workman’s compensation funds, and second, limited liability for the acts of drivers. [[12]](#footnote-12), [[13]](#footnote-13) Uber and Lyft do not need to pay into funds like Social Security and workman’s compensation funds for independent contractors, which means states and local governments miss out on all the taxing and funding that a traditional company the size of Uber or Lyft would generate. Additionally, Uber denies liability for independent contractors since they are not employees.[[14]](#footnote-14) This includes cases where a driver verbally assaulted a woman and punched a man during a drive, a driver taking a passenger on a high speed chase, or an ongoing sexual assault investigation against an Uber driver. [[15]](#footnote-15) If the drivers are independent contractors, and therefore the company is not liable, the victims will be undercompensated compared to if the drivers had been labeled employees. Clearly the eventual decision will have large impact on the viability of companies such as Uber and Lyft, and if they continue, our economy and tort system as a whole.

**III. Important Cases So Far**

 In two cases, one in California and one in Massachusetts, Uber settled with class action groups so that the drivers would be continued to be classified as independent contractors.[[16]](#footnote-16) These settlements resulted in Uber paying $84 million to the plaintiffs and providing the drivers with more information regarding their deactivation (firing) policy, as well as creating driver’s associations in those states. Clearly, Uber drivers being classified as independent contractors is very important to Uber. Lyft settled in a similar fashion in California in 2016. [[17]](#footnote-17) And while these settlements are good for the plaintiffs in those states, it continues to come at the cost of other benefits to all drivers and the public, such as insurance coverage if a driver was in an accident on the way to pick up a customer and medical leave if they are injured and cannot work.

**IV. The Future of Employee/Independent Contractor Litigation**

Judge Chhabria, while working to fit these round drivers into a square hole status, noted that perhaps some of the drivers should be considered employees while others would only reach the contractor status depending on how much they work. [[18]](#footnote-18) Another suggestion is to create a new status that lies somewhere in between employee and independent contractor, affording some of the benefits but not at full cost to the employers. [[19]](#footnote-19) Another suggestion is to stop basing coverage of benefits on the status of employee or independent contractor. [[20]](#footnote-20) An option would be to allow workers to qualify for coverage based on the amount and regularity of the work they provide. [[21]](#footnote-21)

In any event, the future litigation surrounding Uber, Lyft, and other sharing companies will certainly have an effect on how we distinguish workers and what benefits to provide to those classifications.

1. NOTE & COMMENT: RIDESHARING'S HOUSE OF CARDS: O'CONNOR V. UBER TECHNOLOGIES, INC. AND THE VIABILITY OF UBER'S LABOR MODEL IN WASHINGTON, 90 Wash. L. Rev. 1431 [↑](#footnote-ref-1)
2. ARTICLE: Employment Rights in the Platform Economy: Getting Back to Basics, 10 Harv. L. & Pol'y Rev. 479 [↑](#footnote-ref-2)
3. ARTICLE: ABC ON THE BOOKS AND IN THE COURTS: AN ANALYSIS OF RECENT INDEPENDENT CONTRACTOR AND MISCLASSIFICATION STATUTES, 18 U. Pa. J.L. & Soc. Change 53 [↑](#footnote-ref-3)
4. ARTICLE: Employment Rights in the Platform Economy: Getting Back to Basics, 10 Harv. L. & Pol'y Rev. 479 [↑](#footnote-ref-4)
5. XpertHR Employment Law Manual 266 [↑](#footnote-ref-5)
6. NOTE: Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc., 41 Iowa J. Corp. L. 727 [↑](#footnote-ref-6)
7. *Id.* at 741 [↑](#footnote-ref-7)
8. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) [↑](#footnote-ref-8)
9. ARTICLE: ABC ON THE BOOKS AND IN THE COURTS: AN ANALYSIS OF RECENT INDEPENDENT CONTRACTOR AND MISCLASSIFICATION STATUTES, 18 U. Pa. J.L. & Soc. Change 53 [↑](#footnote-ref-9)
10. ARTICLE: Employment Rights in the Platform Economy: Getting Back to Basics, 10 Harv. L. & Pol'y Rev. 479 [↑](#footnote-ref-10)
11. Uber’s Loophole in the Regulatory system 6 HLRe 75, 6 HLRe 75 [↑](#footnote-ref-11)
12. ARTICLE: ABC ON THE BOOKS AND IN THE COURTS: AN ANALYSIS OF RECENT INDEPENDENT CONTRACTOR AND MISCLASSIFICATION STATUTES, 18 U. Pa. J.L. & Soc. Change 53 [↑](#footnote-ref-12)
13. Uber’s Loophole in the Regulatory system 6 HLRe 75, 6 HLRe 75 [↑](#footnote-ref-13)
14. *Id*. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. https://newsroom.uber.com/growing-and-growing-up/ [↑](#footnote-ref-16)
17. http://www.theatlantic.com/business/archive/2016/01/lyft-drivers-uber-sharing-economy-employees/431631/ [↑](#footnote-ref-17)
18. *Cotter v. Lyft, Inc*., 60 F. Supp. 3d 1067, 1082 (N.D. Cal. 2015) [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. ARTICLE:WHY THE LAW STILL CAN'T TELL AN EMPLOYEE WHEN IT SEES ONE AND HOW IT OUGHT TO STOP TRYING, 22 Berkeley J. Emp. & Lab. L. 295 [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)