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Lyfting TNCs and On-Demand/Sharing Economy Companies Out of the Misclassification Abyss By Mandating Workplace Insurance in Driver Contracts

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Unlike traditional motor carriers that transport cargo, many Transportation Networking Companies (TNCs), e.g., Uber and Lyft, and similar on-demand/sharing economy companies (On-Demand Companies), e.g.,GrubHub (a food delivery service provider), are silent on the issue of workplace insurance in their driver contracts or terms and conditions. This trend stems from a widespread concern that requiring independent contractors (ICs) to obtain workplace insurance, such as occupational accident (Occ/Acc) insurance (if workers' compensation insurance is not required or available in a particular state), or make settlement deductions for such cost could tip the control or balancing test used for determining IC/employee status.

A Whole New Ball Game: Misclassification Suits in the On-Demand Economy

Just last month, closing arguments were made in what is believed to be the first trial in a worker misclassification case against an On-Demand Company, GrubHub.[1] Other California Labor Code violation actions involving Uber and Lyft suggest that the TNCs and On-Demand Companies could face workers' compensation liability exposure, particularly since their contracts with their respective drivers tend to be silent regarding workplace insurance for drivers. In these lawsuits, the ICs have typically sought to establish employee status in order to assert wage claims under the Labor Code and/or claims for unlawful misclassification in violation of the Labor Code § 226.8.

Specifically, Lyft and Uber have been sued for their alleged failure to: (1) pay wages and overtime compensation; (2) provide meal and rest periods; (3) comply with itemized employee wage statement provisions or furnish accurate wage statements; (4) pay wage at the time of employment termination; and (5) reimburse for business expenses and illegal wage deductions. Lyft and Uber have also faced unfair competition, unfair business practices and claims pursuant to the Labor Code's Private Attorney General Act of 2004 (PAGA), which allows private individuals, who are considered "aggrieved employees," to sue their employers on behalf of the State of California Labor and Workforce Development Agency for violations of the Labor Code as an alternative avenue for enforcing the Labor Code.[2]

These lawsuits demonstrate that if there are sufficient indicia of employee status, then the drivers may be able to obtain wages, overtime compensation and penalties through the establishment of a Labor Code violation. Presumably, in a similar fashion, the drivers would also be able to obtain other benefits to which an employee is entitled (as opposed to an independent contractor), such as workers' compensation insurance, in the event of a workplace injury.

The Best Defense is a Good Offense: Mandate Workplace Insurance

Notwithstanding the prevalent concern about worker misclassification actions, contractually requiring an IC to obtain some form of workplace insurance and requiring settlement deductions from ICs that *choose* to purchase such coverage, from an *individual policy* through the Company, *should not* adversely affect independent contractor status. In fact, most vendor-vendee contracts impose a requirement that those providing services will be protected by workplace accident insurance. For instance, the courts in California, Texas and Florida, which apply a multifactor control test in reviewing and determining worker misclassification claims, with the paramount factor being "control," have not considered Workplace Insurance requirements as indicia of control.

In *Lexington Ins. Co. v. Workers' Comp. Appeals Bd. & Sheik Zahid Ali*, a California case, a company and an owner-operator had an agreement that if the owner-operator provided Occ/Acc, then the company would deduct premiums and fees from the owner-operator's settlement checks and remit them directly to the insurance company.[3] The motor carrier found and provided the Occ/Acc to the owner-operators and did so as a *group policy*. Because the company-and not the owner-operators-provided and handled all aspects of insurance, the court found that it constituted "some evidence of its control 'over the details of the working relationships of the parties to the contracts.'" The court implied that if the owner-operators had procured their own Occ/Acc, then that would factor in favor of finding an IC relationship. Thus, a *group policy* is not recommended for such coverage, but having coverage itself is ideal.

Similarly, in Texas case *White v. D.R. & P.A., Ltd.*, a moving company entered into an independent contractor agreement with an individual driver that, among other things, required the driver to "obtain at his own expense automobile liability insurance and general liability insurance."[4] Ultimately, the court found that the agreement created an IC relationship and the right of control was squarely in the hands of the worker despite the insurance requirement.

Concerning the TNC segment, in *McGillis v. Dep't of Econ. Opportunity*, a Florida case, an Uber driver was found to be an IC, and not an employee, where the agreement between the company and driver unequivocally disclaimed an employer-employee relationship and the parties' actual practices reflected the arm's-length relationship depicted in the agreement. Specifically, the driver had discretion in carrying out his work, received a Form 1099 to report his income, and did not receive any fringe benefits from the company. Unsurprisingly, the determinative factor was control: the driver supplied his own vehicle and had no direct supervision. Thus, neither driver insurance nor vehicle insurance was a consideration, let alone a deciding factor, when making a workers status determination in Florida.

Hit it Out of the Park: Preventing Workplace Accident Claims

The starting point to preventing worker misclassification claims is to act like a vendor (and not an employer) and contractually require drivers to provide the TNC or On-Demand Company with evidence of workplace insurance when services are being rendered by the driver to the TNC or On-Demand Company. Any risk attributable to a worker misclassification determination is far outweighed by the risk of not having some form of workplace insurance. This coverage will serve as the first line of defense in the event of a workplace injury. Indeed, contracts that are silent as to workplace insurance *suggest* that the relationship between the TNC or On-Demand Company and their drivers is more like one of *employment*. Further, failing to require or provide workplace insurance significantly increases the likelihood of an IC challenging worker status, since the worker will have a

greater need to find some avenue of benefits to cover medical costs in the event of an on-the-job mishap.

The best ways to prevent workplace accident claims and associated worker misclassification suits are to: (1) contractually require the IC have some form of workplace insurance (including Occ/Acc); (2) allow the IC the option to procure or provide its own workplace insurance; and (3) if the IC chooses to purchase such workplace insurance through the Company with settlement deductions (as required by the insurer), ensure that it is an individual and not a group policy.

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[1] *See Lawson v. GrubHub, Inc.*, No. 3:15-cv-05128 (N.D. Cal.).

[2] *See e.g.*, *Del Rio v. Uber Technologies, Inc. et al.,* No. 3:15CV03667 (N.D. Cal.); *Ronald Gillette, et al., v. Uber Technologies, et al.*, (consolidated at *In Re Uber FCRA Litigation*, C-14-5200 EMC) 3:14-cv-05241-EMC (N.D. Cal.); *Armen Adzhemyan, et al., v. Uber Technologies, Inc.*, BC608874 (Ca. Super. Ct.); Douglas O'Connor, et al.,

v. Uber Technologies, Inc., et al., C-13-3826 EMC (N.D. Cal.).

[3] *See Lexington Ins. Co. v. Workers' Comp. Appeals Bd. & Sheik Zahid Ali,* No. A142340, 2015 Cal. App. Unpub. LEXIS 9181 (Cal. Ct. App. Dec. 16, 2015). This case only suggests how a decision could come down in California under these facts and is not binding authority due to it being an unpublished decision.

[4] *White v. D.R. & P.A., Ltd.,* No. 01-12-00227-CV, 2014 Tex. App. LEXIS 209 at *7 (App. Feb. 25, 2014).