

LEGAL UPDATES

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## Services

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# Uber Drivers are Not Employees According to the NLRB

On May 14, 2019, the Office of the General Counsel of the National Labor Relations Board (NLRB) released an advice memorandum concluding that UberX and UberBlack drivers are independent contractors and not employees. This advice memo is the latest development in the debate of whether gig workers are employees or independent contractors.

The advice memo provides gig businesses with added assurance that gig workers will be denied employee status under the National Labor Relations Act by the NLRB, preventing gig workers from forming a union for the purposes of collective bargaining and filing charges of unfair labor practices.

### The Uber advice memo

In reaching a favorable decision for Uber, the General Counsel applied the factors of the common law agency test from the January 2019 NLRB decision SuperShuttle DFW, Inc., which shifted the focus of the independent contractor inquiry from an emphasis on “economic realities” to an inquiry focused on “entrepreneurial opportunities.” In assessing the amount of control Uber maintained over its drivers, the General Counsel found several factors significant:

The drivers set their own schedule and had complete control over their own cars.

The drivers chose their own geographic log-in location.

The drivers could choose to work for competitors and take advantage of financial incentives to increase earnings and maximize profits.

The drivers had the freedom to work outside the Uber App; accepted contractual obligations to indemnify and hold Uber harmless for liability based on the driver's own conduct; and Uber disclaimed responsibility for the conduct of Uber riders.

According to the General Counsel, the above factors indicated that Uber exercised minimum control over Uber drivers' decisions, lacked control over the "manner and means" of the Uber drivers work, and provided the drivers with "entrepreneurial independence."

Notably, the General Counsel dismissed the significance of the method of payment as an indicator of control over drivers. While acknowledging that payment by flat fee or commission has been used as an indicator of control in the past, the General Counsel described such considerations to be of "questionable" value and rejected method of payment as a means to delineate between independent contractor and employee status.

Finally, while the General Counsel found that Uber drivers do work "as part of the Employer's regular business of transporting passengers," which would typically be a factor supporting a finding of employee classification, the General Counsel dismissed this factor as unimportant. There's little doubt that the General Counsel's statement on this particular point is in direct response to and a renunciation of the 2018 decision by the Supreme Court of California, *Dynamex Operations West, Inc., v. Superior Court of Los Angeles County*, which held that for purposes of California state wage and hour laws, all workers are presumed to be employees unless the hirer is able to establish under all three prongs of the applicable test that the worker is an independent contractor.

## **What this means for you**

The advice memorandum certainly favors businesses, and while it only applies to Uber, it portends application of the same principles to all gig workers. However, because the memo was issued by the NLRB, it technically applies only in the context of federal labor law and has no bearing on decisions at the state level regarding wage-and-hour disputes. Consequently, gig businesses may find themselves in the predicament of treating gig workers as independent contractors at the federal level and employees at the state level, depending on the test adopted by the state courts to determine employee status.

## **Contact us**

The Labor and Employment team at Husch Blackwell will continue to monitor legal developments involving gig workers that may impact your business. If you have questions about the implications of the NLRB advice memo for your business, contact Erik Eisenmann or your Husch Blackwell attorney.

*Tracey Oakes O'Brien was a contributing author of this content.*