Employee or Independent Contractor? Uber Court Moves One Step Closer to Answering This Critical Question

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Many of us perhaps have grown accustomed to riding Uber and enjoy the often significant discounts that their services may provide as compared to traditional taxi companies, and a recent case is certainly closely watched because of Uber's high profile. In the latest development involving drivers for the Uber ride-sharing service, a Federal Court in California has granted a motion to certify a class action. The Court ruled that the question of whether Uber drivers are employees, as the plaintiffs claim, or are independent contractors, can be decided on a class-wide basis. Although not deciding that question on the merits, this class-certification order provides the framework to answer the key question of whether Uber's drivers are independent contractors or employees.

In his Order issued on September 1, 2015, Judge Edward Chen of the United States District Court for the Northern District of California certified a class of drivers from whom, the plaintiff's claim, Uber allegedly withheld tips in violations of Section 351 of the California Labor Code. The case is entitled *O'Connor v. Uber Technologies, Inc.* The ultimate decision on the legal status of the independent contractor issue will likely have repercussions.

In reaching its decision, the Court extensively reviewed the California common law employment test established by the Supreme Court of California in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). Under *Borello*, of primary importance in determining whether or not an employment relationship is present is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. The Court made clear that actual control exercised by the principal is not determinative, and rather, the ability to exercise control is the relevant consideration. The fact that parties label their relationship as an independent contractor relationship is ultimately of little relevance to whether or not the relationship would be recognized in that way under the law.

This decision has relevance that reaches beyond Uber, however, and it provides another wake-up call for employers in California and beyond. Specifically, the risk to a business of improperly classifying workers as "contractors," when in fact they are employees, is tremendous. Improperly classified workers may recover damages and penalties under a whole host of wage and hour laws, (which are most expansive in California)

including for minimum wages, overtime, meal period and rest break penalties, damages for failure to provide itemized wage statements, waiting time penalties, and damages for failure to reimburse business expenses, among others. The federal and California governments can also seek to recover tax payments and associated penalties for employment taxes that the employer should have remitted. Thus the ultimate resolution as to this issue can have a devastating financial impact on any employer.

As Benjamin Franklin famously said, "An ounce of prevention is worth a pound of cure." In light of the spotlight placed on this issue by the Uber cases, and the federal Department of Labor's recent guidance for determining whether a contractor is really an employee, it is prudent that any employer who regularly utilizes independent contractors review carefully the particular arrangements. It is wise to consult legal counsel for advice on these matters.

If you have questions, please contact your Lathrop Gage attorney or any of the attorneys listed above.