



BUREAU OF LABOR AND INDUSTRIES

**ADVISORY OPINION OF THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

Regarding:

October 14, 2015

**THE EMPLOYMENT STATUS OF
UBER DRIVERS**

ADVISORY OPINION

Introduction

In recent months, BOLI has received requests for guidance on the employment status of Uber drivers. To date, no case relevant to this question has been filed with BOLI. Any such case would be decided on the specific facts and legal arguments presented. Although the analysis would not be binding in that proceeding, we intend this Advisory Opinion to be instructive to all interested parties—most notably Uber, its drivers and other transportation network companies—on what conclusions can be drawn from current, available information.

Under existing labor laws, the rights of workers are dependent upon their proper classification as employees. Employees are afforded workplace protections such as receiving at least minimum wage for all hours worked (unless exempt), timely payment of wages, safe working conditions, remedies for discriminatory practices and, unemployment and workers' compensation benefits. Independent contractors, although they may have greater independence and flexibility than employees, are entitled only to compensation and other advantages as provided by agreement.

In Oregon and many other states, workers are increasingly performing work in circumstances that appear to be outside of traditional employment arrangements. This trend has raised concerns that employees are being improperly classified as independent contractors, volunteers or interns. When an employer misclassifies a worker, it is not only the worker who is adversely affected. The employer also skirts its responsibility to pay employer taxes, creating an uneven playing field for employers who do follow the rules.

Recent administrative and court cases in California address the employment status of Uber drivers. In addition, a recent opinion from the United States Department of Labor (Administrative Interpretation No. 2015-1, July 15, 2015) analyzes the misclassification of workers generally. These are instructive to this Advisory Opinion.

Analysis

Like federal law, Oregon's wage and hour regulations broadly define "employ" as "to suffer or permit to work." ORS 653.010(2). A business "suffers or permits" a person to work if, as a matter of economic reality, the person is dependent on the business. When determining whether a person has performed work as an employee, BOLI applies the "economic realities" test used by courts to determine employee status under the federal Fair Labor Standards Act. See, Cejas Commercial Interiors, Inc. vs. Torres-Lizama, 260 Or App 87 (2013). The economic realities test considers the degree to which a worker is economically dependent upon the employer. Workers who are economically dependent are suffered or permitted to work and, therefore, are classified as employees. Independent contractors, in comparison, are workers who exercise economic independence in the operation of their own businesses.

The economic realities test is comprised of the following factors:

1. **The degree of control exercised by the alleged employer;**
2. **The extent of the relative investments of the worker and the alleged employer;**
3. **The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;**
4. **The skill and initiative required in performing the job;**
5. **The permanency of the relationship; and,**
6. **The extent to which the work performed by the worker is an integral part of the alleged employer's business.**

No factor by itself is decisive and not all must be met to determine employment. Rather, we consider the factors in their totality and in relation to one another to determine whether a worker is economically dependent on the alleged employer.

The facts examined here are taken from the California administrative and court cases. Uber's practices in Oregon are substantially the same as those in California. When applying the economic realities test to the relationship between Uber and its drivers, we draw the following conclusions:

1. **Degree of control**

The employer's control is considered in light of the ultimate determination whether the worker is economically dependent on the employer or, performing work under their own business. To be working under their own business, the worker must control such a meaningful part of the business that it stands as a separate economic entity.

While Uber drivers use their own vehicle and may accept or reject ride requests, effectively setting their own work schedules, Uber exercises a significant degree of control over the driver's actual work. Uber unilaterally dictates the fare to be charged, a percentage of which is paid to the driver. Uber monitors the performance of drivers and may discipline or terminate those who do not perform to Uber's standards. Uber may restrict a driver's access to its smartphone application if the driver fails to

complete a requisite number of trips within a defined period. Uber instructs drivers as to their conduct, personal appearance and methods for carrying out services. Uber prescribes qualifications for its drivers, selects them through a screening process that includes a background, motor vehicle records check, and vehicle inspection.

These facts do not show such worker control that the worker could be considered a separate economic entity from Uber. Rather, they show a much greater degree of control by Uber. This indicates an employment relationship.

2. Relative investments

The nature and extent of the relative investments from the employer and the worker help determine whether the worker has an independent business. An independent contractor usually makes investments that support the business beyond any one particular job. Investments may enable the business to expand, change its costs or otherwise change the manner and extent of how it provides goods or services. If the worker's investment is relatively minor compared to the employer's, then the worker may be economically dependent on the employer.

An Uber driver's investment is largely restricted to the use of a personal vehicle. This includes fuel, maintenance and insurance costs. Sometimes, driver investment includes a deposit for the iPhone Uber provides for access to its application. Uber provides, however, the entire apparatus that makes the service possible. This includes, but is not limited to, the software application itself, marketing, finance and accounting systems, and management of operations. The driver's investment is negligible compared to that of Uber's multi-billion dollar infrastructure. This indicates an employment relationship.

3. Worker's profit and loss

A worker with their own business may experience either a profit or loss, often dependent upon their managerial skills to administer the business. An employee's ability to earn more is dependent upon their ability to work and the employer making work hours available, not the managerial skills of the worker.

An Uber driver does not exercise managerial functions that affect the opportunity for profit or loss. Uber sets the fare without input from drivers. The driver's ability to earn additional income is related only to the number of rides they provide through Uber. In fact, Uber prohibits workers from answering rider questions about booking future rides outside the Uber application or in any other way soliciting future rides from Uber riders. All these factors indicate an employment relationship.

4. Skill and initiative

A worker's business skills, judgment and initiative, rather than their technical skills, indicate whether they are economically independent from the business. If the work requires technical skills but is not reliant on such business skills to perform the work, then the worker is likely an employee.

Drivers do not exercise managerial and business like skills or initiative that would indicate they are operating independent businesses. Rather, they are dependent entirely upon Uber's application in order to perform any work. This indicates an employment relationship.

5. **Permanency of the relationship**

Employees are generally hired on a permanent or indefinite basis. Independent contractors generally work project to project.

Uber does not engage drivers to perform services for a fixed period of time, project or contract basis. As long as the drivers satisfy Uber's standards they may work indefinitely. The relationship may, therefore, be expected to last for a long period of time. This indicates an employment relationship.

6. **Work as an integral part of business**

If a worker performs services integral to the business, it is likely the worker is an employee. Courts have found this factor particularly compelling. Work can be integral even if it is just one component of the business. Work can also be integral if it involves the same tasks performed by thousands of other workers providing work for the business.

Uber provides transportation services to its customers, services it cannot provide without its drivers. As such, the driver's work is not only integral but, a necessary part of Uber's business. This indicates an employment relationship.

These six factors from the economic realities test illustrate how Uber drivers are not operating their own separate businesses with the degree of autonomy one expects with an independent contractor. To the contrary, the rigorous hiring process, the highly controlled directions as to how work is to be performed and at what price, the expectation of long term employment, the insignificant investment of the driver when compared to the massive infrastructure provided by Uber and the integral nature of the driver's work to the business are all characteristic of an employment relationship.

It should be noted that Oregon's minimum wage laws exempt "taxicab operators." The term "taxicab operator" is based on a traditional and older model describing the delivery of transportation services and may not apply to Uber drivers. Even if the exemption did apply, however, Uber drivers would still be covered by other important workplace protections such as the right to be paid in full and on time and, the right to work free from discrimination and harassment.

Conclusion

Uber suffers or permits drivers to work for the company's benefit. Further, drivers are economically dependent on Uber pursuant to the "economic realities" test. Under Oregon law, and relative to the factors discussed in this opinion, Uber drivers are employees.



Brad Avakian, Commissioner

Oregon Bureau of Labor and Industries