



Courtside *Newsletter*

Uber Class Action Lawsuits: How Proposed Settlement Affects the Independent Contractor v. Employee Debate



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This month's *Courtside Newsletter* will discuss the recent settlement of the California and Massachusetts class action lawsuits against Uber Technologies, Inc. and how it potentially impacts the classification of workers as either employees or independent contractors.

As an article in the San Francisco Magazine states, "the crux of [the lawsuit] was whether the sharing economy habit of using contractors rather than fully vested employees violates basic labor laws." The Uber cases have been closely watched as potentially setting a precedent that could affect this "sharing economy" or "gig economy." In this rapidly growing business model, companies do not hire employees to perform certain key tasks. Instead, the company facilitates interactions between independent contractors and customers through electronic communications (e.g. smart phone applications). On one hand, the independent contractors enjoy flexibility and unlimited income potential by setting their own hours and working for more than one company. However, on the other hand, they are not due any benefits such as overtime or health insurance, guaranteed hours or a minimum wage, and are often faced with the question of who to turn to when their rights are potentially violated.

Terms of the Uber Settlement

The uncertainties of the appeal, as well as the impending trial before a jury in San Francisco where Uber is very popular, encouraged the plaintiff's attorney to negotiate a settlement and the defendant's attorney to accept some terms favorable to the drivers. The current question will be whether the Uber company policy changes will satisfy Judge Chen, who in denying Uber's motion for summary judgment last year, took apart Uber's claim that it is a technology company simply facilitating smart phone

app interactions between riders and independent contractor drivers.

Under the terms of the settlement:

- Drivers are not reclassified to be employees.
- The main case in California and a smaller case in Massachusetts were conditionally settled for \$100 million (which includes a contingent \$16 million based on Uber's initial public offering).
 - Drivers who drove at least 25,000 miles and opted out of the arbitration agreement will receive \$8,000 or more.
 - Drivers who worked part-time will receive about \$200.
 - No settlement figure has been identified for drivers who drove less than 25,000 miles.
- The parties' lawyers will get \$21 million.
- Uber will not provide drivers with benefits under state and federal labor laws.
- Drivers will not be reimbursed for gas.
- Uber will clearly inform riders that tips are not included in Uber's fares.
- Uber will provide drivers with small signs to post in their vehicles to encourage tips.
- Uber will make significant policy changes, including:
 - Uber will not be allowed to delist a driver without longer notice, sufficient cause, and transparency, including an appeals process.
 - Uber will institute an "appeals panel" comprised of drivers who believe they were unjustly dismissed.
 - Uber will help create and then recognize a Drivers Association to communicate concerns to management, and Uber will meet with the drivers' councils quarterly.

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Approval of Settlement is Required

The Uber settlement (154 pages) is not final until it is accepted by U.S. District Judge Edward M. Chen in San Francisco, and the judge is not required to approve the settlement just because the lawyers are satisfied with it. A hearing on preliminary approval was scheduled for June 2nd, but is currently pending. Judge Chen has ruled favorably for the plaintiffs throughout the litigation. He certified a 15,000-driver class in August and another 160,000-driver class in December by invalidating Uber's employee arbitration agreements. The ruling on the arbitration agreement was appealed and is set for hearing in June.

Government Agencies and Organizations Not Bound by Settlement

Government agencies and organizations are not bound by the pending Uber lawsuit settlement.

IRS: The Internal Revenue Service could audit Uber and decide the drivers are employees. In the case, Uber would be responsible for all employment taxes that were not withheld from wages, with penalties and interests.

NLRB: The National Labor Relations Board is reported to already be investigating Uber. One commentator wrote that the Uber settlement may help support the classification of the drivers as employees, because Uber alone controls the listing and delisting of drivers, how they are evaluated, and how they are compensated, and the right to set their own hours is compatible with employee status.

Teamsters: The Teamsters are reported to be interested in organizing Uber drivers and may file charges claiming that Uber's assistance to the new drivers' councils violated federal labor law, giving the NLRB an opportunity to decide whether the drivers are employees. Employees have a legal right to form unions and negotiate wages, but an association of independent contractors does not enjoy those protections and might even be violating antitrust law.

Settlement Incentive: Administrative proceedings typically lack the incentive to settle, which is present in court proceedings because millions in legal fees must be paid when expensive law firms are involved.

Legal Issues Not Resolved by Uber Settlement

An increasing number of people work in the new flexible labor markets or "gig economy" and have issues similar to the Uber drivers. Those issues include, for example:

- Benefits (usually provided by employers)
- Tracking compensation (usually documented on paycheck stubs)
- Sharing in success of company (usually hard work results in raises, bonuses, promotions, and stock options)

- Communicating with the company (usually company policies and labor laws apply)

Regulating New Working Models

This case and others provide support to the argument that the law is not keeping up with the changes in the economy created by technology. Enforcing current law is like trying to put a square peg into either the round employee hole or the round independent contractor hole – it just doesn't fit!

The underlying motivation for enforcing these labor laws is allegedly to protect the worker from being unfairly treated and to ensure that workers receive benefits (overtime pay and medical coverage, paid time off, protected leave, etc.). The trend is to impose this responsibility on the employer even when the employer does not exercise control over the worker's actual work. However, in reality the enforcement of labor laws is also driven by the desire of the government (local, state and federal) to have control and protect its entitlement to funding – when workers are employees on payroll, taxes are withheld and paid to the government.

Impact on the Real Estate Broker-Agent Relationship

According to the National Association of REALTORS® ("NAR"), "the hallmark characteristic of an independent contractor relationship is one where the worker is generally free of control." However, there seems to be a trend away from the old classification tests (employee or independent contractor) and toward expanding responsibility beyond the employer that controls the work.

No court has yet decided whether Uber drivers are employees or independent contractors – that question will continue to be debated and litigated, or possibly be the subject of rulings by the National Labor Relations Board or the California Labor Commissioner, or state or federal legislation. The Courts in the Uber cases have suggested that the legislature intervene to "enact rules particular to the new so-called 'sharing economy'" and to create "a new category of worker altogether, requiring a different set of protections."

Under the "follow the money" model, it seems likely that we will continue to see a chipping away of the protections from liability provided to real estate brokers based on the classification of licensed agents as independent contractors. Many issues remain to be resolved!

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