

Uber Fallout May Come In Several Forms

By Robert W. Wood

Last week, I wrote about FedEx and its \$228 million settlement of a worker status dispute involving “independent contractor” package delivery drivers ruled to actually be employees. Now, it’s Uber, but at this stage, the company’s worker status problems are in their infancy. Still, it is no small matter, especially now that California’s Labor Commission has ruled one driver to be an employee and not an independent contractor.

A Florida state agency similarly ruled that Uber drivers are employees not long ago. Although one ruling in California and one in Florida are not conclusive — and they may end up being reversed — these cases and many others like them will be watched. What’s more, Uber is facing a federal lawsuit by its drivers. A San Francisco jury may end up ruling on their status. The outcome could import a panoply of taxes, fringes and liabilities and could dampen the startup’s soaring valuation.

Uber has already appealed the Labor Commission ruling. See *Uber Technologies Inc. v. Berwick*, CGC-15-546378 (S.F. Super. Ct., filed June 16, 2015). The amount at stake is only \$4,152.20 for a two-month period when Barbara Ann Berwick drove for Uber. But the bigger question involves *billions*. Uber said it did not exert any control over the driver, but the Labor Commission said Uber is “involved in every aspect of the operation,” from vetting drivers and their vehicles to setting rates for trip fares. Uber’s arguments that it just matches passengers and drivers fell on deaf ears.

“Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation,” the ruling states. “The reality, however, is that defendants are involved in every aspect of the operation.” The Labor Commission said Uber controls the tools drivers use, monitors their approval ratings and terminates their access to the system if their ratings fall below 4.6 stars.

Uber promises good open-ended pay, flexible hours, even discounts on vehicles. But employee status? No way. Health and dental coverage? Tax withholding? Nope. And a recent survey showed that contract workers for companies like Uber have trouble getting benefits on their own.

The battle over the independent contractor versus employee designation has been underway for decades. It’s been a long-running issue at FedEx, which operates with a similar contractor setup with its ground delivery drivers. That’s brought class actions, and efforts to change state laws to put liabilities on the companies.

Uber and Lyft now face similar suits over whether they should foot the bill for things like gas and vehicle maintenance. Uber’s latest \$1.2 billion in financing and more than \$40 billion valuation make it a unicorn many times over, but its PR problems are huge, too.

As many tax, employment, insurance and labor disputes reveal, workers labeled as independent contractors may be employees. Arrangements can be genuine or can be independent in name only, with no chance of standing up against the Internal Revenue Service, other agencies or the courts. Independent contractor versus employee characterization questions span medical malpractice cases, tax disputes, worker compensation and unemployment matters and more. Even employment discrimination and sexual harassment cases.

Some Uber drivers have sued claiming the company takes too large a cut of tips. And an even greater legal exposure is accident liability. There are already some infamous cases involving injuries and even death. When a driver has an accident that injures the passenger or a third party, there is recourse to the drivers and their insurance. Yet a serious or fatal accident can involve millions, far exceeding driver

insurance policies. Uber is a clear target unless the Communications Decency Act of 1996 prevents liability. But it is not far-fetched to imagine verdicts for injured plaintiffs, no matter how the legal niceties are observed. The law has been sorting out similar issues for decades, and the contracts and the actual course of conduct of the parties are likely to count.

Who might be even more aggressive than accident victims? Taxing authorities. The IRS and state taxing agencies could benefit nicely by receiving tax withholding money from Uber on pay to the drivers. And though it’s uncertain that the IRS and state tax agencies will try, there’s certainly a possibility that they will. With Uber’s vast valuation, expect more lawsuits, whatever the drivers may be called.

As with franchises, Uber may test the legal limits, but consider such basics as: the employer’s control over the worker; the worker’s opportunity for profit or loss; the worker’s investment in facilities; the worker’s skill set; and the duration of the relationship. If a driver must obey many rules and is subject to the control of Uber, a court could find employee-employer liability. So could a taxing agency. Workers may be labeled as “independent contractors,” but labels aren’t enough for the IRS. Uber has roiled the marketplace. But taxing and employment agencies that stand to make money off employees and not off independent contractors are likely to be watching.



Robert W. Wood is a tax lawyer with a nationwide practice (www.WoodLLP.com). The author of more than 30 books including “*Taxation of Damage Awards & Settlement Payments*” (4th Ed. 2009 With 2012 Supplement www.taxinstitute.com), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.