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California labor regulators blast a big hole in Uber's 'sharing economy' dodge

By: Michael Hiltzik | June 17, 2015



Uber drivers in Santa Monica protesting their treatment by the firm last year. (Christina House / For The Times)

California regulators rule that Uber drivers are employees, not "independent contractors"
Can Uber really be worth \$50 billion if it has to treat drivers as employees? Doubtful

"Sharing economy" firms like the car services Uber and Lyft have always been based on something of a sham: the idea that the drivers are working for themselves, not for the bosses.

That concept is so alluring, on the surface, that it has spread to house cleaners, launderers, delivery persons -- you name it. But it's fundamentally false, and the California office of the labor commissioner on Wednesday blew a big hole in it.

It may also have blown a hole in Uber's venture capital valuation, which was last quoted at about \$50 billion.

In a case involving Barbara Ann Berwick, an Uber driver in San Francisco, the labor office ruled that Uber drivers are its employees and not, as the company would have it, "independent contractors." If the ruling stands after an appeal by Uber, it means the firm is responsible for all the expenses incurred by the drivers that it normally dodges, such as maintenance, vehicle wear and tear, insurance and gas. It would have to meet California wage standards, including the payment of overtime.

The commissioner's office rejected Uber's assertion that it's merely a "technological platform" -- that is, a smartphone app that allows drivers and passengers to make private deals with one another. In fact, Uber exercises tremendous control over the drivers, requiring them to pass background checks and accept a given percentage of ride requests, measuring them against passenger feedback, and setting fares.

The drivers perform a service that is central to Uber's business model (that is, transportation). Uber isn't, say, a pizzeria that happens to pay drivers to deliver its pies after they're made, which might allow the drivers to be classed as non-employees. "Without drivers such as [Berwick]," the commission found, "Defendants' business would not exist." The agency ordered Uber to pay Berwick \$4,152, mostly for mileage and tolls she incurred carrying Uber passengers in the Bay Area.

To labor advocates, the commissioner's office has simply recognized reality. "As things stand now, Uber is breaking the law," says Shannon Liss-Riordan, a Boston labor lawyer who represents drivers for Uber and Lyft as well as delivery personnel for FedEx, which has also claimed that they're independent contractors rather than employees. "It exercises tremendous control over the drivers, and under the law it's responsible for all the obligations that go along with being an employer." (We wrote about the "independent contractor" dodge a couple of weeks ago.)

As it happens, Uber and its fellows have been cruising for a bruising under California law for quite some time. In March, for instance, U.S. District Judge Edward M. Chen narrowed his eyes at Uber's claim to be merely a "technology company," calling it "fatally flawed in numerous respects." The ruling came in a case which Liss-Riordan is seeking certification as a class-action for Uber drivers.

Considering "the substance of what Uber actually *does*," Chen wrote, "Uber does not simply sell software; it sells rides. Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs." He noted that not only does Uber market itself as "Everyone's Private Driver," it has *trademarked* the slogan.

Chen rejected Uber's request to toss the drivers' lawsuit on summary judgment, ruling that the drivers are "presumptive" employees. But he reserved the final judgment on that score for a jury trial in the future.

Liss-Riordan says that the California office of the labor commissioner's ruling may not set a direct precedent for her federal court cases (she has brought a similar lawsuit in San Francisco federal court against Lyft), "but it's a boost that the commissioner reached the same conclusion that we're urging in federal court."

Uber founder Travis Kalanick and other promoters of the sharing economy--or the "1099 economy," as it's sometimes known in reference to the IRS form for reporting non-employee pay--love to describe their business model in terms of the "freedom" it gives workers to set their own hours and capitalize on their otherwise unused cars and apartment space.

In practice, however, the worker obtains the freedom to struggle, while the promoter obtains the comfort of sticking the worker with his or her expenses while extracting a fee. Uber's astronomical valuation isn't based on the value of the labor and material input by its legion of drivers, but on the excessive share of that input that gets upstreamed to Uber.

It's possible that Uber, Airbnb, and other sharing economy firms have identified a business model that can benefit themselves and their workers. It's less clear that the benefits are balanced fairly right now. That's because the firms have been exploiting loopholes or crevasses in the law in ways that benefit only themselves. Once you've identified the providers of your company's services as "independent contractors" or as citizens exempt from, say, lodging regulations, you've cleared the way to exploit them.

It's fashionable to argue today that the relationship between employers and labor has changed so fundamentally that the law has to change to keep up. The examples most often cited are those of Uber and its fellows, but that's circular reasoning. Liss-Riordan doesn't buy it.

"I don't see why anybody thinks we ought to rewrite the laws to benefit a \$50-billion company," she says. "Uber can afford to provide the same protections for its drivers that employees get."

The major benefit of rulings such as those in California may be transparency. "People get lured into working for Uber" by talk of making gobs of money as their own boss, she observes. But many don't realize how much their own expenses cut into their profits until they've already signed up.

These rulings may have started the process of rebalancing the costs and benefits of the sharing economy. That's likely to help the car-owners, apartment dwellers, housekeepers, and delivery personnel get paid what they're worth. If Uber has to eat its drivers' expenses and shoulder the responsibilities it has avoided so far, it might end up not being worth as much as its gaudy numbers suggest, but who really thought it was?