



This Boston Lawyer Could Be Uber's Nemesis as It Eyes Expansion

Curt Woodward – May 23, 2014

When a few taps on the smartphone screen can summon a real-life person to your door, it's easy to feel like there's a bit of magic in the air.

That's what makes on-demand services one of the most intriguing frontiers in business. Whether you want a ride to the airport, a bag full of groceries, or someone to walk the dog, scrappy new companies are using the proliferation of smart mobile devices to connect demand and supply in a hyper-efficient way.



And in this new world of digital labor, it's pretty close to gospel that the companies making those connections are simply middlemen linking independent contractors with people who will pay for their services.

"This economy facilitates new markets by matching providers who have specific assets or skills with the people who need them, dramatically expanding the possibilities for private commercial exchange of services between consenting entities," NYU professor Arun Sundararajan wrote in *Wired*.

But not everyone is buying into that utopian vision. A prime example can be seen in courtrooms from Boston to San Francisco, where one of the fastest-growing companies in the tech startup world is being sued for allegedly mistreating the people who provide its services.

The target in these lawsuits is Uber, the maker of super-slick smartphone apps that can dispatch, track, and seamlessly pay for a ride in taxis, town cars, or everyday commuter vehicles.

Leading the assault is Shannon Liss-Riordan, a Boston-based lawyer who specializes in suing companies that give short shrift to workers. For all of the company's next-wave technological prowess, Liss-Riordan contends that Uber is relying on some very old-school tactics to keep its costs down—treating people as independent contractors when they should be paid as employees.

Uber is fighting those allegations, which are part of a larger lawsuit that also contends the company has improperly held onto tips that should be flowing to drivers. It could be months before the issues get fully decided by a federal judge, but if the former Uber drivers represented by Liss-Riordan win, there could be huge implications for technology companies hoping to build a business around an on-demand, unattached labor force.

“There’s this real struggle that’s going on between companies of all types—I would say especially these startup technology companies who are trying to define themselves as being something different—against these employment protections that have been put in place over decades in order to protect workers,” Liss-Riordan says. “They are just trying to distance themselves from it because it’s a way to save money.”

This isn’t the first time Liss-Riordan has gone after a company that claimed it was merely marshaling a bunch of independent contractors. She’s pursued and won similar claims against cleaning businesses, which said they were selling expensive franchises to house cleaners, and strip clubs, which charged dancers big fees to step out on stage. And her firm is going after the old-line cab industry, filing a lawsuit that alleges drivers have similarly been misidentified as contractors.

She’s also among the lawyers who have spent years arguing with FedEx in court over the company’s policy of classifying some delivery drivers as independent contractors who must pay for day-to-day expenses. FedEx has won some of those claims and settled others, but Liss-Riordan prevailed last year in a federal case in Massachusetts and is now seeking reimbursement for the former drivers’ costs.

“Just like Uber’s trying to claim it’s a technology company, FedEx tried to claim that it was not a package delivery company—it was a logistics operation that connects people who want to send packages to people who want to receive packages,” Liss-Riordan says with a laugh. “OK, well, that looks like a package delivery company to me, and it looked that way to the court too.”

Since its founding in San Francisco in 2009, Uber has expanded to 100 cities around the world and attracted the financial backing of institutional powers like Goldman Sachs and Google Ventures, the latter of which led a \$258 million investment last summer. If you believe the latest anonymous reports, Uber is considering raising even more money, with investors perhaps prepared to value it at multiple billions of dollars.

That’s a stunningly quick ascension for a private company, one that illustrates the growth potential in the current era of mobile computing. With smartphones increasingly being carried in the pockets and purses of people around the world, entrepreneurs are finding it possible to create companies that can spread across the physical map with the kind speed previously seen only on the Internet.

That kind of growth also results in some interesting conflicts. Uber and its competitor, Lyft, have probably exemplified that friction better than anyone because they are entering a highly regulated industry, typically without getting permission. That’s led to the now-familiar battles with local regulators and protests from established competitors, which tend to happen just about everywhere these companies enter a new market.

The employment law questions could add another troubling angle for Uber and its competitors. Liss-Riordan has a separate, largely identical case pending on behalf of Uber drivers in Massachusetts, which has some of the country’s strictest employment laws. She’s also recently joined a similar California-based case against Lyft, a mobile-app-based provider of rides-for-hire largely from everyday drivers.

If courts start cracking down on big names like Uber, it wouldn’t be a stretch to see much smaller startups that depend on a contract-labor model start to get cold feet, and a cold shoulder from investors.

The fundamental question is whether the people providing the services advertised—in this case, drivers for Uber—should be treated as regular employees instead of

contractors working on a job-to-job basis, and therefore have their daily workplace expenses paid by the company.

The answer is not always simple, since different states have different laws that decide when someone is working for a company rather than partnering with it. In California, where Uber is based and where Liss-Riordan's potentially national class-action lawsuit is being heard, the courts weigh several factors to test whether a worker should be considered an employee.

The main consideration under California law is how much control a company has over a worker's day-to-day decisions and activities. Among the other questions: Is the worker paid by the hour or by the job? Who supplies the tools and supplies needed to perform the work? Is the work itself part of the company's regular business?

Uber declined to comment for this story, but it has previously characterized the lawsuit as "frivolous" and "entirely without merit." The company asked to have the employment question thrown out of court last year, although the judge disagreed, saying the allegation was strong enough to require further arguments.

In that preliminary ruling, San Francisco-based federal Judge Edward Chen wrote that Liss-Riordan's allegations were enough "to make the existence of an employment relationship plausible on its face," and that some of the other facts at issue "favor finding an employment relationship."

On the other hand, Chen wrote, some parts of the Uber model may resemble a legitimate independent contractor business, including the fact that drivers supply their own vehicles and are paid by the job, and especially the idea that Uber doesn't control how often they work, where they drive or whether they choose to pick someone up.

"If this proves to be the case, plaintiffs' assertion of an employment relationship would appear to be problematic," Chen wrote.

The case could take a long time to resolve—mediation talks scheduled for last year apparently went nowhere. But the possibility of a loss or expensive settlement with Liss-Riordan does not seem likely to slow Uber's aggressive expansion plans.

In his blog post noting the company's mega-investment from Google and TPG Capital, co-founder and CEO Travis Kalanick made special note of the regulatory and legal roadblocks in the way as Uber seeks to expand around the globe.

Google's stake in Uber would help it add "the expertise that comes with evangelizing new technology with governments and regulatory bodies around the world," he said, while TPG Capital possesses "regulatory know-how in highly regulated ... industries in the farthest corners of the globe."

It was also hard to miss the backgrounds of Uber's two new board members: Google chief lawyer David Drummond, who heads up the search and software company's lobbying efforts, and attorney-turned-private equity billionaire David Bonderman.

"Our vision is to build a technology company that changes transportation and logistics in urban centers around the world," Kalanick wrote. "And this financing gives us the fuel to make that a reality."