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## **Uber and Lyft Drivers** **Independent Contractors or Employees?**

**By Attorney W. Todd Huston**

With the measured demise of the manufacturing economy in Massachusetts, residents have sought new opportunities for remunerative work. Concurrently, employers operating in the cost-cutting bottom-line environment have initiated a shift from the traditional employer-employee relationship to the more cost-effective independent contractor model. This revolution represents an important change in the Massachusetts economy.

There has been a fundamental shift from employer-employee scenario to a business relationship which is task based, or based upon "gigs." This "gig economy" is an environment in which temporary positions are common and organizations contract with independent workers for short-term engagements. And it is within this new paradigm, the "gig economy", that transportation network services operate.

Transportation network services are the ride services like Uber and Lyft. These companies offer a ridesharing experience that allows patrons to request transportation via their smartphone. Drivers, using the appropriate application on their smartphone, are paired with passengers who are driven to their requested destination. The question presented is are these workers entitled to workers' compensation benefits? Currently there is no case law in Massachusetts which explicitly addresses this issue. This article explores the relevance of workers' compensation to Uber and Lyft.

The transportation network services model as implemented strongly favors viewing drivers as independent contractors. Massachusetts case precedent, and the **MacTavish**

factors support this classic interpretation; insurance defense attorneys may comfortably rely upon absence of case law to the contrary. Uber and Lyft operate under a money-saving business model ostensibly employing independent contractors. Uber specifically states on their website that once you are approved to drive with Uber as an **independent contractor**, they will provide everything you need to be a success on the road. Both companies, Uber and Lyft, have been a party to lawsuits involving drivers demanding to be classified as employees rather than contractors without benefits. To date, no driver has prevailed on this issue.

A cursory look at the drivers at transportation network companies certainly supports the traditional independent contractor interpretation. The relationship is similar to the taxi driver. Typically taxi drivers lease or rent a taxi medallion in a cab, for a set fee for a discrete period of time. The taxi driver is not paid a salary. The taxi driver earns fares, which he/she keeps during his/her shift. The fare charged is generally fixed by a meter, but longer trips can be negotiated by the parties. Taxi drivers in Massachusetts are independent contractors, not employees.

Uber and Lyft drivers use an application, the proprietary software of the principal, which sets the fare. Uber drivers get to keep a piece of each fare. Sounds remarkably similar to the taxi driver. In addition, Uber drivers are the masters of their destiny. A driver can work when he/she wants to work. Each day an Uber or Lyft driver can consider whether or not he/she cares to work. There is no requirement that a driver be available at a particular time on a particular date. Uber drivers typically use their own vehicles, and smart phones to run the appropriate application. A driver can choose whether he wants to pick up a fare or not. This sounds like an independent contractor – right?

A circumspect review of the relationship between the Uber and their “partners” i.e. drivers suggest that there is significantly more control involved than realized at first blush. And it is control that is always at issue in establishing the employer-employee relationship. Before turning away the Uber driver case, employee’s counsel should take the time to review the websites for both Uber and Lyft, as they both provide interesting detail concerning the employment relationship. The balance of this article deals with specific details which appear on the Uber website.

Uber determines and calculates the fare to be charged. In fact, Uber raises and lowers fares depending upon the volume of rider traffic. There is no discretion for the driver to determine the fee to be charged. Ultimately, Uber determines how much a driver can make.

A taxi driver is paid by the passenger; cash or credit is exchanged at the conclusion of the ride. An Uber driver is paid by Uber, not the passenger. No money is ever exchanged between the passenger and driver in the transportation network. The passenger who utilizes a transportation network pays the principal, Uber, who in turn pays the driver. Likewise, tolls are charged automatically by the Uber Software to the

Uber Passenger, and are reimbursed to the driver. Payment to the driver, by the company is usually made once a week. This begs the question, is this really a gig, or payment for a shift, with reimbursement for employee expenses incurred while working?

Conversely, there is a valid argument that you are driving your own vehicle, therefore, you are an independent contractor. Clearly the omnipotent software provider has no control over your vehicle, or does it? Do you want to supplement your income with your two-door 2000 Toyota Corolla driving for Uber? Well turns out your vehicle is too old; Uber requires that the all vehicles be model year 2001 or later. Likewise, Uber dictates that all vehicles must be four doors. Need to earn some cash to get that dent repaired? Unfortunately, you cannot be an Uber driver if your vehicle has obvious cosmetic damage. There is an inordinate amount of control over the type of vehicle that can be used. With the right case, these facts would complement your legal argument that your driver is an employee.

The tools of this business are ostensibly owned by the driver -- at least that is how it appears. But most transportation network service companies have vehicles available for rent or lease. No smartphone – no problem. For a nominal fee, the companies also will provide you with a phone to run their application. Again this is a “lease” so you are renting the tools of the trade. But when you start to contemplate the control factors in conjunction with the equipment being owned by the principal, this employment relationship is further obfuscated. If your client is leasing the phone or vehicle, the leasing agreement should be requested and examined carefully.

If you are not sure whether you want to work for a transportation network service, take a look at their website. There are training videos on the website. The videos provide an overview of the service, with tips on how to maximize your rating, and customer satisfaction. The criteria for employment also appear on the website. There are also financial bonuses offered for signing up and picking up a minimum number of fares within the first thirty days. Referring a new driver also has a bonus component. Again, fodder for the argument that this is an employer-employee relationship. A persuasive argument could be crafted that this is analogous to a sales job, with commissions.

The transportation network driver is completely dependent upon the principal's software. This software dictates the price to be charged. The principal's software provides a preferred destination route, and allows for both the driver and patron to communicate and be rated. The driver is totally dependent upon this software, this tool, owned by the principal for his/her livelihood. This software controls and directs the driver on each and every encounter, without exception.

What about the fringe benefits? Independent contractors are infrequently the beneficiaries of any fringe benefits from the principal. However, Uber offers discounts to their drivers for phone plans, gas and vehicle maintenance. Assistance in securing health

insurance and financial planning is also available for drivers. These services all appear on the Uber website.

Uber also provides liability insurance. Once you have gone online and are available to pick up a passenger, you are covered by Uber's third party liability insurance. If a driver is involved in an accident, Uber is to be notified. This coverage provides no coverage for the driver or his vehicle, but does insure the driver for damages sustained by an injured passenger or third party. From the defense attorney's perspective, this situation is analogous to a General Contractor's insurance coverage relative to a sub-contractor. However, employee's counsel may want to explore this relationship to establish whether this is a further indicia of an employer-employee relationship.

A further chink in the armor of the driver as independent contractor is the inability to expand. Typically, an independent contractor can sub-contract some or all of his work. This is not possible with the transportation network companies. There is only a one on one relationship between the driver and Uber. A driver cannot hire a fleet of drivers to work for him through Uber. On the other hand, it does not appear that drivers have to exclusively work for a single transportation network company. This should be explored with the client.

The transportation network services can stop you from working, and terminate your relationship. You can be fired from Uber. There is a rating system in effect that allows passengers to rate the driver after each interaction. If your driver's rating is too low, the driver will be terminated, without recourse. Of interest, in October of this year, two Uber drivers in New York were awarded unemployment benefits after Uber deactivated their accounts. While not dispositive on the issue, it certainly gives credibility to the position that these transportation network service drivers are employees.

The status of the transportation network company drivers is not clear cut. In August of this year, Governor Charlie Baker signed into law Massachusetts' first statewide regulations on ride-sharing services like Uber and Lyft. The specific amendments to the Massachusetts General Laws can be found at Bill H.4570. The new law imposes a new fee on ride-sharing services and establishes specific requirements for background checks, inspections and insurance for transportation network companies. The law does not regulate or address whether or not drivers are employees. To date, a lawsuit against Uber has failed to establish the drivers as employees. **O'Connor v. Uber Technologies Inc.**, 13-CV-03826, U.S. District Court, Northern District of California.

The workers' compensation litigation of the Uber driver as an employee has three distinct governmental paths: (1) Department of Industrial Accidents; (2) Department of Unemployment; and (3) Department of Revenue. The rulings and finding by each Administrative body should be considered and argued in a future workers' compensation proceeding. As mentioned infra, litigation is pending throughout the country before each of these three forums.

The final classification of a transportation network driver is fact dependent. The issue appears decided, but ample avenues of attack on the driver as independent contractor are available. A careful interview or cross examination of the employee will be critical in every case. Each of the **MacTavish** factors will need to be reviewed. How long did the employee work for the company? Which control factors were in place. Due to the dearth of current litigation in Massachusetts, the final answer to the question of the relationship of the driver to the principal has not been adjudicated. However, I am hopeful that this article has provided the litigator with food for thought.

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