THE PUBLIC SECTOR

Uber drivers: wage slaves or entrepreneurs?

by Jeff Sloan
Sloan Sakai Yeung & Wong LLP

It's no surprise the National Labor Relations Board's (NLRB) General Counsel—a Trump appointee—supports Uber's argument that its drivers are independent contractors, not employees protected under the National Labor Relations Act (NLRA). While the General Counsel's determination closes the door to Uber drivers' unionization efforts under the NLRA for now, it points the dissatisfied drivers toward other tantalizing strategic options.

General Counsel's advice memo

The NLRB General Counsel periodically issues "advice memos" addressing pending cases that involve significant policy issues. On May 14, 2019, the General Counsel published an advice memo to the NLRB's San Francisco regional director regarding three unfair labor practice charges filed against Uber by its drivers.

The key question was the "employee" status of Uber drivers. Uber's business model is predicated on drivers being independent contractors rather than employees. A contractor relationship allows the company to avoid the significant costs and liability risks that come with having employees—shifting the many burdens and costs of an "employment" relationship onto the drivers and, not coincidentally, allowing the company to avoid the reach of the NLRA.

Invoking a controversial fresh-off-the-press decision by the NLRB, *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338,* the General Counsel concluded in the advice memo that Uber drivers operate as independent "entrepreneurs" rather than employees. The memo noted that drivers set their own schedules, determine when to log in and out, control their "work locations," often work for Uber competitors, and have full control over the use of their cars. It also pointed out Uber's variable fare and "surge" pricing, promotions, and other features, suggesting those factors give drivers entrepreneurial options and independence.

Moreover, the memo relied in part on the fact that drivers must indemnify Uber against liability for their conduct, further suggesting an arm's-length business relationship. The General Counsel concluded that "none of the facts indicate significant employer control" and the Uber system affords drivers "significant opportunities for economic gain and, ultimately, entrepreneurial independence."

The *SuperShuttle* case reflects an important shift in NLRB case law, reversing *FedEx Home Delivery,* a 2014 ruling in which the Obama Board held that certain FedEx drivers were employees, not contractors. *SuperShuttle* thus set the table for the General Counsel's advice memo.

General Counsel advice memos are neither legally binding nor subject to court review, but they are crucial guidance for NLRB regions nationwide. The advice memo is effectively a reminder to all Board regions that the *FedEx Home Delivery* decision is dead and buried and an implicit instruction to dismiss any unfair labor practice charges or petitions filed with the NLRB by any Uber driver or group of drivers.

Are Uber drivers 'employees' under California law?

The states are free to define "independent contractor" differently from the NLRB and federal law. As we've reported in past issues of this newsletter, the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court* is California's radical new contribution to the national debate. While the NLRB's approach focuses on the supposed "entrepreneurial" aspirations of Uber drivers, California's definition focuses on other factors.

In *Dynamex,* the supreme court interpreted a California Industrial Commission wage order in a decision that's instructive for all private-sector employers. The court's simplified analysis, throwing out the more nuanced traditional common-law test, has been expressed as an "ABC" test. Under the ABC test, a worker is properly considered an independent contractor, and outside the reach of any Wage Order, only if the hiring entity establishes that:

(A) The worker is free from the control and direction of the hiring entity with regard to the performance of the work, both under the contract for the performance of the work and in fact;

(B) The worker performs work that's outside the usual course of the hiring entity's business; and

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work he performs for the hiring entity.

Under *Dynamex*, a worker is presumed to be an employee rather than a contractor unless the hiring entity can prove A, B, and C. That simplified approach, in the court's view, provides greater clarity and consistency than before and prevents the manipulation that could result from a test that requires weighing disparate factors on a case-by-case basis.

As Mark Schickman commented in "The gig is up: Supreme court ruling not good for gig economy" (see pg. 3 of our May 14, 2018, issue), "This ruling should put an end to the claims of Uber and dozens of other driving and delivery services that their drivers aren't employees. If driving is your business, drivers are employees." Thus, litigation against Uber by driver "employees" may well have legs in the California court system. Of course, Uber "independent contractor" agreements surely contain binding arbitration clauses that may prevent meaningful court review.

Jiu jitsu moves by 'independent contractor' drivers

Dynamex suggests that employment claims against Uber could be successful. Such claims could cover myriad areas, including wages, hours, and reimbursement requirements. Paradoxically, however, driver advocates in various states have played jiu jitsu against Uber by capitalizing on the company's premise that drivers are contractors, not employees.

In general, the "*Machinists* preemption" under federal labor law, named for a 1976 U.S. Supreme Court case, *Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, prohibits states or municipalities from enacting legislation that would interfere with uniform national labor policy. But the 9th Circuit recently held in *Chamber of Commerce v. City of Seattle* that the *Machinists* preemption doesn't apply to independent contractors because the NLRA specifically excludes contractors from its coverage. That opens the door to state and local regulation of the corporate treatment of independent contractors.

Willing to accept their status as independent contractors, some Uber drivers are capitalizing on that seam in federal labor law coverage. For example, the New York City Council established a base hourly rate of $18.22 for app-based drivers in August 2018. A Chicago driver group is reportedly seeking a similar base rate, using New York's legislation as a model. The city of Seattle's more comprehensive approach presents a fascinating counterpoint.

Seattle adopted an ordinance that accepted the independent contractor status of Uber drivers and provided a procedure under which Uber and Lyft drivers could effectively unionize—not as employees, but as independent contractors. The legislation survived a challenge based on NLRA preemption. A related challenge based on antitrust law was allowed to proceed but hasn't been resolved. Other litigation challenging Seattle's ordinance on different grounds was dismissed as premature but may be revived.

Even more intriguing were the efforts of the California Legislature in 2016. Under Assembly Bill (AB) 1727 (aka the California 1099 Self-Organizing Act), independent contractors would have been empowered to "negotiate" directly with companies like Uber. The State Mediation and Conciliation Service (SMCS) would have been required to provide mediation services and investigate allegations of bad-faith bargaining (i.e., unfair labor practice charges). AB 1727 didn't survive the 2016 legislative session, but it could be revived at any time.

Bottom line

The NLRB General Counsel's advice memo is by no means a *coup de grâce* against Uber drivers' unionization efforts. Indeed, because of a seam in federal labor law, the drivers may have a better shot at negotiating terms as independent contractors than as "employees." And the *City of Seattle* decision left open the question of whether Seattle's ordinance violates federal antitrust laws. That's a serious lingering issue confronting advocates for governmental regulation of driver "contractors."

Public-sector readers should note that *Dynamex*, which involved a private-sector employer, interpreted California Wage Orders that don't apply to California public-sector employers. A different standard—the *Borello* "control" test, named for *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*—applies to public-sector employers in California.

Finally, imagine how Uber might react to being under the jurisdiction of the SMCS—a subsidiary of the proemployee Public Employment Relations Board (PERB).

The author can be reached Sloan Sakai Yeung & Wong LLP in Berkeley, jsloan@sloansakai.com. ✤