Proskauer

NLRB Office of the General Counsel Advises that Uber Drivers Are Not Statutory "Employees"

Labor Relations Update on **May 15, 2019**

In an Advice Memorandum dated April 16, 2019, but released on May 14, 2019, the NLRB's General Counsel staked out a position in one of the most contentious and influential questions in labor and employment law today: Whether or not Uber drivers – and by implication, potentially, other "gig economy" workers – are statutory employees under the National Labor Relations Act or independent contractors.

If the drivers are employees then they are protected under the NLRA and have the right to organize; independent contractors lack those rights. Applying the Board's recent analysis of the standard for determining independent contractor or employee status – which was discussed here – the Division of Advice concluded that drivers of UberX and UberBlack were bona fide independent contractors, not "employees." Advice directed each of the NLRB Regions to dismiss the pending charges against Uber.

Unlike a NLRB decision, an Advice Memorandum is not appealable, and it signifies that the NLRB General Counsel's position on a particular issue. In this case, the General Counsel's signal is that the agency will not prosecute the pending NLRA charges on behalf of the Uber drivers.

Applying the *SuperShuttle DFW* Test to UberX and UberBlack Drivers

The Advice Memo focused largely on the NLRB's recent *SuperShuttle DFW* decision to justify its position. That case was factually similar to the situation involving Uber drivers, as it involved franchisees who operated shared-ride vans for SuperShuttle Dallas-Fort Worth, and the Board found that the franchise operators were not "employees". In that case, the Board reverted to the traditional common-law agency independent-contractor test, which applied ten or more factors in considering whether an employment relationship exists. Significantly, under this qualitative analysis, a critical consideration is the worker's "entrepreneurial opportunity" And whether the "position presents the opportunities and risks inherent in entrepreneurialism."

This focus was vital to the Advice's conclusion. Advice concluded an Uber driver's ability to work for competitors and maintain control over their vehicles, work schedules, and log-in locations, among other things, supported an independent contractor classification, particularly through the "prism of [the driver's] entrepreneurial opportunity."

Takeaways

The obvious impact of this Memo is that under the *SuperShuttle DFW* standard, the NLRB's Regional Offices under the Trump Board will not prosecute unfair labor practices under the NLRA on behalf of Uber or similar ride-share drivers, or certify elections or bargaining units petitioned by them. The implication is that other "gig economy" workers will be met with the same resistance from the Trump Board's Office of the General Counsel and its Regional Offices, however, each independent contractor engagement may be factually distinct and should be independently evaluated under the *SuperShuttle DFW* test.

This Advice Memorandum presents a significant shift from the NLRB Division's position under the previous administration in September 2016, when it advised that Postmates' couriers were statutory employees, not independent contractors, under the NLRA. As we noted in January, the NLRB may also decide to clarify the employee status of other groups of workers through rulemaking.

The issuance of the Advice Memorandum comes as other branches of government – federal and state – have recently waded into the employment status and rights of "gig economy" workers under federal and state wage-and-hour laws, to varying results. For example, the United States Department of Labor recently opined that "gig economy" workers are not entitled to minimum wages or overtime under the Fair Labor Standards Act, while the California Supreme Court recently applied a more restrictive test for whether workers are independent contractors or employees under California law. New York City also recently enacted a first-in-the-nation minimum wage law for for-hire drivers, which could foreshadow a playbook for advocates of "gig economy" workers to shift their focus to the state and local levels of government.

This is an area we have been monitoring from all angles of labor and employment law and seems ripe for continued activity. So stay tuned!

View Original

Related Professionals

- **Mark Theodore**
  Partner
- **Joshua S. Fox**
  Partner
- **Jacob P. Tucker**
  Associate