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OPINION | COMMENTARY

A Lawsuit to Break the Gig Economy

Uber drivers claim they are legally employees, but that doesn't reflect reality.

By A.J. KRITIKOS

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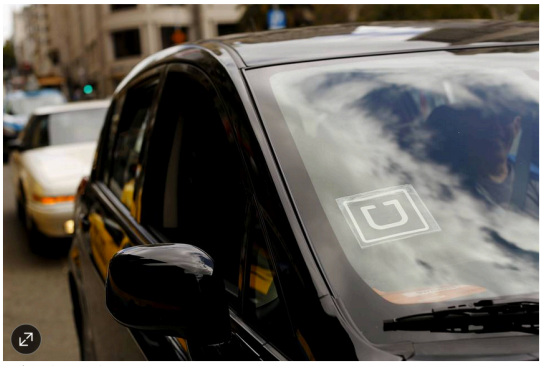
The crackdown on Uber continues in California, where the ride-sharing firm faces a lawsuit that could break the company's peer-to-peer structure—and the rest of the "gig" economy.



An Uber car in San Francisco. PHOTO: ROBERT GALBRAITH/REUTERS

Three Uber drivers have brought a class-action suit against the company, alleging violations of the California Labor Code and seeking monetary damages. Earlier this month a federal district court certified a class on two issues: whether Uber improperly withheld gratuities from its drivers, and whether drivers are legally employees of Uber, rather than independent contractors. This is a blow to Uber, since class-action suits normally fall apart at this stage.

The question of whether the drivers are Uber employees is the more serious, as it would trigger a number of workplace protections. Drivers would be eligible for overtime and reimbursement of work expenses. Yet determining whether someone is an employee or independent contractor is notoriously subjective.

In California law the primary question is whether the putative employer has the right to control the individual's "work details." The California Supreme Court has articulated 13 factors to guide lower courts, but a balancing test has not yielded consistent results. Uber has a number of factors on its side: Drivers typically provide their own cars, set their own schedules and are paid by the job, not by the hour. When they signed up as drivers, they expressly agreed to be independent contractors. But the plaintiffs have some factors on their side, too: In most cases Uber can fire drivers at will.

Uber should win on the merits. But the California Supreme Court has long held that someone who provides services for an employer is presumed to be an employee until shown otherwise. Shifting the burden of proof makes these cases much harder to delineate and helps plaintiffs' lawyers secure settlements even when the claims are frivolous.

Legislators should fix this mess to avoid stifling the sharing economy. The relevant California Labor Code provisions date to 1937. The federal Fair Labor Standards Act (FLSA), which strengthened the dividing line between employees and independent contractors, was passed in 1938.

According to the U.S. Supreme Court, "the prime purpose" of the FLSA was "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." That clearly doesn't hold here. For example, one of the plaintiffs in the Uber suit is a screenwriter by day and chauffeur by night.

Uber is not an overbearing employer using its bargaining power to impose poor terms on drivers. The market is relatively free: Drivers can come and go (including to competitors Lyft and SideCar), working when they want for as long as they want.

There's a simple patch: Lawmakers should amend labor-protection statutes so that when a worker and company in the sharing economy agree in writing that they are forming an independent contractor-principal relationship, then courts must treat it as such. That would better reflect the realities of the sharing economy and free courts from the unenviable task of applying old precedents to 21st-century situations.

Exempting a category of workers from some protections is not new or radical. The California Labor Code and FLSA already exempt some types of workers, including certain computer professionals, lawyers and contracted salesmen.

Basic contract rules would still apply. The agreement to be an independent contractor could be deemed null if it was made under duress or the company misrepresented material aspects of the job. Perhaps an even better solution would be to allow *any* company and worker to expressly renounce some protections afforded by statute.

Reasonable people can agree that driving on the weekends for Uber, dropping off merchandise on occasion for Deliv, or conveying groceries on the side for Instacart does not make one an employee of those companies. The law should reflect that reality.

Mr. Kritikos, a former clerk for the U.S. Court of Appeals for the Third Circuit, is a lawyer in private practice.