



Howard B. Jackson.....

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..... an additional \$16 million if Uber goes public and certain valuation measures are met. Interestingly, the settlement included a provision that the drivers in these two states would remain independent contractors, not employees. That provision did not buy Uber much peace, however, as a similar class action lawsuit was filed in Illinois on May 1, 2016. In that case, the Complaint alleges that the drivers are employees, and says Uber owes the plaintiffs for unpaid overtime, pay for time not worked, reimbursement for expenses, and for the loss of gratuities which the lead plaintiff says Uber “stole from her.”

Déjà vu All Over Again?

If the subject of a large company fighting multiple class action suits over driver classification sounds familiar, perhaps it should. During much of the last decade Federal Express (“FedEx”) fought many class action lawsuits over their treatment of drivers as independent contractors.

FedEx operated for years under a business model that classified its drivers as independent contractors. The drivers used their own equipment, as they were required to purchase the truck if they wished to drive for FedEx. Drivers also paid for fuel and other expenses. Use of one’s own equipment has long been one of the hallmarks of an independent contractor. On the other hand, FedEx required adherence to a great many standards. The drivers wore FedEx uniforms. They handled packages and tracking per FedEx requirements and systems.

EVERYTHING OLD IS NEW AGAIN. OR IS IT?

In April of this year Uber settled two large class action lawsuits, one in California and one in Massachusetts.

Uber is a high-profile company on the leading edge of the new “shared economy;” by providing an app that would-be passengers use to find rides with drivers who own their own vehicles, Uber is not only transforming the landscape of paid transportation, but also challenging long-standing legal precedents in employment law regarding the status of its drivers. Specifically, the primary question in both of these lawsuits was whether Uber drivers were employees or independent contractors.

Per the settlement terms, the plaintiff classes will receive at least \$84 million, and can receive up to

The trucks had to meet FedEx requirements, including bearing the company logo.

Eventually, FedEx changed its business model and in 2011 hired the FedEx Ground drivers as employees. That did not end the pending lawsuits or their costs. For example, in June of 2015 FedEx settled a decade long class action case in California by agreeing to create a \$228 million fund for payment of the misclassified drivers.

Now, Uber is the new favorite target for driver misclassification lawsuits.

How Do Uber Drivers Compare to FedEx Drivers?

Both employers required the drivers to own their vehicle. Of course, the Uber driver’s vehicle is typically a passenger vehicle and does not bear a company logo. Uber must approve the vehicle, and drivers are required to meet safety standards. FedEx also approved vehicles and had safety standards. Uber drivers are not required to wear uniforms. They do not track packages via a company system, but do of course learn of driving opportunities and track and report rides via Uber’s software.

Uber has recently published a guideline for its drivers regarding factors that can lead to “deactivation,” a term that refers to Uber removing someone from its list of drivers. According to the guidelines, poor quality can lead to deactivation. Quality is measured in various ways, including the “Star Rating” which is based on surveys from drivers and riders, cancellation rate (the percentage of times the driver accepts an assignment and then cancels), and acceptance rate (the percentage of driving opportunities that the driver accepts).

Uber will also deactivate a driver for fraud, safety violations, violation of drug and alcohol policy, legal compliance failures, violating the ban on firearms, failure to provide accurate personal information, unacceptable activities (such as accepting illegal hails or giving rides anonymously), or engaging in discrimination by refusing to serve or mistreating riders on the basis of race, sex, religion, etc. (Is it just me or is this list beginning to sound rather like an employee handbook policy?)

Will the Old Independent Contractor Analysis be Made New Again?

The new economy has created new models for companies and the individuals who provide services for them. Uber is a prime example.

Under the current legal analysis for independent contractors (including a list of factors used by the IRS in determining independent contractor status for tax purposes), it appears likely that the drivers

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Ann Sartwell.....

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for a safety sensitive machinist position with the railroad company, and his offer of employment was contingent on a satisfactory medical review. The employer revoked its offer of employment based on his obesity. He did not have medical conditions associated with obesity or claim physical limitations. The plaintiff sued, contending discrimination because of an actual disability under the ADA and because he was regarded as disabled. The employer was granted summary judgment on both counts and the plaintiff appealed.

The appellate court affirmed the lower court's summary judgment ruling for the employer, and its analysis is instructive. First, agreeing with *EEOC v. Watkins Motor Lines*, 463 F.3d 436, 442-43 (6th Cir. 2006), the court found that an individual's weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range and it occurs as the result of a physiological disorder. Both requirements must be satisfied before a physical impairment, and thus an ADA violation, can be found.

EMPLOYER UPHELD IN REFUSING TO HIRE MORBIDLY OBESE PLAINTIFF

The subject of morbidly obese plaintiffs under the Americans with Disabilities Act (ADA) generates a lot of interest as well as litigation. In 2008, Congress made changes to the original law by enacting the ADA Amendments Act (ADAAA). Though the amendments made it easier for some ADA plaintiffs to prevail, questions still remain. A very recent Eighth Circuit decision endorses the reasoning of a pre ADAAA Sixth Circuit decision that concluded that obesity, standing alone, is not a physical impairment.

In *Morriss v. BNSF Railway Co.*, 817 F.3d 1104 (8th Cir. 2016), the Court granted summary judgment to an employer facing a complaint of both "disability" "regarded as disabled" discrimination. The plaintiff applied

Second, the court found that earlier cases dealing with the issue were still applicable. The ADAAA charged the EEOC with the responsibility of redefining the terms, "substantially limits" and "major life activity" to insure broader coverage, but Congress did not give instructions regarding the definition of "physical impairment."

Next, the court found that obesity, in and of itself, is not a physical impairment simply because it has been labeled "severe," "morbid" or "Class III." Instead, weight is merely a physical characteristic - not a physical impairment - unless it is both outside the normal range and a result of an underlying physiological disorder. In so ruling, the court rejected a provision in a now withdrawn EEOC Compliance Manual which states that "severe obesity," "body weight more than 100% over the norm" is an impairment. Even after the enactment of the ADAAA, to be considered a physical impairment, it must result from an underlying physiological disorder or condition.

In rejecting the argument that the employer regarded him as having a physical impairment, the appeals court found that the ADA does not prohibit discrimination based on a perception that a physical characteristic - as opposed to a physical impairment - may eventually lead to a physical impairment as defined under the Act. As noted by the district court, the EEOC's own current interpretive guidance specifically states that, "the definition [of impairment] . . . does not include characteristic pre-disposition to illness or disease." 29 C.F.R. Part 1630.

The court's position is different than that of the EEOC, which filed a brief in support of the plaintiff. The Compliance Manual referred to above was removed because of the ADAAA changes, but the EEOC nonetheless continues to contend that morbid obesity can be a disability and has entered into consent decrees in the last 5 years with at least two employers in similar cases. The decision also does not address the June 2013, resolution of the American Medical Association (AMA) which declares obesity to be a disease.

Editor's Note - This ruling provides a useful precedent to employers in defending obesity discrimination cases. It also furnishes some useful explanations of the application of the ADAAA. However, obesity cases remain controversial and ripe candidates for litigation.

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motivated by an “independent unlawful purpose.” Therefore, ruled the Board, the employer’s permanent replacement of strikers was unlawful.

Two key pieces of evidence formed the basis for the NLRB’s finding of unlawful motivation. One came from a telephone conversation between the union attorney and the employer’s attorney. The employer’s attorney indicated that the employer was permanently replacing strikers, and the union’s attorney asked why. Although the employer’s attorney later denied the answer, the Administrative

NLRB CIRCUMSCRIBES EMPLOYERS’ RIGHT TO PERMANENTLY REPLACE ECONOMIC STRIKERS

Many years ago the U.S. Supreme Court ruled that an employer possesses the right to permanently replace economic strikers to continue business operations during an economic strike. *Mackay Radio*, 304 U.S. 333 (1938). This doctrine holds that a union has the right to use the economic weapon to engage in a strike, and an employer may use an economic weapon by permanently replacing economic strikers. A recent decision by the National Labor Relations Board (“NLRB” or “Board”) illuminates some limits on this long-standing principle.

In *American Baptist Homes*, 364 NLRB No. 13 (May 31, 2016), the NLRB found that an employer who replaced economic strikers was

Law Judge ruled on credibility grounds that he in fact said that the employer “wanted to teach the strikers and the union a lesson. They wanted to avoid any future strikes, and this was a lesson that they were going to be taught.”

The Board found that this credited testimony established unlawful motive. An employer can replace economic strikers as a means of forcing the union to accept the employer’s economic position. However, striking is itself a fundamental right under the National Labor Relations Act. Therefore, reasoned the NLRB, an employer may not permanently replace economic strikers to punish them for engaging in a strike.

With respect to the second key piece of evidence establishing unlawful motive, the Executive Director of the site at issue provided an affidavit which indicated that one reason for permanently replacing the strikers was the official’s belief that the permanent replacements would be willing to work in the event of another strike. Thus, by hiring such replacements, the employer could avoid future strikes, and also avoid the cost of hiring temporary employees again in the future. Once again the NLRB found that, in the same way that hiring permanent replacements to punish the strikers for striking was unlawful, so also was the motivation of avoiding future strikes (i.e. future protected activity by employees).

The Board indicated in a footnote that the employer is not required to express a reason for permanently replacing economic strikers, but that if the employer does so (or if the evidence otherwise indicates a reason), the Board can and should determine whether that reason constitutes an independent unlawful purpose.

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PLEASE JOIN US IN WELCOMING L. ERIC EBBERT!

L. ERIC EBBERT is a Member of Wimberly Lawson Wright Daves & Jones, PLLC in the Knoxville, Tennessee office, which he joined in 2016. He is licensed in both Tennessee and Florida. He practices in the areas of Labor & Employment law - Management, business litigation, and health care liability. His emphasis on Labor & Employment law includes counseling and defending employers in state and federal courts and before government agencies under Title VII, Americans with Disabilities Act, Age Discrimination in Employment Act, Family and Medical Leave Act, Fair Labor Standards Act, National Labor Relations Act, and state employment laws; conducting high-level investigations; management training; and employment contracts. His litigation practice also includes real property, breach of contract, tort liability, products liability, and health care liability, as well as the full spectrum of business-to-business litigation. Eric has tried more than 30 cases, representing regional, national and multi-national companies, through all stages of litigation and appeals. Eric received his Bachelor of Science degree in Accounting from Brigham Young University, and his law degree from the University of Tennessee College of Law. He is admitted to practice in the United States District Court for the Eastern, Middle and Western Districts of Tennessee, and the Middle and Southern Districts of Florida, and the U.S. Tax Court. Since 2007 Eric has served as a member of the District Investigatory Committee of the Tennessee Board of Law Examiners. He is also a member of the American, Tennessee, and Knoxville Bar Associations, a member of SHRM, and a member of the Board of the Senior Citizens Home Assistance Service, Inc. He devotes his personal time to family and church activities.

would be found to be employees. They must adhere to Uber standards during the performance of their duties. If they do not do so, including accepting a high enough percentage of driving opportunities, Uber will deactivate them.

One may argue that while the above is true, the drivers supply their own vehicles, are free to accept or reject assignments, and can certainly pursue other opportunities, business and personal, while working via Uber. All of these things are true, and make the analysis a closer case than many.

With all due respect to the IRS factors and other “factor”-based analysis of the issue, there has always been an extent to which the determination of independent contractor status has been something of a “know it when I see it” exercise. The primary consideration in the “know it when I see it” judgment is whether it appears that the person in question is genuinely in business for himself or herself, or is dependent on the organization in question for his or her work. While it may be a closer question with Uber for a variety of reasons, the bottom line reality is that, absent Uber, the drivers are not in the driving business at all.

Assuming that the “old” and existing independent contractor analysis leads to classification of the drivers as employees, that raises the question: Will Congress or the courts change the law in some way that accommodates this and similar work models? The answer will impact a great many people. Uber says that over 450,000 drivers use its app each month in the U.S. alone. (April 21, 2016 blog by Uber CEO and co-founder Travis Kalanick.) Uber is just one company. It has competition in the transportation business that uses a very similar driver model. And there are many other employers and individuals who are engaging in, and desire to engage in, such non-traditional forms of work.

If there is a change in the law, who would accomplish it? What would it look like? The courts are unlikely to create wholesale changes in the independent contractor analysis. That leaves legislation as the more likely route. Given the rise of new business models such as Uber, Congress may see a need to act. But in which direction? Congress could create new laws that make it harder to treat someone as an independent contractor. Or, Congress could enact rules creating new standards that are easier to define and understand and which, if met, would clearly permit independent contractor classification.

It is too early to tell whether Uber and other employers with “shared economy” business models will become prevalent or powerful enough such that new rules are forged to assist them, or at least lend clarification to the analysis. Meanwhile, it seems that lawsuits on this topic will continue unabated.

“Uberification” Makes Strange Bedfellows: Unions and Uber

An unusual aspect of Uber’s resolution of the California and Massachusetts lawsuits was its agreement to help create and fund a drivers association in both states. Since that time, in May of 2016, Uber recognized an Independent Drivers Guild in New York City that was created via the International Association of Machinists. Uber’s cooperation in these efforts is apparently driven by a desire to have a more formalized means to communicate with its many drivers, and to address and resolve their concerns.

This model will not work if the drivers are employees. Under the National Labor Relations Act an employer may not fund a union or its activities. Where that takes place, the organization is considered an unlawful, employer-dominated union.

For so long as the drivers are considered independent contractors, however, the new arrangements between Uber and the unions may operate lawfully. This is because the National Labor Relations Act only covers employees, and does not apply to independent contractors. So long as the drivers are independent contractors, then Uber can flatly refuse to deal with any union that wishes to represent them. On the other hand, and for the same reason, Uber is also free to enter contractually defined relationships with unions if it so desires, and can even contribute funds to help cover the union’s activities in communicating with and providing services to Uber drivers.

Will the Law Keep Up?

As a societal institution, the law often lags behind society and technology. The courts rule based on precedent, and legislatures must debate change in a politically charged environment. Meanwhile, businesses such as Uber and others find creative new ways to provide services and attract and serve customers. It will be interesting to see whether, and if so when, the law adjusts to new working arrangements such as Uber’s in the “shared economy” model.

The Firm wishes to congratulate Howard Jackson for publication of this article in the July Edition of HR Professionals Magazine.

EDITOR’S NOTES: This case highlights the importance of developing and implementing a good communication plan during significant events, such as striking or picketing. One cannot eliminate all risk, but a good communication plan that is developed in advance and disseminated among the management team appropriately can help tremendously.

This article has addressed the topic of economic strikes - which are strikes over economic conditions such as wages and benefits - but the

rules are different when a union engages in an “unfair labor practice” strike, which is a strike over working conditions. Since the issues between employees and management are often complex, it is not always obvious whether employees are engaged in an economic strike or an unfair labor practice strike. Employers should think through this and other issues carefully, preferably with labor counsel, before taking actions relative to the employment of strikers.