

Uber Drivers: Employees or Independent Contractors?

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The purpose of this short contribution is to shed some light on the discussion regarding an Uber drivers' qualification – whether they should be considered employees or independent contractors. If Uber is considered as an employer and the driver as an employee, then the Company will be responsible for certain matters. For instance, depending on the jurisdiction, withholding taxes on the amounts paid to the driver, social security and unemployment insurance obligations as well as other compliance related obligations. On the other hand, if Uber drivers are qualified as independent contractors, the Company will keep facing less paperwork, administrative hassles and costs. In this regard, the drivers will be responsible to inform their income to the tax authorities as self employed individuals^[1].

As a background, on 5 July 2010, Uber^[2] started its revolution^[3] across San Francisco^[4]. The main idea of Uber was that anyone with a vehicle could make extra cash by providing rides to passengers. For passengers, the concept of easier and cheaper services was the goal. The ECJ has analyzed Uber's business model and, in spite of the Company's arguments^[5], it ruled that Uber should be subject to regulations^[6] applicable to a taxi operator^[7].

Uber has affirmed that all drivers on its platform are partners and must be considered as independent contractors. However, the Company has faced various legal proceedings across the world wherein authorities belonging to different legal fields have argued that the drivers should be qualified as employees.

For example, in the UK^[8], the Employment Tribunal ruled that drivers cannot be considered as self-employed but regular workers^[9]. The decision was also upheld by the Employment Appeal Tribunal^[10] and the Court of Appeal^[11]. Similarly, in Switzerland, the SUVA^[12] qualified Uber drivers on behalf of Social Security Agency of the Canton of Zurich, in May 2016, as employees. The Swiss State Secretariat for Economic Affairs (SECO^[13]) also stated that Uber drivers should be qualified as employees. UNIA (Switzerland's largest trade union) has also reached the same conclusion^[14]. Also, *Le Tribunal des prud'hommes de Lausanne*^[15], recognized the drivers as employees^[16]. *La Cour de Cassation*^[17] in France also upheld the characterization as an employee. The main justification adopted by the French Court is based on the fact that an Uber driver cannot build his own client base or fix the prices which he/she thinks is fair. These characteristics make the driver an employee of the Company.

On the other hand, in the United States, the District Court of Pennsylvania declared Uber drivers as independent contractors^[18]. So did the State of Florida^[19]. But California has projected an atmosphere of doom and gloom for the Company, as the Government recently approved the AB5 bill^[20]. The bill was designed to determine if an individual should be qualified as an independent contractor or employee. In order to decide which qualification is the correct one, an ABC test must be applied^[21], that is: (A) Is the individual free from control of the hiring company?; **and** (B) Is the individual providing a service that is not the hiring company's core business?; **and** (C) Is the individual truly engaged in running his/her own business of the same nature of the service provided to the hiring company?

In case the three questions are answered positively, the worker is considered an independent contractor. Consequently, in case of any of the questions are answer negatively, an employment relationship is established. Thus, in applying AB5 provisions to the Uber model, drivers, if qualified as employees according to the proposed test, could gain protection established in California labor laws, although they would not have the right to claim some expenses against their taxes anymore. Additionally, Uber would be obligated to pay payroll taxes.

Nevertheless, Uber has also received some good news. In Australia, the Fair Work Ombudsman concluded an investigation against the Company and decided to qualify Uber drivers as independent contractors^[22]. Moreover, Brazilian highest Labor Court changed a lower decision and also pronounced Uber drivers are contractors^[23].

Given these different opinions, we seek to add our perspective to the debate? As a starting point, it is relevant to bear in mind that labor law and tax law have different purposes^[24]. In case an individual is considered an employee under labor law does not mean that this same person should be considered an employee for tax law purposes.

In order to understand the contextual or common meaning of an employment relationship (at least in interpreting tax treaties), one could refer to the OECD Commentary on Article 15 which provides certain indicators. Indicators that can be relevant to determine an employment relationship, in particular, include checking (i) who has the authority to instruct the individual about the way the work should be performed; (ii) who controls and has responsibility over the place where the work is performed; (iii) who provides tools and materials at the individual's disposal in order for that individual to perform the work; (iv) who determines how many workers are necessary to perform the work and their qualification; (v) who is in the position to select the individual and terminate the contractual agreement; (vi) who is allowed to impose disciplinary sanctions to the individual regarding his/her performance; (viii) who set up the individual's holidays and working hours.

In light of these indicators, one could argue that drivers are employees as (i) the company provides some rules regarding car maintenance and manners that must be followed by the drivers, (ii) the Company fixes ride prices and handles the payment processing; (iii) Uber approves drivers' applications and can cancel the use of the platform by them; (iv) the Company can also impose sanctions. These parameters indicate that there is some level of subordination and dependence.

In contrast, one could also argue that Uber drivers are independent contractors as (i) the drivers are flexible to provide services whenever and wherever they want to, that is, they are free to decide their work schedule and holidays; (ii) the drivers put the main tool necessary to provide services (for example, their own cars); (iii) drivers are able to refuse a client or a location to work (iv) drivers are free to contract with other parties and there is no exclusivity; (v) considering that around 80% of value of the service (fees) is given to the Uber driver, the fact that one of the parties gets such a high percentage can indicate a partnership, since it is not consistent with the traditional understanding of an employment relationship.

The above analysis indicates that it is difficult to arrive at a conclusion. Broadly speaking, the analysis shows that tax law (depending on the jurisdiction) can only classify the drivers as "employees" or "contractors". However, the Uber Model has showed that this line is not that clear and you can have a "hybrid" model that encompasses characteristics of both an employee and a contractor.

At this stage, bearing in mind the absence of a proper definition that could be applied to the business model used by Uber^[25], we prefer to rely on the opinion that a hybrid classification should prevail. This classification will entail separate tax related obligations for both Uber and the drivers. This is a matter that will be discussed in an another contribution.

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[1] On Uber's website, the Company provides information regarding taxation of the so-called Uber driver-partner. See <https://help.uber.com/driving-and-delivering/article/paying-taxes-as-an-uber-driver-partner?nodeId=4d959f38-520e-4387-8eab-c01454cc3744>.

[2] The interesting point of the economic model is that Uber's resources to operate its business are basically (i) a digital platform which connects supply and demand; (ii) an extensive user base; and (iii) a worldwide brand.

[3] As stated by Dara Khosrowshahi, Uber CEO, in his letter to investors, the Company started by providing rides. It later on expanded to other services such as ridesharing and carpooling, food delivery, electric scooters and bicycles, driverless cars and rides made by helicopters. See <https://investor.uber.com/a-letter-from-our-ceo/default.aspx>.

[4] The Uber digital platform has been used to connect willing passengers to drivers. The drivers use their own cars when providing services and Uber – which also handles the payment procedure – gets a percentage of the fare charged by the driver from the passenger.

[5] Uber contended that it did not operate in the transport sector but was running a computer service business.

[6] For further information, see ECJ C-434/15, Asociación Profesional Élite Taxi v. Uber Systems Spain SL, Judgment of the Court (Grand Chamber) of 20 December 2017. The ECJ ruled that in this model of intermediation service, the objective is to obtain consideration by connecting, using a smartphone, drivers using their own vehicle with passengers who need rides and, therefore, it is intrinsically linked to a transport service. Accordingly, the directives which regulate e-commerce and services in the internal market shall not be applied, but rather the common transport policy.

[7] For a comparison between Uber and traditional taxi operators, see OECD 2018, Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. For example, in both cases they need drivers (with proof of qualification) with an available vehicle as well as passengers. However, some noteworthy differences exist: (i) Uber passengers have to sign up on the Uber app; (ii) the identities of both (Uber driver and Uber passenger) need to be revealed; (iii) both Uber parties, after completing the ride, are prompted to rate each other; (iv) only passengers with positive ratings are allowed to order cars and only drivers with positive ratings can provide the service, (v) traditional taxi operator matches passengers usually randomly or by means of dispatcher, while Uber uses technologies and algorithms etc.

[8] Here it is important to highlight that, under UK Law, there are five main types of employment status, namely: worker, employee, contractor, director and office holder (unlike other jurisdictions which only provide for an employee vs independent contractor difference). The relevant status will determine individuals rights and also the responsibilities and obligations attributed to the employers) – see <https://www.gov.uk/employment-status>. For further details, see Employment Rights Act 1996, Section 230, available at <http://www.legislation.gov.uk/ukpga/1996/18/contents>. Therefore, when comparing decisions issued by UK Employment Courts to decisions issued by other countries, this difference must be taken into account.

[9] UK Employment Tribunals, Mr. Y Aslam, Mr. J Farrar & Others v. Uber BV, Uber London Ltd and Uber Britannia Ltd., Case n. 2202550/2015, on 28 October 2016.

[10] UK Employment Appeal Tribunal, Mr. Y Aslam, Mr. J Farrar & Others v. Uber BV, Uber London Ltd and Uber Britannia Ltd., Appeal No. UKEAT/0056/17/DA, on 10 November 2017.

[11] UK The Court of Appeal, Mr. Y Aslam, Mr. J Farrar & Others v. Uber BV, Uber London Ltd and Uber Britannia Ltd., Case No: A2/2017/3467, on 19 December 2018. The claimants claimed themselves a worker status. Then, the analysis made by UK Courts was in relation to the terms "worker" and "self-

employed/contractor”.

[12] Abbreviation of *Schweizerische Unfallversicherungsanstalt*, Swiss National Accident Insurance Fund, a public-sector insurer and leading provider of health care coverage for employees in Zurich in case of accidents.

[13] See https://www.swissinfo.ch/eng/wage-dumping_swiss-authorities-say-uber-drivers-should-be-treated-as-employees/43984356.

[14] See <https://www.unia.ch/fr/actualites/actualites/article/a/14710/>.

[15] For further information, see <https://www.rts.ch/info/suisse/10410983-uber-est-bien-un-employeur-estiment-les-prud-hommes-lausannois.html>.

[16] Lately, another legal analysis regarding Uber’s operation was done by the Geneva Cantonal Government and the head of Cantonal Government Mr. Mauro Poggia has reaffirmed that services provided by Uber are subject to taxi regulations and, therefore, the Company will face a ban if it does not reclassify its drivers as employees and regularize the situation by means of payment of taxes and fines and other compliance obligations. See <https://www.swissinfo.ch/eng/uber-faces-ban-in-geneva-if-it-fails-to-hire-drivers/45340404>.

[17] Cour de Cassation, Chambre Sociale, ECLI:FR:CCAS:2020:S000374, Uber France, société par actions simplifiée unipersonnelle et autre(s) v. M. A. X., Arrêt n°374 du 4 mars 2020 (19-13.316).

[18] The United States District Court for the Eastern District of Pennsylvania, Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies Inc., Civil Action n. 16-573, 11 April 2018.

[19] Third District Court of Appeal of State of Florida, Darrin E. McGillis v. Uber, N. 3D15-2758, Lower Tribunal N. 0026283468-02, 1 February 2017.

[20] AB5 is the short term for Assembly Bill n. 5, also known as “Gig Worker Bill” published in the Official Journal on 19 September 2019. See https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

[21] For about 30 years, California Labor Courts applied a 11 factor-test established during the trial of S.G. Borello & Sons, Inc. v. Department of Industrial Relations to decide if an individual should be considered an employee. Such precedent was revisited in 2018 by California Supreme Court when Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County was analyzed. By that time, it was ruled that the ABC test should be applied to determine a worker qualification.

[22] For further information, please see <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release>.

[23] Tribunal Superior do Trabalho (TST), Marcio Vieira Jacob v. Uber do Brasil Tecnologia Ltda., RR - 1000123-89.2017.5.02.0038, published in Official Journal on 07 February 2020. Such decision is still not binding and can be appealed.

[24] Labor law aims at protecting employees and ensuring them rights due to the employment status, besides setting forth obligations and responsibilities for employers. Tax law, in general, focuses on collection of money from those who have capacity to pay to fund State activities.

[25] The OECD Interim Report 2018 defines Uber as a Ride-for-hire company and states that it is “a digital platform that creates value by matching drivers and passengers so that they can complete a ride on a pay-as-you-go basis. It is built around the following main steps. First, the ride-for-hire company recruits drivers with access to their own cars. It then orchestrates the drivers centrally, e.g., monitors their active hours and locations in order to offer a transportation platform. Third, the company develops a platform, including a mobile app, which allows passengers to book a ride. Finally, it ensures transaction quality using a review system whereby drivers and passengers have the option of rating the quality of the interaction” (Op. cit, page 66/67).