Forbes

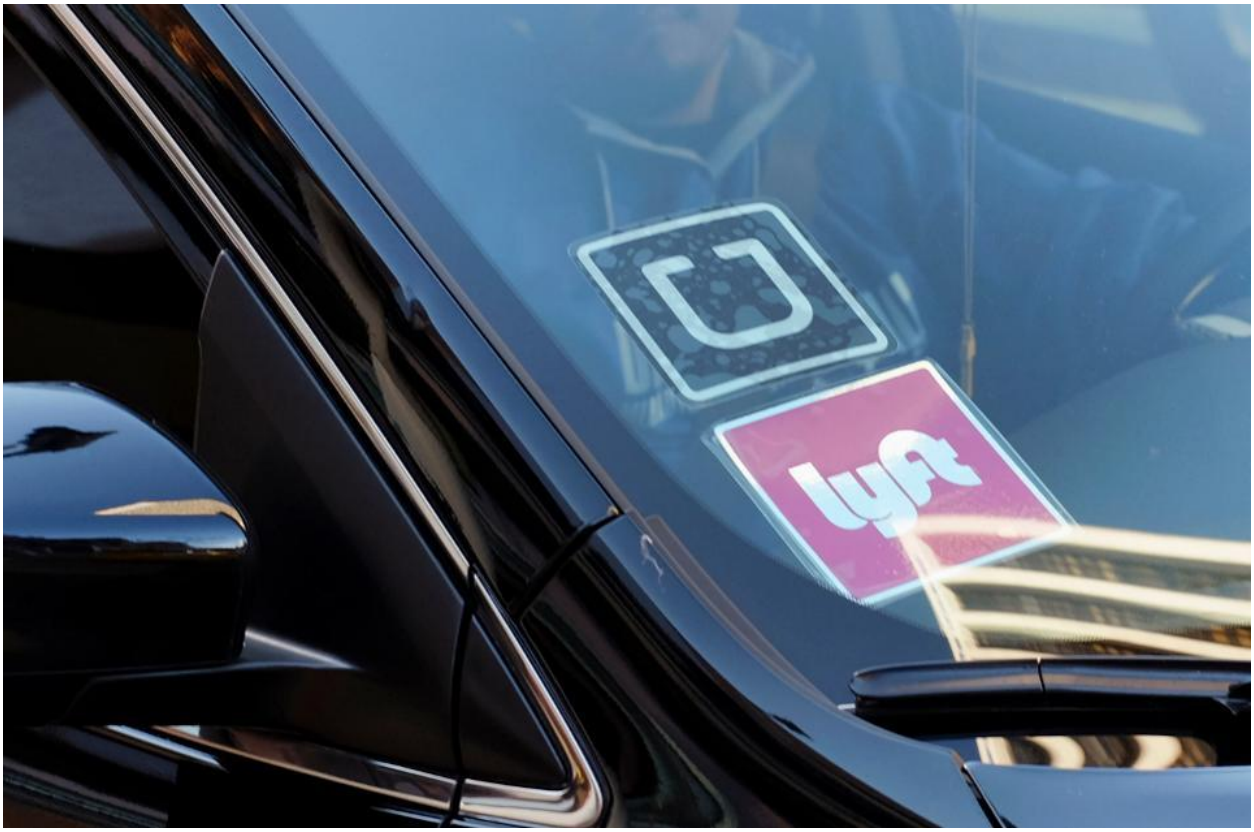
Robert W. Wood
THE TAX LAWYER

TAXES 09/11/19

Despite Sweeping California Gig Worker Law, Uber Says It Won't Treat Drivers As Employees

***UPDATE**: On September 11, 2019, Uber's top lawyer announced in a news conference that Uber will not treat its drivers, who are independent contractors, as employees under the newly passed California bill. Tony West, Uber chief legal officer, pledged that its drivers will remain independent contractors. Mr. West said Uber's business is not providing rides but "serving as a technology platform for several different types of digital marketplaces." He added that the company was "no stranger to legal battles."*

California's Senate has passed a bill—Assembly Bill 5—that could require Uber, Lyft and gig companies to treat workers as employees. A similar bill was already passed by California's Assembly, so the assumption is that soon the bill will become law. What happens then is anyone's guess. Under the new law, workers in California could generally only be considered independent contractors if the work they do is *outside* the usual course of a company's business. Conversely, workers must be employees instead of contractors if a company exerts control over how they perform their tasks, or if their work is part of a company's regular business. Can Uber or Lyft claim its drivers are ancillary, or somehow not the core, the very reason those rideshare companies are operating? It's hard to see how. Sure, these companies may have gone public and be worth fortunes, but they arguably got there with a "don't hire employees because they are expensive" model. Of course, Uber and Lyft are not alone.



Just think of the vast gig economy. Assemblywoman Lorena Gonzalez, the Democrat who authored the bill, said it is to stop businesses from gaming the system by misclassifying workers. The state wants to stop “free-riding businesses” from passing their own business costs onto taxpayers and workers. Gig workers have stretched branding and worker classification boundaries with vast armies of "non-employees." Add it all up and you have a perfect storm. Worker status issues can come up almost anywhere, and not just from the government. Workers who sign contracts as independent contractors can *still* sue claiming they are employees. Third parties injured by an 'independent contractor' can sue saying he or she was *really* an employee, so the employer is liable. And much of that has already been happening.

Having employees triggers federal and state tax withholding, anti-discrimination, health care, pension, worker’s compensation and unemployment insurance obligations. You avoid these entanglements by hiring independent contractors, or do you? If they are *really* independent contractors, sure, but labels aren’t enough. Disputes are common, and many different agencies can second-guess your decision. There’s the IRS, state tax authorities, labor departments, and insurance companies. All of them scrutinize the status of workers. Signing a contract does *not* prevent the worker from suing and winning.

Obamacare defines a full-time employee as someone who works on average at least 30 hours per week, or 130 hours per month. Independent contractors

aren't covered, assuming their status is legitimate. If your independent contractor classification doesn't hold up, taxes and penalties can be crushing. No matter how you label someone, the substance of the work relationship will control, but it can take years for these disputes to really rise to the surface, and California wants a fix. Traditionally, to determine who is an independent contractor, the IRS says you must evaluate 20 factors, and assess whether you are controlling the method, manner and means of the work. No one factor is controlling.

The duration of your work relationship is important, as is whether it is full or part time, professional credentials, flexible vs. rigid hours, who supplies tools and supplies, expense reimbursements and more. A written contract is key to independent contractor status, but that alone is clearly not enough. Are you paying for a job—like having someone put in a new kitchen—or paying for someone to work by the hour doing reception work?

Reports from the Treasury Inspector General says employers are still getting it wrong. Millions of 'independent contractors' are really employees and that means payroll tax withholding. Determining who is an employee has always been a fact-intensive minefield. Some companies push the envelope. In 2015, FedEx settled their long-running dispute with FedEx Ground California drivers for $228 million. FedEx Ground defended its so-called independent contractor model vigorously. But in 2014, the Ninth Circuit found that 2,300 drivers were covered by California's workplace protection statutes. See *Alexander v. FedEx Ground*. The FedEx case is a good reminder that no matter how you label someone, the substance of the work relationship will control.

In franchise operations like Domino's Pizza, where each store is independently owned, the relationship can be even more attenuated, yet a $32 million verdict says there can still be liability to the company. And with Uber, Lyft and others, there have also been lawsuits, whatever the drivers may be called. California has passed bills in the past to lean on employers. One was SB 459 to increase the penalties. California's Labor and Workforce Development Agency can fine you for "willfully misclassifying" an employee from $5,000 to $15,000 per violation. The penalty goes up to $25,000 per violation if you commit a "pattern and practice" of "willfully misclassifying" workers. But California's latest bill could vastly change the landscape. Stay tuned.

This is not legal advice. For tax alerts or tax advice, email me at Wood@WoodLLP.com.