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PERSPECTIVE

Classifying laborers in the sharing economy

By Hon. James Ware (Ret.)

The sharing economy is now a recognized sector of the world economy. Businesses and individuals have embraced this new economy to exchange and share privately owned goods and services. Many of these "exchanges" have grown from neighborhood cooperatives into national and international enterprises. The sharing economy covers a wide range of business models, from peer-to-peer networks like Airbnb to business-to-peer networks like Zipcar. As they have grown, many of these enterprises have developed rules that control the activities of individuals who participate in them. A healthy debate has emerged over when the amount of control over the laborers transforms the enterprise from a cooperative to an employer.

Traditionally, any person who performs labor for an enterprise is classified as either an employee or an independent contractor, depending on the level of control. If an enterprise exercises control over the details of how activities are preformed, including the means and manner for performing them, an employment relationship is recognized. If control over the details of the activity rests with the laborer, as distinct from the end result only, the relationship is likely to be recognized as that of an independent contractor. Under the Fair Labor Standards Act, the U.S. Department of Labor uses an economic realities test that focuses of "whether the worker is economically dependent on the employer or in business for him-or herself." *See* DOL Administrator's Interpretation No. 2015-1, issued July 15, 2015; *see also S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 342 (1989).

As Douglas J. Farmer points out in "California Employment Law: The Complete Survival Guide," "Failure to classify a laborer correctly can result in failure to comply with a multitude of employment laws, tax laws, employee benefit plan obligations and other legal requirements." For example, the California Fair Employment and Housing Act prohibits discrimination in the workplace, but independent contractors are excluded from its coverage. The severe consequences for misclassification have led many companies to ask human resources professionals or lawyers or a neutral to conduct a periodic assessment of its practices.

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The labor relationships involved in the sharing economy have introduced new classification issues. In this current economy, some enterprises do not conduct a neutral classification analysis because they do not regard themselves as being in an employment relationship. In their contracts, they describe themselves as providers of technology that facilitate peer-to-peer exchanges. Reliance on contractual definitions is dangerous because the conduct of the parties, not a written contract, defines the proper classification.

Some sharing enterprises do not define themselves as employers, because labor is not being supplied to the enterprise, but is instead supplied by one user of the technology to another user. Moreover, the meaning of "user" or "participant" can vary between modalities. In the room-sharing enterprise Airbnb, hosts and guests are both called users. In the ride-sharing enterprises Lyft and Uber, only riders are called users.

As sharing enterprises have come to see that consumers react to the quality of service, these enterprises have introduced standards of conduct that hosts or drivers have to follow. The enterprises are trying to stay on the independent contractor side of the line between enforcing standards of conduct and leaving things up to the participants.

Classification carries significant consequences for laborers. For independent contractors, there are no salary restrictions or minimum work-time rules. On the other hand, many rules and regulations protecting laborers are not applicable to them. Of course, there is always the possibility that as the enterprise becomes more economically dependent on them, the laborers can organize and together demand more from the enterprise.

The *Berwick v. Uber* administrative action and the *O'Connor v. Uber* class action presently pending before the 9th U.S. Circuit Court of Appeals and U.S. district court in San Francisco, respectively, are being carefully watched by the labor-management bar because they add new insight into how classification disputes arising out of the sharing economy might be resolved.

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