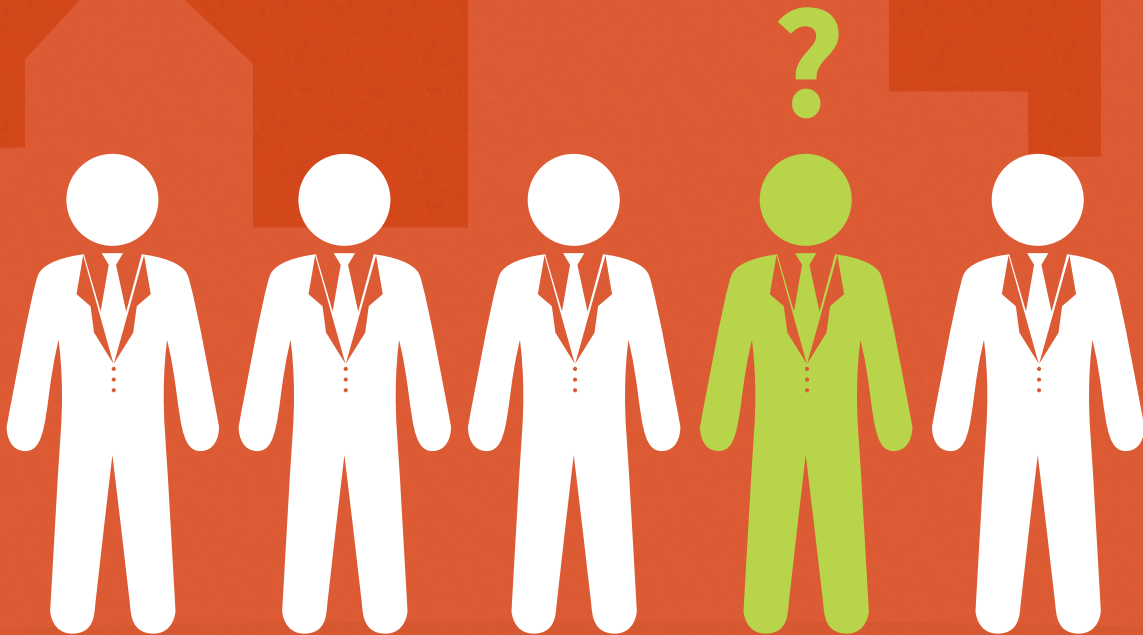


LESSONS FROM UBER:

What Every Worker Should Know About Misclassification



A White Paper Presented by

LAW OFFICES OF
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The California Labor Commission made headlines across the nation in June 2015 when it ruled in favor of a California Uber driver in a worker misclassification claim. Whether you work for Uber, one of its competitors, or in another industry entirely, the case addresses some issues that may be relevant to you and your rights as a worker in California.

DRAWING ATTENTION TO A WIDESPREAD PROBLEM

The landmark Uber case was filed by a driver for the ride-sharing company who claimed that she was an employee of the ride-sharing company and not, as Uber argued, an independent contractor. The Commission agreed with the driver and ordered Uber to reimburse her for thousands of dollars in unpaid expenses, including toll fees, mileage reimbursements and interest.¹

Uber appealed the decision in state court, and the outcome could have a broad impact on the peer-to-peer business model in California and beyond. However, the Commission's ruling alone — although technically binding only on the specific parties involved in that case — is likely to have widespread consequences in its own right by raising awareness about misclassification issues across all industries and motivating misclassified workers to stand up for their rights.

TWO TYPES OF WORKER MISCLASSIFICATION

Misclassification of workers can occur unintentionally, but businesses frequently do it deliberately as a tactic to shift costs onto workers and thereby maximize their own profits.

If you are misclassified in your job, it means that you are footing the bill for a number of costs that should be covered by the company you work for.

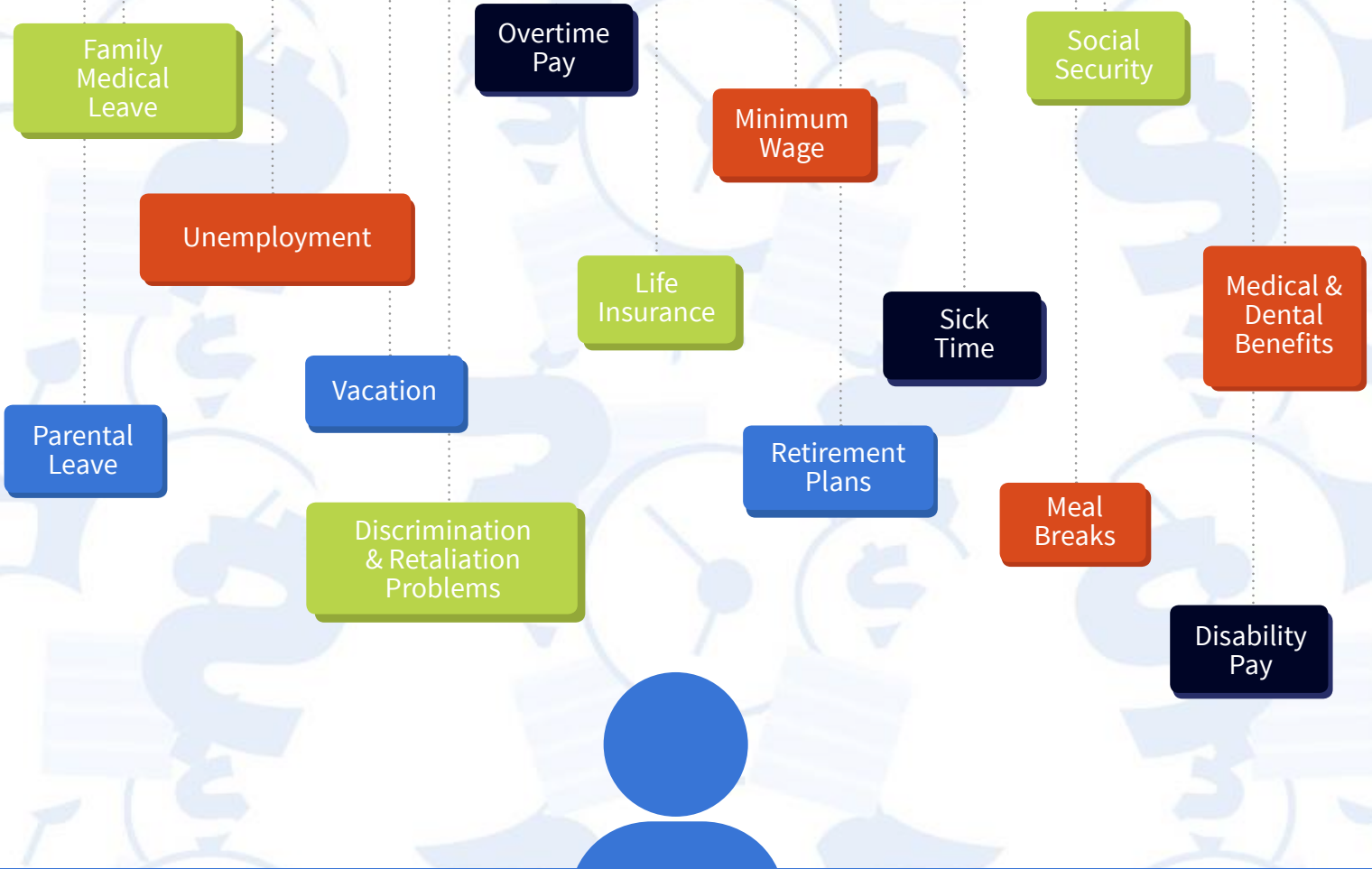
There are two main ways that employees can be misclassified. The type of worker misclassification at issue in the Uber case involves the misclassification of employees as independent contractors. A separate but equally important issue for California workers is the distinction between hourly and salaried employees, which will be discussed later in this paper.



EMPLOYEE



**INDEPENDENT
CONTRACTOR**



MISCLASSIFICATION AS AN INDEPENDENT CONTRACTOR: WHY IT MATTERS

If you are misclassified as an independent contractor, when in truth you should be an employee, it is likely that you are being deprived of several important rights and protections provided for by state and federal law. California's minimum wage and overtime laws, for example, apply only to employees and not to independent contractors, and this means that you may not be getting paid fairly for the time you spend at work. You may also be illegally deprived of your right to paid meal and break times, which can add up to thousands of dollars lost each year.



Worker misclassification can also cause problems if you get hurt or become ill and are unable to work. California's workers' compensation laws are designed to protect employees but not independent contractors, which means that you could be denied valuable medical and financial benefits if you are hurt on the job as a misclassified worker. Similarly, as an independent contractor, you may not have access to disability insurance.



Additionally, if you are incorrectly classified as a non-employee, you may be deprived of important employee benefits such as vacation time, maternity leave, sick time, family medical leave and other paid time off. You may also be denied the opportunity to enroll in employer-provided medical and dental insurance plans, retirement plans and life insurance policies. If you lose your job as a misclassified worker, you may not have access to the important financial safety net provided by unemployment insurance. Furthermore, the wages you earn may not count toward the credits you will need to qualify for Social Security retirement or disability benefits.



Yet another way that being misclassified as an independent contractor can interfere with your rights is by depriving you of protection under state and federal employment discrimination and retaliation laws. Without the benefit of these important laws on your side, your ability to seek recourse may be limited if your employer treats you unfairly or retaliates against you for standing up for what is right.

WHO COUNTS AS AN INDEPENDENT CONTRACTOR?



In an advisory memo published on July 15, 2015, the U.S. Department of Labor stressed that “most workers are employees” and that both the Federal Fair Labor Standards Act, and by extension, the California Labor Code are intended to provide “expansive coverage for workers.”² Although many workers are treated as independent contractors due to deliberate or unintentional misclassification, not every independent contractor is misclassified. Under certain circumstances, the classification is legitimate and appropriate. However, as illustrated by the Uber case, that distinction is not always clear.

In general, independent contractors are in business for themselves while employees are financially dependent on their employers.

The main factor for determining whether you are an independent contractor or an employee is the degree to which you have the right to direct and control the way you do your job.

If it is not up to you to decide how to perform your work, this may be an indication that you are an employee rather than an independent contractor. Similarly, if the company you work for has the right to fire you at will and without cause, this may also indicate an employment relationship.

WEIGHING THE FACTORS

Even if you do have control over the manner and means by which you carry out your job duties, that factor alone does not necessarily mean that you are an independent contractor under California law. There are several other factors that must be considered as well.

YOU MAY BE MORE LIKELY TO BE AN EMPLOYEE IF:



Although no single factor is determinative, these and other factors must be evaluated to determine whether you are properly classified as an employee or independent contractor.

As a general rule, the more a company is involved in what you do and how you do it, the more likely it is that you are an employee.



ANOTHER TYPE OF MISCLASSIFICATION: EXEMPT AND NON-EXEMPT EMPLOYEES

Although it does not get as much press, another common type of worker misclassification occurs when non-exempt workers are incorrectly classified as exempt workers. These terms refer to whether or not the job is subject to minimum wage and overtime laws. If you are a non-exempt worker in California, you are entitled to one-and-one-half times your normal hourly pay for any work you do in excess of eight hours per day or 40 hours per week.⁴

Most positions are bound by these laws and are thus referred to as non-exempt, while certain others are not, making them exempt. In everyday terms, non-exempt workers are generally paid by the hour, while exempt workers are typically salaried. Thus, even if you are classified as an employee rather than an independent contractor, you still may be at risk of misclassification if you are paid an annual salary rather than an hourly wage.

WHO COUNTS AS AN EXEMPT EMPLOYEE?

Just as there are situations in which a worker may be legitimately classified as an independent contractor, there are also circumstances in which it is appropriate for an employee to be classified as exempt. However, those circumstances are limited, and many workers classified as exempt should in fact be classified as non-exempt.

Certain jobs, such as airline workers and outside sales professionals, are automatically considered exempt as a matter of law. For most occupations, however, the distinction between exempt and non-exempt employees requires a case-by-case analysis that depends largely on the nature of the work itself.

Generally speaking, legitimately exempt employees tend to have relatively high-level positions within the companies they work for, regardless of what their specific job titles may be. These positions typically fall into one of the following three categories: executive, professional or administrative.⁵

EXEMPT EMPLOYEE CATEGORIES



**EXECUTIVE
EMPLOYEES**



**PROFESSIONAL
EMPLOYEES**



**ADMINISTRATIVE
EMPLOYEES**



EXECUTIVE EMPLOYEES

Executive workers are those who are engaged primarily in management of other employees. Specifically, you may be an exempt executive employee if you meet all four of the following criteria:

1. You supervise at least two other employees.
2. You make a salary that is at least twice the minimum wage.
3. Your primary responsibility is the management of other workers.
4. You have a voice in hiring, firing and assigning work to other employees.

On the other hand, if no one at work regards you as being the boss or in charge, you may not qualify as an exempt executive employee.⁶

PROFESSIONAL EMPLOYEES

Professionals make up another category of workers who can be legitimately classified as exempt. You may fall within this category if your work requires specialized knowledge and advanced training, as well as professional judgment and discretion. Examples of exempt professional employees include teachers, doctors, lawyers, architects and registered nurses, as well as some creative professionals such as actors, journalists and musicians. In contrast, skilled laborers such as mechanics, carpenters or electricians do not fall within this exemption.⁷



ADMINISTRATIVE EMPLOYEES

The third exemption applies to executive employees whose primary occupation involves providing support to the business. Common examples of employees within the administrative exemption include those working in human resources, accounting, public relations or payroll.

To be considered an exempt administrative employee, your job duties must include the performance of non-manual tasks that are directly related to business operations or management. Furthermore, the work you do must require you to exercise independent judgment and discretion on matters of significance.⁸

In contrast, regardless of your job title, performing simple clerical work such as answering phones or filing papers is not enough to justify classifying you as an exempt administrative employee.



THE SOCIETAL COSTS OF EMPLOYEE MISCLASSIFICATION

Companies often engage in both types of worker misclassification as a cost-saving, but unfortunately those costs are simply handed off to the employees themselves.

If you are misclassified as an independent contractor or exempt employee, your employer may owe you thousands of dollars in unpaid wages and overtime — even if the misclassification is not deliberate.

Along with the many negative consequences that may affect you and other misclassified workers on an individual level, employee misclassification has harmful repercussions on a societal scale as well. In California alone, worker misclassification results in an estimated \$7 billion in lost payroll taxes every year,⁹ and that figure is even higher when considering the cost of increased reliance on social safety nets like emergency room care and government assistance. If your employer is sidestepping its responsibilities to you, your fellow workers and your community in order to reduce its own costs, it is also gaining an unfair advantage over its law-abiding competitors in the marketplace.

**LOST
PAYROLL
TAXES
PER YEAR**



If you believe that you may be a misclassified worker, it is a good idea to talk to an employment lawyer about the details of your situation to learn more about the possibility of taking legal action to remedy the situation. An attorney with experience advocating for the rights of misclassified workers in California can help you evaluate your options, including the possibility of filing a claim to recover back wages, unpaid overtime and other compensation you may be entitled to by law.

SOURCES

¹ Uber v. Berwick, No. CGC-15-546378 (Cal. Super. Filed June 16, 2015).

² Wiel, D., Administrator's Interpretation No. 2015-1 [Memorandum]. Washington, DC: Department of Labor. Retrieved from http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

³ See S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal.3d 341, 350-51 (1989); 38 Cal. Jur. 3d Independent Contractors §3.

⁴ Cal. Lab. Code § 510

⁵ Cal. Lab. Code § 515

⁶ Cal. Code Regs. tit. 8, § 11040(1)(A)(1)

⁷ Cal. Code Regs. tit. 8, § 11040(1)(A)(3)

⁸ Cal. Code Regs. tit. 8, § 11040(1)(A)(2)

⁹ State of California Department of Industrial Relations, Worker Misclassification (July 15, 2015) http://www.dir.ca.gov/dlse/worker_misclassification.html.

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