

NLRB General Counsel's Conclusion That Uber Drivers Are Independent Contractors Continues Trend That "Gig Economy" Workers Are Not Employees Under Various Federal Laws

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Earlier this month the National Labor Relations Board (NLRB) released an Advice Memorandum dated April 16, 2019, which took the position that Uber drivers are independent contractors, and thus, not covered by the National Labor Relations Act (NLRA). This memorandum was issued after a series of unfair labor practice charges were filed with the NLRB by Uber drivers. Based upon the common-law factors of agency and "viewed through the 'prism of entrepreneurial opportunity'" the memorandum held that Uber drivers had significant entrepreneurial opportunities because they had "near complete control of their cars and work schedules, together with freedom to choose log-in locations and to work for competitors of Uber."

Among other factors that weighed in favor of independent contractor status, the memorandum noted that "Uber's lack of control over the manner and means of the UberX drivers' work, and the drivers' freedom to make their own entrepreneurial decisions, strongly favor independent-contractor status." While a ruling on these unfair labor practice charges will ultimately be made by a NLRB regional director, the conclusions reached in these memorandums are generally followed by the regional director. The impact of this memorandum, if followed, is that "gig economy" workers will find it much more difficult to unionize or bring legal actions against companies

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based upon violations of the NLRA. Moreover, this memorandum follows an opinion letter dated April 29, 2019 by the Department of Labor which found that unidentified "gig economy" workers were not employees under the Fair Labor Standards Act.

A clear trend is developing in decisions by federal agencies that not only are "gig economy" workers not employees of a company, but that in making such a determination, federal agencies will place more importance on factors demonstrating a contractual relationship as opposed to an employer-employee relationship. However, it should be noted that the general counsel's memorandum released by the NLRB does not affect the various state laws applicable to independent contractor classification. Therefore, companies should consult with legal counsel to ensure they are in compliance with both state and federal laws and regulations pertaining to whether a worker is an employee or independent contractor.