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Philly UberBlack Drivers Press 3rd Circ. For Employee Status

By **Linda Chiem**

Law360 (October 16, 2018, 3:34 PM EDT) -- Philadelphia-based Uber limo drivers told the Third Circuit on Monday that they're similar to migrant workers who are compensated at the whim of an economically dominant entity, meaning they should be recognized as employees entitled to proper wages under the Fair Labor Standards Act.

Drivers Ali Razak, Kenan Sabani and Khaldoun Cherdoud — who drive for Uber Technologies Inc.'s higher-end service UberBlack, which offers rides in luxury sedans or SUVs — filed a reply brief pressing their **appeal to undo** U.S. District Judge Michael M. Baylson's **April 11 ruling** that the drivers are not employees under FLSA or Pennsylvania wage-and-hour laws.

They argued that they've worked more than full-time hours for poverty level wages and can prove that Uber drivers are economically dependent on the ride-hailing giant as their "employer," despite Uber's repeated attempts to cast drivers as the owners of their own businesses, according to the brief filed with the Third Circuit.

"The record shows that behind Uber's carefully constructed contracts and mandated corporate structures, the economic reality is that the plaintiffs are just like the migrant workers," they said. "There is, after all, a reason why plaintiffs have brought this suit seeking a minimum wage of just $7.25 an hour."

"While some of the plaintiffs may genuinely have hoped to own and operate small businesses at some point, those hopes have gone unfulfilled," the drivers added. "Due to Uber's dominant position and business practices, plaintiffs have been relegated to spending long hours providing (and waiting to provide) rides for Uber, which they do on Uber's terms and in exchange for poverty-level wages. They have no meaningful alternative. Plaintiffs therefore lie at the core of the class of workers that the FLSA was meant to protect."

They continue to maintain that Judge Baylson improperly granted Uber summary judgment in their proposed class action over unpaid "on call" time and unreimbursed vehicle expenses — which hinged on whether Uber misclassified limo drivers as independent contractors instead of employees — and should've let a jury decide the issue.

The drivers insisted that they meet each of the six subsidiary factors that the Third Circuit set in its 1985 ruling in Donovan v. DialAmerica for determining whether a worker is an independent contractor or an employee.

Those so-called Donovan factors examine the degree of the hiring entity's control, the worker's opportunity for profit or loss based on managerial skill, the level of the worker's investment in the enterprise, whether the work requires special skill, whether the worker is engaged on an ongoing basis and whether the work is integral to the employer's business.

And since no one factor trumps another nor is there a specific number of Donovan factors that must be met to find economic dependence, a reasonable jury could actually determine that the drivers are employees, according to the drivers.

"Indeed, Uber has no response to many of the facts plaintiff marshalled to show economic dominance. Uber has overlooked almost every fact in this case except for a few choice ones about plaintiffs and the litigation-driven verbiage in the contracts that it wrote itself," the drivers argued. "Uber makes much of the plaintiffs' LLCs but does not dispute that it compelled and assisted in their creation. Uber does not contest that drivers' choice [in] whether or not to accept rides is hollow because Uber denies drivers the information needed to exercise any meaningful judgment about which rides to accept."

"Namely, Uber does not allow drivers to know or inquire about the destination of their assigned rider until after they have accepted the ride and the rider is already in the car," the drivers said.

Meanwhile, Uber and its Philadelphia subsidiary Gegen LLC countered that they don't even control the day-to-day operations of the Philadelphia-based Uber limo drivers, who own their own businesses.

According to Uber's Sept. 24 brief with the Third Circuit, the **drivers are in business for themselves**, provide a service materially and wholly different from the business that Uber operates in — which is the development and licensing of its smartphone-based ride-hailing app — and acted at all times in their own interest and for their own advantage while also deriving their revenue from multiple streams. Those are the hallmarks of being an independent contractor, Uber argued, so they cannot snag employee status.

"Rather than confronting these undisputed facts regarding their respective business endeavors, appellants and their amici seek to obscure the issues by attempting to disparage Uber as 'the piece-work factory of the smartphone era' and offering a litany of complaints about the alleged ineffectiveness of the Uber app in generating leads," Uber argued. "Such empty rhetoric does not reflect the reality of the record evidence, and it is not material to the issue that is before this court: whether, as a matter of economic reality, appellants were in business for themselves. They undoubtedly were."

Business groups such as the U.S. Chamber of Commerce and the National Federation of Independent Business have also weighed in with an **amicus brief** supporting Uber's position, explaining that so-called gig-economy companies like Uber depend on independent contractors — who can accept "gigs" if and when they please, rather than having their wages and hours dictated by an employer — and reclassifying such workers as employees would have damaging implications for the business community.

In siding with Uber in April, Judge Baylson pointed to the fact that the drivers were entitled to make their own hours, work as much or little as they wanted and largely invested in their own equipment, concluding that Uber had the edge in four of the six factors that the Third Circuit set forth for determining whether a worker is an employee under the FLSA.

The drivers had the edge, though only slightly, in two of the categories, Judge Baylson said. Driving is not itself a special skill, the judge said, as would be the case for a typical contract worker. Additionally, the drivers' service is an integral part of Uber's business, he said, noting that UberBlack specifically is only one of many services offered by the company.

An attorney for the drivers said they had no comment. Representatives for Uber were not immediately available for comment Tuesday.

The drivers are represented by John K. Weston and Jeremy E. Abay of Sacks Weston Diamond LLC and Ashley Keller and Seth Meyer of Keller Lenkner LLC.

Uber and Gegen are represented by Andrew M. Spurchise, Sophia Behnia, Paul C. Lantis, Robert W. Pritchard and Joshua C. Vaughn of Littler Mendelson PC.

The appellate case is Ali Razak et al. v. Uber Technologies Inc. et al., case number 18-1944, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Dave Simpson and Cara Bayles. Editing by Alyssa Miller.
