

UberBlack Drivers Ask 3rd Circ. To Revive Wage Suit

By Jeannie O'Sullivan

Law360, Philadelphia (January 15, 2019, 1:44 PM EST) -- A proposed class of Philadelphia, Pennsylvania-area UberBlack limo drivers asked the Third Circuit to revive their suit accusing Uber Technologies Inc. of violating state and federal labor laws, saying a district court prematurely determined they were independent contractors and not employees entitled to minimum and overtime wages.

During oral arguments Tuesday before a three-judge panel in Philadelphia, an attorney for the drivers said the question of whether they should be considered employees or independent contractors under the Fair Labor Standards Act and Pennsylvania wage-and-hour laws is a mix of law and fact, and thus should be placed before a jury.

"Mixed questions of law and fact always go to juries," Ashley Keller of Keller Lenkner LLC, representing the drivers, told the panel.

An attorney for the ride-hailing app business reiterated the company's position that the drivers for all purposes function independently.

"There were no restraints" on the drivers in terms of when they worked, how long they worked or where they chose to work, nor from pursuing leads generated by outside companies or working on their own, Uber attorney Robert W. Pritchard of Littler Mendelson PC told the court.

Named plaintiffs Ali Razak, Kenan Sabani and Khaldoun Cherdoud — who drive for Uber's high-end service UberBlack, which offers rides in luxury sedans or SUVs — want to undo U.S. District Judge Michael M. Baylson's finding in April that the drivers had an edge in only two of the six factors the Third Circuit set in its 1985 ruling in *Donovan v. DialAmerica* for determining whether a worker is an independent contractor or an employee.

Per the *Donovan* factors, courts must consider the degree of control the alleged employer has over the way the work is performed; the alleged employee's opportunity for profit or loss depending upon his management skills; the alleged employee's investment in equipment, materials or helpers; the degree of permanence of the relationship between the alleged employee and alleged employer; and how integral the alleged employee's work is to the alleged employer's business.

Judge Baylson found that although "driving" is not itself a "special skill," that factor weighed in favor of employee status, and the drivers' service was indeed integral to Uber's business. The other facts tipped toward independent contractor status, the judge found.

The proposed class action, first filed in the Court of Common Pleas of Philadelphia in January 2016, alleged that Uber violated the Fair Labor Standards Act, the Pennsylvania Minimum Wage Act and the Pennsylvania Wage Payment and Collection Law,

misclassifying UberBlack limo drivers as contractors, not paying them wages or overtime and requiring them to cover their own business expenses.

The drivers wanted the court to change their status to full-time employees and were seeking compensation and business expense damages, pre- and post-judgment interest, disgorgement of Uber's Philadelphia profits and attorneys' fees and costs.

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 is 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 Linda Chiem and Dave Simpson. Editing by Stephen Berg.

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