Uber Can't Use DOL Guidance, Philly Drivers Tell 3rd Circ.

By **Linda Chiem**

Law360 (May 2, 2019, 6:07 PM EDT) -- Philadelphia-based Uber limo drivers told the Third Circuit Thursday that the ride-hailing giant cannot use recent U.S. Department of Labor guidance to snuff their proposed class action alleging they're misclassified as independent contractors, saying the guidance isn't binding.

Drivers Ali Razak, Kenan Sabani and Khaldoun Cherdoud said in a court filing that an April 29 **opinion letter** from the DOL's Wage and Hour Division saying workers for an unnamed gig economy platform that connects service providers with clients are contractors doesn't have any bearing on their ongoing Fair Labor Standards Act suit against the ride-hailing giant.

The drivers sought to neutralize Uber Technologies Inc.'s attempt to have the Third Circuit consider the DOL's opinion letter, which Uber described in a Wednesday court filing as a "pertinent and significant authority" on the issue at hand.

"Such opinion letters, which are issued without notice-and-comment rulemaking, do not warrant any deference by this court," the drivers said Thursday.

The plaintiffs drive for Uber's higher-end service UberBlack, which offers rides in luxury sedans or SUVs, and have been **pressing** the Third Circuit to **undo** U.S. District Judge Michael M. Baylson's April 2018 **ruling** that they are not employees under FLSA or Pennsylvania wage-and-hour laws. The Third Circuit held **oral arguments** in January.

The DOL opinion letter represented the first Trump-era guidance on the hot-button issue of employee-versus-independent contractor classification. It analyzed the unnamed company's business model using a six-factor test aimed at discerning the "economic realities" of whether workers are employees.

The guidance was issued as an opinion letter, which offers the DOL Wage and Hour Division's perspective on specific pay- and benefits-related questions posed by employers or other entities the DOL regulates. Such letters don't bind judges but can bolster businesses' legal defenses to workers' claims.

Therefore, while the letter offers a glimpse into the DOL's narrowed take on who counts as an employee, it doesn't influence the merits of the instant case and the matter of whether the misclassification debate should continue to be heard in court, the drivers said.

"Importantly, the opinion letter has no bearing on the issue of whether the district court or a jury should make the findings of fact required to decide whether an individual is an employee or independent contractor," the drivers said. "On that issue, it is clear that the trier of fact 'must first make findings of the historical facts surrounding [the individual's] work and then use those findings to make findings as to the six factors.'"

The drivers' attorney, Jeremy E. Abay of Sacks Weston Diamond LLC, reiterated that the DOL

opinion letter doesn't serve as precedent for the court to follow.

"Whether our clients qualify as employees under the FLSA is a fact-intensive question that should be resolved by a jury trial, not by an opinion letter based exclusively on facts cherry-picked by the requesting party," Abay said in a statement to Law360 on Thursday. "The timing of the letter is also suspect, coming weeks after Uber identified our case as an existential threat in its IPO filing."

The drivers 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, saying it should've been allowed to go before a jury. The limo drivers' wage-and-hour claims hinge on whether Uber misclassified them as independent contractors instead of employees.

The drivers insisted 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.

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

Uber has argued that 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.

Representatives for Uber were not immediately available for additional comment Thursday.

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 Braden Campbell, Dave Simpson and Cara Bayles. Editing by Daniel King.

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