

## UBER DRIVER FOUND TO BE AN EMPLOYEE: WHY THIS MATTERS TO YOUR BUSINESS

The California Labor Commissioner recently found a San Francisco-based Uber driver was an employee rather than an independent contractor. The decision is one more in a series of cases determining whether drivers in the transportation industry are employees, but its reach extends beyond the transportation industry. It should serve as a warning and reminder to businesses of just how costly misclassifying workers can be.

### California's Labor Commissioner's Ruling Challenges Uber's Business Model

Uber's classification of its drivers as independent contractors is important to its low-cost business model because it allows the company to decrease overhead and maximize profit. This overhead comes in the form of gas and maintenance expenses, as well as additional payroll expenses such as Social Security, worker's compensation, and unemployment insurance.

One ex-driver challenged the classification, arguing that, as an employee, she was entitled to be reimbursed for the cost of driving her vehicle. The Labor Commissioner agreed, finding that the driver, Barbara Ann Berwick, was in fact an employee of the company and was thus owed \$4,152.20 for the work-related expenses that she incurred on the job, such as gas and toll charges.

Although this ruling only applies to Berwick, her success might prompt a flood of claims from workers in like circumstances. As it stands, Uber is facing similar litigation in a number of states, as well as a class action filed by drivers who are seeking to recover lost tips and expenses.

While Uber emphasizes the number of jobs it has created and the flexibility that its drivers enjoy in choosing their own hours, critics point out the lack of job security and protection afforded to the workers.

Under California law, workers are presumed to be employees. Businesses bear the burden of establishing that workers are independent contractors. Although the factors vary depending on which agency is making the determination, the most critical factor is the amount of control that a business exerts over the worker. Uber claims to merely be a technological platform that facilitates private transactions between the driver and the passenger, but the Labor Commissioner pointed to facts that highlight Uber's control over every aspect of operations, namely vetting prospective drivers, monitoring their ratings, and controlling the tools that they use. Further, the ruling pointed to the drivers' lack of

investment in the business or “managerial” skills that could affect profit or loss.

This decision might be the least of Uber’s worries. While the Labor Commissioner’s decision was specific to Berwick’s claim, the California Employment Development Department (EDD) and other similar state and federal taxing authorities can audit the company in an effort to recover unpaid employment taxes, exposing Uber to significant tax liability.

## Key Takeaways

Many businesses classify workers as independent contractors to avoid certain expenses and administrative burdens. However, **businesses must be wary of this practice, as misclassification litigation is becoming more common and can be incredibly costly**. Consequences come in the following forms of liability:

- Federal income tax liability for past wages
- Penalties for each W-2 the employer fails to file
- Employer contributions for past social security and federal unemployment taxes
- Repayment of back payroll state taxes, subject to interest and penalties
- Potential overtime pay and penalties for missed meal and rest breaks, inaccurate wage statements, etc.
- Reimbursement of business-related expenses
- Past worker’s compensation insurance premiums
- Civil penalties from \$5,000-\$25,000 per violation
- Possible criminal sanctions

**Hoge Fenton's employment law attorneys are available to review how you classify your workers and keep you on track.**

## Primary Contact

- Jenn Protas