



*Fiona W. Ong*

### **NLRB Finds Certain Gig Economy Workers to be Independent Contractors**

On the heels of the Department of Labor's recent opinion letter, finding certain gig economy workers to be independent contractors under an "economic reality" analysis, the Office of General Counsel (OGC) of the National Labor Relations Board has now issued an Advice Memorandum finding UberX and UberBLACK drivers to be independent contractors as well.

Advice Memoranda contain the recommendations of the OGC to the Board on particular issues of interest. In this [memo](#), originally issued in April 2019, the OGC applied the common law agency test that the Board set forth in *SuperShuttle DFW, Inc.* Under this test, the Board reviews ten factors, with no one factor being decisive:

1. The extent of control which, by the agreement, the master may exercise over the details of the work.
2. Whether or not the one employed is engaged in a distinct occupation or business.
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
4. The skill required in the particular occupation.
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the person is employed.
7. The method of payment, whether by the time or by the job.
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not the parties believe they are creating the relation of master and servant.
10. Whether the principal is or is not in business.

All of these factors are evaluated by the "important animating principle . . . [of] whether the position presents the opportunities and risks inherent in entrepreneurialism." Notably, "[W]here the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, [the Board] will likely find independent-contractor status."

In this particular case, involving the shared-ride and taxicab industries, the OGC also gave significant weight to two other factors: (1) the extent of the company's control over the manner and means by which drivers conduct business, and (2) the relationship between the company's compensation and the amount of fares collected.

Applying all of these factors, the OGC determined that both UberX and UberBLACK drivers had significant entrepreneurial opportunity based upon their near complete control of their cars and work schedules, along with their freedom to choose log-in locations and to work for Uber's competitors. UberBLACK drivers, in addition, invested more capital in their work by providing higher-end vehicles and maintaining commercial liability insurance. Moreover, they could hire other drivers to work on their behalf, could accept UberX requests in addition to those for UberBLACK, and contracted with Uber as business entities rather than individuals.

This memo further illustrates that the Trump administration's approach to independent contractor status is more lenient than that under the Obama administration, which tended towards finding employee status in almost all situations.

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