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UberBlack Drivers Fight For Employee Status At 3rd Circ.

By **Linda Chiem**

Law360 (July 26, 2018, 4:58 PM EDT) -- Philadelphia-based Uber limo drivers told the Third Circuit on Wednesday that Uber exploited drivers by misclassifying them as independent contractors to dodge paying minimum and overtime wages, and that a district court improperly ruled that the drivers didn't count as employees 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 an opening brief in their appeal seeking to undo U.S. District Judge Michael M. Baylson's **April 11 ruling** that the drivers are not employees under the FLSA or Pennsylvania wage-and-hour laws.

They 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, according to their brief.

"No reasonable jury could find that plaintiffs and Uber lack the sort of economic relationship that qualifies as employment under the FLSA," they said. "At a minimum, a reasonable jury surely could find UberBlack drivers are Uber's employees; and given the procedural posture of this appeal, that is all that is needed to require reversal here."

Uber is the piece-work factory of the smartphone era, the drivers said in their brief, hiring unskilled workers to toil long hours delivering its core service while ensuring that such workers have no ability whatsoever to build business goodwill of their own.

The drivers insist that Uber exercises substantial control over which rides UberBlack drivers are assigned and how they perform them, while simultaneously denying them the information they would need to make any meaningful choice about which rides to accept. As such, they should be **classified as employees**, they said.

"Drivers do not and, through Uber's take-it-or-leave-it terms, cannot exercise any business acumen, managerial judgment, or skill in performing their work. Instead, they are paid beggar's wages that are based primarily on the number of hours they work," the drivers argued. " UberBlack drivers such as plaintiffs are no better off — and are indeed worse off — than a limousine driver being paid as an employee. Labeling plaintiffs the entrepreneurial managers of their own small businesses is an affront to economic reality, not a reflection of it."

Uber pays drivers only for the trip, and it does not pay drivers for the time and expense of driving to pick up a passenger or for the time that drivers spend "on call" while waiting for a ride to be assigned to them, according to the brief. For instance, Uber doesn't reimburse drivers for vehicle expenses, maintenance, the

costs of parking, tolls while not carrying a passenger or the cost of a cellphone data plan.

The drivers insist that they meet each of the six subsidiary factors that the Third Circuit set in its 1985 ruling in Donovan v. DialAmerica to assess the ultimate question of economic dependence to distinguish between employees and independent contractors.

"UberBlack drivers do not have their hands on the levers of profit and loss. Uber does," they said. "That is the hallmark of economic domination and its presence here justifies reversal of the district court."

At a bare minimum, a jury could clearly find that the plaintiffs are integral to Uber's business, worked for Uber for an extended period, and employ no special skill, the drivers argued. 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, they said.

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 Third Circuit factors.

The drivers had the edge, though only slightly, in two of the four 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 driver's service is an integral part of Uber's business, he said, while noting that UberBlack specifically is only one of many services offered by the company.

"When plaintiffs chose to use the Uber app as a lead-generation resource to support their independent transportation businesses, they contractually agreed that they were independent contractors," Uber argued.

According to Uber, the drivers are in business for themselves, provide a service materially and wholly different from the business that Uber operates in — which is developing and licensing 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.

Counsel for the parties 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 is represented by Andrew M. Spurchise, Niloy Ray, Sophia Behnia, Paul C. Lantis, Wendy Buckingham, 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 U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Dave Simpson. Editing by Alyssa Miller.
