2019 SIGNIFICANT NEW CASES

Presented By Michael Milwee

“Res Ipsa What?”
GIG ECONOMY
CASES

Q.D.A., INC
UBER
Super Shuttle DFW, Inc. and
Amalgamated Transit Unit

• Indiana Supreme Court decision reversing agency determination of employment, finding that Q.D.-A. had met the ABC test and claimant driver was not an employee.
• Q.D.-A.’s business is to connect drivers with customers to who need vehicles too large to tow driven them.
• Drivers contract labelled drivers as an “independent contractor.” Drivers could choose own routes, hours, could decline trips, negotiate pay, paid own expenses, hire other drivers if they qualified under Federal regulations.
• ABC test is (1) Driver free from direction and control, (2) Driver performed work outside of company’s usual course of business, and (3) Driver customarily engaged in independent trade or business.
• Agency Administrative Law Judge (ALJ) found for claimant, agreeing that there was an independent business but finding the other two ABC prongs were not met. Specifically, control was exercised by a two day orientation on applicable federal rules and a driving test.
• ALJ also fund that Q.D.-A.’s usual business was one way service and the driver performed these services for customers.
• Supreme Court reversed. The ABC test was met because directing the drivers to follow applicable traffic laws and federal regulations does not constitute “control” and neither did asking for a successful completion of trips.
• Court also found that Q.D.-A. did not perform drive away services itself. It cited the federal “broker” registration requirements etc., to conclude that it did not provide the services. It criticized the agency decision for speculative reliance on customer expectations without reference to actual operations.
• Compact opinion that provides a good discussion of the ABC test and makes the point that legal requirements are “state regulation” and not employer control.
In the Matters of Appeal Board No. 603937 [Uber] (New York April 29, 2019)

• NY Dept of Labor initially determined that employer Uber was liable for tax contributions for drivers. Employer appealed asserting drivers were independent contractors. ALJ held telephone hearing and sustained initial determination. Uber appealed to the UI Appeal Board. UI Appeal Board affirmed the ALJ.
• Board decision in this case pertains to Uber drivers in the Upstate area of New York. During the 2018 meeting we discussed the earlier Board ruling (Case 596722) which pertained to downstate drivers in the New York city area.
• Herein the Board again undertook a review of Uber’s contracts with drivers and again found the drivers to be employees. As earlier, the Board delineated the multiple means of control over the drivers exercised by Uber.
• Uber has appealed to the court and has until October 2019 to perfect its appeal.
Opinion letter of USDOL’s Wage and Hour Division, dated April 29, 2019.
• Opinion letter written to an unspecified operator of a “virtual market place” seeking an opinion that providers accepting job referrals from the market place operator were independent contractors.
• DOL appears to have accepted factual representations from the letter which were not made part of the opinion. No hearing or other fact finding process appears to have occurred.
• Opinion cites six (6) factors for analyzing and resolving questions.
  1. Control
  2. Permanency of relation
  3. Investment in facilities, equipment or helpers
  4. Skill, initiative, judgement and foresight required
  5. Opportunity for profit and loss
  6. Integrality
• Opinion analyzes all six factors based on presented facts, cites many federal case decisions, and concludes that the providers using the market palce platform are not employees. Opinion focuses on the lack of control by the platform owner and the freedom of the providers to accomplish the taskers in the manner, time, and price they choose.
• This is not an unemployment insurance (UI) case. However, the analytical framework and cited case law will be helpful in a UI case.
Super Shuttle DFW, Inc. and Amalgamated Transit Union Local 1338 National Labor Relations Board Case 16-RC-010963, 367 NLRB No. 75

• Non unemployment insurance case involving the question of whether Super Shuttle 6 drivers serving Dallas airports were employees or independent contractors for a possible collective bargaining outcome.

• NLRB (4 members) affirmed a District Director that the drivers were independent contractors. Decision emphasized the entrepreneurial aspects of the work, citing control as the flip side of entrepreneurial, citing US Circuit Court of Appeals and Supreme Court precedents.

• Lengthy (and vituperative) dissent from a single Board member. essentially saying the majority has misread or misrepresented prior decisions, citing various instances of controls exercised by Super Shuttle and ignored by majority.

• Decision contains a lengthy discussion citing numerous cases of the common law factors involved in deciding “employee” status. Useful materials for analyzing the issue even if not directly a UI case.
So, While the two YUTES were filing their UI claims that day...
NON-GIG ECONOMY CASES

Matter of Thomas Gunn
Matter of Juan Salcedo
Matter of James D’Altorio
Harry’s Nursing Registry, Inc.

• Off duty misconduct. Claimant worked as a civilian carpenter for the NY City Police Dept. Off duty auto accident resulted in felony conviction for driving while intoxicated, sentenced to 120 days in jail. After meeting with the Police Department and his union, Gunn resigned due to threat of termination.

• Claimant disqualified from benefits due to misconduct termination or, alternatively, voluntary quit without good cause. At the hearing, the Labor Dept submitted as “background” another disqualification, dated that same day, based on the felony conviction. ALJ reversed on the misconduct UI issues and awarded benefits.

• Following appeal by Labor Dept., UI Insurance Appeal Board, vacated earlier rulings and remanded for a new hearing on the felony conviction issue. On remand claimant disqualified and unsuccessfully appealed to the Board.

• Court rejected collateral estoppel claim and affirmed misconduct disqualification. Felony conviction violated Police Dept. handbook and, even if off duty, cast a negative light on the Police Dept.
**In the Matter of Juan Salcedo, Respondent, EH. Mfg. Inc, Appellant, Commissioners of Labor, Respondent, Supreme Court of NY, Appellate Division, April 25, 2019 2019 Slip Op 03125**

- Employer appealed decision of UI Appeal Board that claimant was entitled to UI benefits.
- Claimant discharged as a result of sending text to co-worker who complained it was harassment. Claimant disagreed with verbal reprimand from supervisor. Claimant met with supervisor, demanded to see the text and was angry, hostile and aggressive according to testimony of supervisor and a witness. Claimant appealed initial finding of misconduct based upon the employer’s anti-harassment policy and insubordinate conduct.
- ALJ reversed finding claimant’s conduct did not rise to the level of misconduct. UI Board affirmed.
- Court affirmed the Board noted no prior insubordinate behavior, no prior warnings, did not make abusive statements or otherwise take actions previously held to be misconduct.
**NON-GIG ECONOMY CASES**


- Labor dispute case involving a strike against a beer wholesaler. 117 workers went on strike, 104 filed UI claims. Employer appealed award of benefits without the 7 week benefit suspension. ALJ and UI Appeal Board affirmed award.

- Court affirmed the award. It noted because the 7 week suspension does not apply in cases when the employer hires replacement workers and does not provide a written certification that the employee will be able to return to his/her position at the conclusion of the strike. The Court noted several actions by the employer that supported this conclusion and affirmed.

- Companion case from the strike is **Matter of Kyle Bebbino, et. Al., Clare Rose, Commissioner of Labor**, which addresses the question of the treatment of union strike benefits paid to claimants. Court upheld agency determination that claimants were totally unemployed because receipt of strike benefits was not conditioned upon participation in strike activities.

- Nurses Registry that supplied registered nurses and other health care workers to hospitals, nursing homes and private patients was audited for the years 2008-2010 and assessed tax contributions. Employer appealed, ALJ sustained employer’s objection and overruled the assessment. UI Board of Appeals reversed the ALJ and upheld initial assessment.
- On appeal to Court, Employer argued that the agency was bound by a 1999 unappealed ALJ decision for the audit period 1994-1995 that the workers were independent contractors. The Court rejected this claim because the UI Appeals Board is not required to conform to a prior unappealed ALJ decision. The Court further noted that the time period here was different and that the case also presented further indicia of control.
AND FINALLY!!!
Updating the status of cases discussed at our 2018 meeting:

• Luis Vega (Postmates, Inc._Commissioner of Labor No. APL 2019-00143.
  • Case now in the Court of Appeals with the Commissioner appealing the Appellate Division’s reversal of the agency’s conclusion that certain food delivery drivers were employees. The commissioner’s brief was filed, Postmates’ was due August 30, 2019 and the Court has transferred the case from it’s letter track brief to its full briefing track and has also invited amici to submit briefs by October 21,2019.

• Matter of Uber Technologies, Inc. Appeal Board 596722 (July 2018).
  • The “downstate” Uber case. Uber appealed the UI Appeal’s decision finding it to be an employer. Uber withdrew its appeal February 8, 2019. This decision is “final” at least in the downstate region.
Updating the status of cases discussed at our 2018 meeting:

• Georgia Dept. Labor v. McConnell et al. Supreme Court of Georgia, S18G1316, S18G1317 (May 30, 2019). 305 GA 812
  • Case involved the accidental release of 4,757 names, addresses and SSNs of individuals who had applied for UI benefits in Georgia. Defense of sovereign immunity and failure to state a claim on which relief could be granted were raised to a suit seeking damages for invasion of privacy, etc. No indication in records of anything negative happening to or financial losses incurred by those whose names were disclosed
  • Court of Appeals decision affirmed trial court on the failure to state a claim theory and did not reach the sovereign immunity issue. Supreme Court reversed and remanded.
  • On remand Court of Appeals reversed trial court on sovereign immunity and held it did not apply. Again affirmed failure to state a claim decision.
  • Supreme Court has affirmed the Court of Appeals on both issues. Interesting opinion the various aspects of distress, invasion of privacy, emotional distress and related issues.