Employment Law: Uber Does It, Hooters Does It, and The President Does It. Why Can't We?

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• Labor & Employment
• Trade Secrets and Unfair Competition
Employment Law: Uber Does It, Hooters Does It, and the President Does It, Why Can't We?

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Agenda

Independent Contractors vs. Employees

• The Department of Labor's Test
• Uber's ongoing misclassification litigation

Discrimination Claims and Breastaraunts

• Claims History
• BFOQ

What Not To Do: Lessons from President Trump

• Employment lawsuits against President Trump's companies
• President Trump's statements viewed legally
Impact of Uber

Uber's biggest impact may not be in transforming transportation, but in changing the labor market and the way we think about work.
Business with Same Model

Postmates, DoorDash, Lyft, Instacart, GrubHub, Seamless, DoorDash, Jolt and many others
Advantages of Using Independent Contractors

• Pay less taxes and other costs (social security, unemployment, workers' compensation)
• No benefits – health care, vacation, sick leave
• No minimum wage or overtime
• No Unions – but see Seattle ordinance
• Cannot bring employment claims
• Greater flexibility in operations – no fixed staffing costs
Department of Labor's Test - Who is an Employee?

• Economic realities test – totality of the circumstances

• “A worker is an employee if he or she is economically dependent on the employer, whereas a worker is an independent contractor if he or she is in business for himself or herself.”

• WHO CONTROLS THE RELATIONSHIP?
Does UBER Meet This Test?

According to attorneys for drivers:

• Uber and Lyft are "constantly evaluating their drivers in real time" and then "using that information to terminate."

• Uber and Lyft managers change the minimum rating from time to time and "use discretion to decide who to terminate and who to give a chance to."
Factors under the Fair Labor Standards Act considered by DOL:

1. **Is the work an integral part of the employer’s business?**
2. **Does the worker’s managerial skill affect his or her opportunity for profit and loss?**
3. **Relative investments of the worker and the employer**
4. **The worker’s skill and initiative**
5. **The permanency of the worker’s relationship with the employer**
6. **Employer control of employment relationship**
SLIDES STRAIGHT FROM
THE DEPARTMENT OF LABOR WEBSITE:
Work Integral to the Business

• Work is integral to the employer's business if it is a part of the production process or is a service that the employer is in business to provide.

• If the work performed is integral to the employer’s business, the worker is more likely economically dependent on the employer.
For example, the work of a carpenter is integral to the operation of a construction company because the company is in the construction business and the carpenter performs the construction on behalf of the company.

On the other hand, a worker engaged by the construction company to repair its copier is not performing work that is integral to its business.
Managerial Skill for Profit/Loss

• This factor should focus on the worker’s managerial skill and whether this skill affects the worker’s profit and loss.

• The issue is not whether the worker possesses skills, but whether the skills are managerial and suggest that the worker is operating as an independent business.
Managerial Skill for Profit/Loss

- Managerial skills that suggest independent contractor status include the ability to make independent business decisions, such as deciding to make business investments or hire helpers.

- Deciding to work more jobs or longer hours is not such a business decision.

- When analyzing this factor, it is also important to consider whether the worker faces a possible loss as a result of these independent business decisions.
Relative Investment

• The worker must make some investment (and undertake some risk for a loss) to indicate he or she is an independent business.

• Merely purchasing tools to perform a particular job is not a sufficient investment to indicate an independent business.

• The worker’s investment must also compare favorably with the employer’s investment to suggest the worker is an independent contractor.
Relative Investment

• A worker’s investment compares favorably when:

  – The investment is substantial and
  – The investment is used for the purpose of sustaining a business beyond the job or project the worker is performing.
Skill and Initiative

• Both employees and independent contractors may be skilled, even highly skilled, workers.

• Specialized skills, such as computer programming, do not necessarily indicate independent contractor status.

• To suggest the worker is an independent contractor, the skills should demonstrate that the worker exercises independent business judgment or initiative.
Permanency of the Relationship

- A permanent or indefinite relationship with the employer suggests the worker may be an employee.

- However, the absence of a permanent or indefinite relationship does not automatically indicate the worker is an independent contractor.
Permanency of the Relationship

• What matters is whether the impermanence is a result of:
  – The worker’s choice (which suggests independent contractor status) or
  – The structure of that particular industry or employer (which may indicate the worker is an employee).
Control

• An independent contractor typically works relatively free from control by an employer (or anyone else, including the employer’s clients).

• This factor includes who controls:
  – Hiring and firing,
  – The amount of pay,
  – The hours of work, and
  – How the work is performed.
Control

• The employer’s lack of control does not automatically indicate the worker is an independent contractor.

• An employer can still exercise control over the worker even if the worker teleworks or works offsite.
Control

• To be considered an independent business, the worker must also exercise control over meaningful aspects of the work.
Uber Misclassification Litigation

California class action

• Filed in 2013 by 400,000 drivers seeking minimum wage, overtime, and vehicle expenses such as gasoline and vehicle maintenance.

• Trial judge REJECTED Uber’s motion for summary judgment. Held that there were factual issues to be decided by a jury.

• Trial judge then certified a class.
Uber Misclassification Litigation

• The trial judge then REJECTED Uber’s mandatory arbitration clause.

• The case was then stayed as the 9th Circuit accepted interlocutory appeal as to the mandatory arbitration clause prohibiting class action. (Hearing is September, 2017 in the 9th Circuit.)

• Class counsel sensed problems.
Uber Misclassification Litigation

- Proposed $100 million settlement in 2016, REJECTED by the federal judge.

- Settlement was not "fair, adequate, and reasonable"; $100 million reflects only 0.1 percent of potential verdict.
Uber Misclassification Litigation

The settlement included terms that would have:

- bolstered drivers’ job security (drivers would no longer be deactivated for a low rate of pickups, would receive a warning before losing their job, and could contest a termination before a panel of their peers);
- forced Uber to implement a more favorable tipping policy; and
- given workers the means to organize as a group, granting them representation “akin to what unions provide.”
Uber Misclassification Litigation

California Labor Commission

• Uber driver is an employee.

• Uber has appealed this.
Uber Misclassification Litigation

New York litigation
• Misclassification suit filed in June 2016 by 5,000 drivers.
• NY DOL found that 2 drivers are employees and eligible for unemployment.

Illinois and Florida litigation
• New class actions filed in May 2016.
• Seeking minimum wage and overtime, expenses, and lost tips for telling passengers that tips are included in the fare and drivers are not being allowed to solicit tips.

Other litigation pending in other states as well on same issues
How to Avoid an "Uber" Bad Situation

Fully evaluate any move from employee to independent contractors.

• It is not as simple as it looks.

• Many governmental agencies have ramped up investigation and enforcement.

• UBER’s entire business was set up to deal with this challenge and they are paying tens of millions in legal fees to defend challenges.
How Do Breastaraunts Get Away With It?
Bona Fide Occupational Qualification (BFOQ)

• The BFOQ exception in Title VII states that discrimination is illegal except, “in those certain instances where a bona fide occupational qualification is reasonably necessary to the normal operation of that particular business or enterprise.”

• An employer using the BFOQ defense must demonstrate that it “had reasonable cause to believe that all (class members) would be unable to perform the job safely and efficiently or that it was impossible or highly impractical to consider the qualifications of each.”
BFOQ

• BFOQ is an affirmative defense – the burden of proof is on the employer.

• BFOQ requires an admission that the employer is in fact discriminating.
BFOQ - Gender

- Prison guards
- Home health aids
- Jobs involving naked people (health care, massages, etc.)
- Servers? Bartenders?
St. Cross v. Playboy Club (1971)

• Margarita St. Cross, was a female Playboy bunny who was fired because she did not meet the weight standards.

• On December 17, 1971, the New York Human Rights Appeal Board ruled that the firing was legal.

• Hiring only women is a BFOQ.
Guardian Capital Corp. (1972)

• A Ramada Inn fired the male servers in its bar and replaced them with women in sexy outfits. Two of the fired waiters filed separate complaints with the NY State Division of Human Rights alleging sex discrimination. Ramada Inn countered with the BFOQ defense which neither the division nor the Human Rights Appeal Board found to be valid.

• Ramada Inn LOST!
Diaz v. Pan American World Airways (1971)

Pan Am maintained the BFOQ applied to flight attendants and it hired only female employees. The 5th Cir. disagreed:

“The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as . . . their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.”
Wilson v. Southwest Airlines - 1980’s

- Southwest hired an ad agency to develop a marketing strategy. That strategy was to be the ‘love airline.’ So the company hired only attractive females for the customer contact positions of flight attendant and ticket agent. It was successful.

- Wilson and a class of over 100 male job applicants challenged Southwest’s open refusal to hire males as a violation of Title VII.

- Southwest argued that the BFOQ exception Title VII justified hiring only females for the positions.

- The BFOQ exception permits sex discrimination in situations where the employer can prove that sex is a ‘bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.’
The court held that being attractive and female is not a BFOQ for being a flight attendant, even when the company marketed themselves using female sexuality:

- Sex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool or to better ensure profitability.
- Sex discrimination is not a business necessity for Southwest as it would be for say, a Playboy Bunny.
- The court also found it relevant that Southwest’s female image was adopted at its discretion, to promote a business unrelated to sex.
Impact on Airlines

Airline industry was particularly hard hit with lawsuits challenging:

- Gender only hiring
- Height and weight requirements
- Airline industry changed
- *And* then came the return of the Breastaraunts
On October 22, 1991, EEOC filed a Commissioner’s Charge, alleging that Hooters only hired women to be “Hooters Girls.”
EEOC v. Hooters

The company affirmed that this was their policy and unabashedly argued that:

• "[T]he element of female sex appeal is prevalent in the restaurants, and the company believes the Hooters Girl is as socially acceptable as a Dallas Cowboy cheerleader, Sports Illustrated swimsuit model, or a Radio City Rockette."

• The primary function of Hooters Girls was, “providing vicarious sexual recreation”.

• “The business of Hooters is predominantly the provision of entertainment, diversion, and amusement based on the sex appeal of the Hooters Girls."
EEOC v. Hooters

• In February, 1995, the EEOC asked Hooters to establish a $10 million settlement fund to be distributed among the 1,423 male applicants already identified by EEOC as having been denied jobs as servers, accept unlimited liability for any additional men who come forward as victims, and abandon their female-only Hooters Girl policy.

• When Hooters did not agree with this offer, the EEOC countered with a $22,171,421 limited liability settlement offer.
EEOC v. Hooters

• On February 15, 1995, Hooters took on the EEOC in a PR campaign that eventually pressured EEOC into dropping the case.

• The campaign involved media ads featuring a hairy “Hooters Guy,” a billboard campaign featuring the slogan, “Washington, get a grip,” and an appeal to Hooters’ customers to write to Congress.

• To help convince Congress, Hooters provided postcards and orange Frisbees with a “Hooters Guy” sticker that customers could send to their Congressional representative.
Isn't Hiring Only Women Discriminatory?

• Hooters' challengers were undeterred and a class action lawsuit was brought against the company. In 1997, the company settled the lawsuit for $3.75 million.

• As part of settlement, Hooters agreed to open three gender-neutral positions but not serving positions.

• Hooters continues to maintain that its servers are covered by a BFOQ and will continue to be only women.
Excerpts from Hooters’ Girl Acknowledgment

- "I hereby acknowledge and affirm that ... (3) the Hooters concept is based on female sex appeal and the work environment is one in which joking and innuendo based on female sex appeal is commonplace."

- "I also expressly acknowledge and affirm that I do not find my job duties, uniform requirements, or work environment to be offensive, intimidating, hostile or unwelcome."
EEOC v. Lawry’s Restaurant

• EEOC sued Lawry’s for hiring only women as servers in 2006.

• A man filed an EEOC charge (in 2004) alleging Lawry’s would not promote him from busser to server solely based upon his gender.

• According to Lawry's, shortly after the initial EEOC charge was filed, the Company began hiring male servers and fixed its hiring practices.

• The 2009 settlement required the restaurant to pay $300,000 for an advertising campaign regarding hiring, $500,000 to individuals within the class, and $225,000 for training all of its employees on compliance with federal anti-discrimination laws.
Time for a new job?

WORK IT!

BE A TWIN PEAKS GIRL
& ENJOY A JOB WITH NO SIDEWORK, GREAT TIPS & FLEXIBLE SCHEDULING.

NO EXPERIENCE REQUIRED.
Latest Challenge – Rafael Ortiz

Rafael Ortiz v. Hooters

• Hooters paid an undisclosed settlement.

Rafael Ortiz v. DMD Florida Restaurant Group

• Rafael Ortiz tried to apply for a position at Twin Peaks. The manager told him that he could not even fill out an application for server as he was male.
Ortiz v. Twin Peaks (2016)

- Rafael Ortiz brought a “class action” on behalf of all men.

- After extended motion practice, the court ordered a mediation.

- Confidential settlement in 2016.
Twin Peaks . . . .their website stated:

- Here at Twin Peaks, we offer everything you crave and more. Hearty made-from-scratch comfort food, draft beer served at a teeth-chattering 29 degrees and all the best sports in town shown on high definition flat screens. All of this is served by our friendly and attentive Twin Peaks Girls, offering their signature “Girl Next Door” charisma and playful personalities to ensure that your adventure starts at the Peaks.

- Be a Twin Peaks Girl! The Twin Peaks Girls are the hosts of the party bringing the Twin Peaks experience to life while serving high quality eats and drinks. They have a “girl next door” personality, offering a playful and energetic hospitality to our guests. Twin Peaks Girls enjoy flexible scheduling, great tips, modeling and travel opportunities. If you think you can work it, click here to find the nearest location to audition! Grab your favorite outfit, glam up your hair and make-up, and visit us today.
Is Weight a Protected Category?


- Two women filed suit in Michigan, alleging that Hooters required them to sign agreements relating to a 30-day "weight probation."

- Company's uniform was allegedly offered only in small, extra small, and double extra small.
Trump's Employment Litigation

• Out of 4,095 lawsuits, 130 were related to employment.

• DOL cited Trump's companies 24 times for violations of the Fair Labor Standards Act.
Trump's Employment Litigation

2017 sexual harassment lawsuit against Trump's golf course in Jupiter, FL:
• "Persistent, unwelcome sexual advances."
• Reported concerns to HR and supervisor but was fired 2 weeks later.

2010 similar lawsuit against Trump's hotel in Chicago:
• "Unwanted an offensive touchings."
• Reported issues to management but was fired 2 weeks later.

Both settled out of court
Trump's Employment Litigation

2016 harassment lawsuit against Trump's golf course in NJ:

• Homophobic harassment, witnessed by direct supervisor
• Management ignored his complaints
• Golf course fired him
• Settled as of May 2017
Question: "What if someone had treated Ivanka in the way Ailes allegedly behaved?"

President Trump's response: "I would like to think she would find another career or find another company if that was the case."
More of Trump's Employment Litigation

2006 class action filed by 913 golf course employees; settled for $475K in 2013

- "Not pretty enough"
- "I want you to get some good looking hostesses here. People like to see good looking people when they come in."
- Trump "likes to see fresh faces" and "young girls"
- Included retaliation claim for complaining of age discrimination
- Included claims for violating CA law relating to meal and rest breaks
Age Bias on *The Apprentice*

Age discrimination suit, alleging that the 49-year old contestant was overlooked for *The Apprentice* television show

- Of 106 finalists, only 2 have been over the age of 40
Trump's Comments About National Origin

- "[Mexicans] are rapists. . . " "
- "The Mexican government . . . send[s] the bad ones over because they don't want to pay for them. . . ."
- "Happy #CincoDeMayo! The best taco bowls are made in Trump Tower Grill. I love Hispanics!"
In *EEOC v. DHL Global*, Hispanic workers were called "stupid Mexicans" and "beaners"; settled for $201K.

In *EEOC v. Fireside West, LLC dba Hilton*, Hispanic workers were called "wetbacks" and "f---ing Mexicans"; settled for $195K.

In *EEOC v. Cannon & Wendt Electric Co.*, a supervisor told employee, "I hate all Mexicans" and Mexicans "are worthless"; settled for $100K.
Similar Comments in the Employment Context

In *EEOC v. Blue Ridge Resources*, a supervisor called employees "stupid Mexicans," told them to "go back to Mexico," and said that all Mexicans who come to the U.S. should be hung; settled for $43K.

In *EEOC v. Glaser Organic Farms*, a manager told workers, "Mexicans are stupid," "Mexicans are lazy," and that Mexicans were ignorant and could not read or write; settled for $15K.
Trump's Comments About Religion

• "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States. . . . "

• "I think Islam hates us" and "there's a tremendous hatred there"
In *EEOC v. Wal-Mart*, the employee was subjected to harassing comments, like "Muslims are terrorists and blow things up"; settled for $75K.

In *EEOC v. Scully Distribution*, management referred to East Indian drivers as "Taliban" and "camel jockey" and they were given less favorable assignments; settled for $630K.

In *EEOC v. Swift Aviation*, employee was subjected to harassing comments, like "I don't know why we don't just kill all them towelheads"; settled for $50K.
Questions?

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