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Think Uber employee issues don't affect your business? Think again

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The problem of classifying a worker as an employee or an independent contractor took on new life in the latest lawsuit against ridesharing company Uber brought by several Tampa-based drivers.

How do they comply with murky laws and regulations about classifying workers in an era of so much change in the workplace?

"Certainly, there's been an uptick in these types of lawsuits," said Michael Landen, a partner with Kluger Kaplan Silverman Katzen & Levine, who specializes in labor and employment law. Landen, who represents a large transportation company whose drivers are suing for overtime pay, regularly counsels business clients on this issue.

"If there is a close call, we tell them to treat them as an employee to be safe or make sure people are working less than 40 hours a week," he said.

In the Tampa suit, four drivers from Hillsborough County are seeking class action status in federal court in the Middle District of Florida against Uber Technologies Inc. They are challenging, "Uber's uniform policy of willfully misclassifying its drivers as independent contractors, when, in fact, each such driver is and/or was an employee of Uber," they said in the suit.

The drivers allege that in misclassifying them, Uber violated the federal Fair Labor Standards Act, tax laws and the Florida Deceptive and Unfair Trade Practices Act when it failed to pay minimum wage, overtime and deprived them of their right to workers' compensation, unemployment insurance, disability insurance, Social Security and other benefits. A similar lawsuit seeking class status was filed by another driver in Orange County, Florida in December.

The lawsuit is the latest in a string of court and regulatory cases brought against the San Francisco-based ridesharing giant over whether drivers are employees or independent contractors.

"The allegations are very serious ones that go to the heart of Uber's business model and the potential exposure can



Applicants line up outside an Uber Technologies Inc. office during a driver recruitment event in Hong Kong, China.

JUSTIN CHIN/
BLOOMBERG

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THE U.S. DEPARTMENT OF LABOR'S WAGE AND HOUR DIVISION PUBLISHED an administrative interpretation last July outlining six factors that are being used to determine whether businesses are in compliance with the law. They are:

- "The extent to which the work performed is an integral part of the employer's business;
- The worker's opportunity for profit or loss depending on his or her managerial skill;
- The extent of the relative investments of the employer and the worker;
- Whether the work performed requires special skills and initiative;
- The permanency of the relationship; and
- The degree of control exercised or retained the employer."

be astronomical," said Richard Reibstein, the partner who heads the Labor and Employment Practice Group of Pepper Hamilton LLP in New York. Ed McKenna, a partner with labor and employment law firm Ogletree Deakins in Tampa, said, "It's part and parcel of the claims that are being brought all over the country against ridesharing companies."

Businesses can rely on independent contractors but there are caveats. "... there is a heightened risk that you will be visited by a regulatory agency or a class action lawyers," Reibstein said. "But it doesn't mean that even if you are, you can't prevail or you can't change what you have done before to enhance your level of compliance."

Companies may be reluctant to make those changes after a lawsuit or audit, Reibstein said, believing it could suggest what they did in the past was improper. "But, that's a losing proposition."

At Pepper Hamilton, Reibstein helps clients improve their compliance with a proprietary system known as IC Diagnostics. It reviews as many as 60 to 70 different factors to determine classification and whether a company's system needs to be revamped. With IC Diagnostics, Reibstein said, "you keep your business model but you tailor it to the law. You tweak it, you restructure it, you re-document it, you re-implement in a way that complies with the law."

Among the actions Reibstein counsels businesses who use independent contractors to avoid are:

- Needlessly directing and controlling actions may transpire without direction and control. For example, Reibstein said, "You don't have to direct a contractor to provide services between 9 and 5 when your business is

open between those hours. When else can they do the work?"

- "You don't need to prevent or restrict a contractor for delegating responsibility or duties to others."

- Avoid paying for expenses of the contractor and work out a fee that includes those costs. "If someone wants \$10 hour plus expenses, pay \$12 an hour," Reibstein said.

For now, Uber and other ridesharing companies are litigating the classification issue. Competitor Lyft, for example, this week agreed to settle a class action suit brought in 2013 by its drivers in California. Under the \$12.25 million settlement, still subject to court approval, Lyft drivers will continue to be classified as independent contractors.

Uber notes that Georgia, Pennsylvania, Colorado, Indiana, Texas, New York and Illinois, have categorized ridesharing company drivers as contractors.

In response to the Suarez complaint, an Uber spokesperson issued this statement: "As the Florida Department of Economic Opportunity's final order recently recognized, Uber's partners are independent contractors who use Uber on their own terms; they control their use of the app, deciding when and for how long they drive, and whether they drive at all. Nearly 90 percent of drivers say the main reason they use Uber is because they love being their own boss."