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Dividing the pie in the gig economy

Pizza Hut class action raises the stakes for misclassification of gig workers

By Johann Annisette and Heather Devine
Jun 27, 2022

Some private motor carriers still use independent contractor drivers in their business models. However, there is an increasing risk that this model will be overcome by successful lawsuits

brought by misclassified employees demanding employee-related benefits.

As a result, the stakes are high for companies if their independents contractors are found to be misclassified employees – as evidenced by a $150-million class-action lawsuit recently launched against Pizza Hut.

These issues should be dealt with directly in the independent contractor agreement, by implementing terms and conditions which limit damage awards in the event of misclassification.

What's new?

Liubomir Marinov, a driver for Pizza Hut in Toronto, is the representative plaintiff in a $150-million lawsuit where he alleges, on behalf of many delivery drivers, that he is a misclassified employee and entitled to the rights and privileges of an employee.

Marinov claims that he worked for a Toronto Pizza Hut since 2005, initially being paid $4.50 per delivery, plus tips. His rate since increased to $10 per hour, which remained below Ontario's minimum wage of $15 per hour.

Read more: The Ontario government has proposed minimum wages for gig workers.

As an employee, the rights and privileges to which he would be entitled include: Ontario's minimum wage, the expenses of the deliveries (such as gas), and the expense of being a licencee/user of Pizza Hut's in-house app. He also claims employment insurance benefits and pension contributions that Pizza Hut would have been required to pay had he been classified as an employee.

This class-action claim is at its early stages. It is not yet certified, nor have the allegations been proven. We set out the claims, however, because it enables the reader to consider the facts as presented by a person claiming to be a misclassified employee.

We also note that the damages claimed are high: $150 million. They include the value of the rights and privileges set out above and reflect the size of the Pizza Hut enterprise. If the plaintiff were to succeed, numerous misclassified employees would have to be compensated.

Marinov is not alone in initiating such a high-value claim. In Ontario, similar employee misclassification class actions have proliferated in recent years, including actions against Amazon, Instacart, and Uber.

Recent decisions elsewhere in Canada, California, the United Kingdom, and France have also found "gig economy" workers like Uber drivers to be employees, contrary to company expectations.

Independent contractors, employees and dependent contractors

To assess the difference, one starts with considering the following factors:

- level of control exerted by the company over the worker's activities
- ownership over the tools and equipment
- whether the worker hires their own helpers
- degree of financial risk undertaken by the worker
- degree of responsibility for investment and management the worker holds
- the worker's opportunity for profit.

This is a highly fact-specific exercise, and the relative weight of each factor will depend on the particular circumstances of the case.

Interestingly, as companies and workers have pushed to delineate the role of independent contractor, the courts have pushed back and developed a new category: that of dependent contractor.

In British Columbia, the plaintiff worker in *Pasche v. MDE Enterprises Ltd.*, 2018 BCSC 701 was found to be a dependent contractor after the court concluded that factors supported a finding of both independent contractor and employee.

The company was ordered to pay Pasche common law damages for wrongful dismissal, to which he would not be entitled had he been an independent contractor.

Read more: More than half of gig economy workers are in favour of unionizing to get better wages, safer workplaces, and job security, according to a report.

In Ontario, the Ontario Labour Relations Board (OLRB) ruled on this question in the context of Foodora delivery drivers in *Canadian Union of Postal Workers v. Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750.

The couriers sought to unionize, which would only be permissible if they were "dependent contractors" as defined under the province's Labour Relations Act. Ultimately, the OLRB concluded the couriers "more closely resemble employees than independent contractors." In coming to this conclusion, the OLRB found the following factors to be persuasive:

- couriers owned their own method of transportation, but the most significant delivery tool was the Foodora delivery app
- couriers were not able to rely on 'customary entrepreneurial tools' such as advertising, to increase their own profits
- Foodora exercised control over pick-ups, deliveries, ability to decline orders, and work hours

- couriers were unable to develop independent relationships with restaurants/clients
- Foodora unilaterally established parameters for couriers, who could be closely monitored via the Foodora app.

Factors to consider: control, sharing of profits/losses, independent sources of work

Thus, where a worker (1) has control over their work selection, hours, and ability to take on work, (2) shares the risk of loss and the benefit of profit with the company, and (3) can and does source their work from others, the probability that the worker is independent is strengthened.

In present-day business models, however, it is rare for a worker to exert control over these factors. Consequently, an analysis of most worker-company relationships would lead to the conclusion that the workers are dependent contractors, or perhaps even employees.

Repercussions for employers?

Upon a finding that a company has misclassified an employee, the company may be responsible for various statutory and common law liabilities. This can include retroactive pay to ensure wages

already earned meet the relevant employment standards legislation, liability for vacation pay, benefits, and overtime pay, or past payments for Canada Pension Plan and Employment Insurance.

A company can also be held liable for a workplace injury and responsible for retroactive payments on unpaid premiums.

Finally, if the misclassified employee is terminated and the contract does not contain termination provisions that satisfy the applicable employment standards legislation, a company may be liable for common law damages for reasonable notice.

It will be important for private motor carriers who rely on independent contractors to keep an eye out for the result of the above-mentioned upcoming class actions. If employment-type rights are extended to the plaintiff classes, the results may have a profound and expensive impact on how these businesses can operate in the future.

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