CORPORATE COUNSEL

Uber Reworks Driver Arbitration Agreements After Legal Loss

by Rebekah Mintzer
rmintzer@alm.com

A high-profile worker classification lawsuit against Uber Technologies Inc. in California has brought national attention to the question of whether workers in the sharing economy are full-fledged employees or just contractors on a digital platform.

The issue is at the center of the class action case, *O'Connor v. Uber*, but it hasn't been the only one that matters as the case makes its way through the courts.

The validity of the arbitration agreements that Uber asks drivers to sign has been a major point of contention between the plaintiffs and the company. So far, the plaintiffs have been winning the argument, and Uber recently revamped its drivers' arbitration agreements in what looks like a direct response to its recent setbacks.

Uber already suffered a loss earlier this year when Judge Edward Chen in the U.S. District Court for the Northern District of California ruled that a class of drivers could sue to get the benefits and rights of W2 employees. The question remained as to how large the class would be, with Uber arguing that since drivers who started in 2014 or after signed an arbitration agreement that waived their rights to go to court, the class should exclude these drivers.

Originally it seemed that Chen agreed with Uber, but he apparently changed his mind after new case law emerged in California under the Private Attorney General Act, a state law that allows private citizens to pursue violations of California's Labor Code and collect penalties (albeit usually small ones) from violators. Last week, Chen ruled that Uber's arbitration agreement included an illegal waiver of drivers' rights under PAGA, and was therefore invalid. Now plaintiffs from 2014 and beyond are included in the class action's numbers.

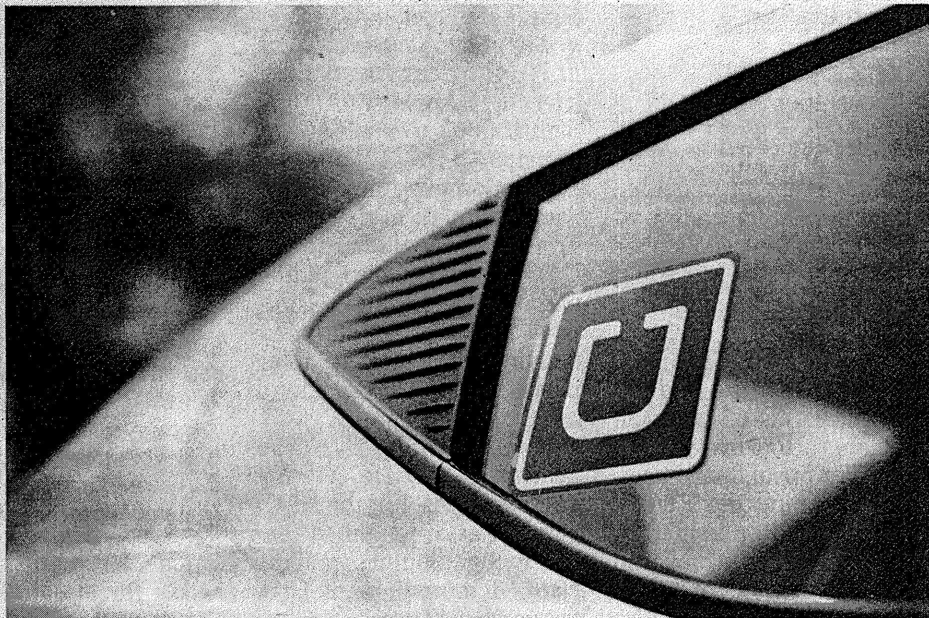
Uber, which has appealed this latest ruling, acted quickly, releasing a new arbitration agreement for drivers that includes a carve-out for PAGA claims just days after Chen's ruling. It seems unlikely that the new agreement could apply retroactively to the class already certified, but releasing a new agreement in the middle of litigation could still have influence on how class members perceive the case, according Adam Moskowitz, a partner at Kozyak Tropin & Throckmorton, who manages the firm's class action practice.

"Clearly this isn't going to be enforced against the class members," he said. "But it does raise the issue of: 'Is this an unsolicited communication to the certified class?' The court has to address that." If the new policy affects the way class members view the case, and prompts them to opt out of the class action, it could be very consequential.

The lead plaintiffs attorney in the case, Shannon Liss-Riordan, has filed an emergency motion calling the new arbitration agreement misleading and saying it has already created confusion for drivers.

It remains to be seen whether the motion will result in any change, or whether Uber will be able to continue promulgating the new policy. But either way, it does raise some interesting issues.

One is the need to ensure that companies articulate the terms of an arbitration agreement so that the person signing it actually knows what they are agreeing to. Some have expressed concern that Uber drivers might not understand the sort of "legalese" that the company is throwing at them with its updated agreement or be able to figure out how to opt out from the reworked arbitration agreement.



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While not commenting on Uber's policy specifically, Todd Lebowitz, a partner at Baker & Hostetler, said that drafting agreements that are still legally airtight while also as readable as possible for the average person isn't always easy. "It's constantly a struggle for attorneys to draft an arbitration agreement that will be held up in court as enforceable, while at the same time not making it so complicated and so convoluted that people can't understand it," he said. "It's a difficult path." If a company fails to do this effectively, Lebowitz added, its contract may fall into the legal trap of "procedural unconscionability."

Douglas Bohn, a partner in the commercial litigation department of Cullen and Dykman, emphasized that companies need to make sure the person signing the agreement understands what the procedures are going to be for resolving a dispute and knows that they have waived the right to take the issue to court. "As long as the parties know what they are agreeing to, that's always the key," he said. If done right, Bohn explained, mandatory arbitration can often provide valuable savings in costs and time.

For now, said Todd Scherwin, regional managing partner at Fisher & Phillips' Los Angeles office, it makes a lot of sense for Uber to fight tooth and nail to shrink the class as much as possible, since a loss would likely upend the company's contractor-based business model.

But that means it'll probably be awhile before courts can get past the arbitration issue and make it to the major employment law questions. "You may be looking at months, if not years or longer before any decisions on the merits are actually reached," Scherwin said.

Rebekah Mintzer reports for Corporate Counsel, an ALM affiliate of the Daily Business Review.