Patterson Belknap Webb & Tyler LLP

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# New York Court of Appeals Delivers News to Employers in *Postmates* Case: Couriers are Employees, Not Independent Contractors

The New York State Court of Appeals recently issued a decision in a closely-watched case that helps to clarify the landscape regarding independent contractors and employees in the gig economy.

In *In the Matter of the Claim of Luis A. Vega v. Postmates Inc.*, decided on March 26, 2020, the Court of Appeals agreed that "substantial evidence" supported the Unemployment Insurance Appeals Board's decision that a courier for Postmates—a food delivery "app" that can be accessed via smartphone—was an employee, not an independent contractor, and thus Postmates had to make contributions to the unemployment insurance fund on his behalf.

In so finding, the Court of Appeals analyzed the nature of the work the courier was hired to perform, the relationship between Postmates and the courier, and the degree of control that each party exercised. Looking to precedent, the Court explained that the "touchstone of the analysis" is whether "the employer exercised control over the results produced by the worker or the means used to achieve the results." The more control exercised by the company, the more likely a worker is to be an employee. The record showed that Postmates unilaterally determined the courier's customer base, locations for delivery, time frame for delivery, pricing of food, and structure of payment to the courier. Postmates also bore the risk of loss in the instances where a customer did not pay. The Court determined that Postmates thus "exercised more than incidental control" over its couriers, which was "sufficient to render them employees rather than independent contractors operating their own businesses." This was true, the Court found, even though the couriers could choose their routes and decide when to make themselves available for work.

The *Postmates* Court distinguished Postmates' couriers from the yoga instructors it had analyzed four years earlier in *In re Yoga Vida NYC, Inc.* 28 N.Y.3d 1013 (2016) (see our alert here). Unlike yoga instructors, who "provide[] a service that is . . . unique to that instructor and his or her personal characteristics," it explained, Postmates couriers are "low-paid workers performing unskilled labor . . . [who] possess limited discretion over how to do their jobs." The Court found it important that unlike the yoga instructors, who exercised discretion over how to design a class and had the ability to develop their own client base, delivery couriers did not have a personal customer base because customers had no reason to prefer one delivery courier to another. The instructors in *Yoga Vida* were also able to choose whether they wanted to be paid on a percentage basis or by the hour, and were only paid if a certain number of students attended their classes, requiring them to build their own customer bases in order to succeed. The Postmates couriers, however, were paid under a structure determined by Postmates, regardless of whether the customer actually paid for their food.

This most recent word from the Court of Appeals highlights the fact-intensive nature of the independent contractor inquiry, which is "necessarily flexible" and inherently leaves room for a court's exercise of discretion. The two decisions discussed above help provide some guideposts for companies trying to determine how much control will result in workers being classified as employees under the New York unemployment insurance statute. As another guidepost, in *Eidelson v. Mulberry Tree Center LLC*, 164 A.D.3d 981 (App. Div. 3d Dep't 2018), the Appellate Division, Third Department affirmed the Unemployment Insurance Appeals Board's decision that tutors who were matched with students by a company were employees of the company, not independent contractors. As in *Postmates*, even

though the workers had the option of turning down tutoring assignments and the company did not dictate how the assignments would be performed—for example, tutors came up with their own lesson plans—the company still exercised sufficient control over the workers for them to be classified as employees because, among other things, it set the pay rate and paid workers even when their students did not pay the company. In addition, tutors had the option of meeting students at a location provided by the company; could use forms provided by the company for keeping track of students' progress and sending invoices; and were referred to by the company as "our teachers."

In analyzing whether workers are properly classified as independent contractors, companies and organizations should think about the nature of the work the worker is performing and the level of autonomy the worker has in doing so, as well as how payment is structured. The analysis is an important one, as the misclassification of individuals can subject a company to penalties and tax liability, along with increased scrutiny by the Department of Labor.

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