

## **PA Supreme Court Rules on Uber Driver’s Demand for Unemployment Benefits in Lowman v. Unemployment Compensation Board of Review**

On July 24, 2020, the Supreme Court of Pennsylvania decided a [matter of first impression](#): whether an otherwise eligible claimant seeking unemployment benefits is “self-employed” and therefore ineligible for those benefits while working as an Uber driver. The Court’s opinion analyzed the appropriate test for determining self-employment under the Pennsylvania Unemployment Compensation Law (“Act”)<sup>1</sup> and carefully evaluated the “control and direction” Uber allegedly exerts over Uber drivers.

The Court found that the claimant was not self-employed and should have been eligible for benefits. The 5-2 decision sets the stage for app-based gig workers to seek unemployment benefits, and can be viewed as a part of a larger movement to secure employment-related protections such as minimum wage, unemployment insurance, and overtime pay for workers in the gig economy.

Transportation network companies have sought to frame drivers as independent contractors rather than employees, building their business models around that framework and defending their position in courts across the country. For example, in *Razak v. Uber Technologies, Inc.*, 951 F.3d 137 (3d Cir. 2020), the Third Circuit vacated and remanded the lower court’s grant of summary judgment to Uber, holding there were genuine issues of material fact with respect to: (i) whether Uber exercised control over drivers; (ii) whether there was opportunity for profit or loss depending on managerial skill; and (iii) the degree of permanence of the working relationship.

Relying on *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985), the Third Circuit in *Razak* applied and analyzed six factors to determine whether the plaintiffs, UberBLACK drivers, were employees under the Fair Labor Standards Act. Those factors include the employer’s right to control the alleged employee, the employee’s opportunity for profit dependent upon managerial skill, the employee’s investment in equipment, whether the position requires a special skill, the degree of permanence of the working relationship; and whether the service is an integral part of the alleged employer’s business. The *DialAmerica* factors showed, at minimum, that there was a genuine issue of material fact sufficient for the litigation to proceed.

The difficulty in analyzing and assigning appropriate weight to similar factors under a different statutory framework appeared center stage in *Lowman*. Here, the claimant was separated from his job as a behavioral health specialist when he filed an unemployment compensation benefits claim. While his application was pending, the claimant began driving for Uber under the terms of Uber’s software licensing agreement, which states unequivocally that the claimant is an independent contractor and not an employee. Per statutory requirements, the claimant reported his earnings from Uber to the appropriate unemployment compensation service center. The service center issued a notice of determination informing the claimant that he was not eligible for benefits because he was self-employed as a driver for Uber.

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<sup>1</sup> Act of Dec. 5, 1936, P.L. 2897, No. 1, [as amended](#), 43 P.S. § 751, [et seq.](#)

The claimant appealed the center's ineligibility determination; however, a referee affirmed the service center's determination. The claimant then appealed to the Unemployment Compensation Board of Review ("Board"), which affirmed the referee's decision. Following the claimant's petition for review, the Commonwealth Court reversed, finding that he was not self-employed and therefore eligible for unemployment benefits.

The Board appealed to the Supreme Court of Pennsylvania where the issue was framed: what is the appropriate test to determine whether a claimant otherwise entitled to unemployment compensation benefits becomes ineligible for those benefits as a result of self-employment under § 402(h) of the Act? The Supreme Court held that § 4(l)(2)(B) of the Act, 43 P.S. § 753(l)(2)(B), contains the appropriate test, ultimately affirmed the Commonwealth Court's ruling, albeit under a different test than previously applied, and determined that the claimant was not self-employed per the meaning of the Act.

The Act does not define "self-employment." Section 753(B), however, defines "employment" as follows:

Services performed by an individual for wages shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the department that – (a) such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact; and (b) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.

Notably, § 753(l)(2)(B) contains a presumption of employment, which remains until it can be shown that the individual in question is not subject to control and is customarily engaged in an independently established trade, occupation, profession or business. The Court examined these factors and the claimant's relationship with Uber to determine whether the claimant was self-employed. Since the issue is one of statutory interpretation, the Court noted its review of the factors is non-deferential and re-affirmed that a determination regarding self-employment is a question of law to be determined on the unique set of facts of each case.

In addressing the control factor, the Court echoed indicia previously discussed in [Razak](#) and assigned weight to the following: the required application process; the inability to use a substitute to provide services; Uber's monitoring, review and supervision of the claimant's performance; pay structure; and provision of tools and equipment. In considering the totality of the evidence, including the express provisions of the Uber licensing agreement, the Court also recognized the evidence showing the absence of control by Uber over the claimant's driving for hire services. However, Uber's vetting, monitoring, and supervision of the provision of services by drivers is implicit in Uber's services. Giving weight to all of the evidence, the Court concluded that Uber controlled and directed the performance of the claimant's services as a driver-for-hire.

Having concluded that Uber exercised sufficient control over the claimant's work, the Court turned to the independence factor for analysis. Although articulated as separate considerations, certain indicia considered in the context of the control factor are relevant in the analysis of the independence factor as well, leading to the conclusion that the claimant was not engaged in an independently established business. Thus, the Supreme Court affirmed the decision of the Commonwealth Court and remanded the matter for calculation of unemployment benefits.

In a statement, Uber importantly noted that the Court, "did not make a determination on the employment status of this driver, and the ruling does not say the driver was an employee."

This decision shows that the courts are beginning to recognize the importance of this nuanced issue. It is unclear how the Court's ruling in this case will affect vicarious liability and insurance coverage matters. The Court's decision is one of statutory interpretation – it did not make a finding on the common-law master-servant test used to determine vicarious liability for actions of a driver.

If you have any questions or need more information about this case, please do not hesitate to contact us.

**Fowler Hirtzel McNulty & Spaulding, LLP**

*Commercial Transportation and Litigation*

Joseph R. Fowler, Esquire

[jfowler@fhmslaw.com](mailto:jfowler@fhmslaw.com)

215-789-4840



Joe Fowler defends commercial motor vehicle cases for insurance carriers, waste haulers, and trucking companies. Under his leadership, FHMS's robust post-accident team is called upon to investigate catastrophic accidents nationwide. This includes the immediate counseling of drivers and safety directors, the retention of accident reconstruction experts, and evidence preservation. Joe has extensive trial and appellate experience in PA, including multiple defense verdicts in Philadelphia County. He is a member of TIDA and frequently speaks on new legal trends impacting the transportation industry.

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