



DOES UBER HAVE EMPLOYEES?

The California Labor Commission recently issued a ruling that may profoundly impact the sharing economy. For such a monumental ruling, the issue at hand was rather petty. A driver working for Uber filed a complaint for reimbursement of approximately \$4,000 in expenses. The driver argued that as an employee of Uber, she was legally entitled to reimbursement for the costs incurred performing her job. Uber countered that its drivers are not employees. Rather, they are contractors who perform services for the passengers they drive, and Uber simply provides a platform enabling customers and drivers to find each other, in the process earning a “brokerage fee.”

The Labor Commission disagreed with Uber, citing, among other factors, the various “boss-like” forms of control that Uber exercises over its drivers, including the vetting process in accepting drivers, the right to fire drivers who are poorly rated, and the pricing limits that Uber imposed. Taken together, the commission found that the drivers are in fact employees of Uber, and therefore

are entitled to the various legal protections available to employees.

This ruling may have a profound impact on the future of Uber and all companies that form the sharing economy. Employees are entitled to many legal protections that contractors are not, and requiring the company to classify its drivers as employees will increase the firm’s costs to the extent that it may undermine the business model. Because of the potential impact, Uber has filed an appeal of this ruling; we certainly have not heard the last of the legal battle.

What may be surprising are the halachic ramifications of the employee-independent contractor debate. We find at least three areas in Halachah where the distinction between an employee and independent contractor impacts the rights and obligations of the parties. This article will analyze the halachic criteria for each classification.

Labor Law

The first area involves labor law. According to *Halachah*, an employee is entitled to quit his job at any time without notice (provided this will not cause a loss to the employer).¹ According to many *poskim*, this applies even if the parties specifically executed a contract (or *kinyan*) binding the employee to fulfill the entire term of the agreement. Although parties are generally free to obligate themselves to any agreement that they see fit, the Torah has a specific objection against a Jew selling himself into slavery. Since locking an employee into a job and denying him the right to quit resembles slavery, the Torah releases an employee from such agreements. However, this release applies specifically to employees. Independent contractors are not viewed as being similar to slaves, and therefore have greater obligations to complete their jobs.

Overcharging or Underpaying

A second discussion involves the prohibition of *onaah*, overcharging or underpaying for an item. The *Shulchan Aruch* rules that *onaah* does not apply to employees (since they are comparable to slaves, who are also excluded from *onaah*), while an independent contractor would be subject to *onaah*.²

Thus, an in-house attorney who is underpaid for his labor cannot claim *onaah*, while outside counsel who is underpaid may assert such claims. Of course the reverse is true as well; an employee who is overpaid for his services would have no obligation to refund the excess pay, while independent counsel would.

Hilchos Shabbos

A third distinction involves *hilchos Shabbos*. One may not instruct a gentile to perform *melachah* for him on Shabbos. This is why a gentile employee may not work for a Jewish-owned business on Shabbos. In contrast, a gentile independent contractor who chooses to perform his work over Shabbos would not violate this prohibition.³

Defining Terms

The question raised in the Uber litigation is one of classification: What are the defining characteristics of an employee as compared to a contractor, and what tests are used to determine their classification? In *Halachah*, we find two specific criteria: how the worker is paid, and the worker’s freedom in setting his schedule.

In *Terumas Hadeshen* 329, we find that the defining test is how the worker is paid. If the worker is paid an hourly or daily rate, he is treated as an employee. We view his wages as payment for his time. Therefore he is similar to a slave with respect to the right to resign, and not subject to *onaah*. In contrast, if a worker receives a set fee for performing the task, we view him as a contractor/*kablan*. The wages are viewed as paying for the service received, and not as buying the worker's time. In this case there is no resemblance to slavery and the rules of *onaah* will apply, while the flexibility to resign mid-task will not.

A second criterion is mentioned in *Sma* 333. The *Sma* asserts that an employee is a worker who must work at specified hours. Since he has committed to work during these times, his freedom is diminished and his status is similar to that of a slave. Accordingly, he is exempt from *onaah*, and may resign at any time. In contrast, a worker who has no obligation to work at set times, but is simply given a deadline by which he must complete his job, would be classified as a contractor/*kablan*. Since he is his own master, he has no similarities to a slave. As such, he would be subject to claims of *onaah*, and also would be penalized if he quit mid-term.

Based on the above, a salaried worker who must work set hours is clearly an employee/*po'el*, while a worker who is paid a set fee to perform a task and chooses when and how to work would clearly qualify as a contractor/*kablan*.

Complex Categories

There are, however, a number of hybrid cases that defy simple classification. The first example is a part-time worker who is paid by the hour but chooses which hours to work. The *Chochmas Shlomo* 333:3 rules that such workers are contractors/*kablanim*; since they set their own schedule they are not similar to slaves, and may not resign. This is consistent with the *Sma's* criterion.

A second question involves a worker who has complete freedom as to how and when to perform the work, but is paid for the job at an hourly rate. An example would be an independent accountant or attorney who works according to his own schedule but bills by the hour. *Mahariz Enzel* 15 categorizes such workers as employees/*po'alim*, which is presumably based on the *Terumas Hadeshen's* criterion. It would seem that the *Sma* would classify such workers as contractors/*kablanim*.

Interestingly, these discussions do not apply to *hilchos Shabbos*. There, *Halachah* clearly looks solely at the way the worker is paid: An hourly worker who is paid for his time would be classified as an employee who is always forbidden to

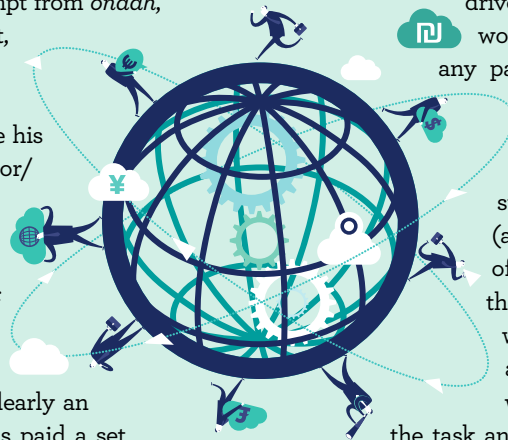
perform *melachah* on behalf of a Jewish employer on Shabbos, while a worker who is paid a set amount to complete a task is a *kablan*, and his working on Shabbos is sometimes permitted.⁴

Halachic Ramifications in Uber Litigation

Returning to the Uber case, the drivers seem to meet both criteria to be classified as contractor/*kablan*. The driver has complete control over his schedule and decides when, and how much, to work, which would indicate he is a contractor/*kablan*. In addition, the drivers are paid a preset amount per ride, which again indicates that they are contractors/*kablanim*. However, there is a unique aspect to this case that must be considered.

Once an Uber driver accepts a passenger through the Uber app, the driver must pick up the passenger immediately and drive directly to the destination. While the worker has absolute freedom to decline any particular job, once he does accept it, he has no discretion as to when to perform his task. In a similar case, the *Chochmas Shlomo* 264 rules that such workers are employees/*po'alim* (applying *Terumas Hadeshen's* criterion of control of schedule, and focusing on the lack of control after accepting the job), while the *Mahariz Enzel* 15 rules they are *kablanim* (since the worker chooses when to accept the work, and is paid for the task and not for the time involved), while the *Nesivos* 264 seems unsure. This dispute would apply to simpler cases as well. A barber is paid by the job and chooses when to work. Nevertheless, once he begins a job, he may not stop halfway through the haircut and tell the customer to return the next day.

Thus, the status in *Halachah* of Uber drivers is unclear, and whichever way the U.S. courts ultimately rule, they will be on solid halachic grounds. In addition, while *Halachah* has very specific criteria for defining a *po'el* or *kablan*, these classifications vary across different areas of *Halachah*. Because a *po'el* with respect to *hilchos Shabbos* may be a *kablan*, his status with respect to *ona'ah* cannot simply be extrapolated to the halachic status of Uber drivers. We must determine the context of the question: What is the issue presented before the courts for which the driver's status is relevant? Only then can we assess which of the halachic characteristics are determinant.



1. Choshen Mishpat 333:3, 5.
 2. Choshen Mishpat 227:33, 36.
 3. Provided the work could have been performed on a weekday, and that there is no *mar'is ayin*, (appearance of a worker doing *melachah* on behalf of a Jewish employer) involved.
 4. Although a *kablan* who is instructed to perform *melachah* specifically on Shabbos is also prohibited; that is because of the concept of *kovea melachto*, which is distinct from the *po'el/kablan* discussion.