



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

September 10, 2010

[REDACTED]

Re: Request for Opinion
Independent Contractors
RO-10-0040

Dear [REDACTED]:

I have been asked to respond to your letter, dated March 24, 2010, in which you ask whether drivers for a licensed limousine service would be determined employees or independent contractors.

We have spent a considerable amount of time reviewing the information provided in your letter and discussing the issues raised therein. While your letter contains thirty-two (32) bulleted statements describing the relationship between the Company and drivers the Department is unable to provide you with determination at this time because doing so would require that we make a number of assumptions without having a basis to know whether they are reasonable. Additionally, several of the key bulleted statements are not factual statements, but are, in fact, legal conclusions regarding the relationship between the drivers and the Company. For example, the letter states "[d]rivers are not subject to direct supervision, direction or control in the performance of their duties, i.e. the Company does not control the manner in which the work is to be performed." An assessment of the degree of supervision, direction, or control that the company has over its drivers is central to a determination regarding the drivers' employment status and, unfortunately, such leading and conclusory statements can't be relied upon by the Department as part of its assessment of the question you have posed. Consequently, additional information regarding the relationship between the limousine service and drivers is required to provide you with a more specific response.

The Department can, however, provide you with the following outline of the standards used for determining whether an individual is engaged as an independent contractor or as an employee under New York State law. The term "employed" is defined in the New York State Labor Law as "permitted or suffered to work." (Labor Law § 2(7).) To determine if an employment relationship exists, courts have utilized the same test in New York as is used for the purposes of the federal Fair Labor Standards Act. (*see, Ansoumana v. Gristede's Operating Corp.*, 255 F.Supp 2d 184, 189 (SDNY 2003).) To determine the existence of an employment relationship, the Supreme Court of the United States has declared that the "over arching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case." (*Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. N.Y. 1999) quoting

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Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961).) As such, courts consider several factors when examining the "economic realities" of a situation. (See, *Brock v. Superior Care, Inc.*, 840 F.2d 1054,1054-1059 (2nd Cir. 1988); See also, *Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61,67 (2nd Cir. 2003).) These factors include (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. No one of these factors is dispositive; rather, the test is based on a totality of the circumstances." (*Brock*, 840 F.2d at 1058-59 (internal citations omitted).) The purpose of this five-point test is to determine whether, "as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service, or are in business for themselves," (*Id.*)¹

The following is a general discussion of this legal framework as it relates to the facts as presented in your letter. In addition to this general discussion, questions, which would further clarify the nature of the relationship, are included.

(1) Control

Your letter indicates that the drivers set their own work schedule. Drivers are free to work at their convenience and can accept or reject any assignment. You also state that drivers will generally work away from the Company's premises and are not required to attend Company meetings or detailed training sessions.

On the other hand, drivers are required to use vehicles which are owned, maintained and insured by the Company. The Company arranges and schedules jobs for the drivers. The Company bills and collects fares directly from its customers. Fares are paid first to the Company which deducts the appropriate fees for car usage, branding, and dispatching services and only then distributes the balance to the drivers. The Company also imposes minimum standards regarding the qualifications of third parties to whom drivers wish to outsource work, the driver's dress code, and communication and dispatching protocols.

In order to provide an analysis of this factor, the following information is necessary:

- (a) How and under what circumstances does a driver obtain work which is separate and apart from work performed on behalf of the company?
- (b) Are there any mandatory minimums regarding work that must be met in order to maintain driver status?
- (c) How are the car usage fees, and any similar deduction from pay, calculated?
- (d) Is there a standard fee that is applied across the board for each driver?

Is the driver able to negotiate the fee with the Company?

¹ Additional facts considered before New York courts include, but are not limited to, whether a drivers' committee assisted in the creation of standards, policies, and procedures, who was responsible is setting the amount of the fare, whether the driver was compensated by the company in the event a customer refused to pay, and whether the driver was forced to share independently gained revenue with the company.

(2) Opportunity for profit or loss

With respect to the driver's opportunity for profit or loss, you indicate that drivers are paid for each job to which they are assigned and that such payment is the balance of what remains after certain company charges and costs from the amount of the fare negotiated by the Company. You also mentioned that drivers are free to provide services concurrently for other businesses, competitive or non-competitive. The opportunity to do so, is limited, however, as they are not permitted to pick up passengers off the street. Moreover, while drivers are free to advertise in electronic and or print media they are prevented from doing so "while performing services for the Company." Additionally, the Company's vehicles are outfitted with Company advertising. Examining these facts in conjunction with one another, it appears that the relationship limits any potential work, not already arranged through the Company, effectively reducing the driver's opportunity for profit or loss to near zero. However, the following information would be helpful in evaluating this factor:

- (a) In addition to the payment arrangement described above, through which drivers are compensated by sharing in a portion of the fares negotiated by the Company, does the Company pay the drivers any standard compensation for each pay period?
- (b) Does the Company permit passengers to tip drivers? If so, are drivers permitted to retain the full tip provided to them?
- (c) How are vehicles assigned by the Company to drivers? Are they provided for a set period of time? To cover certain assigned jobs? Given to drivers for their use on an indefinite basis?
- (d) Are there any restrictions on the driver's use of the company vehicle other than those discussed above?
- (e) Are vehicles "recalled" from drivers during non-work times if they are needed by other drivers for Company assignments?
- (f) Who is responsible for the maintenance and upkeep of the vehicle?
- (g) Does the Company pay for fuel, tolls, and other costs associated with use of the vehicle? If yes, does this arrangement cover only costs incurred in connection with Company fares?
- (h) Where is the vehicle housed?
- (i) Are drivers ever considered to be "on call?"
- (j) Is there a schedule?
- (k) Is it determined in advance and if so, how far in advance?
- (l) Do drivers have days off? Are they permitted to be considered unavailable at their discretion?
- (m) When is the restriction on driver advertising specifically applicable? For example, it is applicable only when the driver is carrying a passenger or en route to pick up a passenger, or is it applicable whenever the driver has a Company vehicle?
- (n) Are there any policies that cover these questions? If so, are they applied across the board to all drivers or can they be negotiated and incorporated into each driver's agreement?

(3) The degree of skill and independent initiative required to perform the work

Your letter is largely silent with respect to the degree of skill and independent initiative required to perform the work. It appears that the skill or independent initiative required for the position would include an appropriate license in order to lawfully drive the limousine, a knowledge of the streets and highways covered in the zones where the drivers work, an understanding of the traffic patterns that could impact the ability to get passengers to their destination in a timely fashion, and an ability to interact successfully with the public. However, in order to provide an evaluation of this factor, the following information is needed:

- (a) Are drivers required to provide a customer base, i.e. customers obtained previous to the Company/driver working relationship, in order to qualify as a driver?
- (b) You state that drivers are permitted to choose their own routes, subject to customer preferences. Are there any circumstances under which the Company would dictate to a driver the route that should be taken?
- (c) How are the drivers selected by the Company? Is this method different than the Company's typical employment screening/hiring process?

(4) The permanence or duration of the relationship

With respect to the permanence or duration of the relationship, your letter indicates that the drivers enter into an independent contractor agreement with the Company. This agreement is for a definite period of time and neither party may terminate the agreement without penalty. In evaluating this factor, it is worth noting that a contract that provides that the alleged employee is an independent contractor is not determinative in establishing that the employee is an independent contractor since such a determination requires an examination of the actual course of conduct between the two parties. (See, *Matter of Webley*, 133 A.D.2d 827 (3rd Dept. 1987).) In other words, "an employer's self-serving label of workers as independent contractors is not controlling." (*Brock v. Superior Care, Inc.*, *supra* at 1059 (2nd Cir. 1988).)

- (a) What is the length of the agreement? Is there a standard length or is the driver free to negotiate the length?
- (b) What is the amount of the penalty?
- (c) What is the relationship, if any, between the amount of the penalty and the agreed upon driver compensation?
- (d) Does the penalty change depending on the remaining time left in order to satisfy the agreement?

(5) The extent to which the work is an integral part of the employer's business

Your letter states that the Company is a licensed limousine service that "primarily provides local transportation on the basis of customers' calls to its dispatcher or by appointment." The integral part of the employer's business factor focuses on whether the workers' services are a necessary component of the business.

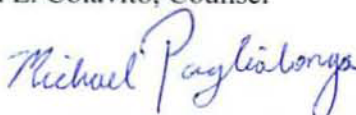
In its most literal sense, "necessary component" has been interpreted to mean that the business would not be able to function without the particular service or component provided by the worker. Alternatively, courts have interpreted "necessary component" more broadly, stating that "[w]hat is important is that the services performed are directly related to the normal functioning of the business and that such services contribute to the ability of the business to operate effectively." (*Marshall v. Michigan Power Co.*, 1981 U.S. Dist. LEXIS 16763 (W.D. Mich. Aug. 26, 1981))

It is unclear if the above statement describes, in total, the business objectives of the Company. As described above, the Company primarily provides prearranged transportation. A driver then, along with the vehicle and client, is among the most basic and necessary components for this type of business and appears to be an integral part of the Company's business. However, the following information would be helpful in providing an analysis in this regard:

- (a) Is this the only service provided by the company such that without these drivers, the Company would be unable to operate?
- (b) Does the Company have other full or part-time drivers who would be considered employees, as opposed to independent contractors?

Since a complete evaluation of the employment relationship cannot be made based on the limited facts provided in your letter, no determination is made as to whether an employment relationship exists between the drivers and the Company. Should you, after a review of the discussion above, require a definitive determination in this regard, please respond to the above questions along with any other information that would be relevant to making such a determination and we will endeavor to provide an answer.

Very truly yours,
Maria L. Colavito, Counsel

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