



What's New in HR Law

Ontario Labour Relations Board Opens the Door for Unionization in the “Gig Economy”

February 27, 2020

Bottom Line

On February 25, 2020, the Ontario Labour Relations Board released its first “gig economy” decision. The “gig economy” is characterized by temporary, flexible jobs where companies typically characterize workers as independent contractors or “freelancers” rather than employees. In *Canadian Union of Postal Workers v Foodora Inc.*, the OLRB found that Foodora Inc. couriers are dependent contractors and, therefore, entitled to unionize.

Independent or Dependent: A Question of Control

Foodora provides an internet enabled platform where customers can order food from restaurants via their proprietary “App”. Foodora’s couriers deliver food from the restaurant directly into the hands of hungry customers. Foodora couriers use their own vehicles or bicycles in the performance of their work (and are solely responsible for the associated insurance and maintenance costs), they have some flexibility in the selection of their working hours, and they

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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are able – and many do – work for other competing courier services simultaneously. Based on these and other factors, Foodora took the position that couriers are not employees but, rather, independent contractors. Ultimately, the OLRB disagreed.

In 2019, the Canadian Union of Postal Workers filed an application to become the bargaining representative of Foodora’s couriers. One of the biggest hurdles the Union faced in its unionization effort was whether Foodora’s couriers were dependent contractors and therefore entitled to organize under the *Labour Relations Act, 1995*. If the couriers were independent contractors, they would not have the right to unionize.

The OLRB has a well-established test for determining whether a group of employees are independent or dependent contractors. The crux of the analysis is simple: *does the working relationship more closely resemble an employment relationship or that of an independent contractor?*

In order to answer that question, the OLRB has developed a number of factors which must be considered:

- the ability to use substitutes or to subcontract out the work
- ownership of tools, equipment, appliances, or materials
- evidence of the individual’s entrepreneurial activity
- the ability for the individual to sell their services to a market generally
- the economic mobility or independence of the individual including the ability to reject work
- evidence of variation in fees charged for services provided
- any integration between the individual and the company
- the degree of specialization, skill, and expertise or creativity involved
- control of the way the work is performed
- the quantum of the contract amount, its terms and manner of payment
- whether the individual does the same work as individuals who are employed by the company.

After reviewing each of these factors, the OLRB found that Foodora couriers were dependent contractors who more closely resembled employees than independent contractors. Some of the most important factors which favoured the dependent contractor designation were:

1. The couriers could not substitute another worker for themselves.
2. Foodora owned, operated, and had full control of the software App on which orders are placed and which is the essential component of the delivery process.
3. The requirements of the courier position limited the courier’s economic mobility and independence.
4. The couriers were critically integrated into Foodora’s business model.

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5. Foodora exercised significant control over the way that the delivery work was performed, including the scheduling shifts and monitoring of delivery times.

While some “gig economy” workers in other settings may very well work on their own terms and legitimately be characterized as independent contractors, this is not what the OLRB concluded in this case. With respect to the working relationship established between Foodora and its couriers, the OLRB found “[t]he couriers are selected by Foodora and required to deliver food on the terms and conditions determined by Foodora in accordance with Foodora’s standards. In a very real sense, the couriers work for Foodora, and not themselves”.

The OLRB has not yet certified the Union as the bargaining agent for the couriers as a number of voter list issues remain outstanding.

Check the Box

The OLRB’s decision may have significant ramifications for Ontario’s burgeoning “gig economy”. As many businesses emulate this model of service delivery, employers should consider whether their relationship with contracted workers is properly constructed. Employers must ask themselves: *does the working relationship more closely resemble an employment relationship or that of an independent contractor?* As in most cases, each situation is unique and must be evaluated on its own merits.

Date: February 25, 2020

Forum: Ontario Labour Relations Board

Citation: *Canadian Union of Postal Workers v Foodora Inc*, 1346-19-R

Need more information?

For more information on employee classification and unionization issues contact [Derek Klatt](#) at 416-408-5506, or your regular lawyer at the firm.



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