

# Uber drivers should be considered entrepreneurs, not employees

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## Introduction

Whether an Uber driver is an entrepreneur or an employee affects a variety of legislative areas. If Swiss employment laws apply, the employee has a basic right to perform the agreed-upon work and the employer must accept such work and pay for it (known as the 'mutuality of obligations test'). Specific termination notice periods must be observed, holidays must be granted and salary compensation entitlements exist in cases of illness or accident.

Public labour laws apply, including staff brokerage and leasing legislation, as well as the Sunday work ban, compulsory provisions on daily and evening work and mandatory rest periods. Gross salary is subject to deductions for various social security insurances covering the risks of age, invalidity, death or unemployment, while similar deductions take place under the mandatory pension fund schemes. Employees are mandatorily insured against the financial risks of accident. Public transportation laws apply to the Uber business model at both federal and cantonal level. Tort laws are also at stake and, although not much discussed in Switzerland, they do affect whether in the event of a car crash Uber or an independent taxi driver will be targeted with personal injury or property damage.

This update focuses on Swiss employment and labour laws. Although Uber contracts in Switzerland contain a choice in favour of Dutch law and have an International Chamber of Commerce arbitration clause, both are likely to be enforceable in private employment law, but not in terms of public employment law.

## Sharing economy

Uber's business model is just one of numerous business models in the fledgling sharing economy. However, the term 'sharing economy' is something of a misnomer. Sharing economy still means the mercantilist brokerage of products and services (at least in most business cases); it is by no means suggesting a pre-capitalistic barter society. While Airbnb is the most prominent broker of residential rentals, its sharing economy rapidly expands into other areas such as personal services, clothing, car and bicycle renting, leasing parking spaces, the provision of food and beverages and corporate finance. It is still the brokerage of products and services under consideration; applying modern digital technologies allows a variety of additional revenue streams in comparison with traditional brokerage. According to estimates, approximately four million workers are engaged in the sharing economy in the United States and the number is rising rapidly (no figures are presently available for Switzerland).

The Airbnb business model is not considered a globally active hotel group with two million

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employees engaged in 192 countries and 34,000 cities. Nevertheless, Uber is considered by many to be a globally operating transport company with 10,000 employees in approximately 60 countries. At the centre of the worldwide judicial and administrative disputes is the question of whether the Uber Group controls and subordinates its drivers to an extent that makes them employees.

### **Tests applied by Federal Supreme Court**

The question in most jurisdictions is to what extent Uber drivers are integrated into Uber, so that a workforce can be legitimately spoken of. The US Fair Labour Standards Act 1938 (which is employee friendly) takes this approach by requiring employer control and employer instructional rights, including the need for physical integration into the employer's work environment. Government agencies and courts in the United Kingdom follow the same route.

Similarly, the Federal Supreme Court assumes an employment relationship when a person is integrated and subordinated into the employer's work organisation. This position is backed by Switzerland's legal commentators. The test for integration and subordination is also the legal litmus test for Switzerland's social security and pension fund legislation.

Integration and subordination are primarily given under Swiss employment laws where the employer has broad authority regarding how the employee must perform his or her work. This means, among other things, a physical presence obligation, which also applies to increasingly popular remote working. This test is related to the obligation to be available for work during a certain timeframe within a day, week or month. In turn, the employee has a fundamental right to perform his or her work. Both workers and employers have only limited, if any, discretion in shaping these aspects.

Labour law integration or subordination is further given if the employee must perform his or her work in person at the employer's work facilities. Despite technical developments, most work in Switzerland still takes place at a specific workplace, even if a globalised economy often requires its cadres and specialists to work from different locations. The need for physical presence is not affected by remote working. The employer also provides the infrastructure necessary for the provision of work, including work equipment and devices (eg, PCs, telephones, desks and chairs, lunch facilities and sanitary equipment). In Switzerland, the physical presence and infrastructure test remains a cornerstone of assessing a working relationship.

The Federal Supreme Court also considers subordination and integration if the worker is economically dependent. This test applies to, for example, constellations where there is a lack of legal or economic decision making on the employee's part, particularly where there is only one employer due to an exclusivity clause. According to the court, part-time workers with only one employer can also enjoy economic decision-making freedom.

### ***Integration and subordination test***

Uber's business model should be viewed in light of the principles developed by Switzerland's highest court. Uber drivers are not obliged to provide a certain number of working hours per day, week, month or year (except for the fact that an Uber driver's contract in Switzerland is terminated automatically if no service takes place during a 90-day period). An Uber driver is not obliged to be available for a specific time. It is only when the Uber driver has, at his or her discretion, accepted a specific transportation job, that he or she is obliged to perform the work.

### ***Mutuality of obligations test***

Before the Uber driver has accepted a transportation job, he or she is completely free to accept or reject his or her passengers and their transportation instructions. Conversely, an Uber driver has no claim to get certain transportation jobs assigned. Accordingly, both contracting parties lack central employment contract rights, which are instrumental to the definition of an employment relationship. In UK courts, the mutuality of obligations is also the legal litmus test when classifying independent versus dependent work performance.

### ***Relative investment comparison test***

Uber drivers are not integrated into Uber's work organisation. The drivers provide significant operational capital, namely the purchase of the car and driving recorder (the US Federal Labour Act

1938 calls this the 'relative investment comparison test'). When it comes to making these entrepreneurial investment decisions, Uber drivers are largely free, apart from that the car must be well maintained (UberPOP) or a mid-class model (UberX) with four doors and cannot not be older than 10 years. The premium class UberBLACK is subject to higher standards. Under the relative investment comparison test applicable in Switzerland, Uber drivers are not classed as employees, as they cover all other operating costs (eg, car maintenance, tax and insurance, government permits, food and beverages, tolls and parking charges and mobile phone charges). In Switzerland, the assumption of substantial investment and other operating costs is also instrumental for social security purposes.

### **Delcredere test**

The entrepreneurial *delcredere* risk, which has played a certain role in common law jurisdictions in the past, is of minor importance to the Uber business model (as is the case with other sharing economy business models), since an Uber transportation fare is billed solely via a credit card system. An Uber driver is at greater risk than a regular taxi driver of a passenger failing to show up for a journey. Failure to show up for a journey incurs a Sfr10 charge levied via the credit card system. In other words, Uber drivers do not need employment protection against the *delcredere* risk.

For most Uber drivers, economic dependency should not be apparent. In line with this test prescribed by the Federal Supreme Court, an Uber driver is not bound to exclusively provide his or her services to Uber customers. Thus, Uber waives a fundamental right as an employer to prohibit the employee from competitive activity during the employment contract (and post-contract), which also plays a role under Swiss social insurance laws. The majority of Uber drivers have other customers and are free to leave the Uber platform at any time in order to take up a competing activity. Uber drivers thus enjoy the legal and economic decision-making freedom required by the Federal Supreme Court. This includes the decision-making freedom of a taxi driver to make no use of Uber's platform (which is the case in many places). Only if this sort of economic independence is no longer given will there be a need for government intervention – not by the labour courts or social insurance authorities, but rather by local government competition and monopoly commissions.

### **Minimal invasive control rights**

In July 2016 the major Swiss trade union UNIA published a legal opinion by a Swiss social law professor who identified extensive control rights of Uber over its taxi drivers. The alleged 'smoking guns' are:

- an Uber driver's obligation to inform his or her passengers of arrival at the agreed starting point of the taxi journey;
- a waiting time of 10 minutes (if the passenger does not appear on time); and
- reporting back on the journey once completed.

According to the expert opinion, Uber's customer feedback system is also a control tool, because when Uber drivers receive lower grades they risk being assigned fewer transportation jobs.

All these allegedly onerous control instruments are found in other contracts as well. As an example, a self-employed gardener, garage owner or tailor must take instructions as to how the garden, car repair or tailoring should be carried out. The gardener, garage owner and tailor may face potential price reductions if customers are not entirely satisfied with their work, or they could face having less or no work in the future. None of the gardeners, garage owners or tailors would consider themselves employed workers. Conversely, these entrepreneurs would rightly oppose more extended directives as to how they should perform their work.

### **Price determination and payment collection**

The UNIA-sponsored expert opinion does not address an important part of the contracts between Uber and Uber drivers: Uber's right to dictate unilaterally the transportation fares to be charged and any discounts granted. It is tempting to say that an Uber driver thereby waives his or her instrumental entrepreneurial right to determine the value of his or her own service or products. However, this view ignores the fact that any end-price fixing in vertical distribution is ultimately a

cartel or competition law issue. A dominant market position would not be a prerequisite for an intervention by anti-cartel commissions (at least not in Switzerland).

The fact that Uber cashes the entire transportation price and repays the Uber driver an 80% service fee is not entirely congruent with Uber's claim to be a mere platform provider. Applying Cartesian strictness, the Uber driver would cash in 100% of the transportation fare and pay Uber a 20% brokerage fee. Swiss employment specialists have also argued that an Uber driver must provide his or her services in person, as is supposedly typical for an employment relationship. However, this argument fails because a mandate agent must perform in person too (in the absence of any other agreement).

### **Brokerage, mandate or agency contract**

Uber claims that its contractual relationship with taxi drivers is a brokerage pursuant to Articles 412 *et seq* of the Code of Obligations. Accordingly, Uber agrees to broker transportation jobs to Uber drivers. According to the Uber business model, Uber is not obliged to act in any way as a broker. An obligation to broker is assumed only if exclusivity is part of the brokerage contract, which does not correspond with the Uber business model. However, there is an obvious business interest on the part of Uber to arrange as many transportation jobs as possible.

It is also typical for a Swiss brokerage contract that the client (ie, the Uber driver) does not have to accept a specific contract (in this case, the transportation job), which is also in line with the Uber business concept. Under the Uber agreement, there is no obligation on Uber's side to compensate the Uber driver for any of its financial expenditures. As opposed to an employment or mandate agreement, Uber is compensated only if a transportation job is successfully accomplished. This leads to the transportation contracts concluded between the Uber drivers and their clients, which are considered in most cases work contracts, whose compensation models are also success-based. In the rarer cases of limousine services concluded for a specific time period, Swiss lease provisions might apply instead.

The contractual relationship between Uber and its drivers is not subject to any agency contract provisions pursuant to Articles 418a *et seq* of the Code of Obligations. This view is appropriate since Uber driver does not conclude any transportation jobs on behalf and on account of Uber, as Uber does not and cannot provide transportation jobs on its own.

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