

Foodora for Thought: The Right to Unionize in the Gig Economy

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The gig economy is by no means a new concept, but it has risen and expanded greatly in recent years. Ever increasing numbers of workers are performing work available through digital platforms such as Foodora (the Company), one of the many app delivery service companies in the modern gig economy.

As the gig economy has grown, so has the importance of the question of whether its workers are employees or independent contractors. *Canadian Union of Postal Workers v. Foodora Inc.* is the first decision of the Ontario Labour Relations Board (the Board) regarding the right of workers in the gig economy to unionize under *Ontario's Labour Relations Act, 1995* (the Act). In this historic decision, the Board determined that the Company's couriers are "dependent contractors" meaning they can be organized by a union and entitled to bargain collectively.

The Law

In Ontario, and most other Canadian jurisdictions, independent contractors are excluded from the labour relations regime. By contrast, employees are entitled to seek union representation. However, in Ontario, the definition of an "employee" expressly includes a "dependent contractor" defined as:

a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor. [emphasis added]

The definition is broad, and the Board has adopted a list of factors to assist it in distinguishing dependent from independent contractors. The essential question for the Board is: "does the relationship with this individual more closely resemble that of an employee or that of an independent contractor?"

The Findings

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In reaching its decision, the Board found the following factors to be significant indicators of the couriers' dependence:

- **Ownership of Tools and Equipment.** In previous decisions, the Board has held that workers who provide their own tools and equipment are more likely to be considered independent contractors. The couriers provide most of their own tools (e.g., bike, phone, carrier bag, etc.). However, the Board found that the most important tool in the food delivery process is the Company's App, which is provided, maintained, and upgraded by the Company. The Board wrote: "Just as the Board would not treat a shovel brought by the employee to the job site as equivalent to the backhoe provided by the contractor, the Board cannot treat the App as an equivalent to the bicycle and smart phone."
- **Chance of Profit.** The Board found that couriers can make more money if they work harder, either by doing more deliveries or dual-apping (i.e., working for the Company and simultaneously working for another food delivery app). The Board reasoned that hard work is not an entrepreneurial activity requiring "acumen, sensitivity to the needs of the market, astute investment, innovation, or risk taking." It is more akin to "working multiple part-time or casual jobs where the employee decides the most desirable place to work at a particular time." It analogized dual-apping to bartending, writing: "[i]f a bartender wants to work at night because there are more tips, it would not influence the classification of the bartender as an employee."
- **Risk of Loss.** The Board found the risk of loss for the couriers to be minimal since the compensation scheme the Company created entitles them to be paid regardless of issues with the restaurant, the customer or the delivery. The Board found that the Company bears the risk of loss in most instances and that, at most, the risk of loss for the couriers arises because of the couriers' expenses, which are unlikely to exceed the compensation they make delivering food for the Company.
- **Control Over Worker Activities.** The Board found that the Company has "a network of incentives and prohibitions to steer and control the behaviour of the couriers." For example, the Company controls the structure of shifts, when shifts are offered, how many people can work, the length of shifts, and the geographical zones. Access to shifts and preferred geographic areas is based on the courier's rating as determined by Foodora. The Board found that the control the Company exercised over the couriers "has the hallmarks of the type of employment relationship the Board often sees in the form of an on-call employee or elect-to-work employee."
- **Integration in Business.** The Board found that the couriers are heavily, if not entirely, integrated, into the Company's business and that the Company's revenue depends entirely on the reliable and timely delivery service of the couriers. The Board concluded: "The courier is a cog in the economic wheel – an integrated component to the financial transaction. This is a relationship that is more often seen with employees rather than independent contractors."

Takeaways for Employers and Franchisors

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Much like the gig economy, the legal framework applied by the Board to distinguish employees from independent contractors is not new. This decision signals to employers and franchisors alike that the Board does not consider the gig economy or app-based businesses to be exceptional within the existing legal framework.

Accordingly, this decision should serve as a caution to companies seeking to engage individuals as independent contractors as opposed to employees. As in the past, the substance of the relationship between the parties is more important than the written agreement and the parties' intentions. Accordingly, any relationship of dependence could create employment issues and the risk of unionization under the Act.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.