
Employment

Are Individuals Who Work for Sharing Economy Businesses Employees or Independent Contractors?

Introduction

There has been a significant growth in the so-called gig or on-demand industries in the last few years.

With the emergence of app-based companies such as Uber, Grab, Go Get, Kaodim and AirBnB, which provide digital platforms connecting individual service providers to clients, these individuals service providers are able to offer their services to clients as and when there is demand for the same.

Individual service providers are often thought to be self-employed or independent contractors. They are perceived as having the freedom to pick and choose the types of work that they wish to take on and they are not bound by restrictions which apply to an employee, for example standard working hours, fixed places of work and how the work is done.

However, is this really the case for companies that use digital platforms to connect the individual service provider with clients?

More often than not, there are pre-fixed terms and conditions which the individual service provider must accept before he/she can register with the digital platform and start providing their services to clients.

Uber Decision

On 28 October 2016, an employment tribunal in London ("**Tribunal**") delivered a landmark decision in which it held that drivers who sign up with the ride-hailing app company, Uber are classified as "workers" within the meaning of the Employment Rights Act 1996.

In reaching this decision, the Tribunal referred to a similar case in the United States where a number of drivers filed a class suit against Uber for classifying the drivers as independent contractors as opposed to classifying the drivers as its employees (*Douglas O'Connor v Uber Technologies Inc, Case 3:13-cv-034260EMC, dated 11 March 2015*). The North California District Court ("**the District Court**") resoundingly rejected Uber Technologies Inc's assertion that it was just a technology company and that it was not in the business of providing transportation services, The said District Court was of the view that Uber did not simply sell software but in reality the company was involved in selling rides to its clients. Therefore Uber Technologies Inc's assertion that it was just a "technology company" was dismissed. The Tribunal agreed with the aforesaid decision of the District Court.

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The Tribunal went on to state that an Uber driver is deemed to be a worker falling within the ambit of the Employment Rights Act 1966 for as long as the driver is able to satisfy the following criteria, that is if the driver :-

- (a) has the Uber app switched on;
- (b) is within the territory in which he is authorised to work; and
- (c) is able and willing to accept assignments.

It follows that Uber is now required to provide benefits to its drivers as stipulated under the Employment Rights Act 1996, which amongst others include minimum wages, paid leave and sick pay. Uber has stated that it will appeal against the decision of the Tribunal.

Effect in Malaysia

In Malaysia, employees can be divided into full-time employees, part-timers and casual workers. Employees who fall within the definition of the "employee" under the Employment Act 1955 are entitled to the benefits as accorded under the Employment Act 1955.

The law in Malaysia as it stands today does not consider independent service providers or self-employed persons as "employee(s)" for the purposes of the Employment Act 1955. The drivers who have registered with Uber and Grab in Malaysia are considered to be self-employed. The same applies to those who use other digital platforms, such as Kaodim and Go Get.

Despite the legal position remaining static, there have been some recent developments in Malaysia in respect of Uber and Grab car drivers, i.e. wherein the Malaysian Government ("**Government**") made an announcement that it intends to legalise both the Uber and Grab services whose status has been disputed thus far. It has been reported that Uber and Grab car drivers will now be required to register themselves with the Land Transport Commission, will need to maintain certain minimum insurance coverage, etc. However, the exact details of the regulation of Uber and Grab services still remains unclear but will no doubt be tabled before Parliament in the next few months.

In any event, this announcement does little to impact the current status of the Uber and Grab car drivers.

At this very preliminary stage, it remains to be seen what impact the Tribunal's decision will have on the employment landscape in Malaysia. Although Malaysian Industrial Courts have generally been more protective of employee rights, any move to recognise independent service providers as employees will potentially have adverse consequences to sharing economy businesses such as Uber, which are able to offer more competitive rates simply because they are able to operate on a different, more cost effective model, as compared to traditional businesses.

Moving forward, Uber and Grab will be regulated industries in Malaysia once the proposed amendments are passed but it remains to be seen whether the drivers will be recognized as independent contractors or employees. Any decision reached by the Courts to categorise a freelance driver as an employee will certainly have a domino effect on similar industries relying on freelance contractors.

Other than the above, it should be noted that there is an increasing governmental emphasis on the promotion and regulation of everything digital. For example, the Minister for Communications and Multimedia had indicated last week that the Government is reviewing all cyber-related laws in Malaysia in a holistic manner towards developing the country's Internet economy.

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It will therefore be interesting to see how Parliament and the Malaysian Courts are able to develop this area of law moving forward, especially in view of decisions from more mature jurisdictions such as the ones recently made by the Tribunal and the District Court as reported above.

We will continue to monitor these developments and provide you with updates from time to time. Please do not hesitate to contact our team should you have any further queries.

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ASEAN Economic Community Portal

The launch of the ASEAN Economic Community ("AEC") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com>.

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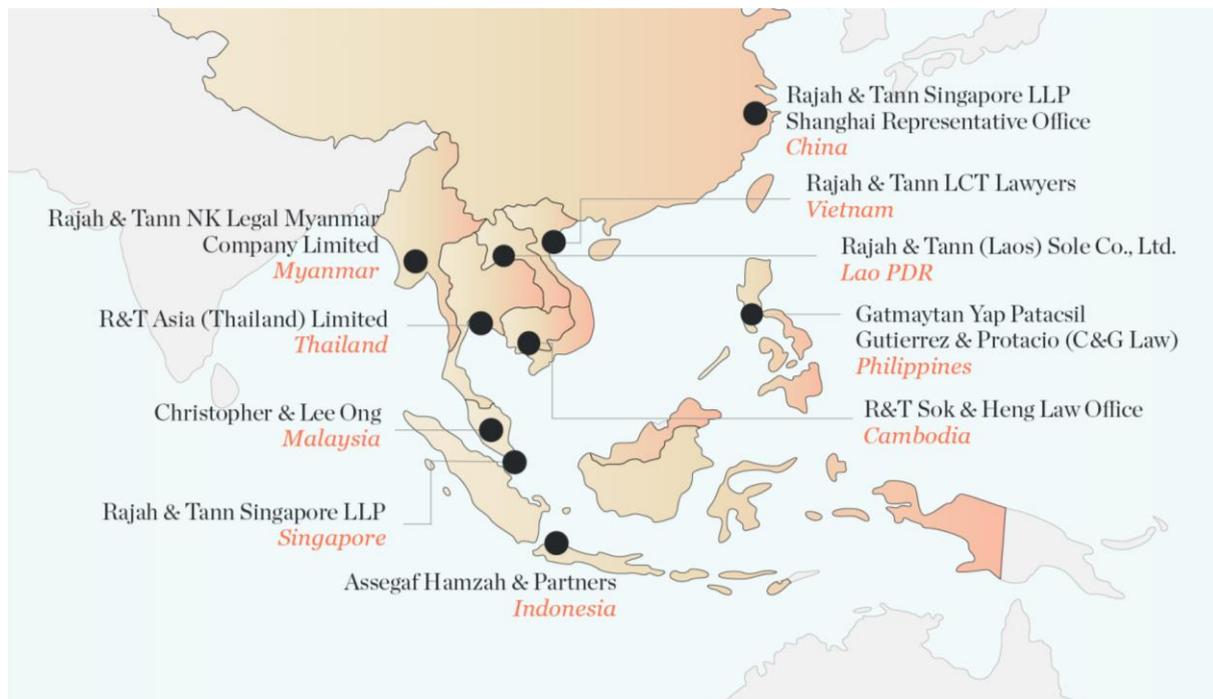
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