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Reclassification: Risks and considerations for the sharing economy and mobility industries

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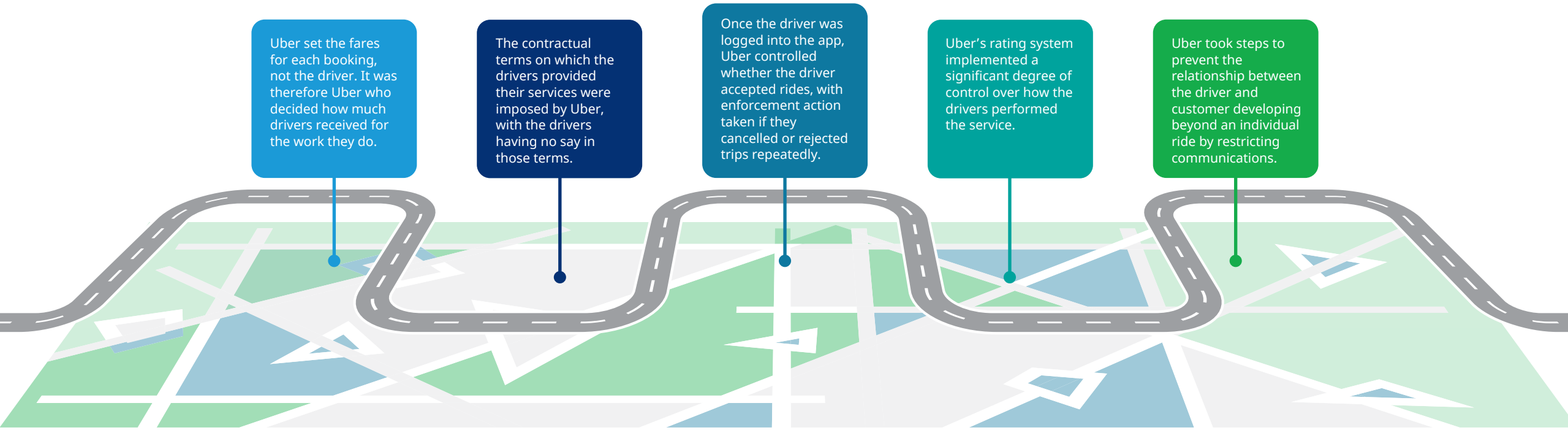
Sharing Economy and Mobility (SE+M) companies are typically at the forefront of disrupting legacy business models and enabling new ones, either opening up new areas of the economy, or changing existing ones. The pace of change and development is incredible, however, regulation struggles to keep up. The recent Uber BV and others *(Appellants) v Aslam and others (Respondents) ["Uber"]* UK Supreme Court ruling illustrates some of the ongoing challenges with defining "gig workers" and related considerations. The question is what might this mean on a more general basis for SE+M companies?

Overview of the Uber ruling

In 2016, a small group of former drivers took Uber to an employment tribunal to argue that they worked for Uber — demanding additional worker status and rights — and won the case. Uber appealed against the decision, and the ruling was upheld in December 2018. Fast-forwarding to 2021, Uber lost its last appeal in the UK Supreme Court. The full details of the ruling can be found **here**.

WHY DID THE SUPREME COURT RULE AGAINST UBER? LAW FIRM BCLP EXPLAIN THE RULING

The five key factors which led to the conclusion that Uber drivers were workers.



The court stated that by "taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber". The court therefore reached the conclusion that these conditions placed the drivers in a position of subordination and that the drivers "have little or no ability to improve their economic position through professional or entrepreneurial skill.

In March 2021, Uber announced that it agreed to reclassify up to 70,000 drivers as workers, enabling these workers to receive, among other additional statutory rights, minimum wage, holiday pay, and access to a pension plan. This does, however, fall short of the full suite of rights owed to employees.

And, moving on to May 2021, Uber have confirmed an impact of USD 600m to cover backdated settlements regarding pay, as referenced in a recent article by **Sky news.**

According to law firm BCLP, the ruling in the Uber case is not binding in the sense that it does not mean that individuals engaged with other service platforms must also be treated as workers.

Different arrangements could mean a different status. It is prudent, however, to have an understanding of the implications. The full BCLP report can be found **here.**

Worker, employee, or independent contractor/ self-employed?

Employment status used to be clear-cut; however, the Uber case and other similar disputes have illustrated how complex the tiers of employment have become in the UK. Though we have been evolving the way we work for decades, the highly disruptive SE+M sectors have been accelerating the change to more fluid and dynamic models. Additionally, the broader macroeconomic and societal impacts of the COVID-19 pandemic are likely to accelerate this shift further.

In UK law, there are three principal categories of employment status:

- Employees working under a contract of employment, who have full employment rights.
- The self-employed, who are independent contractors.
- Workers, who have a status in between employment and self-employment.

However, labels do not determine employment status: that depends on the terms of the contract and how the arrangements operate in practice. The Uber case illustrates this.

“A worker is a classification that is unique under UK employment law. Workers are not employees, but are entitled to certain social protections. Our decision means that Uber drivers will receive holiday pay and will be guaranteed at least the National Living Wage (as a floor, not a ceiling, meaning they will be able to earn more, as they do today) and eligible drivers who want a pension will receive one.”

ACCORDING TO UBER CEO, DARA KHOSROWSHAHI

The table below provides an analysis of these three principal employment status categories and some of the related insurance and risk considerations for SE+M companies.

	Self-employed (SE)	Workers	Employees
Overview	Independent contractors (ICs) are viewed as self-employed and essentially have no employment rights except: (i) health and safety protection and (ii) protection from discrimination (in some cases) and from mistreatment following whistleblowing.	The "worker" concept only exists in UK employment law, and is a catch-all category used to provide those who would otherwise be self-employed, but who have some employee characteristics (such as a degree of control by the business), with meaningful legal rights.	An employee is someone who works under an employment contract. Employees have multiple rights, including but not limited to annual leave, minimum wage, automatic enrolment onto pension schemes, and statutory sick pay.
Insurance considerations	ICs/SEs can have their own insurances to cover their third party public liability, auto/motor (where appropriate) and other income, accidents, and health. An SE+M platform may have some form of contingent corporate insurance for liability risks and may or may not be involved in offering or arranging the IC/SE insurances.	Workers are considered to have more rights than ICs/SEs, but not as many as employees. Examples include paid annual leave each year, whistleblowing, and other statutory rights. In addition, offering the option of a pension may be a requirement.	Employees are insured under Employers' Liability/equivalent and their respective activities covered under corporate insurance programmes where employee benefits type arrangements (including access to pensions) are typically arranged by the corporation itself on their behalf.

The table is for illustrative purposes only—each SE+M company and business model must be viewed within its own merits and specific legal and regulatory requirements. Some business models may have a combination of the above within their broad workforce, whilst others will be subject to multiple jurisdictions.

Risk and insurance considerations for SE+M companies

- **Impact on employers' liability/workers' compensation and equivalent** — and the interchange between Independent Contractors (ICs) scheme type programmes and more traditional corporate insurance programmes can be complex (particularly Employers Liability, General Liability/ Third Party Liability, and Group Personal Accident). If the employment status of gig workers can vary, or change, then this could impact the way their respective risks are managed and insured. A key example could be ICs being reclassified as employees and then needing to be included within Employers Liability programmes.
- **Increased requirements for workers and employees** — Many SE+M companies may offer more than the statutory minimum of "employee" benefits and related services in order to sustain their supply-side workforce and attract/retain gig workers. In the longer-term, the changing nature of work may lead to more flexible and dynamic arrangements (such as saving for retirement, health and wellness, and loss of income).
- **Tax and reclassification risks** — These may arise in relation to the UK National Insurance Contributions (NICs) and the implementation of retrospective backdating of disputed and/or applicable taxes, which could result in sizeable and unexpected exposures. Importantly, in the UK, the legal tests for tax purposes and those that determine employment rights are not the same, so an individual may be taxed as an employee but not have full employment rights.

Visit the CIPD for more information.

How SE+M businesses can manage reclassification risk

The Uber judgement, and its decision to reclassify 70,000 UK drivers as workers, demonstrates there is still no common precedent in the UK for SE+M business models and the related regulatory, legal, and insurance considerations.

As such, SE+M companies should keep the following in mind as they pursue their respective business strategies in the UK:

- The lack of clarity on how to reform employment status makes navigating the longer-term future challenging for all stakeholders.
- Insurance programmes and risk management strategies need to be flexible and responsive to current and potential future changes in regulatory and authority stances on the classification of a dynamic workforce, as this may affect SE+M companies' risks and insurance specifications.
  - From a corporate risk management perspective, this directly relates to the impact on general liability, workers' compensation, employers' liability programmes, and equivalent. However, consideration must also be given to additional "employee benefit" type arrangements, such as income protection, personal accident, and death and disability, and how such offerings take into account the potentially different classifications of the broader workforce.
- Collaborative approaches between SE+M companies, their internal/external advisors (including legal and public policy), and their risk and insurance partners are key to ensuring continuity of risk management and sustained insurance protection, compliant with the various regulations and laws.
- A holistic approach is required across risk management and insurance within SE+M companies to ensure adequate protection for the dynamic workforce irrespective of status.

From a risk management and insurance perspective this [ruling] also illustrates the importance of viewing the individual merits for each SE+M company and determining specific strategies to respond to their own unique business models. Given the dynamic and unique nature of each SE+M company's business and workforce ecosystem, a tailored framework and approach is required. By bringing together legal, regulatory, risk management, and insurance perspectives, SE+M companies can better manage the challenges posed by reclassification. Over the next few months and years there are likely to be further legal and regulatory bumps in the road, however, the new economy is here to stay, and the broader impacts of COVID-19 and technological disruption will likely lead to the increasing role and importance of casual labour.

Important notes

This paper does not constitute professional and/or legal advice and is not a legal analysis of the Uber ruling. With respect to specific risk management and insurance considerations, please contact your local Marsh team. This document was prepared from a UK perspective, but discusses some higher-level concepts; considerations are considerations are subject to local legal and regulatory frameworks, including the available insurance and risk management products.

For more information regarding the Marsh sharing economy and mobility industry proposition, please contact Sam Tiltman or your regular Marsh representative.

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About Marsh

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