

## Discovery Needed In Uber 'On Call' OT Fight, Judge Says

By **Dan Packel**

Law360, New York (December 15, 2016, 6:20 PM EST) -- A Pennsylvania federal judge on Thursday allowed a putative class action accusing Uber Technologies Inc. of violating the Fair Labor Standards Act to move forward, saying the issue of whether the company's drivers are "working" when "on call" can only be resolved after discovery.

U.S. District Judge Michael Baylson noted that the suit, in which the drivers claim in part they did not receive minimum or overtime wages, raised questions about whether they were at work when logged into the company's app.

"In the new 'Uber world,' digital technology and terminology are on the verge of capturing the English language. 'On call' may mean something other than an obstetrician waiting at home before driving to the hospital to deliver a baby. Is a volunteer firefighter sleeping at home, but subject to a wake-up call to race to a burning house, 'on call?'" he asked in the opinion.

Judge Baylson continued with a string of opera references.

"In Mozart's *Magic Flute*, are the three boys 'on call' to rescue Pamina when in distress? In *Rigoletto*, is Sparafucile 'on call' to murder the Duke? In *Falstaff*, is Falstaff 'on call' to visit Alice Ford 'dalle due alle tre' when her husband is not home?" he added.

Uber had asked the judge to throw out two counts containing claims for unpaid overtime wages. The company argued that the drivers' complaint showed no facts that asserted they were working just because they were logged into the Uber app.

The plaintiffs responded that their complaint was sufficient, as they alleged "a given workweek in which each plaintiff worked over 40 hours without receiving overtime pay."

Judge Baylson noted that while the FLSA does not address whether "on call" time qualifies as work that is compensable, the U.S. Supreme Court has ruled that it is under certain circumstances, and that the Third Circuit took up the matter in a 1998 case.

In that case, *Ingram v. County of Bucks*, according to the judge, the appeals court said that on-call time can be compensable under the FLSA if employees must remain on the premises or — more importantly for Uber drivers — if the time is so restrictive that it interferes with their personal activities.

But Judge Baylson said the *Ingram* case was decided at the summary judgment stage, or after discovery, and the Third Circuit has never considered whether these factors can be evaluated at the pleadings stage.

Consequently, he concluded that discovery was necessary in the instant case, ordering expedited discovery solely on the question of on-call time.

Attorney Jeremy Abay, who represents the plaintiffs, said that he was confident that that discovery would yield the facts that the judge was looking for.

"We're pleased that Uber's third motion to dismiss was rejected and that the case is moving forward," he said.

The judge did rule in favor of Uber in ordering that four paragraphs in the amended complaint — which addressed a now dismissed breach of fiduciary duty claim — be struck.

A lawyer for Uber declined to comment on the ruling Thursday.

The drivers are represented by John K. Weston and Jeremy E. Abay of Sacks Weston Diamond LLC.

Uber is represented by Robert W. Pritchard, Paul C. Lantis and Wendy Buckingham of Littler Mendelson PC.

The case is Ali Razak et al. v. Uber Technologies Inc. et al., case number 2:16-cv-00573, in U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Philip Shea.

*This story has been updated to include a comment from an attorney for the plaintiffs.*