

Wear: Bigger battle for Uber, Lyft could be over employee status of drivers

Posted: 12:00 a.m. Sunday, Jan. 10, 2016

By [Ben Wear](#) - American-Statesman Staff

I'm guessing almost none of you have heard of "Sledgehammer Shannon." I certainly hadn't until recently.

But rest assured, top Uber and Lyft officials know all about [Shannon Liss-Riordan](#), a Boston plaintiffs' lawyer. And for all the talk here and in other cities about how [requiring fingerprints for driver background checks](#) threatens the ride-hailing companies' business model, the real menace to Uber and Lyft's money machinery lies in a California federal court.



+ *Shannon Liss-Riordan, a Boston trial lawyer, is the lead attorney in a class action lawsuit against Uber in California challenging its classification of drivers as independent contractors. Photo courtesy of Lichten & Liss-Riordan.*

And Liss-Riordan's fingerprints, which are all over *O'Connor v. Uber* and separate litigation involving Lyft and other companies that use off-the-payroll drivers, are the ones that matter most.

Because the financial core, the bottom-line genius, of Uber and Lyft's business model is not as much how many drivers it can put on the street at any given time (which goes to the fingerprint issue) but rather the cost-sharing terms between the companies and those drivers. That arrangement is basically this: Drivers, you pay most of the costs and shoulder the personal risk of providing the rides, then share 20 percent or more of the proceeds with the company.

What allows the companies to do this is that the drivers are deemed independent contractors, not employees of Uber and Lyft (and, similarly, companies like Handy, Caviar and Postmates that use “gig workers” in a like fashion). That legal distinction relieves the companies of a host of expensive obligations, such as offering a minimum hourly wage, paid vacation, health insurance and sick days, paying overtime, unemployment taxes, Social Security and Medicare payments, and withholding federal taxes from driver payments. The drivers, meanwhile, buy or lease the core equipment — the vehicles — then cover the maintenance and gasoline costs.

Liss-Riordan in *O’Connor v. Uber*, [certified in September as a class action lawsuit](#) with as many as 160,000 Uber driver/plaintiffs, argues that the drivers under established labor law are in fact company employees, not independent contractors. Uber disagrees and has challenged the drivers’ ability to even litigate the matter because it required all of its drivers since June 2014 to sign a clause stipulating that all disputes would go to arbitration rather than the courts.

The judge in the California case in December called that clause “both procedurally and substantively unconscionable” and allowed all the drivers into the class action fold.

A jury will begin deciding as early as June (subject to a grant of a delay by the judge, always a good possibility in complicated litigation) who is right.

Liss-Riordan, who declined to comment for this column pleading a packed schedule, has a track record as a labor lawyer — primarily representing low-wage workers against employers — that could give pause to even as formidable an opponent as Uber (latest estimated market value: \$62.5 billion).

She has won cases against companies such as Starbucks (the Uber of the caffeine world) and FedEx and, at the other end of several spectra, [strip club owners](#). Those adult entertainment purveyors, challenged over how they split the proceeds of lap dances and such, had argued that the dancers were independent contractors. The club owners argued they were in the business of selling alcohol and simply furnished a venue where curvaceous contractors could network with willing customers.

Uber, albeit in a radically different business, is making much the same argument. Transportation network companies, Uber lawyers argue in filings, are in the tech business rather than the transportation business. That likely will be a big surprise to anyone who has heard the companies describe themselves as “ride-sharing” businesses. Uber, in fact, has become something of a verb like Google, as in, “I’ll Uber to the concert.”

Thing is, Liss-Riordan argues, companies like Uber and Lyft set the rates for the customers (and have lowered them over the past year in many cities, much to the consternation of drivers), determine the split between the companies and the drivers, can hire and fire (or rather, “deactivate”) drivers and mandate conditions of the rides, including the tidiness of the cars, a prohibition on tipping, and even limits on what drivers may say. For instance, Uber drivers are instructed not to share their phone numbers with customers, an effort to avoid them finagling off-the-app rides.

Uber and Lyft also keep close watch on driver ratings by customers, and an Uber “partner” with a less-than-exemplary average can find himself or herself banished from the app.

But wait, the companies say, the drivers get to set their own hours, working as little or as much as they want. They can even work for more than one company (including traditional taxi or limo companies), and many of them do.

Liss-Riordan, like Austin City Council Member Ann Kitchen (who has [led the charge here](#) on the fingerprint requirement), has been accused of wanting to kill a popular service, one that perhaps saves lives by keeping drunks from getting behind the wheel and also provides ready money for middle- and low-income workers. Not enough money, Liss-Riordan argues, nor enough of the kind of worker protections hammered out over decades.

Or perhaps she and other labor lawyers are trying to apply 20th century labor principles to a new 21st century model.

The court system will decide, eventually, and all of it almost certainly will occur well away from Austin. But even as the local skirmishing over fingerprints continues, including with a petition drive that could produce a referendum this fall to overturn the newest version of a city ordinance on transportation network companies, keep an eye out for this other battle of briefs.

What’s next for Uber and Lyft in Austin?

As the Austin City Council in mid-December was passing a new ordinance mandating fingerprint-based background checks for drivers, Mayor Steve Adler argued that [the legislation was “incomplete.”](#) The council, he and Council Member Ann Kitchen said, would come back Jan. 28 with a package of incentives and disincentives to speed compliance with the new law. Negotiations on those amendments are ongoing.

Meanwhile, a new group called Ridesharing Works for Austin has [begun a petition drive](#) to gather the 20,000 signatures of registered voters necessary to force a November public vote overturning the new law.