FPLG
FOR PURPOSE LAW GROUP
A Professional Law Corporation

BUSINESS & SOCIAL ENTERPRISE: FUNDAMENTALS

Classification of Gig Economy Workers: Rideshare Companies' Fight Against AB5

09.02.20 | Linda J. Rosenthal, JD

Since the enactment of California's Assembly Bill 5 ("AB5"), many employers have struggled with classifying their workforce. AB5, which codifies the factors set forth in the California Supreme Court case, Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal. 5th 903, changes the method of determining whether a worker should be classified as an employee or independent contractor in California.

Those factors, better known as the "ABC" test, establish strict criteria that must be satisfied in order for a worker to qualify as an independent contractor. How workers are classified is significant as employees are entitled to labor protections, such as minimum wage laws, sick leave, and unemployment and workers' compensation benefits, while independent contractors are not.

Pursuant to AB5, an employer must establish ***each*** of the following three factors to meet its burden to show that a worker is properly classified as an independent contractor:

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; ***and***

(B) that the worker performs work that is outside the usual course of the hiring entity's business; ***and***

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Cal. Labor Code §§ 2750.3(a)(1)(A)-(C).

AB5 and the Gig Economy

Companies operating in the gig economy, a market system in which temporary positions are common and companies tend to hire independent contractors and freelancers instead of full-time employees, seem to have been impacted the most from AB5. The Bureau of Labor Statistics reported in 2017 that 55 million people in the U.S. are "gig" workers. The term "gig" being a slang word typically used by musicians to refer to a job that lasts a specified period of time, can represent a wide range of positions from handymen to freelance programmers. It is projected that in 2020, gig workers will represent more than 40% of the entire U.S. workforce.

For companies like Uber and Lyft, which have historically classified their drivers as independent contractors, that means changing their entire business model, creating significant expense and administrative burden. As such, they have continued to classify their drivers as independent contractors resulting in numerous lawsuits alleging that Uber and Lyft have been misclassifying their drivers as independent contractors in violation of AB5.

Judge Schulman's Injunction Order

On May 5, 2020, California's Attorney General Xavier Becerra (joined by City Attorneys for Los Angeles, San Diego and San Francisco), filed a lawsuit on behalf of the People of California seeking an injunction and penalties against Uber and Lyft for their failure to comply with AB5.[1]

The People filed a motion for a preliminary injunction and on August 10, 2020, the Honorable Ethan P. Schulman, granted the motion finding that Uber and Lyft violated AB5 and misclassified their workers. However, Judge Schulman agreed to temporarily stay his ruling for ten days to allow the parties time to appeal the decision. Uber and Lyft both filed notices of appeal.

In his ruling, Judge Schulman addressed the contradictory positions taken by Uber and Lyft. Specifically, "in the same breath as Defendants argue that they are not subject to AB5, they urge the Court to stay the litigation until the Ninth Circuit can decide the constitutionality of that legislation, insisting that a decision in their favor will moot this case."[2] As the Court further noted, "if AB5 does not even apply to Defendants, why would the Court need to stay this litigation until its validity has been determined?"[3]

More concerning for the Court was Uber's arguments presented in a federal lawsuit filed to enjoin enforcement of AB5. In the federal case, Uber, Postmates, and two individual drivers, argued (and presented evidence in support thereof), that the sponsors of AB5 ***targeted*** and refused to consider an exemption for gig economy companies. "Uber contends that the same legislation it asserts in federal court 'targeted' its business does not, in fact, apply to it at all," making it "difficult for the Court to take seriously such contradictory positions."[4]

The Court additionally offered a scathing rebuke of the rideshares' position that their drivers perform work outside the usual course of Uber and Lyft's business (ie., the "B" prong of the ABC test). More specifically, the rideshare companies deny they are in the business of transporting passengers in exchange for compensation. "Instead, they assert that they are merely 'multi-sided platforms; that operate as 'matchmakers' to facilitate transactions between drivers and passengers."[5] The Court found that, contrary to Uber and Lyft's creative business description, their "drivers provide an 'indispensable service' to [the companies] and [they] 'could not more survive without them' than it could without working a smartphone app."[6] In short, Judge Schulman found that "under any

reasonable understanding of the English language, an Uber or Lyft driver can only be viewed as working in the hiring entity's business."[7]

The ruling would have required Uber and Lyft to immediately reclassify their drivers as employees – thus making them eligible to receive regular employee benefits – or, stop operating in California. Rather than comply with the statute and the injunction order, Uber and Lyft threatened to cease operations in California as early as 11:59 p.m. on August 20, 2020. However, the First District of the California Court of Appeal granted them a reprieve by further staying Judge Schulman's injunction order pending the outcome of the appeal.

Alternate Business Models

Uber and Lyft have indicated that they have considered various business structures as an alternate to their existing business models. One option that has been proposed recently is a franchising model. Under a typical franchising model, a franchisee pays a fee, in addition to a portion of its ongoing revenues, to use the franchisor's brand. Uber is already familiar with this structure as it is similar to how Uber operated when it officially launched in 2011 (when Uber riders were only allowed to hail black luxury vehicles through its mobile app). Uber still uses a franchise model in Europe where it works with fleet operators in Germany and Spain. However, as compared to other business models that would allow flexibility for rideshare drivers, a franchise model would likely be a last resort for continued operations in California. Plus, even under a franchise model, Uber and Lyft could still be scrutinized if they attempt to exert too much control over the franchisees.

Introduction of Proposition 22

Proposition 22, an initiative on the November 2020 ballot, appears to be an effort to find a middle ground for rideshare companies. Although prop 22 would consider drivers as independent contractors (and exempt from AB5), it would enact wage and labor policies specific to rideshare companies. For example, it would limit the amount of time drivers are permitted to work during a 24-hour period. It would also require companies to provide certain benefits such as healthcare subsidies and disability payments to their drivers.

Prop 22 has overwhelming support among police unions and business organizations – with contributions in support of prop 22 totaling over $110 million. Contrast that with the $866,000 in opposition to prop 22 which is funded primarily by various labor unions.

Conclusion

While Uber and Lyft executives may be correct that they simply cannot change their entire business model overnight, the priority has clearly been to challenge AB5 rather than to take steps to comply with it. Nonetheless, it is projected that in 2020, gig workers will represent more than 40% of the entire U.S. workforce. Given the size of the "gig" economy, and more importantly, the role that food delivery companies have played during the pandemic, it is anticipated that rideshare companies will continue to have a future in California. In order to continue to operate, however, it is clear that the companies will have to offer at least ***some*** labor protections to their drivers.

[1] San Francisco County Superior Court, case number CGC-20-584402.

[2] Aug. 10, 2020 Injunction Order, pg. 19, lines 22-24.

[3] Id. at pg. 19, lines 24-26.

[4] Id. at pg. 20, lines 1-12

[5] Id. at pg. 23, lines 7-9.

[6] Id. at pg. 23, lines 15-17 (citing O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2015) 82 F.Supp.3d 1133, 1141).

[7] Id. at pg. 26, lines 23-25.