CALIFORNIA COURT DECIDES UBER AND LYFT DRIVERS ARE LIKELY EMPLOYEES, NOT INDEPENDENT CONTRACTORS

In a 74 page decision on October 22 affirming a lower court ruling, an intermediate California appeals court (Cal. App. 1st, Div 4) upheld a preliminary injunction issued by that lower court that Uber and Lyft drivers are in reality likely not independent contractors who may be denied the statutory protections due employees, but are in fact employees. The case is *The People v. Uber Technologies, et al*. The court upheld a ruling by the trial court that these companies were likely violating state labor law. In August, the trial court judge had ruled there was an "overwhelming likelihood" that the government would win its case and ordered Uber and Lyft to comply while the trial court scheduled a full trial on the merits.

The case revolves around an interpretation of California Labor Code section 2775(2019), which codified the California Supreme Court's holding in *Dynamex Operations West v. Superior Court*, 4 Cal 5th 903 (2018). *Dynamex* and the subsequent law provide that a person is an employee, not an independent contractor, unless the entity (here Uber and Lyft) demonstrates ALL of the following (the "ABC test"):

> "For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: [¶] (A) The person 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. [¶] (B) The person performs work that is outside the usual course of the hiring entity's business. [¶] (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (§ 2275, subd. (b)(1)).

Uber and Lyft maintained that the law does not apply to them, saying they are not transportation businesses but tech platforms. The companies - neither of which yet is profitable - save money for themselves and thus they allege for customers by treating drivers as independent contractors, because they do not provide benefits or pay into state unemployment insurance systems. And the companies claim that converting drivers to employees would mean they would employ far fewer drivers in California and likely raise prices.

California, perhaps the nation's most aggressively progressive state, disagreed with Uber and Lyft and together with San Francisco, San Diego and Los Angeles, filed suit, despite threats by the companies to leave the state should they lose. The companies stated forcing them to reclassify their drivers as employees under state law would force them to accord gig workers more labor protections, such as access to employer-sponsored health insurance, overtime pay and paid sick leave. A loss in the lawsuit could cost the companies hundreds of millions of dollars in penalties and restitution to drivers because of the past violations.

The appeals court devoted most of its Opinion to the issue of interest here---the likelihood that at trial that *The People* would prevail or the defendants would prevail. And it focused on part B of the above ABC test, whether the person performs duties outside the usual course of the entity's business. It

noted the law exempts various professions and businesses but not ride-sharing. It rejected the views of the expert witnesses for the companies, who had testified in the Superior Court that the companies are two -sided marketing apps, employing software platforms matching drivers and riders, and the drivers have tremendous flexibility and engage in other businesses , not just ride-sharing activity. Opinion 27-30. The court noted the companies have not fared well in court including in Massachusetts, and that the California statute has been enacted without material change in Massachusetts, New Jersey and Delaware. The Court determined the crucial issues as follows:

We recognize that defendants' business models are different from that traditionally associated with employment, particularly with regard to drivers' freedom to work as many or as few hours as they wish, when and where they choose, and their ability to work on multiple apps at the same time. But some of the features of the delivery-driver model at issue in *Dynamex* are present here as well. Strip away the use of the internet as a mode of communication with drivers, and this case bears many similarities to that one. The dispositive issue there was not whether the defendant and its drivers followed what might be viewed as a traditional employment model, who may be said to receive the drivers' services, or how payment was structured, but whether the mode in which the drivers were utilized met the elements of the ABC test. So too in this case. There is considerable evidence that the ride-share drivers involved here meet this test, despite the changes in the traditional workplace enabled by modern technology.

Most pertinent is the following. Uber and Lyft both solicit riders. They screen drivers and set standards for vehicles that can be used. Defendants track and collect information on drivers when they are using the apps, and they may use negative ratings to deactivate drivers. Riders request rides and pay for them through defendants' apps, and the drivers' portions are then remitted to them, either through a payment processing service or a dedicated bank account....The remuneration here may reasonably be seen as flowing from riders to defendants, then from defendants to drivers, less any fee associated with the ride. With the possible exception of rides obtained using Uber's Drive Pass subscriptions-which we discuss separately below-defendants' revenues are directly connected to the fees that riders pay for each ride....

These facts amply support the conclusion that, whether or not drivers purchase a service from defendants, they perform services for them in the usual course of defendants' businesses. Defendants' businesses depend on riders paying for rides. The drivers provide the services necessary for defendants' businesses to prosper, riders pay for those services using defendants' app, and defendants then remit the drivers' share to them, either through a bank account in the case of Uber or a payment processing service in the case of Lyft. Opinion at 34-35.

But court battle is still at a relatively early stage --true, the appeals court on ordered the companies to reclassify drivers as employees while the case proceeds, they have at least 30 days to do so, and before then the companies can appeal the injunction to the California Supreme Court..

And the thirty days is crucial for another reason: as so often in California, e.g., real property tax ceilings, and affirmative action in state colleges and universities, California voters can have the final word. Proposition 22, supported with a reported $200,000,000 by Uber, Lyft and other app companies, would allow ride-hailing and food delivery apps to continue to classify their drivers as independent contractors with certain concessions such as limited benefits without the usual comprehensive protections according employees. Many drivers say they want to maintain the flexible work schedules that the independent contractor status permits, but the companies claim that may not

be possible if they are employees. And other drivers say they want the labor law's protections.

This is judged the most expensive referendum effort in state history. A University of California poll several weeks ago found the result within the margin of error: 39% of likely voters favored the measure, 36% opposed it, and 25% still undecided.

"Today's ruling means that if the voters don't say Yes on Proposition 22, rideshare drivers will be prevented from continuing to work as independent contractors, putting hundreds of thousands of Californians out of work and likely shutting down ridesharing throughout much of the state," Uber spokesperson Matt Kallman said. But the California Attorney General disagreed, saying, "Californians have fought long and hard for paycheck and benefit protections. Uber and Lyft have used their muscle and clout to resist treating their drivers as workers entitled to those paycheck and benefit protections."

Ironically, the California dispute and the possible widespread impact of a final decision, at least for gig workers, flies in the face of the most recent National Labor Relations Board pronouncements on the employer-employee relationship. Under the Obama Administration the Board adopted an expansive definition that threatened to embrace the classic independent contractor franchisor - franchisee relationship , and even sued McDonald's. But the Trump Administration has reverted to the more traditional test, which tends to exclude normal independent contractor arrangements. Then again, California is not infrequently a harbinger of our legal future.

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