California Court Re-Classifies Independent Drivers as Employees Pursuant to AB5

Labor & Employment Law Update

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On Monday August 10, 2020, Judge Ethan Schulman of the California Superior Court issued an injunction against Uber and Lyft ordering them to classify drivers as employees and not as independent contractors. The order follows a preliminary injunction lawsuit filed this spring by the State of California, along with a number of large cities in the state, where it was alleged that Uber and Lyft were in violation of California's Assembly Bill 5 ("AB5"). A new state law that went into effect on January 1, 2020, AB5 codified what is known as the "ABC" test, which is commonly used to determine whether a worker is an employee as opposed to an independent contractor.

Specifically, under AB5, 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:

1. 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.
2. The person *performs work that is outside the usual course* of the hiring entity's business.
3. The person *is customarily engaged in an independently established trade, occupation, or business* of the same nature as that involved in the work performed.

In his order, Judge Schulman found that neither Uber nor Lyft would be able to establish the B prong of the ABC test and as a result, the likelihood that California will ultimately prevail in its action against Uber and Lyft is "overwhelming." Judge Schulman also found that any costs to Uber and Lyft related to restructuring and proper worker classification to come into compliance with AB5 are outweighed by the harm to the drivers, businesses and the public associated with workers being deprived of "the panoply of basic rights and protections to which employees are entitled under California law." The court's opinion is not surprising in light of AB5's prohibition of engaging anyone as an independent contractor who is critical to and part of a company's business operations. In short, prong B

creates a burden that is very difficult for any business to meet.

The order represents the latest development in an ongoing battle regarding the classification of drivers. After the enactment of AB5, Uber filed a federal lawsuit challenging the law's constitutionality. Uber, Lyft and others have also championed Proposition 22, a ballot initiative in the November 2020 election to define app-based transportation (rideshare) and delivery drivers as independent contractors. Just last week, California's Labor Commissioner Lilia García-Brower alleged in separate lawsuits against Uber and Lyft that they are "committing wage theft by misclassifying drivers as independent contractors" and that "freelance workers [are being] deprived of a host of legal protections in violation of California labor law." The lawsuit is in response to nearly 5,000 claims from drivers for lost wages.

While pending in California, these actions illustrate how critical it is to ensure workers are properly classified under applicable state law. Employers should be mindful to ascertain what test is used in their state for various laws, and how workers are evaluated against such standards. Counsel should also be utilized to analyze and craft independent contractor agreements that do more than simply label the relationship as independent contractor, but also incorporate elements necessary to demonstrate that the contractor truly meets the applicable standards.