Uber, Lyft, and DoorDash Attempt a U-Turn on AB 5 via New Ballot Initiative

by Diane Marie O'Malley & Emily Leahy

The fate of Assembly Bill 5 (AB 5) may be headed to the voters. Uber, Lyft, and DoorDash have unveiled the Protect App-Based Drivers and Services Act, a $90 million ballot initiative targeting AB 5. AB 5, signed by Governor Newsom on September 18, 2019, is expansive legislation that has potentially significant impact on California employers. AB 5 broadly adopts a new test for determining whether a worker is an independent contractor or an employee, with far-reaching implications. Backers of the initiative hope to get the proposal on the November 2020 ballot. In the meantime, any employer who has services provided by independent contractors or any non-employee workers will need to examine its relationships and, in some cases, its business model to determine the application of AB 5.

Protect App-Based Drivers and Services Act

The Protect App-Based Drivers and Services Act is a statewide ballot measure narrowly directed at undoing AB 5 for "app-based rideshare and delivery drivers." The initiative's stated goal is to "protect the right of app-based rideshare and delivery drivers to work as independent contractors and maintain control over their own hours and when, where, how long they work, and the ability to work with multiple companies."

The measure proposes new protections and benefits for drivers, including an earnings guarantee, healthcare stipend, occupational accident insurance to cover on-the-job injuries, automobile accident and liability insurance, and protection against discrimination and sexual harassment.

Why are Uber, Lyft, and DoorDash so concerned?

ABC Test Under AB 5

AB 5 codifies the ABC Test adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*[1] for determining whether a worker is an "employee" or an "independent contractor" for purposes of the Labor Code, the Wage Orders, and the Unemployment Insurance Code.

AB 5 presumes that a person providing labor or services for remuneration is an employee rather than an independent

contractor, unless the hiring entity demonstrates that:

(A) the person is free from the control and direction of the hiring entity in connection with the performance of the work,

(B) the person performs work that is outside the usual course of the hiring entity's business, and

(C) the person is customarily engaged in an independently established trade, occupation or business.

If classified as an employee rather than an independent contractor, the worker would be entitled to minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave.

AB 5's Exemptions

The bill exempts certain specified occupations, including among others, licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, and workers providing licensed barber or cosmetology services. It also exempts others performing work under a contract for professional services, with another business entity, a referral agency, or pursuant to a subcontract in the construction industry. It also exempts business-to-business contracting relationships, referral agencies, and pursuant to a subcontract in the construction industry. These exemptions instead are governed by the test adopted by the California Supreme Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*[2].

Enforcement Of AB 5

The bill goes into effect on January 1, 2020, but applies retroactively to existing claims and actions "to the maximum extent permitted by law." It also permits the Attorney General or a city attorney to prosecute an action for injunctive relief "to prevent the continued misclassification of employees as independent contractors" upon their own complaint or upon the complaint of a board, officer, person, corporation, or association.

Implications

AB 5 requires employers to examine their business models and analyze whether any non-employee workers are properly classified as independent contractors. Please note that even if an employer’s workforce arrangement qualifies as an “exemption” under AB 5, the arrangement likely is still subject to the Borello test, which we expect will be heavily scrutinized by courts going forward. We encourage employers to talk to their counsel to determine whether AB 5 has any implications for their business operations. Stay tuned as we will be watching for and updating you on the status of the Protect App-Based Drivers and Services Act.

1 2 Cal. 5th 903 (2018).

2 48 Cal.3d 341 (1989).

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