BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services.	R. 12-12-011

OPENING COMMENTS OF THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY AND SAN FRANCISCO INTERNATIONAL AIRPORT REGARDING THE APPLICABILITY OF ASSEMBLY BILL 5 AND LABOR CODE SECTION 2750.3 TO TRANSPORTATION NETWORK COMPANIES AND THEIR DRIVERS

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INTRODUCTION

The San Francisco Municipal Transportation Agency (SFMTA) and the San Francisco International Airport (SFO) (collectively, "the City and County")[1] submit these joint comments in response to the December 19, 2019, order of Administrative Law Judge (ALJ) Robert M. Mason III inviting party comments on the applicability of Assembly Bill (AB) 5 to Transportation Network Companies (TNCs) and their drivers. While the application of AB 5 to TNCs is ultimately a question for the courts,[2] from a regulatory standpoint, the California Labor and Workforce Development Agency (LWDA) is the State agency best positioned to help answer how AB 5 applies to any particular category of workers. AB 5 codifies the California Supreme Court's decision *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, establishing the standard for determining whether a worker is properly classified as an independent contractor or an employee. AB 5 applies this standard to provisions of the California Labor Code, the wage orders of the Industrial Welfare Commission (IWC), and the Unemployment Insurance Code that are within the jurisdiction and expertise of the LWDA. As a result, the City and County recommends that the Commission defer any rulemaking regarding the application of AB 5 to TNCs and their drivers, pending interpretation by courts and the LWDA.

Alternatively, if the Commission decides to move forward with rulemaking, the City and County notes that the law places the burden on the TNCs (the hiring entity) to demonstrate that drivers are *not* employees. At this point in the proceedings, the TNCs have not done so. Therefore, the City and County requests that the Commission allow reply comments to be filed by the parties in response to the TNCs' opening comments as part of this rulemaking proceeding. Additionally, the City and County recommends that any Commission rulemaking expressly recognize that whether and how AB 5 should apply to TNCs is a question to be resolved through court interpretation and administrative rulemaking, guidance, and possible enforcement. Furthermore, any Commission action in this

[1] Both the SFMTA and SFO are constituent departments of the City and County of San Francisco established by and operating under the City's Charter.

[2] AB 5 expressly empowers several civil and criminal law enforcement entities to enforce its provisions in any court of competent jurisdiction. AB 5 § 2, adding Labor Code § 2750.3(j). Private plaintiffs may also enforce its provisions through litigation.

proceeding should acknowledge that TNCs must comply with orders of LWDA components and other agencies with jurisdiction over employee protections, even if the Commission exercises concurrent jurisdiction over related matters. *See Orange Cty. Air Pollution Control Dist. v. Pub. Util. Comm'n* (1971) 4 Cal. 3d 945, 951-952.

I. The Commission Should Defer to the Appropriate Decisionmakers

The application of AB 5 to any particular hiring entity or worker is a question of state labor law. In *Dynamex*, 4 Cal.5th at 943-964, the California Supreme Court articulated the standard that applies for determining whether workers are properly classified as independent contractors or employees for the purposes of IWC wage orders. *Dynamex* adopted a presumption that a worker is an employee unless the hiring entity can establish that the worker is an independent contractor under a standard known as the "ABC test." AB 5 codifies this decision, with respect to the wage orders, provisions of the Labor Code, and Unemployment Insurance. *See* AB 5 § 2, adding Labor Code § 2750.3(a); *id.* § 4, adding Unemployment Insur. Code § 606.5.

LWDA through the Department of Industrial Relations (DIR) and its Division of Labor Standards Enforcement (DLSE) has express statutory authority to issue rules and regulations implementing provisions of the Labor Code and to enforce those statutes and the IWC wage orders. By way of background, LWDA is a State cabinet-level agency that oversees various workforce-related departments, boards, and panels. Most relevant for this rulemaking, the DLSE is empowered to enforce wage, hour, and other labor protections.[3] LWDA also houses the dormant IWC whose statutory functions DLSE now carries out. It is clear that if any administrative determination in this area is appropriate, LWDA is the proper agency to address the question of AB 5's application to TNCs.

The California Labor Code requires the IWC "to ascertain the wages paid to all employees in this state, to ascertain the hours and conditions of labor and employment in the various occupations,

[3] The San Francisco Office of Labor Standards Enforcement (OLSE) enforces City and County labor protections. The application of many of these protections turns on employment status. OLSE interprets the ordinances it enforces through rules, guidance, and administrative enforcement actions, and it looks to courts' and LWDA's interpretations of analogous state laws for guidance.

trades, and industries in which employees are employed in this state." Cal. Lab. Code § 1173; *see also* Cal. Const. Art. XIV § 1 (authorizing the State Legislature to provide for minimum wages and employee welfare through a commission with legislative, executive, and judicial powers). The IWC carried out this duty by issuing a series of industry-specific wage orders, including the transportation industry wage order that the *Dynamex* Court interpreted. *See Dynamex*, 4 Cal.5th at 925-26 (discussing 8 Cal. Code Regs. § 11090 (Wage Order No. 9)). Although the State Legislature has defunded the IWC, its orders remain in effect, and the California Supreme Court continues to recognize the IWC's broad statutory mandate and authority. *See Dynamex*, 4 Cal.5th at 936-37; *Kilby v. CVS Pharm.* (2016) 63 Cal.4th 1, 9 n.3, 10, 13; *Martinez v. Combs* (2010) 49 Cal.4th 35, 54-57, 64, as modified (June 9, 2010); *Gattuso v. Harte-Hanks Shoppers, Inc*. (2007) 42 Cal.4th 554, 563. The California Labor Code authorizes DLSE to enforce provisions of the Labor Code and the IWC's wage orders. *See* Cal. Labor Code § 95(a); *see generally id.* §§ 74, 79-107; *Dynamex*, 4 Cal.5th at 945 n.18; *Kilby*, 63 Cal. 4th at 11, 13.[4] LWDA already has begun issuing guidance on the application of AB 5. *See, e.g.*, Welcome to the Employee Status Portal, at https://www.labor.ca.gov/employmentstatus.

As part of its enforcement activities, DLSE adjudicates claims for unpaid wages brought under the Labor Code and the wage orders. In doing so, the DLSE frequently makes determinations regarding the status of claimants as employees or independent contractors. In fact, the DLSE has done so in cases brought by individual drivers against their TNC employers. *See Berwick v. Uber Technologies, Inc.*, No. 11-46739 EK (Cal. Dept. Labor, June 3, 2015), 2015 WL 4153765; *see also Azhar v. Lyft, Inc.*, No. 18-1000018 RZ (Cal. Dept. Labor, Apr. 3, 2019). In *Berwick*, DLSE relied on the pre-*Dynamex* test to determine that the claimant, an Uber driver, was an employee of the TNC because, among other factors, Uber vets prospective drivers, requires only the specific driver

[4] In addition to DLSE's jurisdiction, various components of LWDA determine employment status to enforce other California employment protections. The Employment Development Department determines employee status in the context of Unemployment Insurance, State Disability Insurance, Paid Family Leave, and related payroll tax questions. The DIR Division of Safety and Health determines employment status in order to apply employee health and safety protections. The DIR Division of Workers' Compensation similarly determines employment status in order to process workers' compensation claims. As part of its oversight role, LWDA works to ensure that its various components' determinations of employment status are consistent.

contracting with Uber to transport passengers, sets standards for the vehicles used to transport passengers, terminates drivers whose passenger ratings fall below its standards, and sets driver compensation for trips provided. *See Berwick*, 2015 WL 4153765, at *6. To date, approximately 400 Uber and Lyft drivers have filed wage claims with DLSE.[5]

Moreover, the DLSE and other LWDA components with authority over aspects of the employer-employee relationship have a long history of adjudicating employment classification issues. *Dynamex* includes a lengthy discussion of the history and purposes of the wage orders, as well as IWC's longstanding authority to define employment relationships to prevent businesses from structuring "irregular working arrangements" to evade their legal responsibilities to employees and obtain an unfair competitive advantage against law-abiding businesses. *See Dynamex*, 4 Cal.5th at 937-953. The Court rejected Dynamex's argument that the IWC exceeded its constitutional authority by defining employment too broadly. *See id.* at 964 n.32. The California Supreme Court has repeatedly acknowledged LWDA's authority over the Labor Code and wage orders. And in *Dynamex*, the Court recognizes that this authority encompasses the threshold question of defining employment relationships.

In contrast to the LWDA's function and authority, the California Constitution and the Public Utilities Code establish the Commission's authority to regulate certain transportation providers (including TNCs). Neither contemplates the Commission engaging in rulemaking with respect to the Labor Code or wage orders. *See generally* Pub. Util. Code §§ 5430-5450. And the Commission has previously declined to assert jurisdiction over drivers' employment classification in similar contexts. Indeed, previously in this very rulemaking, the Commission declined to "meddle into [TNCs'] business model by forcing TNCs to designate each driver an employee or contractor." *Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry*, Decision 13-09-045, 2013 WL 10230598 (Sept. 19, 2013), at 46. Similarly,

[5] Many of these are recent claims that are in process, and frequently Uber and Lyft seek to compel arbitration of these wage claims under arbitration agreements.

in the Commission's decision in *Prime Time Shuttles*, it declined to exercise jurisdiction over drivers' employment status, observing that:

> [T]he financial struggles of some of Prime Time's drivers do not alter the nature of our jurisdiction regarding service and safety. We regulate those matters directly. We do not regulate driver's incomes, or a [passenger stage corporation] PSC's preference for employee or nonemployee drivers, or the way that the PSC recruits new drivers. Prime Time may have committed improprieties, under laws that we do not administer, with respect to any or all of these other matters, but if such is the case, relief lies elsewhere. If and when Prime Time is found to have committed such improprieties, we may reconsider Prime Time's fitness to continue to hold a PSC certificate, but such reconsideration would come only after a court or agency with jurisdiction over the underlying subject matter has taken action.

In Re Prime Time Shuttle Int'l, Inc., 67 CPUC 2d 437, 1996 WL 465519 (Aug. 2, 1996).

In *Kairy v. SuperShuttle Int'l*, 660 F.3d 1146 (9th Cir. 2011), the Ninth Circuit rejected SuperShuttle's argument that CPUC jurisdiction preempted drivers' claims for wage and hour violations stemming from their misclassification as independent contractors. The court relied in part on the CPUC's amicus brief, quoting it as follows:

> The Commission has held, and continues to hold, that both the courts and appropriate governmental agencies, such as California's Department of Industrial Relations ("DIR") have the necessary jurisdiction to determine employment status such as employee or independent contractor.... [T]he Commission, however, does not look at various factors for determining employee status of a Commission-licensed shuttle van carrier's drivers, unless there is a specific jurisdictional reason to do so.

Id. at 1154 (quoting CPUC Amicus Br. at 2). The Commission's amicus brief, in turn, argued that its jurisdiction is limited to service and safety, but that DIR/DLSE has the necessary jurisdiction to determine employment status, and deference to DLSE's determinations is appropriate. *See* Brief Amicus Curiae in Support of Appellants (Dec. 30, 2010, Amended), 2010 WL 6828464, at *2, 6, 8-9.

The same holds true today. The State Legislature has expressly tasked LWDA, through DLSE, with enforcing wage orders and Labor Code provisions, as amended by AB 5. LWDA and, ultimately, the courts, will determine the employment status of TNC drivers through regulation, administrative enforcement actions, and litigation by private plaintiffs or public law enforcement bodies. Any Commission action to determine the applicability of AB 5 would serve only to create confusion. As a result, the Commission should refrain from considering this question and instead defer to LWDA and the courts.

II. Comments from Parties other than TNCs are Premature

Alternatively, if the Commission were to consider rulemaking regarding the application of AB 5 to TNCs, comments from parties other than TNCs are premature. AB 5 codifies the presumption that a worker who performs services for a hiring entity is an employee. By its plain meaning, AB 5 applies to TNCs. Labor Code § 2750.3 (AB 5) applies expansively to "the provisions of this [the Labor] code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission." *Id.* § 2750.3(a)(1). And the IWC has issued a specific wage order regulating the transportation industry. *See* 8 Cal. Code Regs. § 11090. As noted above, even before AB 5 was enacted, DLSE had enforced the Labor Code against TNCs. AB 5 did nothing to restrict DLSE's jurisdiction over such determinations.

Under AB 5, hiring entities bear the burden of proving that any worker is properly classified as an independent contractor rather than an employee. In order for a hiring entity to do so, it must show that the worker meets each of the elements of the "ABC" test, which are:

A. The person is free from the control and direction of the hiring entity in fact as well as by contract;

B. The work performed by the person is outside the usual course of the hiring entity's business; and

C. The person hired is customarily engaged in an independently established trade, occupation, or business.

TNCs have yet to make such a showing. Until TNCs meet their burden under the "ABC" test, comments from non-TNC parties are premature. As a result, the City and County requests that the Commission allow reply comments to be filed by the parties in response to the TNCs' opening comments if the Commission concludes that it has a basis to consider the application of AB 5 to TNCs and their drivers.

III. Any Rulemaking Should Recognize the Role of Courts and the LWDA

If the Commission were to engage in rulemaking on the application of AB 5 to TNC drivers, its consideration of AB 5 should recognize the role of courts in adjudicating the application of AB 5 to TNC drivers, and the role of LWDA—and local agencies enforcing analogous employee protections—in determining worker classification through administrative enforcement actions and potential rulemaking. To prevent preemption claims from adding costs and delay to AB 5 enforcement in court or administrative actions, the City and County urges the Commission to clarify expressly that any action by the Commission cannot delay or preclude any related activity falling in the jurisdictions of LWDA, local agencies, or the courts. As the California Supreme Court has held, companies regulated by the Commission must comply with the orders of all State agencies with jurisdiction, including those of LWDA components. *See Orange County Air Pollution Control Dist.* (1971) 4 Cal.3d at 951-952 (holding that CPUC-regulated entities must comply with the orders of LWDA components the IWC and Division of Industrial Safety); *see also* 37 Ops. Cal. Atty. Gen. 31, 36 (1961).

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Respectfully submitted,

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