CLIENT ALERT

Uber and Postmates Fail to Stop Enforcement of AB 5, New California Contractor Law

Feb.11.2020

Yesterday, U.S. District Court Judge Dolly Gee of the Central District of California denied Uber and Postmates' motion for a preliminary injunction to enjoin California Assembly Bill 5—the new California statute that broadly restricts the ability of California employers to classify workers as independent contractors. In *Olson, et al. v. State of California, et al.*, Uber and Postmates, along with two individual drivers, requested a preliminary injunction when they filed their suit against the State on December 30, 2019, alleging violations of the U.S. and California Constitutions.

Assembly Bill 5

AB 5, which was enacted on September 18, 2019, adopts and expands the reach of the stringent three-part "ABC test" for establishing that a worker is an independent contractor (first articulated by the California Supreme Court in 2018 in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*). Under the ABC test, an employer can only classify a worker as an independent contractor if it can prove that the worker is (A) free from the control and direction of the hiring entity, (B) performing work that is outside the usual course of the hiring entity's business, and (C) customarily engaged in the same work performed for the hiring entity as part of an independent business. AB 5 became effective on January 1, 2020.

The District Court Decision

Despite finding that Uber and Postmates "established some measure of likelihood of irreparable harm" stemming from threatened enforcement of AB 5 by city attorneys, including the possibility of criminal penalties, Judge Gee determined that "Plaintiffs have not shown serious questions going to the merits—the critical factor in determining whether to issue a preliminary injunction" —and that "the balance of equities and the public interest weigh in favor of permitting the State to enforce this legislation." The Court also noted that any irreparable harm is speculative because Plaintiffs simultaneously insist that the ABC test would not affect drivers' employment status, and that even in the absence of AB 5, Uber and Postmates "remain subject to potential liability and enforcement of wage and hour laws pursuant to the *Dynamex* decision."

The District Court ruled that Plaintiffs failed to show that they are likely to succeed on the merits. Judge Gee rejected Plaintiffs' arguments that AB 5 targets gig economy companies in violation of the 14th Amendment's Equal Protection clause because Plaintiffs failed to meet their burden to show that they are a "politically unpopular group" or that AB 5 serves no legitimate governmental purpose. The State's asserted interest in protecting exploited workers to address the erosion of the middle class and income inequality "appears to be based on a 'reasonably conceivable state of facts that could provide a rational basis' for any ostensible targeting of gig economy employers and workers."

Judge Gee also held that enforcement of AB 5 does not unconstitutionally impair Plaintiff's contracts because the contracts at issue were entered into in the wake of foreseeable potential enforcement of the ABC test, which has been in effect since the

2018 *Dynamex* decision, and because AB 5 is an exercise of the State's police power to protect workers aimed at remedying what it perceives to be a broad economic and social problem.

Furthermore, Judge Gee stated that Plaintiff's due process argument—that AB 5 deprives gig economy workers of the right to pursue their chosen profession—is unlikely to succeed because even if Individual Plaintiffs' employment status would change under AB 5, "they potentially could still pursue their line of work, provided that their employers compensate them properly and allow them to have flexible work schedules."

Implications for California Employers

This decision confirms that California employers should presume that, in most instances, they will be unable to classify workers as independent contractors unless they fall within one of the strict carveouts contained in AB 5, such as doctors, lawyers, accountants, and direct salespersons. Carveouts for other specific professional services—such as marketing, HR administration, graphic design, and photography—are subject to criteria separate from the ABC test, which includes the worker holding a business license in addition to any required professional licenses or permits by July 2020. And AB 5 contains still other carveouts for business-to-business contractors, service providers providing services through referral agencies, and temporary services employers, where specific criteria is met.

California employers should carefully review AB 5 to understand the applicability of any relevant carveouts. Where contractors do not satisfy the ABC test or fall under a carveout, California employers should consider reclassifying such workers as employees, recognizing that misclassification is now more likely to impose significant liability.

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