THE TRANSPORTATION BRIEF®

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

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PROP 22'S IMPACT ON THE TRANSPORTATION INDUSTRY

The gig economy – spearheaded and underwritten by major gig economy companies such as Uber, Lyft, and Doordash – has launched a high-profile campaign to prevent the application of California's AB 5 law (and the ABC test it dictates) to determine a worker's employee status. By putting the question before California voters as Proposition 22 (Prop 22), proponents of this voter referendum hope to carve out a new "dependent contractor" status.

Prop 22 will appear on the ballot this November, writing yet another chapter of the independent contractor (IC) saga in California. Prop 22 establishes that gig economy drivers will be deemed to be ICs, but also provides certain guaranteed benefits and protections that would not be available to a traditional IC. For example, Prop 22 guarantees drivers minimum earnings (based off of 120% of the local minimum wage), full payment of tips, per-mile compensation for the use of the vehicle, a healthcare subsidy based on the average weekly amount of hours of "engaged time" a driver performs above a set minimum, and occupational accident coverage.

Not to be left behind, California state courts have also waded into the dispute, with at least one judge ruling that Uber and Lyft must treat their drivers as employees pursuant to the ABC test under current law while a lawsuit challenging the drivers' IC status proceeds. Because the trial court order requiring the use of employees was stayed by the appellate court, Uber and Lyft are not required to transition to an employment model unless Prop 22 fails and the case is ultimately decided against Uber and Lyft.

Prop 22 directly impacts only those companies that use online applications or platforms to facilitate on-demand services using private passenger vehicles (e.g., core gig-economy companies such as Uber, Lyft, and Doordash). While a favorable outcome for Prop 22 helps support the general objection to the ABC test as expressed in AB 5, it will not have a direct impact on the greater transportation industry. Even more narrowly, a decision in the Uber and Lyft employment case requiring those companies to treat drivers as employees will emphasize California courts' tendency in transportation gig economy fact patterns, but will not be directly transferable to the larger transportation industry as controlling precedent.

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BRIEFLY

DOL Publishes IC Rule

On September 25, 2020, the US Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) to develop a consistent test for determining independent contractor (IC) status under the Fair Labor Standards Act (FLSA). In the NPRM, the DOL proposes to apply a more formalized "economic realities" test in which a court must evaluate whether a worker is economically dependent on a putative employer or is in business for him/herself. To accomplish this, a court would examine two "core" factors: (1) the nature and degree of control the worker has over the work; and (2) the opportunity for profit or loss based on initiative and/or investment. If both core factors indicate either independent contractor status or employee status, no further inquiry would be needed.

If both core factors do not lead to the same result, the proposed rule provides three additional "guideposts" for consideration. These are: (1) the amount of skill required; (2) the degree of permanence of the working relationship; and (3) whether the work is part of an integrated unit of production. As proposed, this factual inquiry will weigh the actual practice between the parties more heavily than what is possible or contractually required.

This proposal marks a more significant stake in the ground for the DOL than is typical in the IC context because any formal rulemaking will be given additional deference in future rulemaking efforts and should be insulated from immediate reinterpretation by a new or opposing administration. The DOL has indicated that it will move quickly in an effort to complete the rulemaking prior to the end of the year. The deadline for submitting comments regarding the rule was October 26, 2020.

Shannon Cohen,
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Ongoing Developments with the FLSA Joint Employer Rule

Earlier this year, the US Department of Labor (DOL) implemented a Final Rule providing direction on joint employer liability for federal wage and hour violations. The Final Rule focuses on whether the alleged joint employer exercises control over the terms and conditions of the work and essentially eliminates consideration of economic dependence on the alleged joint employer.

On September 8, 2020, a federal district court deemed much of the Final Rule invalid, finding (1) the Final Rule conflicts with the expansive definition of "employer" under the FLSA and (2) the DOL failed to justify the Final Rule's departure from prior DOL guidance.

Whether the DOL appeals the court's decision may rest on the results of the upcoming election. In the interim, companies should carefully evaluate the relationship they may have with their subcontractors' employees (i.e., fleet drivers in the motor carrier context) to avoid costly potential liability.

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No Circuit Split (Yet) on the FAA "Transportation Worker" Exemption

In the Summer edition of *The Transportation Brief*, we discussed the First Circuit's recent holding that Amazon's "AmFlex" delivery drivers are exempt from the Federal Arbitration Act (FAA), even if they do not cross state lines, because the goods they transport are moving in interstate commerce. Since then, the Ninth Circuit has agreed with the First Circuit in another case involving AmFlex drivers (over a strong dissent), while the Seventh Circuit reached the opposite conclusion (i.e., that delivery drivers are not exempt) in a case involving GrubHub. It might appear that the Seventh Circuit's holding conflicts with the two cases involving Amazon, but the unique nature of prepared-food delivery seems to have influenced the court's analysis, so it is not clear what test the Seventh Circuit would apply when the delivery of goods is at issue. The Eleventh Circuit is considering such a case, and there is a possibility of a circuit split emerging due to precedent in that circuit. Scopelitis is closely monitoring these developments and will share updates as these holdings develop.

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SPOTLIGHT

Spotlight on

Mergers & Acquisitions

News regarding independent contractor misclassification considerations continues to make headlines. Among the many reasons that industry leaders follow these developments so closely is their potential to materially impact a business's sale—both for a seller or a buyer.

Findings relating to an independent contractor program (and potential liability exposure) can lead to modifications to the transaction's financial terms, such as requiring hold-backs, specific indemnity, or carve-outs. These findings can also drive exclusions to a reps and warranties insurance policy. However, there are steps, either as seller or buyer, that can be taken to avoid some of these challenges.

When preparing to bring a company to sale, the seller should take stock of the state of its independent contractor program and resolve any uncovered shortcomings before a potential buyer conducts due diligence. Scopelitis frequently assists clients with these pre-sale audits, which can also expedite the diligence process by resolving such shortcomings, making the transaction less likely to get mired in diligence.

As the buyer, companies should ensure they have engaged specialty transportation counsel that can conduct a due diligence review of the target's contractor program and uncover any "landmines" that can be addressed either in the transaction's purchase agreement or resolved by seller prior to closing.

The Firm's Mergers & Acquisitions team routinely advises clients on these matters, either as specialty transportation counsel or as primary "deal" counsel. Scopelitis Partners Greg Feary, Andy Light, Jay Robinson, Todd Metzger, or Katie Feary-Gardner can help you learn more about the Firm's M&A due diligence and audit portfolios.

DISPATCHES

- Becky Trenner advises *carriers with owner-operator fleets to continue filing comprehensive written responses to all unemployment claims* filed by independent contractors, despite their potential eligibility for federally funded Pandemic Unemployment Assistance benefits. A thorough explanation of the carrier's lack of any employment relationship with owner-operator claimants will help evidence a consistent position in the event the high volume of independent contractor unemployment claims filed in 2020 leads to an uptick in state unemployment tax audits as we saw following the 2008 economic recession.

- An update from Chris Eckhart, the Ninth Circuit Court of Appeals has scheduled oral argument on the *challenge to the FMCSA's December 2018 order preempting California's meal and rest break rules for November 16, 2020.* It could take from 3 to 12 months after the oral argument for the Court to issue a decision.

- Shannon Cohen reports that *California has further amended the business-to-business rule originally found in AB 5.* Previously, an independent business was required to show that it actually contracted with other businesses in order to take advantage of the alternate test. Now, a party need only show the right to contract with other parties in order to apply the Borello test in lieu of the default ABC test found in AB 5.

- We recently reported on the California Supreme Court's decisions in *Ward v. United Airlines* and *Oman v. Delta Airlines,* which addressed *the reach of California's itemized wage statement and wage payment timing laws to interstate workers.* According to Jay Taylor, the Ninth Circuit has scheduled an oral argument for October 30, 2020 to address, among other things, claims that implementation of *Ward* and *Oman* will violate the US Constitution's Commerce Clause. In related news, the California Supreme Court has remanded a potentially significant case to the California Court of Appeal for reconsideration in light of *Ward* and *Oman*. That case, *Gulf Offshore Logistics, LLC v Superior Court*, will examine the application of *Ward* and *Oman* to a broader set of wage and hour laws—including California's minimum wage and meal and rest break standards—that are frequently the basis of claims against interstate motor carriers that operate in California.

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