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4 Takeaways From Uber, Lyft's Worker Classification Loss

By **Braden Campbell**

Law360 (August 11, 2020, 7:54 PM EDT) -- The San Francisco Superior Court's ruling Monday that Uber and Lyft must treat their drivers as employees under California law represents a seismic shift in a sprawling legal battle over how to classify workers in the gig economy.

Judge Ethan Schulman's order blew a massive hole in the companies' claims that their workers are independent contractors, at least under California's revamped classification test. But a looming campaign to exclude gig economy companies from the state's Assembly Bill 5 and an impending election that could extend California's revamp nationally mean this fight is far from over.

"I think everybody recognizes that this isn't the end of the battle, but it's a fairly extensive, 33-page, well-written opinion," said Jesse Jauregui, an employment partner in Alston & Bird LLP's Los Angeles office. "It puts Uber in a tough spot."

Here, Law360 looks at four takeaways from the pivotal decision:

A Stinging Rebuke

Monday's order granted California Attorney General Xavier Becerra a preliminary injunction **making Uber and Lyft reclassify their drivers** as employees under A.B. 5. The 2019 law makes it harder for employers to classify their workers as independent contractors who aren't covered by wage, workers' compensation and other laws that protect those classified as employees.

The ruling is "historic" in its impact and scope, said Shannon Liss-Riordan, a plaintiffs attorney who has filed numerous lawsuits seeking to make Uber and Lyft treat their workers as employees.

"[Judge Schulman] just really called out Uber and Lyft on all of these arguments that they've been making, and rejected them all," said Liss-Riordan, a partner at Lichten & Liss-Riordan PC in Boston.

A.B. 5 imposed the so-called ABC test, which makes employers prove each of three elements in order to classify their workers as independent contractors, including that the workers perform duties outside the company's regular business. Uber and Lyft argued that they satisfy this prong of the test because they don't provide rides, but rather a platform for connecting independent drivers to customers.

Judge Schulman had little time for this argument, writing that "it's this simple: defendants' drivers do not perform work that is 'outside the usual course' of their businesses." Similar language peppers the ruling, which roundly rejected several other arguments.

"The bluntness of the language really sticks out," said Brian Chen, an attorney with the National Employment Law Project, a workers' advocacy group. "At a certain point, this decision really feels like Judge Schulman threw up his hands and said, 'We're not going to stand for any of these ridiculous arguments you're making.'"

Appeal Is Imminent

The ruling poses an existential crisis for Uber and Lyft, which have built massive businesses on the independent contracting model. Naturally, the companies are wasting little time challenging the decision.

Shortly after Judge Schulman issued his order — which he stayed for 10 days so the companies could seek review — Uber and Lyft announced plans to appeal. But they face an uphill battle, experts say.

"The argument that Uber is not an employer really does run counter to both A.B. 5 and the Dynamex decision," Jauregui said, referring to the 2018 California Supreme Court ruling codified in A.B. 5. The ABC test presumes workers are employees unless employers can prove otherwise, and it's unlikely an appeals court will see the analysis differently than Judge Schulman, Jauregui said.

Still, it's unlikely the companies will accept their loss as a fait accompli and comply with the order, Liss-Riordan said.

"I think Uber and Lyft's strategy is going to be to delay as much as possible," she said. "That's been their strategy all along: just putting off the day of reckoning."

Proposition 22 Looms

Any delay caused by the appeal will buy the companies time for their Hail Mary: undercutting A.B. 5 via ballot initiative.

Uber, Lyft and a handful of other gig economy companies have mounted a campaign to put the question of gig workers' status to a statewide vote through a ballot initiative known as Proposition 22, which could exempt them from A.B. 5.

"Proposition 22 is the main event," said Todd Lebowitz, a BakerHostetler partner who specializes in employee classification.

A "yes" vote on Proposition 22 would allow the companies to treat their workers as independent contractors while codifying some traditional employment benefits for gig workers, such as an earnings floor and insurance against on-the-job injuries. A "no" vote would mean Uber and Lyft must abide by A.B. 5, precluding them from treating California drivers as independent contractors — the appeal notwithstanding.

The companies have pledged upward of $100 million combined to support the initiative, which will appear on the Nov. 3 ballot. The California Labor Federation, a statewide union coalition, is leading the opposition. How the battle shakes out in this climate is hard to forecast.

"The pandemic has brought a certain amount of uncertainty to all these political positions," Jauregui said. "It's a real challenge to A.B. 5."

Impact Hazy Outside California

To the extent A.B. 5 still applies to the gig economy on Nov. 4, Judge Schulman's order will stand as a landmark application of California law. How it will play in the rest of the country is unclear.

The ruling will likely be persuasive in Massachusetts, which uses a version of the ABC test to decide classification under state wage law, and where **Attorney General Maura Healey has sued** to make Uber and Lyft treat their drivers as employees. Vermont and New Jersey also apply the test broadly, while other states use it in the construction industry or to decide eligibility for unemployment, NELP's Chen said.

But most state wage laws and the federal Fair Labor Standards Act determine status based on the extent of an alleged employer's control over a given worker. No court has explicitly said Uber and Lyft drivers are employees under this standard, though some courts **have suggested** advocates have a case.

Schulman's ruling may be instructive to other courts applying control tests, but the ruling's greater impact outside California may be in spurring other states to apply the ABC test to their wage laws, said Chen, who is part of a coalition working to pass a version in New York. Similar efforts are afoot elsewhere, he said.

"A lot of these campaigns were in a holding pattern directly looking at what's going to happen in California," he said. "What we're seeing now is that A.B. 5 is on the books, it's actually being enforced, and it's being used to win significant victories for misclassified workers."

Advocates may also push for a bigger prize: a national ABC test. In February, the U.S. House of Representatives **passed the Protecting the Right to Organize Act**, a sweeping labor law overhaul that would use the ABC test to decide whether workers can form unions. Joe Biden has pledged to go a step further on the campaign trail, throwing his weight behind a generally applicable national ABC test. Should he win the White House and Democrats retake the Senate, that could come to pass.

"I think that's a fight we can have and we can win," Liss-Riordan said.

--Editing by Philip Shea and Alanna Weissman.