

Labor/Employment

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Uber's new contract language won't prevent worker suits, experts say

The wording will not prevent drivers from filing claims alleging misclassification once AB 5 becomes law on Jan 1.

Language in Uber's contract requiring California drivers to acknowledge it as a technology company rather than a transportation business has very little standing and won't prevent drivers from filing misclassification claims in the future, legal experts said Monday.

According to the company's Technology Services Agreement, which was last updated Nov. 25, new drivers are required to "acknowledge and agree that [the] company is a technology services provider that does not provide transportation services."

While the technology services agreement was updated last week, a December 2015 version of the company's contract included identical language, an Uber spokesman said Monday.

But Daniel H. Handman, a partner in Hirschfeld Kraemer LLP's Los Angeles office, said the wording will not prevent those drivers from filing claims alleging misclassification once AB 5 becomes law on Jan 1. The law presumes all workers are employees unless they fulfill all three prongs of the "ABC" test laid out in *Dynamex Operations West v. Superior Court*, 2018 DJDAR 3856.

Those claims could come as early as next month. Uber Chief Legal Officer Tony West said in September the company does not plan to reclassify its workers as employees, claiming Uber is a technology company. And under AB 5, the state attorney general and any city attorneys of municipalities with more than 750,000 can prosecute employers who continue to misclassify workers.

"It's certainly not dispositive," Handman said of the contract language. "It's not going to win the day for Uber, but it doesn't hurt."

Handman likened the proclamation to non-compete agreements in which employees acknowledge "the restrictions in this agreement are reasonable and tailored specifically to this company's business needs," he said. But that acknowledgment doesn't mean the driver understands the legal complexity for Uber regarding whether the business is a technology company or a transportation business, Handman noted.

"Those are complex issues that could be understood in a number of different ways," Handman explained. "So what the average Uber driver interprets that to mean, assuming they even read the agreement, is probably not likely to make a whole lot of difference in most judges' minds."

The disclaimer could help Uber establish its exemption claim under the ABC test, says Kelly O. Scott, a partner of Ervin Cohen & Jessup LLP in Beverly Hills and head of the firm's employment law department.

Uber claims its drivers fall under the exemption outlined in prong "B," considered the toughest of the *Dynamex* test's standards, because it operates outside the company's "usual course of business" as a technology platform. Still, Uber will have to overcome its perception as a ride-hailing company.

“They’re going to have to finesse the history they’ve established and get us to think that’s not what they do,” Scott said. “Good luck with that.”

But it has been done, Scott said. Before it was reversed on the appellate level, a federal judge ruled in *Vazquez v. Jan-Pro Franchising Int’l 2019 DJDAR 3707* the company, which sells janitorial franchises, was not a cleaning business, despite that being a main function of the business, Scott said. Janitors working for the franchises initially sued Jan-Pro alleging they were misclassified as contractors and underpaid.

“Jan-Pro successfully argued at the trial court level they’re a franchise business,” he said. “It’s been appealed and the focus is on [Prong] B. They’ve got a tough battle, and the same could be said for Uber.”

The technology argument is stronger than it appears, said Chris Lilly, an employment lawyer with TroyGould PC in Los Angeles. Whatever the challenge in court, judges will have to look past both public perception and the disclaimer and answer whether Uber is a ride-share company or a technology platform, Lilly said.

“They don’t have drivers,” Lilly said. “They have technology. That’s certainly going to be their argument. This is one factor in their favor — [a] very small one, though.”

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