Court Denies Preliminary Injunction in Uber Lawsuit Arguing that California's AB 5 is Unconstitutional; Other Challenges Continue

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Key Points:

- A California district court has denied a preliminary injunction in a lawsuit brought by Uber and Postmates challenging the constitutionality of California's new worker classification law, Assembly Bill 5 ("AB 5"), finding that the companies failed to demonstrate a likelihood success on the merits.
- In separate lawsuits, a district judge recently granted a preliminary injunction enjoining the enforcement of AB 5 with respect to motor carriers, finding that it is preempted by federal law, while freelance journalists are seeking a preliminary injunction against AB 5 based on First Amendment and equal protection grounds.
- In addition to legal challenges, groups are also pursuing legislative relief from AB 5, including a ballot initiative backed by Uber, Lyft and DoorDash.

California's controversial new worker classification law known as AB 5, adopting the restrictive "ABC test" for determining employee or independent contractor status, went into effect January 1 of this year and was promptly met with challenges on several fronts. One such challenge, brought by Uber and Postmates, hit a roadblock on February 10 when the district court in their lawsuit attacking the constitutionality of AB 5 denied their request for a preliminary injunction. Specifically, the court found that "plaintiffs have not shown either a likelihood of success on the merits or that serious questions exist as to any of their claims." Meanwhile, a narrower challenge brought by the trucking industry has fared better, with the district court in that case granting a preliminary injunction against the enforcement of AB 5 as to motor carriers. In a third lawsuit, brought by associations representing freelance journalists, a motion for preliminary injunction will be heard on March 9. Each of these developments is discussed below.

Olson v. California (Uber/Postmates Lawsuit)

On December 30, 2019, Uber, Postmates and one driver for each service filed suit in the Central District of California against the State of California and Attorney General,

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alleging that AB 5 violates various provisions of the United States and California Constitutions.

The plaintiffs argue the AB 5 violates the Equal Protection Clause of the 14th Amendment and California Constitution because it targets app-based workers and treats them disparately from traditional workers. The plaintiffs further contend that AB 5 violates the Due Process Clause of the 14th Amendment and California Constitution because drivers have a right to pursue their chosen occupation and the businesses have a protected interest in operating free from governmental interference. They assert similar arguments based on the Ninth Amendment and California's "Baby Ninth Amendment," the U.S. and California Constitutions' Contracts Clauses, and the Inalienable Rights Clause of the California Constitution. Given its broad challenge to the fundamental architecture of the law, if successful the lawsuit has the potential to invalidate AB 5 in its entirety.

On January 8, 2020, the plaintiffs filed a motion for a preliminary injunction seeking to enjoin enforcement of any provision of AB 5 against the plaintiffs. On February 10, however, the court denied the motion for several reasons. First, the court found that the plaintiffs failed to demonstrate a likelihood of success on the merits because AB 5 is rationally related to the state's valid interest in preventing misclassification of workers, still allows the plaintiffs to pursue their chosen professions even if their employment status changes, and does not substantially impair the plaintiffs' contractual relationships with their drivers. Second, the court found that any irreparable injury based on the plaintiffs having to restructure their business models is speculative. Finally, the court found that the state's interest in applying AB 5 to hundreds of thousands of California workers outweighs the plaintiffs' "fear of being made to abide by the law."

California Trucking Association v. Becerra

On November 12, 2019, the California Trucking Association (CTA) filed a lawsuit in the Southern District of California against the California Attorney General, the Labor Commissioner, and other members of the Labor and Workforce Development Agency claiming that AB 5 violates the Supremacy Clause and Commerce Clause of the U.S. Constitution and is preempted by federal law as applied to motor carriers.

Specifically, the CTA alleges that AB 5 forces motor carriers to treat drivers as employees and is thus preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which prohibits states from "enacting or enforcing a law, regulation … related to a price, route, or service of any motor carrier…with respect to the transportation of property." The CTA further argues that AB 5 violates the Commerce Clause by depriving motor carriers of the right to engage in interstate commerce because they must cease contracting with independent "owner-operator" drivers or face the risk of civil and criminal penalties.

On January 16, a San Diego federal judge granted a preliminary injunction enjoining the enforcement of AB 5 as to "any motor carrier operating in California." In granting the preliminary injunction, the judge explained that AB 5 is likely preempted under the FAAAA and that plaintiffs would face the risk of governmental enforcement actions as well as civil and criminal penalties if they do not change their operations to engage drivers as employees. The CTA and Teamsters (which intervened in the case) are appealing the decision.

Update: On February 10, 2020, the court dismissed the CTA's claims based on the dormant Commerce Clause, as well as a claim based on preemption by a Federal Motor Carrier Safety Administration order regarding meal and rest breaks, but left the FAAAA preemption claim intact.

American Society of Journalists et al. v. Becerra

On December 17, 2019 the American Society of Journalists and Authors, Inc. (ASJA) and the National Press Photographers Association (NPPA) filed a lawsuit in the Central District of California arguing that AB 5's provisions regarding freelance journalists violate the First and 14th Amendments. AB 5's "professional services" exemption carves professionals who engage in marketing, graphic design, grant writing and fine arts out of the scope of the law altogether. However, freelance journalists are eligible for the exemption only with respect to publishers to which they provide 35 or fewer submissions per year, and freelancers who make video recordings are ineligible for the exemption entirely. The plaintiffs argue that these distinctions violate free speech because they depend on whether a writer is engaging in marketing versus journalistic reporting, or in graphic design versus still photography. Similarly, they allege that AB 5 violates equal protection by excluding the recording of video images from the limited exemption for photographers and photojournalists, and that doing so is also a content-based restriction on free speech.

On January 3, a federal judge denied the plaintiffs a temporary restraining order due to their delay in filing the request until one day before the law went into effect, without considering the underlying merits of the suit. However, the court will have an opportunity to address the merits when the plaintiff's motion for a preliminary injunction is heard on March 9.

Legislative Efforts

As the legal challenges to AB 5 progress, some impacted industries are also looking to use the political process to make changes to the law. In December, 2019, network companies, including Uber, Lyft and Doordash, filed a ballot initiative that would classify drivers as independent contractors provided that a network company does not: (1) unilaterally prescribe specific dates, times or minimum hours during which drivers must be logged into a network system; (2) require a driver to accept a specific rideshare or delivery request as a condition of access to the company digital network; (3) restrict a driver from performing ride share or delivery services for other network companies; or (4) restrict the driver working in other professions. The ballot measure would also create a minimum earnings floor for drivers and establish a sliding subsidy to pay for driver health benefits, casualty insurance benefits and disability benefits. Supporters need to collect 622,212 valid voter signatures by May to qualify the measure for the November ballot.

Other affected industries are applying pressure on the California Legislature to make amendments to AB 5. In recent weeks, Assemblywoman Lorena Gonzalez (D), the author of AB 5, has been the target of demonstrations, protests and social media campaigns by industries adversely impacted by the law. Last week, Gonzalez signaled that she would seek to amend the law to address the concerns of freelance writers. While Gonzalez has not agreed to make any other changes to AB 5, some legislators and gig economy players are hoping for a broader discussion of potential amendments to address concerns about the impact of the law on industries with non-traditional work

patterns. However, it is unlikely that Gonzalez, who is a former union official, will agree to any substantial rewrite of the law that does not have the support of organized labor.

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