Prop 22 – Adapting for Delivery Companies

CDA Webinar

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Marron Lawyers was founded by Paul Marron in 1995. The Firm defends Home Delivery companies nationally in misclassification of independent contractor class actions and regulatory matters. Mr. Marron leads a 9-lawyer team. The Firm has tried to verdict wins in court and regulatory misclassification cases for groups as large as 1500 drivers. Clients in CA, OR, AZ, HI, CO, TX, MO, AL, TN, MI, MN, NY, VA, SC & FL have hired the Firm.

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It is to be used only by members of the CDA community.

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Note: The impact of this new Prop 22 legislation is still being realized. Accordingly, the information provided in this Webinar & PowerPoint will change almost daily and should be updated by your company routinely. Marron Lawyers provides up to date information and guidance.

OVERVIEW:

Breakdown of Proposition 22

- ➤ **Big Picture**
- ➤ **Conditions for IC Status for App-Based Drivers**
- ➤ **Definitions**
- ➤ **Requirements of Prop 22 for Network Companies**
- ➤ **Miscellaneous Additional Provisions**
- ➤ **Retroactivity?**

➤ **Impact on Delivery Companies**

Big Picture for Prop 22

➢ Enacted as Cal. Bus. Prof. Code Sections 7448-7467

➢ Proposition 22 Provides that "App-Based Drivers" who meet the law's criteria are Independent Contractors

➢ Prop 22 Applies a 4-Part test for IC status that is very easy to meet

➢ Prop 22 has payments/admin requirements far greater than in a traditional company/IC relationship

Four Conditions for Independent Contractor Status Under Prop 22 (Section 7451)

An "app-based driver" is an independent contractor IF each of the following four conditions are met:

➢The driver gets to set their own hours

➢The driver is not required to accept trips

➢The driver can work for other network companies

➢The driver can engage in other professions

That's it! That's all you need to show to declare the driver an IC

➢ **Very easy to meet relative to other possible standards – Previously misclassification was either "kill shot" ABC test or nuanced weighing of multiple factors under the common-law *Borello* standard**

➢ **Rest of law address the requirements imposed – Much more significant than a traditional independent contractor relationship**

Definitions Under Prop 22:

- Delivery Network Company ("DNC")
  - Company that (1) facilitates deliveries <u>using an app</u>, (2) on an on-demand basis, and (3) maintains a record of time and miles of drivers operating on the app
  - Will include existing companies such as DoorDash, Instacart, etc

- Transportation Network Company ("TNC")
  - Company that provides prearranged transportation services to customers <u>using an app</u>.
  - Will include existing companies such as Uber, Lyft, etc

- "App-Based Driver"
  - A driver who is either (1) a DNC courier; (2) a TNC Driver; or (3) a TCP (Charter Party carrier) driver or permit holder AND
  - For whom the <u>four conditions of Section 7451</u> of the law are met

Requirements of Prop 22

➢Written contract

➢Earnings Guarantee

➢Healthcare Subsidy

➢Insurance

➢Anti-Discrimination Policy

➢Criminal Background Checks

➢Safety Training

➢Zero Tolerance Drug/DUI Policies

➢App-Based Driver Rest

Requirements of Prop 22 – Written Contract – Section 7452

➢ "A network company and an app-based driver shall enter into a written agreement prior to the driver receiving access to the network company's online enabled application or program"

➢ Contract must specify grounds for contract termination

➢ Company may not terminate the agreement except on the grounds specified

➢ Mandatory appeals process for drivers whose contracts are terminated

Requirements of Prop 22 – Earnings Guarantee – Section 7453

➢Network companies must provide an "earnings floor" for app-based drivers
  - ➢App-based drivers cannot be compensated at less than 120% of state or local minimum wage for all <u>engaged time</u> (local based on place of pickup – higher minimum applies), plus $0.30 per engaged mile for vehicle expenses
    - ➢ "Engaged time" – Time from when the driver accepts a delivery/trip to when the delivery/trip is completed; does not include time waiting between trips
  - ➢Each pay period a network company must analyze the driver's earnings, compare the with the earnings floor, and make up any shortfall
  - ➢The per-mile rate for vehicle expenses receives an annual CPI adjustment
  - ➢Likely fairly easy to reach the earnings floor, even in a high-minimum-wage state like California

➢Network companies must ensure drivers receive <u>100%</u> of any gratuities
  - ➢No deductions, including for credit card payment processing
  - ➢Gratuities <u>do not</u> count towards earnings floor

Requirements of Prop 22 – Quarterly Healthcare Subsidy – Section 7454

➢Driver engaged for 25 hours per week on average over a quarter with a network company = Mandatory contribution of 100% of the average Covered California contribution from that company

➢Driver engaged for 15-25 hours per week on average over a quarter with a network company = Mandatory contribution of 50% of the average Covered California contribution from that company

➢Driver may receive a subsidy from more than one network company

➢Note: Average contribution is around 82% of the premium

Requirements of Prop 22 – Quarterly Healthcare Subsidy – Section 7454 – Cont'd

➢ Reporting requirement – Each pay period, the network company must report the driver's hours for the period, plus total hours for the quarter

➢ Drivers must provide proof of enrollment to obtain the subsidy

➢ Payment of the contribution must be made within 15 days of the end of the quarter, or 15 days of the time the driver provides proof of current enrollment, whichever is later

➢ State is required to publish the average Covered California contribution

Requirements of Prop 22 – Insurance – Section 7455 - "Occ Acc" and Death Benefit

➢Accidental death & dismemberment insurance – ("Occ Acc") – for injuries suffered while online with a network company platform

  ➢Coverage for medical expenses incurred, $1 Million

  ➢Disability payments of 2/3 driver's average weekly earnings from ALL network companies for the four weeks prior to the date of the injury

  ➢Coverage applies while "online," not only "engaged"

➢Death Benefit – per Sections 4701 and 4702 of the Labor Code – while "online"

➢If online on more than one platform, benefits are split pro-rata between the platforms

  ➢BUT – No pro-rata liability if the driver is engaged on one platform

Requirements of Prop 22 – Insurance – Section 7455 - Auto Liability and General Liability

- Auto liability policy
  - DNCs required to maintain $1 Million per-occurrence coverage to compensate third parties for injuries or losses during <u>engaged</u> time
    - Coverage applies only when the driver is engaged on the particular company's trip – Driver's personal insurance covers time "online" but not "engaged"
  - TNC required to maintain $1 Million per-occurrence for death, personal injury, or property damage, as well as $1 Million uninsured/underinsured motorist coverage from time passenger enters the car to time passenger exits.
  - Note: Personal auto liability policies generally exclude coverage for commercial purposes.

- Additional General Liability Insurance Requirements
  - As required by the PUC

Requirements of Prop 22 – Anti-Discrimination Policy – Sections 7456, 7457

➢ Discrimination Prohibited

  ➢ Cannot discriminate against contractors on the basis of race, color, ancestry, national origin, religion, creed, age, physical/mental disability, sex, gender, sexual orientation, gender identity, medical condition, genetic information, marital status, or military or veteran status

➢ Claims brought under this section brought solely under the <u>Unruh Civil Rights Act</u>

  ➢ Unruh Act Claims have <u>no statutory attorneys fees</u>

  ➢ Under most statutory discrimination claims there would be a provision for award of attorneys fees

➢ Sexual Harassment Policy Required

  ➢ Means of electronically submitting complaints is required

Requirements of Prop 22 – Criminal Background Checks – Section 7458

➢ Criminal Background Checks for Drivers Required
  ➢ Initial local and national criminal background check consistent with PUC 5445.2
    ➢ Search through nationwide database with validation
    ➢ Search of DOJ national sex offender registry
  ➢ Third-party checks are permitted
  ➢ Must be done prior to driving
  ➢ Must provide a copy to driver
  ➢ Continual monitoring of driver's criminal history permitted after initial consent to check if network company elects to do so.
  ➢ Disqualifying convictions
    ➢ Serious felonies/hate crimes as defined by PUC
    ➢ Conviction in the last seven (7) years of any crime listed in PUC code 5445.2 – includes DUI, domestic violence, terrorism

Requirements of Prop 22 – Safety Training – Section 7459

➢Safety training program mandated by Prop 22
   ➢Collision avoidance/defensive driving
   ➢Identification of collision-causing elements
   ➢Recognition and reporting of sexual assault/misconduct
   ➢(For food delivery drivers) Food safety training

➢Must be completed by driver prior to driving
   ➢But drivers already under contract have until July 2021

➢Provides that safety policies, features, or equipment cannot be used as evidence of an employment or agency relationship with the driver

Requirements of Prop 22 – Zero Tolerance Substance Abuse Policy – Section 7460

➢ Network companies required to impose a "zero tolerance policy"

➢ Policy triggered upon report from "any person" that the driver was under the influence while performing delivery services or transportation services

➢ On receipt of report, driver suspended while investigation takes place

➢ Customer can also be blocked for knowingly submitting a false report

Requirements of Prop 22 – App-based Driver Rest – Section 7461

➤ Provides mandated rest periods for drivers

➤ Driver cannot be logged in and driving on a network company's platform for more than 12 cumulative hours in a 24-hour period, unless the driver has already logged off for an uninterrupted period of six hours

➤ If driver has been logged in for more than 12 hours, system must lock the driver out of that company's app for a 6-hour rest period

➤ Note: Statute does not mention cumulative hours across platforms

Prop 22 – Retroactivity?

➢ From initial review, Prop 22 <u>appears not</u> to be retroactive; i.e., not cut off existing cases that were pending prior to time statute was passed

➢ Judge Schulman, overseeing the Labor Commissioner's litigation against Uber and Lyft stated that "[Prop 22] would not moot out the People's prayer for remedies for past violations"

➢ Assemblywoman Lorena Gonzalez, architect of AB5, stated to constituents prior to the proposition's passage that it <u>would</u> be retroactive

Prop 22 – Retroactivity? – Cont'd

➢Conversely, AB5 provided that it constituted a declaration of, not a change in, existing law regarding violations of the Labor Code related to wage orders, and therefore <u>was</u> retroactive in applying the ABC test

➢Numerous legal challenges to AB5

➢*Dynamex* retroactivity: California Supreme Court heard oral arguments in *Vazquez v. Jan-Pro Franchising, International* on Nov. 3; both sides asked Court to decertify the question.

➢ABC test may be retroactive; carve-out (Prop 22) may not be retroactive

Requirements of Prop 22 – Miscellaneous Additional Requirements

➢ Criminal enhancements for people who falsely impersonate network company drivers (Section 7462)

➢ Local regulations <u>preempted</u> – Local governments cannot enact their own regulations contradicting Prop 22. Prop 22 "occupies the field" of app-based driving (Section 7464)

➢ Income reporting obligations – Company must prepare an "information return" for all drivers with income greater than $600 in a calendar year

  ➢ 1099-K fulfills "information return" requirement

➢ State AG required to appoint independent counsel to defend law

Requirements for Delivery Companies Under Prop 22

➢Deliveries must be arranged through an app

➢Deliveries must be "On Demand" only – NO fixed routes
  ➢However – Company is allowed to aggregate up to 12 deliveries into a single "delivery request" offered to contractors, with no limit on number of requests per day

➢Company must maintain record of engaged time and engaged miles

➢Drivers may only drive <u>passenger</u> vehicles
  ➢Vehicle code section 465 – Excludes trucks, but cargo vans not excluded

➢Delivery location selected by the customer, within 50 miles of the pickup location

Requirements for Delivery Companies Under Prop 22 (Cont'd)

➢Big Picture: Intended to allow 'spur of the moment' customer orders for local delivery to fall within the law

➢E.g., DoorDash; Instacart

➢Companies should assess for opportunity to adapt as well as potential for threat from app-based companies
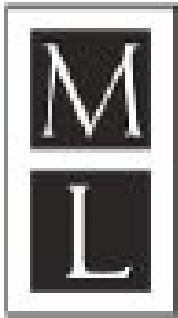
Questions ?

- 9 Attorneys focused on Home Delivery
- Nationwide experience and wins on misclassification
- Nationwide reach. Experience in CA, AZ, CO, TX, OR, MO, MI, FL, AL, TN, MN, NY, and HI

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