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REPORT RE:

AB 5 ENFORCEMENT

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 19-1392

Honorable Members:

On February 28, 2020, this Honorable Body adopted a motion requesting that the City Attorney and Chief Legislative Analyst report on options for the City of Los Angeles to enforce Assembly Bill ("AB") 5, and related legal programmatic factors to take into account.

As set forth below, the City is already enforcing AB 5 through actions the City Attorney's Office has filed on behalf of the People of the State of California, and through the Office of Wage Standard's enforcement of the City's Minimum Wage Ordinance.

Additional enforcement would require more resources, and would also be aided by the adoption of a subpoena ordinance, granting the City Attorney's Office the power to conduct pre-litigation investigations.

BACKGROUND ON AB 5

In *Dynamex Operations West, Inc. v. Superior Court* 4 Cal.5th 903 (2018), the California Supreme Court adopted the "ABC test" to determine whether workers are independent contractors or employees under California wage orders. In September 2019, Governor Newsom signed AB 5 (Gonzalez), which codified *Dynamex* and clarified its application.

Specifically, with certain exemptions, AB 5 provides that for purposes of the California Labor Code, the Unemployment Insurance Code, and California wage orders, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business.¹

PEOPLE OF THE STATE OF CALIFORNIA ENFORCEMENT ACTIONS

The City Attorney's Office has already filed several actions enforcing AB5 on behalf of the People of the State of California.

First, the City Attorney's Office is prosecuting three separate actions against trucking companies that operate at the Los Angeles Port for misclassifying their drivers as independent contractors. In those actions, the trial court concluded that AB5 is preempted by federal trucking laws. The City Attorney's Office appealed the trial court's ruling, and on November 19, 2020, the Court of Appeal for the Second Appellate District reversed, concluding that federal law does not preempt AB 5. *See People v. Superior Court (Cal Cartage Transportation Express, LLC)*, 57 Cal. App. 5th 619 (2020). Defendants petitioned the California Supreme Court for review, but the Court denied the petition. Defendants have now petitioned the United States Supreme Court for review. The United States Supreme Court has not yet ruled on the petition.

Separately, the City Attorney's Office, in conjunction with the California Attorney General's Office, the San Francisco City Attorney's Office, and the San Diego City Attorney's Office, filed suit against Uber and Lyft for misclassifying their drivers as independent contractors. On August 10, 2020, the trial court issued a preliminary injunction prohibiting Uber and Lyft from misclassifying their drivers. On October 22, 2020, the Court of Appeal for the First Appellate District upheld the preliminary injunction. *See People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266 (2020). The preliminary injunction never took effect, however, because last November, California voters approved Proposition 22, which exempts app-based drivers from AB5. The City Attorney's Office, however, continues to prosecute the case against Uber and Lyft in an effort to obtain restitution for California drivers (as well as other remedies) for the period before Proposition 22 took effect.²

OFFICE OF WAGE STANDARDS ENFORCEMENT ACTIONS

The Office of Wage Standards (OWS), within the Bureau of Contract Administration, is tasked with implementing and enforcing the minimum wage and paid sick leave requirements established by the City's Minimum Wage Ordinance. As part of those responsibilities, the OWS conducts an investigation when it receives a complaint alleging violations of the Minimum Wage

¹ On September 4, 2020, AB2257 took effect, which amended some of AB 5's exemptions, and added other exemptions.

² Constitutional challenges to Proposition 22 are also being litigated. The City Attorney's Office has supported those challenges with the filing of amicus briefs.

Ordinance. If a worker is alleged to have been misclassified as an independent contractor, and was not paid minimum wage or did not receive sick time benefits as a result, the OWS will determine whether the worker is an employee. This is a threshold question that requires analysis of the misclassification under AB5. Since the adoption of the ABC test, the OWS has applied it, when necessary, to conduct its investigations.

RESOURCES NEEDED FOR ADDITIONAL ENFORCEMENT

Additional litigation resources would be necessary for the City Attorney's Office to bring additional enforcement actions.

Finally, as information on worker misclassification is not always publicly available, and given that vulnerable workers may be reluctant to come forward, adopting an ordinance providing the City Attorney's Office with pre-litigation investigative powers, such as subpoena power, could greatly enhance the City Attorney's Office's ability to bring additional cases.

If you have any questions regarding this matter, please contact Managing Assistant City Attorney Michael Bostrom at (213) 978-1867, or Deputy City Attorney Dania Minassian at (213) 978-7184. They, or another member of this Office, will be present when you consider this matter to answer any questions you may have.

Sincerely,

MICHAEL N. FEUER, City Attorney

By



MICHAEL J. BOSTROM
Assistant City Attorney

MJB:pj

cc: Honorable Eric Garcetti, Mayor
Richard Llewellyn, City Administrative Officer
Sharon Tso, Chief Legislative Analyst
John Reamer, Director, Bureau of Contract Administration