

Labor Law Enforcement in the Gig Economy

June 28, 2019



Office of Labor Standards Enforcement
Patrick Mulligan, Director

Office of Labor Standards Enforcement

The Office of Labor Standards Enforcement (OLSE) enforces local labor laws adopted by San Francisco voters and the San Francisco Board of Supervisors.

Many of these laws apply citywide. Other laws apply specifically to City contractors, lessees, and others doing business with the City.



Local Labor Laws That Impact Gig Workers

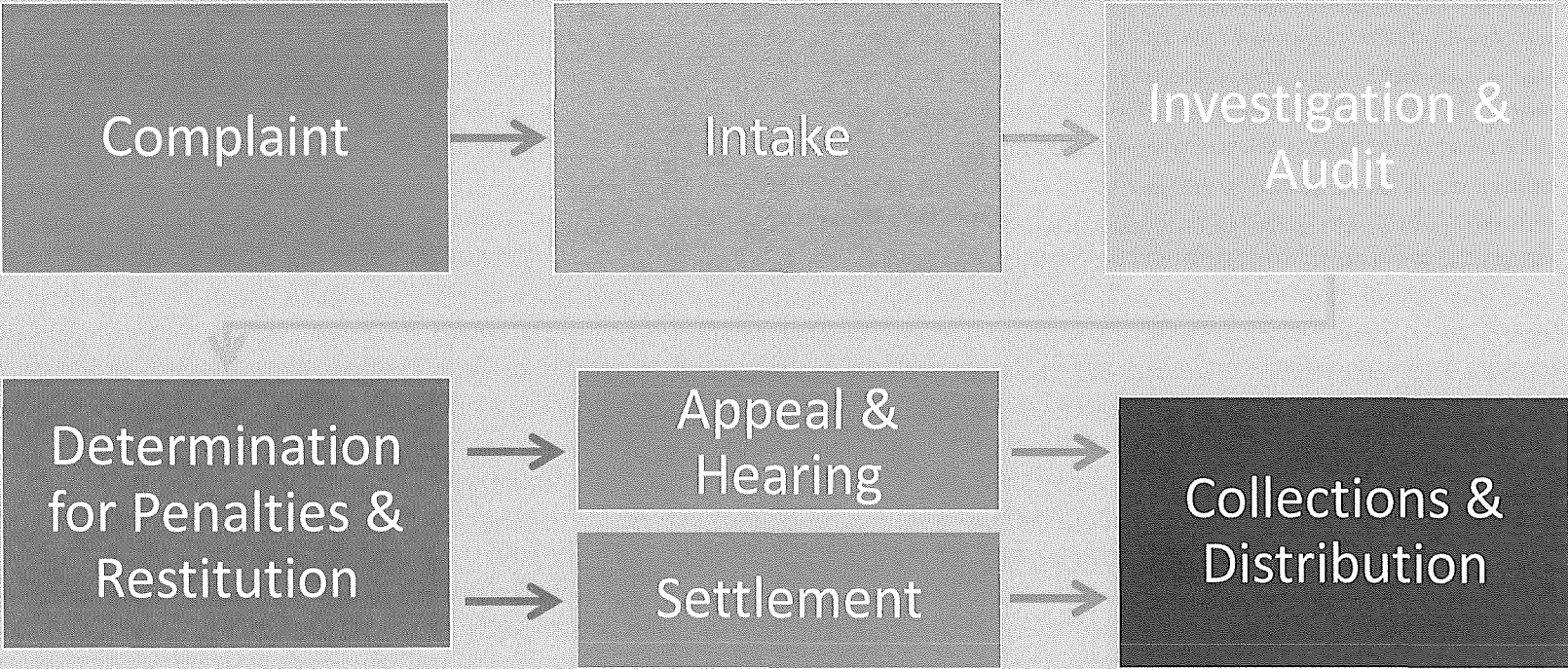
Eight San Francisco labor ordinances apply to employees in the “gig economy”

*The Fair Chance Ordinance is preempted by CPUC regulations for “Transportation Network Companies.”

Ordinance	Statute
Minimum Wage	Admin. Code Chapter 12R
Paid Sick Leave	Admin. Code Chapter 12W
Health Care Security	Admin. Code Chapter 14
Family Friendly Workplace	Admin. Code Chapter 12Z
Paid Parental Leave	Police Code Article 33H
Lactation in the Workplace	Police Code Article 33I
Consideration of Salary History	Police Code Article 33J
Fair Chance Ordinance*	Police Code Article 49



OLSE Enforcement Process



Enforcement Challenges in the Gig Economy

- Employers assert that their workers are independent contractors
- Employers creatively identify themselves as simply a marketplace platform
- Refusal to provide required data on payments and benefits
- Potential litigation



Moving Forward

- OLSE will continue to investigate gig economy companies for violations of San Francisco labor laws.
- OLSE's investigations rely on state law to define an "employee," including looking to the Labor Code, Wage Orders, and court decisions.



IWC WAGE ORDER DEFINITIONS

“Employee” means “any person employed by an employer.”

“Employ” means “to engage, suffer or permit to work.”

“Employer” means “any person [or business entity] who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any other person.”

SUBJECTS COVERED BY THE WAGE ORDERS

- Definition of “hours worked” – (1) time the employee is subject to the employer’s control, or (2) all time the employee is suffered or permitted to work, whether or not required to do so. (*Morillion v. Royal Packing* (2000); *Mendiola v. CPS Security Solutions* (2015).)
- Payment of no less than the MINIMUM WAGE for all hours worked – for each discrete task or unit of time. (*Armenta v. Osmose* (2005); *Gonzalez v. Downtown LA Motors* (2013).)
- Payment of OVERTIME COMPENSATION for all overtime hours worked.
- SPLIT SHIFT PREMIUM and REPORTING TIME PAY

MORE SUBJECTS COVERED BY WAGE ORDERS

- Record Keeping Requirements: Hours Worked & Wages Paid
- Required Uniforms and Necessary “Tools or Equipment”
- Meal Periods and Paid Rest Periods- Premium Pay for Violations (*Brinker Restaurant Corp. v. Superior Court* (2012); *Augustus v. ABM Security Services* (2016).)
- No deductions from pay for cash shortage, breakage or loss
- Limits on charges for employer-provided meals and lodging
- Working condition requirements – seating, rest area, etc.

*DYNAMEX OPERATIONS WEST, INC. v.
SUPERIOR COURT (2018) 4 Cal.5th 903*

- Issue – what is the test for determining whether workers should be classified as employees or independent contractors for purposes of California wage orders?
- Holding – Under the “suffer or permit” definition of employ, courts should apply the “ABC” test to determine whether workers are employees or independent contractors, starting with a presumption that any person providing services to another is an employee, so that the burden rests on the hiring entity to establish that the worker is an independent contractor not intended to be included in the wage order’s coverage.

DYNAMEX: THE “ABC” TEST

- The worker is an employee, unless A and B and C are shown:
- A: The worker is free from the control and direction of the hiring entity in connection with performance of the work, both under the contract for performance of the work and in fact. (Right to control, even if not exercised, negates A.)
- B: The worker performs work that is outside the usual course of the hiring entity’s business.
- C: The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

EMPLOYEE PROTECTIONS UNDER STATE LAW OUTSIDE THE IWC WAGE ORDERS – None of these laws cover independent contractors

- Right to Have Wage Claims Adjudicated By the Labor Commissioner
- Anti-Retaliation Laws – for filing wage claims, for whistleblowing, for refusing to perform unsafe work, for disclosing wages, for serving on jury, for taking time off to visit child's school or day care center, for taking time off for medical treatment or counseling for victims of domestic violence or sexual assault, for using sick leave to care for family member, for engaging in political activity, for lawful off-duty conduct, etc.
- Unemployment Insurance
- Workers Compensation Insurance
- Anti-Discrimination Laws- that prohibit discrimination on the basis of race, ethnicity, nationality, religion, sex, sexual orientation, etc.
- Occupational Safety and Health Laws

MORE STATE LAWS (OUTSIDE THE WAGE ORDERS) THAT PROTECT EMPLOYEES, NOT INDEPENDENT CONTRACTORS

- Reimbursement of Necessary Business Expenses – e.g., mileage for use of personal vehicle - Lab. Code § 2802: *Gattuso v. Harte-Hanks Shoppers* (2007).
- Requirements for Timely Payment of Wages and Penalties for Failure to Timely Pay Wages
- No Unlawful Deductions From Wages
- No Forfeiture of Accrued Vacation Time
- Right to Attorneys' Fees for Prosecuting Wage Claims
- Paid Sick Leave
- Right to Access Personnel Records, Including Pay and Time Records

DETERMINING EMPLOYEE OR INDEPENDENT CONTRACTOR STATUS FOR NON-IWC CLAIMS

- The *Borello* Test- *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341. A multi-factor test that is applied “with deference to the remedial purposes of the protective legislation, starting with presumption of employee status. Test based on the totality of the circumstances, with no one factor determinative – but certain factors are considered more important than others. These factors include:
 - Right to control the manner and means by which the work is performed.
 - Whether person performing services is engaged in distinct occupation or business
 - Whether the work performed is part of regular business of hiring entity
 - Whether hiring entity or worker provides the instrumentalities, tools, and place of employment.
 - The skill required in the particular occupation

THE *BORELLO* FACTORS - Continued

- The length of time for which services are to be performed
- The method of payment- whether by time or by job
- The worker's opportunity for profit or loss based upon his or her managerial skills
- The worker's investment in equipment or materials required for the task, or his/her employment of helpers
- Whether the service rendered is an integral part of the hiring entity's business
- Whether, in the locality, the work is usually done under the direction of a hiring entity or by a specialist without supervision
- Whether or not the parties believe they are creating an employer-employee relationship

THE *DYNAMEX* ABC TEST: BETTER FOR WORKERS THAN *BORELLO*

- *Borello* much more cumbersome test – results uncertain and inconsistent, time consuming litigation, and more difficult to show “commonality” among similarly situated workers – a necessary prerequisite for class certification in class actions.
- Under *Borello*, “the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.”
- Some *Borello* factors really don’t clarify whether worker is employee or independent contractor.
- ABC test simpler to apply, focuses on most relevant factors, fosters finding employee status and “commonality” by making each factor separately determinative – hiring entity must prevail on ALL three factors to overcome presumption of employee status.

Lessons for San Francisco

- **AB 5 is a starting point**
- **Clear rules are needed on:**
 - Waiting times
 - Operating expenses
- **New York TLC provides one example of how this can be done**
- **Access to company data is essential**
- **Need to resource enforcement agency**

New York Taxi and Limousine Commission

Pay Standard: \$17.22 an hour/utilization rate = \$29.70

Expenses: 62 cents mile/utilization rate = \$1.08

February to mid May:

- **Drivers earned an additional \$172 million compared to per-trip pay from similar time period the previous year**
- **Average trips per day continued to increase**

Waiting time

- **Waiting time is work time**
- **New York: drivers ready, but without passengers
40% of the time**
- **Higher wait times = greater congestion**
- **Aligning incentives**

What drivers earn (2)

- EPI estimates that the average driver in the U.S. earned: **\$11.77** after expenses
\$9.21 as a W-2 equivalent
- Reich and Parrot (2018) estimate **\$14.22** an hour in NY prior to policy change.
- **40%** of drivers in New York are on Medicaid, **14%** uninsured

Operating expenses

- **Vehicle Registration**
- **Vehicle Depreciation or Leasing**
- **Gas**
- **Taxes**
- **Financing**
- **Maintenance and Repair**
- **Cleaning**

IRS rate: 58 cents a mile

How much do TNC workers earn?

- **Uber drivers earned an average of \$23.87 an hour in 2015 *before expenses* (Hall and Krueger 2017)**
- **Need to take into account:**
 - Operating expenses
 - Loss in benefits working as an independent contractor

Most platform workers are part-time,
...but full-time workers account for
a significant share of hours and earnings

	Pct drivers	Pct hours
Part-time (1-15 hours)	53%	21%
About half-time (16-34 hours)	30%	38%
Full-time (35+ hours)	17%	41%
Total	100%	100%

Uber Drivers 2015

Bruce Schaller presentation to SASE 2019; Hall and Krueger (2017)

Small, but growing share of workers are engaged in labor platforms

- **The share of workers in non-employee work arrangements grew in the US by 1.9% from 2000-2016. Vast majority (86%) in labor platforms. (Collins et al 2019).**
- **JP Morgan Chase sample of customer data (Oct 2017)**
 - 1.96 of families in San Francisco received income from a labor platform
 - 93% of those in transportation
- **SFCTA: 45,000 platform drivers working in San Francisco, 6,000 on the road at peak times**

What does AB5 do?

- **Codifies the Dynamex decision in California law**
- **Clarifies it's application, with some exemptions:**
 - Licensed insurance agents
 - Certain licensed healthcare professionals
 - Securities brokers and dealers or investment advisors
 - Direct sales representatives
 - Real estate licensees
 - Hairstyling and barbering services that meet certain conditions
 - Work under certain professional services contracts
- **Expands the ABC test to:**
 - Labor Code
 - Unemployment Insurance Code

Gig Workers and Labor Standards

Ken Jacobs

UC Berkeley Labor Center

For San Francisco Board of Supervisors Hearing

Status of Worker Rights in California's Gig Economy

June 28, 2019

California Uber and Lyft Drivers

Gig Workers Rising

**GIG
WORKERS
RISING**

~ 1%

or less of the US workforce
drives for Uber or Lyft

**GIG
WORKERS
RISING**

Source: SF Chronicle op-ed by Dara Khosrowshahi, Logan Green and John Zimmer; Pew Research Center, Economic Policy institute

Most people only drive for a few hours, while full-time drivers provide many rides:

About half of drivers work full time hours
and for 1 out of 2 drivers, driving is their
only job

Full-time drivers provide close to 50% of
rides

**GIG
WORKERS
RISING**

People who rely on gig jobs typically have few other options:

64% are people of color

57% have household incomes under \$30k

52% have a high school degree or less

45% need to control their own schedule

**GIG
WORKERS
RISING**

The average Uber driver makes just

10.87

per hour after fees, vehicle expenses, and the mandatory extra Social Security & Medicare taxes that “self-employed” drivers must pay

**GIG
WORKERS
RISING**

Gig Workers Rising is a campaign supporting and educating app and platform workers who are organizing for better wages, working conditions and jobs. Gig Workers Rising supports and educates those who work in the gig economy as they come together to win better wages, benefits and a voice at work.

**GIG
WORKERS
RISING**

Drivers supported by Gig Workers Rising are organizing to demand:

A living wage

Transparency

Benefits

A voice at work

**GIG
WORKERS
RISING**

Job segregation, gender blindness, and employee agency: Tracy E. Higgins, 35 Me.L.Rev. 241 (2003).

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Overview of United States Supreme Court affirmative action decisions in race and gender cases: 1980-1995. Winston Riddick and Patricia Riddick, 23 S.U.L.Rev. 107 (1996).

Post Office Square or Peimberton Square? Which way to turn with an employment discrimination suit. Joan A. Lukey and Gabrielle R. Wolohojian, 36 Boston B.J. 8 (Jan.-Feb. 1992).

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The effect of *Alexander v. Sandoval* on federal environmental civil rights (environmental justice) policy. Michael D. Mattheisen, 13 Geo.Mason U.L.Rev. 35 (2003).

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Title VII: What's hair (and other race-based characteristics) got to do with it? Wendy Greene, 79 U. Colo. L. Rev. 1355 (2008).

Voluntary affirmative action in employment for women and minorities under Title VII of the Civil Rights Act: Extending possibilities for employers to engage in preferential treatment to achieve equal employment opportunity. Chris Engels, 24 J.Marshall L.Rev. 731 (1991).

Zero tolerance for the First Amendment: Title VII's regulation of employee speech. Kingsley R. Browne, 27 Ohio N.U.L.Rev. 563 (2001).

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§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972,

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persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

- (1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];
- (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
- (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
- (4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

* Mr. Wright's Exhibit # 1. *

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of

pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

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Revision Notes
1964 Acts. S
House Report
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1972 Acts. I
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(Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 102-166, Title I, §§ 104, 109(a), Nov. 21, 1991, 105 Stat. 1074, 1077.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1964 Acts. Senate Report No. 872 and House Report No. 914, see 1964 U.S. Code Cong. and Adm. News, p. 2355.
1972 Acts. House Report No. 92-238 and Conference Report No. 92-899, see 1972 U.S. Code Cong. and Adm. News, p. 2137.
1978 Acts. House Report No. 95-948 and House Conference Report No. 95-1786, see 1978 U.S. Code Cong. and Adm. News, p. 4749.
Senate Report No. 95-989 and House Report No. 95-595, see 1978 U.S. Code Cong. and Adm. News, p. 5787.
1986 Acts. House, Conference Report No. 99-841 and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 4075.
1991 Acts. House Report No. 102-40 (Parts I and II), Interpretive Memorandum, and Statement by President, see 1991-U.S. Code Cong. and Adm. News, p. 549.
References in Text
The National Labor Relations Act, as amended, referred to in subsec. (e)(1), is Act July 5, 1935, c. 372, 49 Stat. 449, as amended, which is classified generally to subchapter II (section 151 et seq.) of chapter 7 of Title 29, Labor. For com-