the national lawyers guild
NEWSLETTER of the
Labor & Employment Committee
http://www.nlg-laboremploy-comm.org June 2020

The NLG Labor & Employment Committee

is proud to announce
a panel and discussion,

"How Can Lawyers Support Worker Organizing Under COVID-19?"

on

Friday, June 26

at 12pm EDT/ 11am CDT/ 9am PDT

This discussion will focus on how progressive lawyers can support worker organizing around health and safety. We will hear from organizers across several sectors and engage in a conversation on the conditions of workers during COVID-19 with a focus on how the legal community can support the recent surge of worker organizing.

Speakers include:

Axel Fuentes
Executive Director, Rural Community Workers Alliance, Missouri

Madeline Janis
Executive Director, Jobs to Move America

David Maraskin
Food Project Senior Attorney of Public Justice

Nafisah Ula
Organizing Director, Jobs With Justice

This event is open to all members of the NLG Labor and Employment Committee. Guild members are encouraged to join the LEC Committee and plug in. For more information email nlglabor@gmail.com!

Solidarity with Black Lives Matter

The police killing of George Floyd—and the demonstrations across the country and around the globe demanding an end to racialized police violence and justice for Floyd, Breonna Taylor, Tony McDade, and so many others—have forced America to focus on the issues of racism and police violence. The police response to these protests shows just how deep this problem goes: even in cities in which mayors and other local leaders have issued statements in support of Black Lives Matter, their police and sheriff's departments, supported by the National Guard and military units, have attacked protestors, running them down with horses and police vehicles and freely deploying tear gas, pepper spray, rubber bullets, and flash-bang grenades, like an occupying army.

Guild Chapters across the country have mobilized to provide legal support for these people's movements and will continue to do so for as long as necessary. As a grassroots organization led by volunteer members who take direction from movements on the ground, we remain committed to the struggle for Black lives and an end to white supremacy.

The Guild is also in this fight for the long haul. In solidarity with movements for Black lives, the family of George Floyd, and all victims of racialized police violence, we are demanding a full, transparent, and independent investigation into his murder and the Minneapolis Police Department. We also call for investigations into the many law enforcement officers who have been documented brutalizing protesters over the past two weeks, as well as all police officers who have records of complaints for violence. We call for demilitarizing the police. Finally, we call for investing in community resources including housing, healthcare, income and reparations for the families of those murdered, instead of investing in the criminalizing, caging, and harming of Black people.

And now is the time for labor to get behind Movement for Black Lives' Vision for Black Lives, which prioritizes the issues that matter most to labor: justice, equality, jobs, housing, health care, and workers' rights. You can find the Movement's detailed policy statements at https://m4bl.org/policy-platforms/.

The Guild's Labor and Employment Committee is in solidarity with Black Lives Matter.

Al Luchar Unidos, Nosotros Podemos Cambiar Este Sistema

UFCW Local 770 Stands in Solidarity with Black Lives Matter and All Those Fighting for Human Dignity and Justice

We are filled with anger and grief at what has happened in the last week in our country: the murder of George Floyd and the death of over 100,000 people from COVID-19. These events remind us that the health and the safety of working people, especially people of color, are continually and systematically disregarded as their lives are not valued, are not respected and are not protected. At the root of peaceful protests this weekend are issues that our union fights for every single day: the fight for basic human dignity and justice in the face of injustice.

Black and Brown people are being disproportionately affected, and dying. The COVID crisis has laid bare the inequity in our American systems. Essential workers, the members of our union—grocery, retail drug, meatpacking, healthcare, and others—have been on the frontlines throughout this entire pandemic. They have been deemed essential without the pay, benefits, and respect that the title should command.

Now during uprisings across the country, we must remain united. Essential workers continue to show up to work and in some places the stores they work in are closed or there is a curfew in effect. At this time:we call on all employers, both union and nonunion, to continue paying workers for all shifts and to make hazard pay permanent. Their service has been devalued and it's time for these highly profitable, multinational corporations to recognize the value of workers on the shop floor.

We call on these same employers to ensure workers are safe and to suspend attendance policies as long as public transit service is interrupted and a curfew is in place.

As members of the Labor Movement, we must work every day to disrupt racism on the shop floor, as well as within our neighborhoods. Racism is the legacy of slavery which has been embedded, systematically, in our country. It is in the air we breathe and the water we drink. It infects all aspects of American life, including the federal government's response to COVID-19.

We do not benefit from being divided like that. It is the big corporations that benefit from racial division. The murders during this pandemic of George Floyd, Breonna Taylor and Ahmaud Arbery (among others) for simply being Black, mandate us to support and prioritize the lives of Black workers. And we must be bold and unequivocal in our policies that lift up people of color.

As a Union, we understand the strength and possibilities of organizing. This is what we do: unify, organize and fight for better lives for all of us. By standing together, we can change this system. We stand with Black Lives Matter, with all organizations, working to bring justice, healing, and freedom to Black people across the Central Coast and Los Angeles, and across the country.

We call on all of our members, and people of conscience to take action, vote for progressive leaders, and to speak out boldly against racism. To be silent is to be complicit.

The success of our work will be marked by the lives we save and make better; and the systems we change to make it so. The events of the last week make even more clear the urgency of the work we are doing together.

A New "Normal" Calls for Paid Leave for Employees

BY JOAN G. HILL

On March 13, the Administration declared a national emergency related to COVID-19. Promptly, Congress went into action to draft a bill providing economic security for employees who are sick or been exposed to the virus. The intent of the law, according to the House debate on March 13, 2020, was to provide security and workplace protections, i.e. paid time off, and job protections including benefits and health care, to help American workers affected by COVID-19, whether they are personally ill, subject to quarantine, or needed to care for someone, including children whose school or day care was closed due to the pandemic. The legislation also sought to address the economic impact of the pandemic.[1]

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) providing extended unemployment benefits and emergency "relief" for workers impacted by COVID-19. Two divisions of the law provide temporary emergency paid sick leave and expanded family medical leave to workers employed by small employers (less than 500). The law went into effect on April 1st and expires December 31st.

The Emergency Paid Sick Leave provisions, as enacted, afford new and recently-hired employees of covered employers up to two weeks of paid sick leave if the employee is not able to work (or telework) if they are subject to a quarantine order, have been advised by a healthcare provider to self-quarantine, have symptoms or seeking a confirming diagnosis for

A New "Normal" *continued*

COVID-19, caring for someone, or caring for a child whose school or daycare has been closed. Employees receive $5100 for the first three conditions, and up to $2000 if caring for an individual or child, over the two-week period.

The FFCRA also expanded the Family and Medical Leave Act (FMLA) by enacting a new condition for protected leave, where the employee is a parent dealing with school closure and/or child care is not available. In these instances, the employee can draw 2/3rds of their regular pay for up to 12 weeks. Smaller employers, having less than 50 employees, can be exempt from both provisions, by asserting that the "viability" of the enterprise would be in jeopardy by granting emergency and expanded leave.

Leading up to the effective date of the law, the US Department of Labor issued several Q & A's designed to give employers and employees advance guidance on the implementation of the law. Later, a set of regulations were issued to interpret the FFCRA paid leave provisions.

As a worker advocate, our education team spent days pouring over the Q & A and regulations to understand the impact on Steelworker membership across the USA. What we found, as we prepared our education webinars on the topics, was that the regulations imposed exclusions and limitations that seemed to have no statutory basis.

We identified how the DOL failed workers by their interpretation of both Acts (EPSL and EFMLA) as well as the Congress' failure regarding the exclusion of millions of workers protected under these Acts. Although it reportedly covers over 60,000,000 workers, the FFCRA abandoned millions of workers once the Department of Labor used its authority to interpret the law.

For example, simply by combining all workplace establishments in the United States owned by one enterprise, even a small business was now excluded. In addition, a gaping hole was left for millions of other workers who were characterized as "health care providers" and "emergency responders." For example, FFCRA stated that for purposes of expanded FMLA, the definition of "health care provider" would be the same as the FMLA statute, as passed in 1993, which is rather expansive to include anybody who provides medical diagnosis and can certify a condition qualifying under the FMLA.

Instead, the DOL came up with its own far-reaching definition that excludes anyone employed in any sort of medical facility, clinic, school, or even the hospital gift shop. A similar broad definition for emergency responders set the stage for further exclusion of millions of workers.

The documentation requirement, dictated by the IRS to support tax credits, also laid a heavy burden on workers in their time of need. As the result of the DOL's limiting and exclusionary interpretation, my first OMG moment was that this law will result in millions of workers pushed onto the unemployment rolls, shifting a burden to state systems rather than the intended shift to the federal government via tax credits.

Again, the FFCRA provisions fall short due to the DOL's interpretation. Under "basic" FMLA, employees are entitled to 12 weeks of leave per year. What looks like 12 weeks of expanded leave to care for children whose school or daycare has closed can in practice be cut short, or not provided at all, if the employee has used traditional FMLA in the prior year. If the employee has already used part or all of their FMLA entitlement, they can only access any part left of the 12 weeks. For many workers who had used FMLA for other reasons in the past year, they may not have enough expanded leave to carry them through the school year.

In the House debate on FFCRA in March, Representative Neal (D. Mass.) suggested the temporary, emergency paid leave (with dollar-for-dollar tax credits) will fall short. What is needed, according to Congressman Neal, is a permanent, not temporary, statute requiring employers to provide paid sick leave and other paid leave (such as to care for a family member) as proposed in the FAMILY Act. [2]

The FAMILY Act, according to the National Partnership**, would allow people to receive a portion of their pay when they need time away from their jobs for family or medical reasons—resulting in significant benefits for their families, businesses and our economy.**

We are reminded that both "presenteeism," where employees show up for work when they are sick, simply doesn't work. Now, watching the rampant spread of COVID-19 in meatpacking facilities and other food producers, if those workers had paid sick days, they would not be compelled to work and spread their illness.

It is not disputed that paid leave actually reduces health care costs because employees don't spread their illness to others, including co-workers. New parents would be able to take time not only to bond, but to breastfeed newborns, and again ultimately decrease health care costs for family plans. There are risks associated with workplace safety and strain on the employee's mental health fearing loss of job if they have to stay home due to sickness. I could go on and on.

As one friend said, we don't want to go back to normal but instead we need to create a new normal. This global health crisis reminds us, in the USA and representing workers in unions, that we should be manufacturing the hell out of medical equipment and not be outsourcing our national health system, including prescription drugs, to foreign producers.

NOTES

1. https://www.congress.gov/congressional-record/2020/03/13/house-section/article/H1675-9
2. https://www.nationalpartnership.org/our-work/economic-justice/family-.act.html

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Joan Hill is a Labor Educator on staff with the United Steelworkers International Union.

Defending Workers' Health and Safety—State by State

BY FRAN SCHREIBERG

The Guild's Labor and Employment Committee has joined with Worksafe, an organization that has advocated for worker safety for decades, in petitioning California's Occupational Safety & Health Standards Board (a quasi-legislative administrative agency) to adopt an emergency temporary COVID-19 safety standard. California has its own state plan, as do about half of the states, and can issue its own regulations or standards as long as those are "as effective as" ones issued by Federal OSHA. Unfortunately, Federal OSHA has done nothing to protect workers from COVID-19, so the field is wide open.

California has an Injury and Illness Protection Program regulation (8 CCR § 3203) already in place, which the Division of Occupational Safety & Health (DOSH or Cal/OSHA) is using, along with several other regulations, as its enforcement mechanism. A more specific regulation would, however, help workers and management to make workplaces safe as folks return to work.

The California program has been a trailblazer with respect to protecting workers from infectious diseases, including novel pathogens. As an example, it has adopted the only workplace safety standard in the nation for the aerosolized transmitted diseases to which health care workers (and select other workers) are exposed.

Getting it to adopt that standard did not just happen, of course—it took sustained pressure from both Worksafe and the labor movement to bring it about. But it did—while OSHA, which has been considering the AFL-CIO's demand for adoption of a standard covering employers' responsibility for dealing with infectious disease in the workplace since 2010, has still not adopted a standard. On the contrary, one of the first acts of the Trump Administration was to halt OSHA from pursuing the Obama Administration's proposal for developing workplace standards for responding to infectious diseases.

The need for the states to take the lead in protecting workers health and safety has therefore never been more urgent. OSHA has been largely missing in action when it comes to responding to the COVID-19 pandemic, relying on the CDC's non-binding guidances for protecting worker safety

and public health and refusing to develop any binding safety standards of its own. OSHA and the Department of Labor have largely ignored the AFL-CIO's demands that OSHA adopt an emergency temporary standard and are now fighting the AFL-CIO's petition for a writ of mandamus to compel OSHA to do so. (You can find the AFL-CIO's petition at https://www.bloomberglaw.com/public/desktop/document/InreAmericanFederationofLaboraDocketNo2001158DCCirMay182020CourtD?1590003355.)

We expect to receive a more positive response from Cal/OSHA. We have submitted a proposed draft of a regulation that requires, among other things:

- Procedures to identify and evaluate COVID-19 workplace hazards, including scheduled periodic inspections;
- Procedures to control the hazard (engineering controls, work practices, PPE, etc.);
- Requiring employers to respond to positive test results by (i) immediately sending employee home or instructing the employee who is already at home to stay home, until a medical provider authorized return to work; (ii) implementing work policies that do not penalize workers for missing work as a result of being diagnosed by a physician with COVID-19; (iii) written notice within 24 hours to all employees who may have been exposed to the employee with a physician confirmed diagnosis of COVID-19; and (iv) immediately closing and deep cleaning all areas, surfaces and equipment that may have been in contact with the diagnosed employee; and
- Undertaking a Job Hazard Analysis to identify modes of transmission and adopt and implement feasible preventive measures to minimize transmission risk, including (i) specific measures to assure social distancing; (ii) ventilation systems to reduce airborne exposure to Covid-19, (iii) personal hygiene and workplace maintenance measures to reduce exposure to Covid-19; (iv) PPE, including appropriate respirators with appropriate training and fit testing; (v) employee training and (vi) appropriate recordkeeping and reporting.

Our petition can be found on the Labor and Employment Committee's website at https://www.nlg-laboremploy-comm.org/OSH_Occup_Safety_Health.php.

The petition was filed May 21 and was referred to Division staff for evaluation. We are urging the Division to favorably report back to the Board and include suggestions for final language.

The Board by law must make a decision no later than six months following receipt of a petition, but we are urging sooner action as workers will face severe consequences if the economy re-opens and they are not protected. If Cal/OSHA recommends proceeding and the Board agrees, next steps often involve either the Board or Cal/OSHA convening an advisory committee of labor, management and persons knowledgeable in the subject to review the petitioner's proposal. The committee may then develop a proposed standard which is scheduled for public hearing or the Advisory Committee may recommend that no new regulation is needed. Again, we hope that the regulatory language provided will move the process forward more quickly.

The monthly California Occupational Safety & Health Standards Board includes a time for comments at the beginning of each meeting. Unions and community groups, on behalf of all workers, will be permitted to speak and it will be helpful to have organizations support the petition and ask for a quick favorable response. The next monthly meeting is on Thursday June 18 and remote participation will be available. Worksafe is working overtime to get as much public input as possible to support its petition.

Obtaining a COVID-19 regulation is only the first step, of course: it takes constant educating, organizing and agitating to make any standard meaningful. If you want to play a part in the campaign to get this regulation adopted by Cal/OSHA, please contact Maggie Robbins at Worksafe at mrobbins@worksafe.org. You can join in a discussion about the next steps we're taking in California by participating in the teleconference set for next Tuesday, June 9, 2020; contact Maggie Robbins for details.

If you are interested in pulling together a similar campaign in other states please contact your local COSH (Committee on Occupational Safety & Health); you can find a directory of State organizations at https://nationalcosh.org/sites/default/files/COSH%20Network%20Directory_2018_0.pdf.

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Fran Schreiberg has been an advocate for worker health and safety for years. She focused on legislative and regulatory advocacy in partnership with Worksafe and numerous labor unions, as well as providing technical assistance and training to workers and their representatives. She is now retired, which means she is working as a full-time volunteer on Working America's organizing and GOTV efforts.

Fixing a Broken Unemployment Insurance System—Starting from the Top

One of the more insidious features of the war against workers is the successful effort by ALEC and its allies to make the states' unemployment systems as unworkable and unfair as possible wherever they get their hands on state government. That serves two goals: (1) making life worse for working people and (2) making government programs both smaller and less effective, and therefore easier to drown in a bathtub.

The Sugar Law Center has been fighting for years against Michigan's "robofraud" program, a system installed to create fraud claims against legitimate UI claimants, usually without any evidence to support them. *Time Magazine* has recently taken notice of this battle (at https://time.com/5840609/algorithm-unemployment/). It is worth a read.

We are seeing the same story unfold in Florida, where Rick Scott's administration not only cut benefits, but designed the State's computerized claim system in order to make it unreasonably difficult for employees to receive benefits. And what is Scott saying now? That the emergency unemployment benefits authorized by the CARES Act in the wake of the pandemic are too generous.

The situations in Michigan and Florida may be especially bad, but they are not unique: states cut benefits sharply in the wake of the 2008 downturn and have frequently made it harder, not easier, to obtain benefits under their new computerized application processes. As a result the percentage of jobless workers surveyed by the Census Bureau who filed UI claims dropped from 51 percent in 2006 to 23 percent in 2016. And, with the overall economic contraction those states whose programs were already insolvent may be unable to continue paying benefits without substantial federal assistance.

We expect other austerity advocates to follow Scott's lead and call for further cuts after the election in those states that have not already hit rock bottom—and some that have—just as they did after the 2008 meltdown, when right-wing politicians (and some nervous centrists) and employers used the fiscal crisis to attack basic social benefits, from UI to school funding, while shifting wealth to the richest of the rich. They won that fight in most states that time and will be coming back for more in 2021.

We need to start addressing these problems at the federal level: imposing national standards for benefits, establishing a minimum 26 weeks of eligibility (unlike the 12 weeks that Florida provides) and setting minimum benefit floors for every state in order to halt the race to the bottom, and setting federal standards for state systems' responsiveness and accuracy. And, it goes without saying, substantial federal funding to help those states whose economies have cratered to make these changes.

BRINGING GIG WORKERS BACK INTO THE FOLD

California's New Law and Gig Employers' Resistance to It

by Amy Cu and Octavio Velarde

"Gig work" and "gig workers" are not new concepts—part time, temporary, and intermittent workers have been around for ages. Within the past decade, however, there has been a rise in delivery-fulfillment platforms, ride-hailing apps, and other technology platforms that connect workers to consumers. This growth has led to a staggering increase in the misclassification of "gig economy workers," as companies assert that they simply operate a technology platform to skirt the responsibilities incumbent with being an employer. In misclassifying workers as independent contractors, employers have deprived workers of their rights under wage and hour laws, anti-discrimination laws, workplace safety laws, unemployment insurance, workers' compensation, and protected leave provisions that workers and their unions have fought so hard to achieve.

Authored by Assemblywoman Lorena Gonzalez, AB 5 codified the "ABC test" for employee status that the California Supreme Court adopted in its landmark decision *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903. (Cal. Lab. Code §§ 2750.3, 3351; Cal. UI Code §§ 606.5, 621.) In contrast to relatively complicated multi-factor tests such as under *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, the ABC test starts with the basic ***assumption that workers are employees***. If the hiring entity seeks to veer from that assumption, then it must satisfy all three of the following conditions to justify classifying a worker as an independent contractor:

A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

B. The worker performs work that is outside the usual course of the hiring entity's business; and

C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.(*Id.* at pp. 916–917.)

Although the ABC test has been the law since the Supreme Court decided *Dynamex* back in 2018, AB 5, which largely went into effect on January 1, 2020, prompted a flurry of litigation in federal and state courts. In addition to codifying the ABC test, AB 5 also authorized the Attorney General and certain city attorneys and city prosecutors to file actions for injunctive relief to prevent employee misclassification. Thus, AB 5 litigation has been initiated by companies as well as by state and local government attorneys. The following cases are the first wave to watch:

Olson, et al. v. State of California, et al. C.D. Cal. Case No. 2:19-cv-10956

Uber and Postmates allege that AB 5 violates federal law (Equal Protection and Due Process Clauses of the 14th Amendment, the 9th Amendment, the Contracts Clause of Article I) as well as California law (Equal Protection Clause, Inalienable Rights Clause, Due Process Clause, Baby 9th Amendment, and Contracts Clause). The district court denied Uber and Postmates' request for a preliminary injunction on February 10, 2020, finding no likelihood of success on the merits. In coming to that conclusion, the court determined that AB 5 is rationally related to a legitimate state interest, did not target gig economy companies, does not deprive gig economy workers of the right to pursue their chosen occupation, and does not unconstitutionally impair Plaintiffs' contracts.

The court found no irreparable harm because the Plaintiffs insist that the ABC test would not affect drivers' employment status, so any irreparable injury based on costly business restructuring is speculative; the likelihood of irreparable harm is offset by the fact that Plaintiffs may still face private

enforcement actions under the 2018 decision in *Dynamex*, even in the absence of AB 5; and Company Plaintiffs could still offer flexibility and freedom to their workers if they classified them as employees.

In balancing equities and the public interest, the court stated:

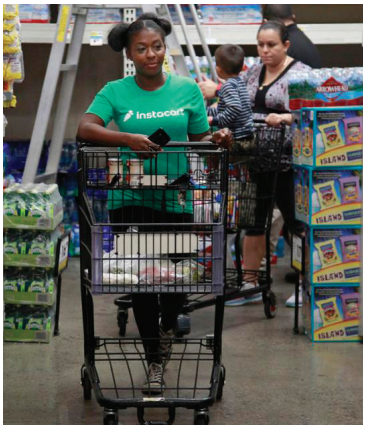
Considering the potential impact to the State's ability to ensure proper calculation of low income workers' wages and benefits, protect compliant businesses from unfair competition, and collect tax revenue from employers to administer public benefits programs, the State's interest in applying AB 5 to Company Plaintiffs and potentially hundreds of thousands of California workers outweighs Plaintiffs' fear of being made to abide by the law.

STATUS: Postmates and Uber filed an appeal to the Ninth Circuit on March 10, 2020. Respondent's brief is due July

6, 2020. The State moved in the district court to dismiss the case. On May 12, 2020, the district court found that the Motion to Dismiss the First Amendment Complaint is appropriate for decision without oral argument. Therefore, the district court vacated the hearing and the Motion is now under submission.

The People of the State of California v. Maplebear, Inc. San Diego Sup. Ct. No. 37-2019-00048731

This case was brought by the San Diego City Attorney against Maplebear, Inc. dba Instacart. The People allege that Instacart misclassified thousands of "Full-Service Shoppers" as independent contractors. "Full-Service Shoppers" gather and deliver groceries. Among the remedies requested is restitution for misclassified employees for unpaid wages, overtime, and rest breaks, missed meals, and reimbursement for expenses necessary to perform the work. The court granted the People's motion for preliminary injunction, noting that it is more likely than not that the People will establish at trial that "Shoppers" perform a core function of Defendant's business; that they are not free from Defendant's control; and that they are not engaged in an independently established trade, occupation or business. The court stated:



The policy of California is unapologetically pro-employee (in the several senses of that word). *Dynamex* is explicitly in line with this policy. While there is room for debate on the wisdom of this policy, and while other states have chosen another course, it is noteworthy that all three branches of California have now spoken on this issue. The Supreme Court announced *Dynamex* two years ago. The decision gave rise to a long debate in the legal press and in the Legislature. The Legislature passed AB 5 last fall. The Governor signed it. To put it in the vernacular, the handwriting is on the wall.

STATUS: Under appeal. *The People of the State of California vs. Maplebear, Inc.*, Docket No. D077380 (Cal. Ct. App. Feb 26, 2020). Although the trial court granted the People's motion for preliminary injunction on February 18, 2020, it issued a stay on the preliminary injunction pending resolution of Instacart's appeal.

California Trucking Association v. Becerra S.D. Cal. Case No. 3:18-cv-02458.

The California Trucking Association alleges that AB 5 is preempted by the Federal Aviation Administration Authorization Act. The district court found that applying AB 5 to truck drivers would regulate prices, routes, and services, which is preempted by the FAAAA. Although the Teamsters moved for an emergency stay, the Ninth Circuit denied the request on March 31, 2020. The case is stayed until the Ninth Circuit hears the preemption issue.

STATUS: The case is currently on appeal before the Ninth Circuit. *CTA, et al. v. Xavier Becerra, et al.* Docket Nos. 20-55106; 20-55107. The appeal from preliminary injunction is still pending. Oral argument before the Ninth Circuit is set to be scheduled for the next available calendar date, which is likely in September 2020.

American Society of Journalists and Authors v. Becerra C.D. Cal. Case No. 2:19-cv-10645

Journalists allege that AB 5 unconstitutionally impinges on their free speech rights. The journalist association challenges the AB 5 exemptions under the First Amendment and Equal Protection clause. The district court granted the State's motion to dismiss and granted Plaintiffs leave to amend.

STATUS: Under appeal before the Ninth Circuit. *American Society of Journalists v. Becerra*, Docket No. 20-55408 (9th Cir. Apr 17, 2020). Plaintiffs failed to file an amended complaint in the district court and on May 27, 2020 the State of California moved to dismiss the case.

Western States Trucking Association v. Becerra C.D. Cal. Case No. 5:19-cv-02447

Similar to the *California Trucking Association* case, the Plaintiffs allege that the FAAAA preempts AB 5 from barring subcontracting by construction trucking enterprises. The district court dismissed the action on ripeness grounds but stayed the Order until June 18, 2020 to allow the Plaintiffs the opportunity to file a First Amended Complaint.

Williams, Weisberg & Weisberg v. State of California Sacramento Sup. Ct. No. 34-2020-00273530-CU-MC-GDS

A court reporter services corporation alleges that its contractors with state and federal courts are not employees. Plaintiffs seek declaratory relief under the Equal Protection clause of the California constitution.

STATUS: The hearing on the demurrer previously scheduled for May 4, 2020 has been rescheduled for July 8, 2020.

California v. Uber Technologies, Inc. San Francisco Sup. Ct. Case No. CGC20584402

The State, joined by the City Attorneys of Los Angeles, San Diego and San Francisco, seeks restitution for unpaid wages it says are owed to drivers and requests that the court force the companies to immediately classify their drivers as employees.

STATUS: Case Management Conference scheduled for October 7, 2020.

The challenges to AB 5 extend beyond the courtroom. Uber, Lyft, and DoorDash filed a ballot initiative called the Protect App-Based Drivers & Services Act, which would establish

criteria different than the ABC test for determining whether app-based transportation and delivery drivers are employees. The ballot initiative would also require companies to provide their independent contractor drivers with "specified alternative benefits." The campaign has qualified the initiative for the 2020 November ballot.

Indeed, the legal landscape surrounding AB 5 is constantly evolving. Beyond California, just a few months ago in February 2020, the House of Representatives passed the Protecting the Right to Organize Act (PRO Act), to amend the National Labor Relations Act so that the ABC test for employees is implemented on a federal level. Although the Senate is not expected to take up the bill during this legislative session, the passage of the PRO Act shows that these important conversations are taking place to pave the way for workers to exercise their rights as employees to organize without fear of contradictory federal law.

Also, in February, part-time Instacart in-store shoppers voted to unionize in Skokie, Illinois—the first Instacart employees to win a certified union election in the United States.

And in March the Third Circuit Court of Appeal overturned a grant of summary judgment and found that Plaintiff UberBLACK drivers raised genuine disputes of material facts in support of their classification as employees under the Fair Labor Standards Act. (*Razak, et al. v. Uber Technologies, Inc.* (3d Cir. 2020) Case No. 18-1944)

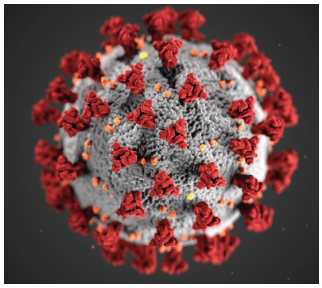
AB 5 is especially salient now because of COVID-19. The need for sick leave benefits, workers' compensation, disability insurance, and unemployment are more critical now than ever. Under AB 5, employees who have been especially vulnerable to misclassification, such as gig workers, janitors, maids, retail workers, grounds maintenance workers, and childcare workers, are presumptively entitled to these much-needed protections. Due to the pandemic, the use of delivery-fulfillment platforms has skyrocketed as the demand for services such as contactless delivery of food and grocery items has surged. With stay-at-home orders in place, these workers are on the frontlines, exposing themselves to dangerous conditions in order to make ends meet—but without the assurance of basic benefits from the entities that hired them.

Yet, rather than acknowledge their responsibility to provide their workers with the rights and benefits associated with status as an employee, some delivery-fulfillment platform companies have used the pandemic as an opportunity to reinforce the alleged need to classify their workers as independent contractors to provide "flexibility."

While the debate regarding classification continues, interim measures have been put into place to assist gig economy workers. For example, Governor Newsom has issued Executive Order N-51-20, which provides 80 hours of supplemental paid sick leave for food sector workers at companies with 500 or more employees. The Executive Order covers individuals defined as "Food Service Workers," including workers who deliver food from a food facility for, or through, a "Hiring Entity." The Executive Order specifically defines "Hiring Entity" to include delivery network companies and transportation network companies. Thus, importantly, the Executive Order provides supplemental paid sick leave to many gig workers without the restraints of contentious employee/employer terminology.

Although the CARES Act expands unemployment benefits to include independent contractors for up to four months through the Pandemic Unemployment Assistance (PUA) program, gig workers are still having a hard time collecting unemployment. For example, D.C., Maryland, and Virginia did not update their online applications to accommodate self-employed persons until the end of April. And in California, according to the state Legislative Analyst's Office, app-based drivers are expected to be among the last to receive unemployment assistance due to misclassification issues that make employment verification difficult.

Overall, AB 5 has created a momentum and energized workers to use their collective voice to improve their working conditions. Its enforcement is pertinent now more than ever given the precarious circumstances workers are facing today. As the initial wave of cases makes its way through the court system and as voters cast their ballots in November, we will surely hear more about AB 5 in the months to come.



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CUBA'S CURRENCY DILEMMA— March, 2020

by Matthew Rinaldi

Two Different Cuban Pesos

In early March of 2020 a delegation from the National Lawyers Guild travelled to Cuba to attend the annual conference with the National Union of Cuban Lawyers. Unfortunately Cuba had to postponed the conference as part of its effort to decrease the anticipated spread of Covid-19. However, we did meet in smaller groups with Cuban lawyers and stayed in casa particulares, private homes licensed to rent space to visitors. This allowed for deep immersion into Cuban society.

First time delegates found themselves perplexed by the continued use of two different peso currencies. Like most economic distortions in Cuba, the problem of dual currencies can be traced to the impact of the United States blockade of the island. The use of two currencies has created unintended and unanticipated problems for the Cuban economy.

Cuban workers in the State sector of the economy are paid in the national currency ("moneda nacional") known by the acronym CUPs. Upon entering Cuba in March, foreigners were required to change their currency into Cuban Convertible Pesos, known by the acronym CUCs. Once within Cuban society, visitors learn to pay for housing, restaurants, tips, tourist cabs and most tourist attractions in CUCs. Cubans working in tourist-related enterprises and many of the self-employed acquire CUCs. At any Cuban currency exchange, each CUC is worth 24 CUPs.

How did this contradiction develop?

The revolution in 1959 inherited a Cuban peso tied to the dollar economy. With the rupture between the Cuban revolution and the United States, including U.S economic sanctions and the Bay of Pigs invasion, Cuba demonetized the pre-revolutionary peso and introduced a redesigned peso. All of these pesos were CUPs. Cubans on the island had a relatively brief opportunity to exchange the old currency for the new. Many emigres in Florida who were still holding old pesos in cash saw their value extinguished.

The new CUP pesos carried images of Cuba's wars of revolution and independence, retaining Jose Marti on the one peso note, with an image of the 1959 rebel column entering Havana on the reverse, Antonio Maceo and Maximo Gomez on the 5 and 10 peso notes and Camilo Cienfuegos on the 20 peso note. Early CUP pesos were signed by Che Guevara, who was President of the National Bank of Cuba for slightly over a year.

Cuba ultimately confronted the U.S. blockade by joining the Soviet economic trading bloc, and the new CUP pesos became Cuba's currency within the Soviet Council for Mutual Economic Assistance, or COMECON. A period of relative currency stability stretched for decades, but ended with the collapse of the Soviet Union. Financial assistance from the Soviet Union and trade with the Soviet bloc declined precipitously between 1989 and 1991, cutting off critical financial transactions and sending Cuba into a spiraling economic decline known as the Special Period.

The Cuban peso was worthless in the now dominant U.S. world economic bloc. Cuba faced a shortage of hard currency and a desperate need for international trade after the collapse of the Soviet Union.

Anti-revolutionary forces within the United States, seeing this crisis, were quick to act. Their goal was to wreck what remained of the Cuban economy. The Torricelli Bill of 1992, also known as the Cuban Democracy Act, openly called for regime change in Havana and imposed severe sanctions on companies and countries throughout the world conducting trade with the Republic of Cuba. It is this imposition of sanctions on other sovereign nations which transforms the U.S. "embargo" into a true "blockade" (or "el bloqueo" as it is known in Cuba.)

The Cuban government initiated dramatic changes to overcome the economic crisis. In one major policy change the island was thrown open to tourism, with the hotels and rental homes at the fabled beaches of Veradero converted to use by foreigners. Though U.S. tourists were prohibited from visiting Cuba by U.S. law, Canadians came to the beaches in the hundreds of thousands during the winter months and Europeans started to fill the hotels of Havana and other major cities.

In 1994 the use of the U.S. dollar in Cuba was legalized and visitors freely used the dollar for purchases. At the same time, Cuba issued an early version of the CUC, with statues of revolutionary heroes on the obverse and the colorful national emblem of Cuba on the reverse to distinguish them from CUPs. The idea was to efficiently harvest the hard currency brought to the island by visitors. The CUCs were not well received by Cubans at first, who in that period generally preferred payment in dollars, but the boom in tourism and

Cuba *continued*

the use of the dollar as an accepted currency on the island allowed Cuba to increase its supply of hard currency for use on the world markets.

The U.S. goal remained the destruction of the Cuban socialist economy. To further tighten the blockade in 1996, the United States passed the Helms-Burton Act. It authorized legal action against any non-U.S. companies doing business with Cuba, opposed Cuba's membership in any international financial organization and authorized legal action against any financial institution exchanging dollars with Cuba. The Clinton-era goal was to strangle the Cuban economy. (The Helms-Burton Act at Title III also allows U.S. nationals to sue Cuba in U.S. courts for "trafficking" in property confiscated after the revolution. Title III required Presidential activation, which did not occur until Trump activated Title III in 2019.)

As Cuba began to climb out of the Special Period in 2000, the Bush administration intensified its financial attacks. Starting in 2004, the limits on fines which the U.S. could impose on foreign banks doing business with Cuba was raised dramatically, with a fine of $100 million assessed against the Swiss Bank USB for transferring U.S. dollar notes to Cuba. USB terminated its transactions with Cuba and paid the fine rather than risk its business operations in the United States.

Cuba responded immediately in 2004 by suspending all use of the U.S. dollar in the internal economy. A newly designed series of CUC notes was introduced, with newly added anti-counterfeiting features. New CUPs were also issued with anti-counterfeiting features, including an image of Celia Sanchez visible only if the bill is held up to the light. Possession of dollars or other hard currency by Cubans was not prohibited.

Impacts of the Dual Currency

The number of visitors to Cuba from the United States rose sharply after 2014, when President Obama announced the first steps toward an anticipated normalization of relations between the two countries. This step was taken by Executive Order, with no supportive legislation from Congress. Further Executive Orders eased travel restrictions on U.S. citizens visiting Cuba, particularly for Cuban-Americans, increased the amount of money U.S. citizens could bring to and spend in Cuba and removed the limits on the amount of remittances Cuban-Americans could send to their relatives on the island.

Because these actions were taken by Executive Orders, most have been easily reversed by Donald Trump through his own Executive Orders. Popular "people to people" trips were discontinued, as were flights to any airport other than Havana. Trump also imposed limits on remittances to Cuba from Cuban-Americans. The years from 2014 to 2019 saw a large increase in the flow of dollars from the United States to Cuba, including funds flowing to the newly self-employed.

Visitors in that period quickly saw the impact of the CUC. The increased arrival of U.S. dollars was impossible to ignore. New restaurants were constructed on empty lots, financed by money sent as remittances. Some argue that restaurants with CUCs crowded out the food market for the best products. Many Cubans transformed their homes to make them more attractive to visitors

Income inequality grew within a society which took pride in providing for all its citizens. The demographics of those visiting Cuba and those sending remittances are not the same as the demographic of Cuban citizens, with remittances in particular flowing disproportionately to white-skinned Cubans. Afro-Cubans feel the most pain from the growth of systemic inequality.

When CUCs were first introduced, efforts were made to utilize them to harvest hard currency from tourists while maintaining social equality in civil society. A ticket for a baseball game, for example, might be 3 pesos. A Cuban citizen would be charged 3 CUPs while a tourist would be charged 3 CUCs, thus using a fixed price to charge an appropriate additional amount for visitors. This benefited the budget of the public sector. But an additional long-term impact of the CUC has been to reward those Cubans who can obtain them.

An additional impact of the dual currency dilemma is virtually invisible to foreign visitors. The exchange rate of CUCs to CUPs utilized within the system of socialist state enterprises distorts the statistics generated within the Cuban economy. According to Juan Triana Cordovi of Havana University, "The entire state sector operates with the rate of 1 CUC equal to one CUP. Here the Cuban peso is overpriced and it is a harmful exchange rate for the efficiency of the state sector." Yet the exchange rate between other sectors is not the same. Hotels and food suppliers use an exchange rate of 1 CUC to 11 CUPs, and the exchange rate at the port of Muriel has varied from I CUC equals 10 CUPs to 1 CUC equals 2 CUPs.

Professor Triana goes on to note, "In my opinion, the most strategic measure would be to unify these exchange rates and conversion factors within the socialist state business sector. This is the dominant sector that employs over 3 million workers and produces 85% or more of the national economy. Today, because of the distortion in the rate of exchange, it

is impossible to know who operates efficiently and who does not." (see On Cuba magazine, May 13, 2016.)

This distortion becomes more complex when Cuba engages in foreign trade. If it sells Cuban-made products overseas, those products sell for hard currency, the domestic equivalent of CUCs. But if the raw materials necessary to manufacture that product are provided to the enterprise with a CUP valuation, how then are the proceeds distributed? Typically the enterprise receives a share of the hard currency proceeds in CUPs, with the excess value utilized to provide for the social services of the state economy. This helps alleviate income inequality, but it makes it almost impossible to determine the efficiency of the state sector.

Plans for a Unified Currency

Discussion about unifying the Cuban peso currencies began in earnest at the Party Congress in 2011. In October of 2013 the government announced that the council of ministers had approved a timetable for implementing measures "that will lead to monetary and exchange unification." The announcement anticipated a gradual process, but there was mention of an 18 month transition. That timetable has been considerably delayed, but it has been decided that the CUC will be completely eliminated and the sole Cuban peso will be the CUP.

There are many Cuban economists who argue that the key issue is the rates of exchange between the CUC and the CUP within Cuban state enterprises. Clearly, if there is one unified currency there is no economic distortion cause by the rates of exchange. The dual currency has been identified as causing a major distortion of the economy and described by Raul Castro in 2016 as "one of the most important obstacles to the progress of the nation."

The process of change was accelerated after Miguel Diaz-Canel become President of the Cuban Republic in 2017. Internal rates of exchange within state-run enterprises were being equalized. As the editor of Cuban Foreign Trade expressed, "The unified currency will be the old good Cuban peso. The key point in the transition is the rate of exchange. It has to be unified, correctly funded, encouraging for exports and exporters. It should be the same for individual affairs, retail prices and for business transactions, state or private, export and import. Never again the present multiple rates."

Steps to eliminate the CUC were apparent in early March while the NLG delegation was in Cuba. While foreign visitors still exchanged hard currency for CUCs, many enterprises gave change only in CUPs and some enterprises, particularly state-run restaurants, were only accepting payment in CUPS.

According to Cuban economist Carlos Manuel Menendez, "The process to eliminate the CUC has been long, perhaps too long, but in recent times it has been accelerated. Even during this pandemic, a number of the larger CUC stores were added to those which only gave CUP change, and it was confirmed that gradually all stores would make that transition."

This process was confirmed when this delegate flew out of Havana on March 12th. While I was able to pay for the taxi to the airport with CUCs, once inside the airport the CUCs had no value. I was able to buy food and a book only with CUPs or hard currency.

As Carlos Manuel Menendez concluded, "Undoubtedly, a slow and not sensational path has been selected to kill the CUC. It will die honorably."

This process will have advanced by the time Cuba is able to reopen its borders to visitors.

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Matthew Rinaldi is a member of the Guild's Bay Area Chapter and active in the Military Law Task Force and other Guild work.

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