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Invited Testimony Related to TNCs Before the House Business and Labor Committee Elizabeth Inayoshi September 25, 2018

Chairman Holvey, members of the Committee, thank you for the opportunity to testify regarding whether Transportation Network Company workers should be classified as independent contractors under the law. My name is Elizabeth Inayoshi, I am an attorney from Hillsboro, Oregon. I represent employees in employment matters, and I assist small business owners in setting up their businesses, including advising them on how to set themselves up to be great employers. I am a member of the Oregon Trial Lawyers Association (OTLA) – we are the lawyers who fight for underdogs. And today I am fighting for workers who are denied proper wage and statutory protections due to misclassification. My testimony today is on behalf of OTLA.

I. CRITERIA FOR INDEPENDENT CONTRACTORS IS SET BY LAW

A worker's status as an independent contractor is not set by the employer or the employee, not even by contract or the business entity that the worker sets up, but by law, both statutory and case law.

a. Statutory Law

Oregon defined independent contractors by statute in 2006¹. It establishes that an "Independent contractor" is a person who provides paid services for remuneration and who, in the provision of the services:

1. Is free from direction and control over the means and manner of providing the services,
2. is customarily engaged in an independently established business;
3. is licensed if a license is required and
4. is responsible for obtaining other licenses or certificates necessary to provide the services.

The statute further sets out multiple criteria for how to determine whether a person is considered to be customarily engaged in an independently established business, including:

1. maintaining a separate location,
2. bearing the risk of loss related to the business or provision of the services,
3. contracting with 2 or more different persons within a 12-month period or routinely making efforts to obtain new contracts to provide services, and

¹ [Or Rev Stat Ann § 670.600 \(LexisNexis\)](#)

4. **having the authority to hire and fire other persons to provide or assist in providing those services.**

The statute specifically indicates that the creation of a business entity by the person providing the services does not by itself establish the status of the person as an independent contractor.

b. Case Law

The Oregon courts support the position that a worker is presumed to be an employee unless the employer – not the worker – proves that the worker is an independent contractor.² In Oregon, all four of the criteria set out in ORS 670.600 must be satisfied for the test of an independent contractor to be met.³ As early as 1947, the U.S. Supreme Court determined that when work was an integral unit of production and “follows the usual path of an employee”, the workers who did that work were employees of a company, not independent contractors.⁴ In a case involving cab drivers where the conditions of employment clearly parallel those of the TNC drivers, the Oregon Supreme Court specifically found that cab drivers’ vehicles were not business locations separate from the business or work location of their employer⁵ and that the drivers’ contracts precluded other persons not approved by the employer to drive for the employer⁶. Consequently, by failing to meet a single criterion – maintaining a separate business location-- the drivers did not meet the criteria to be independent contractors.⁷

II. TNC DRIVERS DO NOT MEET THE LEGAL CRITERIA OF INDEPENDENT CONTRACTORS

Although the TNC’s claim their drivers are independent contractors, those drivers do not meet the criteria of independent contractors under either Oregon statutory or case law:

a. Do Not Have Freedom from Direction and Control

TNCs point at a driver’s ability to choose the hours of work to demonstrate that the drivers are free from direction and control by the TNC. Many employees have flexible work hours. Granted these are often professional employees who can choose to come in late, leave early, work from home as long as their work is completed satisfactorily – but for all that flexibility they are still employees.

In the same way, the TNC driver’s choice of hours is not sufficient to show freedom from direction and control by the TNC’s over the means and manner of providing the services. When we look at who controls the key means and manner of providing these ride-for-hire services, the TNCs clearly control and direct the work of the drivers. TNC drivers cannot control the choice of customer or the price they charge; they cannot set or even negotiate the contract under which they work, including the amount they are paid for their work; the drivers have to pass an employer-designated background check before they can provide service; and the employer defines the minimum standards for their cars.

To get riders, the driver must use the application that the TNC provides – and the TNC can cut off access to that application at will. The TNC sends drivers the rides they can pick up, cuts drivers off from receiving any rides if their customer ratings fall below a very high bar, controls the number of drivers

² *ACN Opportunity, LLC v. Emp’t Dep’t*, 362 Or 824, 826-27, 418 P3d 719, 720-721 (2018)

³ *Broadway Cab LLC v. Emp’t Dep’t*, 358 Or 431, 443, 364 P3d 338, 344 (2015)

⁴ *Rutherford Food Corp. v. McComb*, 331 US 722, 729, 67 S Ct 1473, 1476, 91 LEd 1772, 1778 (1947).

⁵ *Broadway Cab LLC*, 358 Or at 446 (2015)

⁶ *Id* at 447 (2015)

⁷ *Id* at 448 (2015)

who receive rides in a given area to sustain “surge” pricing, even though some drivers may remain riderless at that same time. **The TNC, not the driver, has control and direction of the driver.**

b. Are Not Customarily Engaged in An Independently Established Business.

In general, drivers are people who need income, need some flexibility in their work schedule, and take these jobs because (a) the application process is minimal; (b) the barriers to entry – passing a background check, having a clean driver’s license, having a suitable car—are relatively low; and (c) they can get to work and be paid fairly rapidly. However, contrary to the criteria set by statute:

- **Do Not Have a Separate Business Location:** Drivers do not have a business location separate from the person for whom the services are provided – **they have no home office, they rent no office space -- they drive a car**, without which Uber and Lyft would not have a service to provide.
- **Do Not Bear Risk of Loss:** Drivers do not bear the risk of loss related to the business or the provision of services:
 - They do not get to set the price they charge the riders
 - They do not get to negotiate the wage they receive from the TNC
 - **They do not share in the profit and loss of Uber or Lyft – they simply get paid for their services, with the wage depending on how many rides Uber or Lyft gives them.**
- **Do Not Have “Multiple Contracts”:** TNC drivers point at the fact that they do not prohibit their drivers from working for competitive services as proof that their drivers contract with 2 or more persons within a 12-month period as the statute requires. Drivers may be hired by more than one of these TNCs, but not in the sense that the law means– such as contractor with a construction business who multiple customers hire during a year to do different projects.

TNC drivers are not hired by different people to do different projects. A TNC – or even two competing TNCs – will hire drivers to provide rides for hire on an ongoing basis. Many people work multiple jobs to make ends meet and can be an employee in all the companies for which they work. **Even if the worker provides the same or similar services to more than one employer – even employers who may be competitors -- that does not make the worker an independent contractor.** For example, many people in retail are able to get only part time hours from a given employer. If a person is a sales clerk for Target during the day, and runs a cash register at Safeway at night, would that worker be less of an employee for either company just because he/she has a second job? Of course not. **In the same way, a TNC driver who has a second job with a second TNC is still an employee, not an independent contractor.**

Even though drivers may work for a TNC only temporarily, the drivers are still employees not independent contractors. Granted, temporary workers in other industries may or may not be independent contractors, depending on the nature of their work, but true independent contractor’s work differs from TNC drivers’ work in a critical way: if the worker provides services that are not part of an employer’s business -- for example, a plumber or an electrician called in to do repairs on an employer’s building -- the worker usually works for his or her own company or for another outside company that provides such services and would not be an employee of the business needing the service. But the TNC drivers’ services are in no way analogous to a plumber or electrician.

If the worker is supporting a core aspect of an employer's business, the likelihood is that the worker is an actual employee. TNCs like to say that they are not a taxi service, that they simply provide a software platform that drivers can access to acquire riders. This is a disingenuous claim. They do not sell the drivers an app that they can use independent of Uber or Lyft. This claim tries to ignore **that without drivers and riders, the TNCs would have no income and no business at all. TNC's core business is providing rides for hire and their drivers provide that core service of the business, not a service incidental to software development.**

- **Do Not Make a Significant Investment:** The TNC drivers also do not make a significant investment in the business – most drivers use a car they already own, they are not going out and getting a driver's license because they already have one, and they have no other "premises" than the car itself. This is in contrast to the extraordinary investment the TNCs make in their software application, marketing, and lobbying.
- **Do Not Have the Authority to Hire Staff:** The TNC drivers cannot hire other people to perform the services that the TNCs hired the drivers to do. When a driver is contracted with the TNC, the contract is exclusive to that driver. Presumably a driver could buy a bunch of cars, organize a bunch of drivers for those cars and have them get themselves approved by Uber or Lyft – but Uber and Lyft decide whether those drivers drive for Uber or Lyft. Uber and Lyft track their performance. And Uber and Lyft can turn off any driver's access without the permission of the driver who recruited them. The recruiting driver would have no authority to control the work of any other driver hired to drive under the Uber or Lyft umbrella.

III. DESIGNATING TNC DRIVERS AS I/C'S HARMS DRIVERS, LAW-ABIDING EMPLOYERS AND THE STATE

The TNCs know that their drivers do not meet the criteria to be considered independent contractors in Oregon. The TNCs therefore want the states to change the law and legislate that the TNC drivers are independent contractors because **that designation benefits the TNCs hugely from a financial perspective**, as they pay none of the statutorily-required employment taxes or insurance for their employees.

However, **legally declaring these drivers to be independent contractors also hugely disadvantages the drivers since they then have none of the safety net protections that the law mandates for employees:** minimum wage, overtime and other wage and hour laws; occupational safety and health law protections; unemployment benefits if they lose their job; **workers compensation if they are injured on the job**; Oregon Family leave and Federal Medical Leave for serious illness, Oregon Sick time for normal illness; payment of half the employment taxes by their employer; protection of the Employment Discrimination laws and the collective bargaining laws. In addition, drivers are stuck with their own operating, maintenance, and repair costs contrary to OAR 839-020-0020 (which prohibits deducting from an employee's wages the cost, maintenance, breakage or loss of tools and equipment), and stuck paying the employers 7.5% of the employment taxes.

Declaring these workers as independent contractors also hugely disadvantages the state through lost tax revenue, ranging from millions to tens of millions of dollars.⁸ Oregon has experienced these same

⁸ "Around the country, academic and government reports have measured the impact of misclassification on state tax revenues or unemployment insurance funds and found sizeable deficits. ¹⁴ For example,

losses. Per the Oregon Legislature's Employment and Labor Background Brief "the Oregon Employment Department audits in 2016 identified 3,400 misclassified workers and \$20,237,668 in unreported payroll." ⁹

Allowing some companies to improperly classify their employees as independent contractors disadvantages law-abiding companies, since compliant companies absorb costs that violators do not absorb, putting the compliant companies at a competitive disadvantage.

Last, but certainly not least, legally designating one type of company's workers as independent contractors -- when those workers clearly should be designated as employees and receive all the statutory protections of employees -- will just encourage more employers to seek the same dispensation. And the state would then have a hard time arguing against the bad precedent it had set, causing more and more workers to lose the protection of the employment laws.

The designation of TNC drivers as independent contractors is contrary to the criteria established by Oregon law and harms drivers, compliant employers, and the state, benefiting only the bottom line of the TNCs.

IV. THE INDEPENDENT CONTRACTOR LAW IMPROVEMENT

The existing independent contractor law, however, suffers from weaknesses. Oregon's independent contractor statute is needlessly complex. In addition, many of Oregon's employment statutes define employees slightly differently from each other, which in turn helps cloud the definition of an independent contractor. This gives companies the opportunity to take advantage of minor differences and phrases to use the I/C designation improperly, as the TNCs have done. Equally important, the statute has no real enforcement mechanism.

a. **Needless Complexity.** First, Oregon's independent contractor statute is needlessly complex and provides unintended loopholes through which employers can slip. Oregon's standard is a variation on a

Colorado's labor and employment agency assessed that an imposing \$ 167 million in income tax revenue had gone unpaid annually between 2009 and 2010. ¹⁵ A policy center focused on Maine's construction industry estimated its state income tax shortfall for the construction industry alone could be as high as \$ 4.3 million per year. ¹⁶ An analysis of 2002 to 2005 audits of the New York Department of Labor's Unemployment Insurance Division revealed an annual average of more than \$ 175 million in underreported taxes to the state's unemployment insurance fund. ¹⁷ Additionally, a state-funded task force in Maryland estimated that the state had lost as much as \$ 20 million in contributions to its trust fund annually." Article: ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. Pa.J.L. & Soc. Change 53 (2015).

⁹ Employment and Labor Background Brief: Worker Classification (January 10, 2018), State of Oregon Legislative Policy and Research Office, p.2, quoting from the Interagency Compliance Network Report to the Oregon Legislature (April 2017), https://www.oregonlegislature.gov/citizen_engagement/Reports/2017%20ICN%20Legislative%20Report_2017_04%20FINAL.pdf, p. 8, accessed September 21, 2018.

popular simplified standard called the "A-B-C standard" used by many states¹⁰. The ABC standards uses three broad criteria:

- a. The worker is free from control and direction over performance of the work, both under the contract and in fact;
- b. The work provided 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.¹¹

Like the Oregon statute, under this standard, an employer bears the burden of proving that a worker is an independent contractor and if an employer fails to prove even one of the factors, the worker is considered an employee. However, a key difference between this standard and the Oregon standard is the second criteria: that the work provided is outside the usual course of the hiring entity's business, a criterion which Oregon's statute lacks. That criterion alone would end the debate about whether a TNC driver is an independent contractor, because the work the drivers provide – rides for hire -- is clearly in the usual course of the TNC's business. But because the Oregon law is more complex, the answers are not so readily apparent.

In addition, Oregon has multiple different definitions of employees.¹² The previously-quoted Interagency Compliance Network Legislative Report noted that Oregon law has multiple definitions of employees that apply to different programs and agencies, and that settling on single definition might create disconnects with federal law counterparts.¹³ It also noted that different authorities interpret the laws differently, with the example that the Court of Appeals has found workers to be independent contractors in four separate cases where the Oregon Employment Division found the workers to be employees.¹⁴ Even law-abiding employers have difficulty determining whether a worker can be legally classified as an independent contractor, even when the worker requests such classification.

b.Enforcement Issues: Second, enforcement of the independent contractor statute is indirect at best. The statute includes no particular enforcement mechanism, with no private right of action for the wronged employees. Workers have to go to court to claim the protections of all the other employment laws that may have been violated, which is time consuming, stressful, and costly. The employees can, for example, sue under the wage and hour laws to try to claim their lost minimum wages and overtime. They can argue to the OED that they are really employees and should be allowed unemployment benefits if they lose their job. They can go to the Workers Compensation Board to challenge their lack of coverage. But even if they win, it's always a day late and a dollar short. I have seen cases where it can take so long to recover unpaid wages that employees have lost insurance, cars, and even homes. And even when back wages are recouped, workers have no right under either federal or state law to claim

¹⁰ See, for example, [Mass Ann Laws ch. 149, § 148B \(LexisNexis, Lexis Advance through Act 217 of the 2018 Legislative Session\)](#); [Md Code Ann, Lab & Empl § 3-903\(c\) \(LexisNexis, Lexis Advance through July 1, 2018\)](#); [Del Code Ann tit. 19, § 3501\(a\)\(7\) \(Lexis Advance through 81 Del. Laws, ch. 425\)](#)

¹¹ See, for example, [Dynamex Operations W., Inc. v. Superior Court, 4 Cal 5th 903, 955-56, 232 Cal Rptr 3d 1, 41, 416 P3d 1, 34 \(2018\)](#).

¹² For example, ORS 652.310(2) (under the Wage and Hour chapter), ORS 653.010 -653.020 (under the Minimum Wage chapter), ORS 654.005 (under the Occupational Safety and Health law).

¹³ Interagency Compliance Network Report to the Oregon Legislature (April 2017), https://www.oregonlegislature.gov/citizen_engagement/Reports/2017%20ICN%20Legislative%20Report_2017_04%20FINAL.pdf, p. 12, accessed September 21, 2018.

¹⁴ *Id.*

from the employer the employment taxes that the workers paid that the employer should have paid, so they are never fully recompensed for their financial loss. Even when the statutes indicate that violation of the laws carries criminal penalties, the state rarely pursues those penalties. All too often, smaller employers who violate these laws just close their doors under a bankruptcy filing, leaving the state holding the bag to recompense the employees from the state's Wage Security Fund – while the employer just opens up a new business a short distance away under a new name and continues to function as they always did.

V. POTENTIAL IMPROVEMENTS

- a. **ABC Standard Adoption:** Despite the difficulties of reconciling definitions with federal law counterparts, many employers as well as workers would benefit from the simplification of the criteria and adoption of the ABC standard, or at least adding to the existing statute the criterion that the work provided is outside the usual course of the hiring entity's business.
- b. **Adoption of a Private Attorneys General Act:** The adoption of a private attorneys general act, that allows individuals to enforce the employment laws when no specific enforcement mechanism is included in the law, would benefit the state and compliant employers, as well as the workers. Allowing a worker to recoup from the violator the excess employment taxes the worker paid as a misclassified employee in addition to their lost wages would help recompense the employee's losses and create an incentive for compliance.

Thank you again for giving us the opportunity to present our position against designating TNC drivers as independent contractors by law.