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Testimony of Elizabeth J. Inayoshi
Before House Committee on Business and Labor
In Opposition to House Bill 3246
April 3, 2017

Chairman Holvey, members of the Committee, thank you for the opportunity to testify about House Bill 3246. My name is Elizabeth Inayoshi, I am an attorney from Hillsboro, Oregon. I represent employees in employment matters, and I assist small business owners set up their businesses, including advising them on how to set themselves up to be good employers. I am a member of the Oregon Trial Lawyers Association, which represents plaintiffs in litigation. OTLA views HB3246 as a poorly written bill that inappropriately benefits the transportation network companies at the expense of their drivers, and we urge you not to support it in its current form. It will harm workers not just in the TNCs, but ultimately in many companies.

DEFINING DRIVERS AS INDEPENDENT CONTRACTORS VIOLATES THE LEGAL TESTS DEVELOPED CAREFULLY OVER TIME THAT DISTINGUISH INDEPENDENT CONTRACTORS FROM EMPLOYEES

Over the course of the 20th century, the United States has increased the protection of the American worker - from wage and hour protections, to unemployment insurance, to workers compensation, to the ability to organize to negotiate for better working conditions, to health and safety standards. Oregon has wisely followed suit, and sometimes exceeded the protections offered at the federal level. Companies covered the costs of many of these protections, in some cases through minimum wages and overtime, in some cases through taxes. A key requirement, however, to receive many of those protections is that the worker be the employee of a company . Over the course of many decades, our legislatures and our courts carefully crafted extensive tests to determine when a company could deal with a worker as an independent contractor as opposed to dealing with a worker as an employee. They set stringent requirements for a company to be able to classify a worker as an independent contractor. In part, they did this to ensure that the vast majority of workers would benefit from the protections that had been enacted, because the United States had seen time and again the effects of having poor or no protections for workers. HB3246 would be another pull of the thread that unravels those stringent requirements and eliminates those worker protections.

HB3246 in **Section 7** specifically chooses to define the drivers in these transportation network companies as independent contractors, despite the reality that these drivers are, in the vast majority of cases, simply doing a job, not running a business. Section 7 defines these drivers as independent contractors primarily on the basis of the drivers being able to work on a flexible schedule and work for

other companies. On that basis, and pretty much only on that basis, this law forces a driver, who may drive 20, 30, 40 or more hours a week for a single service, to pay their own employment taxes, to have no unemployment insurance, to have no workers compensation coverage, to have no Oregon sick leave protection, receive no overtime, have no minimum wage guarantee. That job may be part-time, and that may be the worker's choice to work part-time for one of these companies, but it is still just a job, and that worker is still an employee.

How can we say these drivers are "employees" and not "independent contractors", when the drivers control their own schedules and can work for other companies? Because they have virtually no other indicia of being independent contractors. In many circumstances, both the federal courts and the Oregon courts use an "economic realities" test to determine whether a worker is an independent contractor or an employee. As the Oregon Court of Appeals said, "the focus of the test is whether "an entity has functional control over workers even in the absence of the formal control…and whether "as a matter of economic reality, [the worker] is dependent on the [putative employer]. "(see, for example, *Cejas Commercial Interiors, Inc. v. Torres-Lizama*, Or. App. 2012). The test looks at a wide variety of factors, with no single factor or group of factors being decisive. The test considers whether the company has the right to hire and fire; sets rules, policies and procedures; provides tools, whether the employer can function without that type of worker or if that type of worker is central to the business; if the company's managers change, whether the workers leave with the old manager or stay and work under a new manager? The test also looks at the worker -- does the worker have his or her own business, does the worker take on financial risk with the work that he or she does? Does the worker control the work she or she does or does the company assign the work, does the worker control their rate of pay?

When you look at all these factors, these drivers meet almost none of them. Even if we look at a few of the key factors that the TNC's point at to prove that the drivers are independent contractors, the arguments do not hold up.

- Yes, TNC drivers have to provide their own car -- in most cases. But HB3246 says that is not even a necessary factor -- in **Section 1(3)(a)(A)** the bill indicates that a "personal vehicle" is a vehicle that a participating driver owns, leases or otherwise has authorization to use. The car does not have to be the driver's car. In fact, the TNC could provide the vehicle and authorize the driver to use it, and the bill would define that as a "personal vehicle" and the worker as an independent contractor. However, the key tool of this particular industry is the software that allows the driver to be alerted to and bid on rides. The company owns and controls the software. Without access to that software, the driver cannot work.
- Yes, the TNC driver can decide when he or she is on duty. But beyond that, the driver has no control over the rides. The driver "offers" a ride for a certain amount of money when passengers request a ride, bidding against a few other drivers. But Uber and other TNC's control which drivers can see the requests, so that they can spread the work over the available drivers. Unlike a cabbie, if a an Uber passenger changes her mind and wants to go to a different location than originally requested, the driver has no authority to continue to that new location. Even if the passenger requests the new location while in an Uber driver's car, the passenger has to leave that car and driver and be picked up by a new car and driver. The drivers do not control their work.
- Yes, under **Section 7(2) and (3)** the TNC driver can work for other TNC's or other companies. Many drivers have a "day job" and driver after hours for a TNC. Some drive for more than one TNC. However, many employees of many companies have a full-time job and a part-time job to earn extra money. Having two jobs, in and of itself, does not make a worker an independent contractor for either company. True, many companies have non-compete clauses that prevent

employees from working for competitors at the same time. However, many companies do not have non-compete clauses for their employees. The lack of a non-compete clause does not magically make an employee into an independent contractor.

- **Section 8** requires the provision of insurance by the driver or the TNC, and requires the TNC to cover claims and defend against claims if the driver's insurance lapses, a clear acknowledgment that the drivers are agents and employees of the TNC. The bill blurs the line between employees and independent contractors.

Some might say this bill sets this definition in place for just one unusual, brand new, niche industry - the transportation network companies. Do not let Uber fool you and do not kid yourselves. TNC's are just the tip of the iceberg. Our concerns with bills that loosen up the protections for workers in what many call the "gig economy" goes much broader and deeper than the bills dealing with transportation network companies. Other industries are watching closely. If you allow TNCs to force employees to be treated as independent contractors just because they are part-time with flexible work schedules, more and more companies will leap onto that bandwagon. Shifting the cost of employment taxes, work-related injuries, and other expenses from themselves to their workers would be irresistible for most companies. This bill would set the precedent that would allow them to demand the same rights as TNCs would have.

Many of these companies will protest that they cannot be competitive if they have to treat drivers as employees. They will say "the times they are a-changin'" -- that technological innovation has resulted in new business models built on the sharing economy, and workers who cannot adapt to change are doomed to extinction like the dinosaurs. Change is inevitable, innovation is vital, but not all change is new, not all change is necessary, and not all change is good. The proposal to make these drivers independent contractors is not new, not necessary, and not good. It is a throwback to the bad old days -- employers finding ways to avoid the cost of treating workers fairly and safely is as old as work itself. A company that cannot compete unless it is allowed to deprive its workers of minimum wages and basic protections does not have a new business model; it has a broken, third-world business model. American workers, Oregon workers deserve better than that.

Beyond the issue of classifying drivers inappropriately as "independent contractors", other sections of this bill further attenuate the protections of the drivers.

- Although **Section 4(1) and (2)** require the TNCs to maintain records for 3 years, what information is kept in those records is unspecified. If a driver has a dispute with a TNC, the bill does not explicitly give the driver access to that information, nor ensure that the information would be sufficient to support any specific employment disputes.
- **Section 5(3)(f)** attempts to protect TNC passengers, but the sweep of the section is huge -- any felonies disqualify an individual from being a TNC driver. Felonies range from murder and armed robbery to unlawfully signing a petition and unlawful record performance. Clearly, being convicted of a violent crime, robbery, or theft should disqualify someone. But the broad sweep of this disqualification section is ill-conceived.
- **Section 6(1**) indicates that a driver cannot solicit or accept a request for a prearranged ride or a request to provide transportation to a rider for compensation other than by means of a TNC's digital network. Read literally, this prohibits a TNC driver from being a cab driver, although **Section 7(2)** says a driver can work for more than one TNC and **Section 7(3)** says a driver may engage in any other occupation or business. If the intent was simply to say that a driver cannot pick up a fare unless the driver is driving under the auspices of a TNC license or cab license, it

doesn't say that. These unclear and contradictory sections would create confusion and trouble down the road.

- **Section 6(3)(a)** requires a TNC to suspend a driver as soon as the TNC receives a complaint. It provides no protection for the driver against petty or unwarranted complaints. Since the drivers would be, by definition under this bill, independent contractors, the drivers could not organize a union and would not have due process protections, or other protections such as Weingarten rights to representation to challenge discipline. The statute affords no right of appeal of a suspension or even termination, and makes no indication of how long a driver can remain suspended without completion of an investigation. The bill would not prevent a TNC from sharing complaints with other employers, regardless of the validity of the complaint.
- The civil penalty for violations is at best vague and at worst wholly inadequate. The bill is unclear as to whether the $100 fine would be applied for every instance of a type of violation, if it would be applied only for each driver that complains or for each instance of every violation found. A company would have to accumulate a tremendous number of violations before these miniscule fines would cause any change in its behavior.

Still other sections create issues for both the driver and consumers. **Section 4(1)(a)-(b)** require record keeping on rides for 3 years. Since one of the most serious complaints about TNCs has been assaults of customers by drivers, records beyond 3 years could be advisable. In addition, although my focus has been primarily the problems that this bill creates for workers, the bill has problematic insurance requirements that create risks for drivers and consumers. Under **Section 9**, the bill requires the driver to have $50,000 in insurance when the driver is connected to the TNC system. Insurance really needs to be higher for a commercial vehicle. The bill also gives insurers a statutory exclusion of a vehicle is being used as a ride-share car. Under these circumstances, the minimum insurance provided by the ride share company needs to be higher.

Finally, **Section 2** makes regulation of TNCs exclusive to the proposed statute. These kinds of transportation services are highly local and have been traditionally regulated at local levels. This bill attempts to unnecessarily and inappropriately end-run that local control. Local governments are better suited to balance regulations of the competing transportation services and ensure they address local needs appropriately.

We urge you to reject this bill.