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New Florida Statute Regulates the Ride-Sharing Industry and Classifies Drivers as Independent Contractors

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The Florida Legislature recently enacted legislation regulating transportation network companies (TNCs), commonly referred to as "ride-sharing" companies. Under the new statute, TNCs will be able to lawfully classify their drivers as independent contractors—at least for purposes of Florida law—so long as certain statutory criteria are met. This has great significance to TNCs and their drivers, because a number of state and local employment laws in Florida apply only to employees, and not to independent contractors, including the Florida Civil Rights Act of 1992 and Florida's Workers' Compensation Law. The new statute will establish a legal framework for TNCs in Florida and preempt the regulation of TNCs by local governments.

Under the new Florida statute, a TNC driver "is" an "independent contractor"—and not an "employee" of the TNC—if all of the following criteria are met:

> (1) The TNC does not unilaterally prescribe specific hours during which the TNC driver must be logged on to the TNC's digital network;
> (2) The TNC does not prohibit the TNC driver from using digital networks from other TNCs;
> (3) The TNC does not restrict the TNC driver from engaging in any other occupation or business; and
> (4) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor with respect to the TNC.

Interactions Between the New Florida Statute and Other Laws. As with Florida law, many federal laws, such as federal anti-discrimination laws, the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act of 1993 (FMLA), and the employment tax provisions of the Internal Revenue Code (IRC), apply to employees, but not to independent contractors. While the new Florida statute will set forth a relatively clear four-prong test for classification as an "independent contractor" (and will preempt contrary local laws in Florida), the Florida statute will not control worker classification under federal laws. Instead, under the Supremacy Clause of the United States Constitution, classification of workers under federal laws will continue to be controlled by federal law. *See Solis v. A+ Nursetemps, Inc.*, (M.D. Fla. Apr. 5, 2013) (concluding that any characterization of individuals as independent contractors under state law, by statute or otherwise, has no bearing upon whether an individual is an employee for purposes of the federal law (citing U.S. Const. art. VI, §2)).

The two tests most often used for determining whether a worker may be classified as an independent contractor under federal law are the "economic realities" test and the "common law" test. Each of these tests looks at the degree of control exercised by the alleged employer. Under the "economic realities" test (used in FLSA and FMLA cases, among others), courts examine various factors to determine the nature of an individual's relationship with the alleged employer, and no one factor is determinative. Those factors may include the nature and degree of the alleged employer's control as to the manner in which the work is performed, the worker's opportunity for profit and loss depending on his/her managerial skill, the worker's investment in equipment or materials required for his/her tasks, whether the service requires a special skill, the degree of permanency and duration of the working relationship, and the extent to which the

service rendered is an integral part of the alleged employer's business. Under the "common law" test (used in IRC cases, among others), courts examine whether the worker must comply with the alleged employer's instructions regarding when, where, and how to perform the work; whether his/her services are integrated into the alleged employer's business operations and if s/he performs the services personally; if there exists a continuing relationship and whether the alleged employer establishes hours of work; and whether the work is performed on the alleged employer's premises, among other factors.

These tests vary considerably from the standard in the new Florida statute, and the fact that a TNC driver *is* an independent contractor under Florida law does not necessarily mean that the driver may be classified as an independent contractor under federal law.

The text of the new Florida statute suggests that classification as an independent contractor is mandatory if the statute's four conditions are met. Under federal law, unless a worker meets the applicable test for independent contractor status, the employer may not classify the worker as an independent contractor. Courts have found that even written agreements purporting to establish an independent contractor relationship are not determinative. *See Holland v. Gee* (M.D. Fla. 2010) (stating that the plaintiff, who had signed an independent contractor agreement, was an employee under Title VII based on an analysis of factors).

Thus, the differences between the standards for independent contractor classification under federal law and the new Florida statute leave open the very real possibility that a TNC could be *required* to classify a worker as an independent contractor under Florida law, and at the same time be *prohibited* from classifying that same worker as an independent contractor under federal law.

While the apparent conflict between federal law and the Florida statute may appear to be only theoretical, many lawsuits have been filed by TNC drivers challenging their classification as independent contractors. Some courts have allowed those cases to survive motions for summary judgment, thus creating a real possibility that a judge or jury will find that the drivers are employees. *See, e.g.*, *Razak v. Uber Technologies, Inc.*, (E.D. Pa. Oct. 7, 2016) (refusing to dismiss TNC driver's misclassification lawsuit under the FLSA); *cf. O'Connor v. Uber Technologies, Inc.*, (N.D. Cal. Mar. 11, 2015) (denying employer's motion for summary judgment on misclassification claims under California law, which determines worker classification using a control test somewhat similar to that used in cases under the IRC). Accordingly, it appears that once the new Florida law takes effect, TNCs will be required to classify their Florida drivers as independent contractors, even though doing so creates a material risk of liability under federal laws.

Florida's new law will also set forth requirements for fare transparency, background checks and substance abuse policies for TNC drivers, and automobile insurance coverage, among other provisions. The new law, Bill CS/HB 221, will be codified as Florida Statute § 627.748 and takes effect July 1, 2017.

Conclusion. Overall, the anticipated impact of Florida Statute § 627.748 will be limited. Companies should be aware that the statute will govern only relationships between TNCs (such as Uber, Lyft, and similar companies operating in Florida) and TNC drivers, but will not extend beyond that industry. Also, the new law will offer limited protections to the TNCs that classify their drivers as "independent contractors" under the four-prong test. While § 627.748 may help those TNCs defeat lawsuits for violations of state laws, it will not insulate them from litigation under

federal laws. Additionally, there is no indication that the frequency or vigor of litigation filed by TNC drivers will soon decrease. In those cases, Florida Statute § 627.748 will be of little or no help.

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[i] If you have any questions about your company's obligation to classify individuals as employees or independent contractors under Florida Statute § 627.748 or any other state or federal laws, please feel free to contact Shane Muñoz, (813) 261-7803 or smunoz@fordharrison.com, or Viktoryia Johnson, (813) 2617814 or vjohnson@fordharrison.com.