

No. S258191

**IN THE SUPREME COURT OF CALIFORNIA**

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GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of  
themselves and all other similarly situated,

*Petitioners,*

vs.

JAN-PRO FRANCHISING INTERNATIONAL, INC.,

*Respondent.*

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On Certification from the United States Court of Appeals for the Ninth  
Circuit

No. 17-16096

Hon. Ronald M. Gould, Hon. Marsha S. Berzon, and Hon. Frederick Block

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**EXHIBIT A TO TAXICAB PARATRANSIT ASSOCIATION OF  
CALIFORNIA AMICUS CURIAE BRIEF IN SUPPORT OF  
RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL,  
INC.**

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DATE: August 28, 2020

Respectfully submitted,  
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By: /s/ Steven Rice  
Attorney for Taxicab  
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# **EXHIBIT A**

## TAXICAB INDUSTRY

The purpose of this information sheet is to provide guidance to the taxicab industry on properly classifying workers for employment tax purposes.

Taxicab drivers typically operate taxicabs under one of the following three business arrangements:

1. The taxicab company acknowledges the driver as an employee.
2. The driver owns and operates the taxicab, independently arranges fares, and personally pays for required licenses, permits, and insurance.
3. The driver performs services as a lease driver on either a fixed-fee or percentage-of-receipts basis.

### IMPACT OF GOVERNMENTAL REQUIREMENTS

Local governments commonly mandate requirements that a taxicab company must meet in order to lawfully own and operate a taxicab company. Generally, these mandates will include provisions that require a taxicab company to exercise certain direction and control over its taxicab drivers to ensure transportation accessibility and to maintain public safety. These requirements differ in each jurisdiction and are not viewed as evidence of an employment relationship unless a taxicab company expands upon or exceeds the mandates. If a taxicab company expands upon or exceeds the mandates, it will be considered evidence of direction and control over the drivers and is evidence of an employment relationship.

### WHO IS A COMMON LAW EMPLOYEE?

Under Section 621(b) of the California Unemployment Insurance Code (CUIC), an employee is “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”

A common law employee is an individual who is hired by a principal to perform services and the principal has the right to exercise control over the manner and means by which the individual performs his or her services.

The right to control, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right to control.

Other factors to take into consideration are:

1. Whether or not the one performing the services is engaged in a separately established occupation or business.
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.
3. The skill required in performing the services and accomplishing the desired result.
4. Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
5. The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
6. The method of payment, whether by the time, a piece rate, or by the job.
7. Whether or not the work is part of the regular business of the principal, or whether the work is not within the regular business of the principal.
8. Whether or not the parties believe they are creating the relationship of employer and employee.
9. The extent of actual control exercised by the principal over the manner and means of performing the services.
10. Whether the principal is or is not engaged in a business enterprise, or whether the services being performed are for the benefit or convenience of the principal as an individual.

Another consideration relative to employment is whether or not the worker can make business decisions that would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time is not sufficient to show a risk of loss.

The numbered factors above are evidence of the right to control. These factors are described more fully in Section 4304-1 of Title 22, California Code of Regulations. When those factors are considered, a determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed, rather than depending on a single controlling factor.

#### **WHO IS NOT AN EMPLOYEE?**

Independent contractors are not employees. They are engaged in a separately established, bona fide business and have a profit or loss motive. They usually contract to perform a specific task and have the right to control the manner the work is to be accomplished. They have a substantial investment in their business and customarily perform services for more than one business. Generally speaking, they are individuals who are not an employees under the common law rules unless they are statutory employees.

#### **EMPLOYEE OR INDEPENDENT CONTRACTOR?**

Tax decisions by the California Unemployment Insurance Appeals Board (CUIAB) provide some guidance as to whether workers in the taxicab industry will be classified as employees or independent contractors.

In *Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board* (1991) 235 CA 3d 1363; 1 Cal Rptr 2d 641, the Appeals Court held the drivers who paid the taxicab company a fixed-fee to lease a taxicab were common law employees of the company.

The Appeals Court found the following were indicators of employment:

- The terms of the lease allowed the company to terminate the drivers.
- The drivers could be terminated under the lease agreement if they did not maintain good relations with the public.

- The lease agreement designated the time period when the shift began and ended.
- The company had the right to coordinate their meal breaks.
- The drivers were prohibited from using the taxicab for personal use.
- The drivers were required to accept charge slips from certain customers.
- The company maintained a dress code.
- The company required the drivers to account for the fares they received by maintaining trip sheets. There was no evidence that the city required the drivers to maintain trip sheets.
- The work did not require the expertise of a skilled professional.
- The drivers depended on the company's dispatcher for their livelihood.
- The drivers did not set their own rates, but were paid according to the number and distance of fares they carried. There was no evidence of entrepreneurial risk.
- The company owned the taxicabs and municipal taxicab license. The taxicab company operated a fleet of cabs for public carriage.
- The customers called the company and the company arranged for the performance of the services.
- The taxicab company's name was on the taxicab.
- The drivers did not advertise their services.
- The driver's work was part of the regular business of the taxicab company.

The above-mentioned case may not encompass the entire set of factors used by the CUIAB in establishing an employee or independent contractor status in the taxicab industry and is presented here as an example only. The Employment Development Department (EDD) and the CUIAB will determine status on a case-by-case basis by applying the applicable CUIC sections to the specific facts existing in a particular working relationship.

## ADDITIONAL INFORMATION

For further assistance, please contact the Taxpayer Assistance Center at 888-745-3886 or visit the nearest Employment Tax Office listed in the *California Employer's Guide*, DE 44, or access the EDD website at [www.edd.ca.gov/office\\_locator/](http://www.edd.ca.gov/office_locator/).

The following EDD resources are also available to help determine the correct classification of the workers.

### ***Employment Determination Guide, DE 38***

The guide has a worksheet that asks a series of "Yes" or "No" questions regarding the treatment of workers to help determine if a worker is most likely an employee or an independent contractor and whether you need to seek additional guidance. To obtain this guide, access the EDD website at [www.edd.ca.gov/pdf\\_pub\\_ctr/de38.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de38.pdf).

### ***Determination of Employment Work Status for Purposes of State of California Employment Taxes and Personal Income Tax Withholding, DE 1870***

The form provides a series of questions regarding the working relationship between the firm and the workers. After the form has been completed and returned, the EDD will send a written determination stating whether the workers are employees or independent contractors based on the facts provided. To obtain this publication, access the EDD website at [www.edd.ca.gov/pdf\\_pub\\_ctr/de1870.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de1870.pdf).

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Requests for services, aids, and/or alternate formats need to be made by calling 888-745-3886 (voice) or TTY 800-547-9565.

This information sheet is provided as a public service, and is intended to provide non-technical assistance. Every attempt has been made to provide information that is consistent with the appropriate statutes, rules, and administrative and court decisions. Any information that is inconsistent with the law, regulations, and administrative and court decisions is not binding on either the Employment Development Department or the taxpayer. Any information provided is not intended to be legal, accounting, tax, investment or other professional advice.

## TAXICAB INDUSTRY

Taxicab drivers typically operate taxicabs under one of three business arrangements:

1. The taxicab company acknowledges the driver as an employee.
2. The driver owns and operates the taxicab, independently arranges fares, and personally pays for required licenses, permits, and insurance.
3. The driver performs services as a lease driver on either a *fixed-fee* or *percentage-of-receipts* basis.

Under the first arrangement, the taxicab driver is subject to the direction and control of the taxicab company and would be considered a common law employee (refer to Information Sheet: Employment, DE 231). Under the second arrangement, the taxicab driver independently makes business decisions related to the taxicab service. Since the driver is not subject to the direction and control of the taxicab company, the driver would be considered self-employed. Under the third arrangement, determining whether a driver is an employee or self-employed person requires a detailed analysis of the business arrangement. How the industry-specific details of the arrangement impact the employment status of drivers who lease a taxicab on a fixed-fee or percentage-of-receipts basis is discussed below.

### FIXED-FEE DRIVERS AS EMPLOYEES IN THE TAXICAB INDUSTRY

There is a strong indication that taxicab drivers who lease taxicabs on a fixed-fee basis under all of the following circumstances are employees. Therefore, there is a high probability that drivers classified as independent contractors are incorrectly classified when the drivers:

- Lease the taxicab on a daily basis or pay the lease fee at the end of every shift.
- Do not have a financial interest in a business and are not subject to a financial risk of loss.
- Are not involved in a separate and distinct business of their own.
- Perform work that is a regular part of the taxicab company's business.
- Can be terminated by the taxicab company without liability by termination or nonrenewal of the lease agreement.

### FIXED-FEE DRIVERS AS INDEPENDENT CONTRACTORS IN THE TAXICAB INDUSTRY

There is a strong indication that taxicab drivers who lease their taxicab on a fixed-fee basis are independent contractors when they:

- Do not perform services under the direction and control of the taxicab company. They are free to conduct their business however they choose.

- Do not rely on the company for their customers. They secure their customers on their own with only an occasional referral from the company. They are not required to accept any referral.
- Prepay to lease a taxicab for a period of at least 28 days.
- Choose their shifts to drive the taxicab.
- Must be provided advance notice of termination or nonrenewal of the lease agreement by the taxicab company or the company may be liable for damages under the terms of the agreement. Drivers are liable for unpaid lease fees when they withdraw from the agreement early, and lease agreements provide provisions for arbitration of disputes.

### DRIVERS WHO LEASE TAXICABS BASED ON A PERCENTAGE OF THEIR RECEIPTS

The California Unemployment Insurance Appeals Board (CUIAB) has held taxicab drivers to be employees when the following circumstances apply:

- The drivers pay a percentage of what they earn to the taxicab company in order to lease a taxicab.
- Since the taxicab company's income depends on how much revenue is generated by the driver, the company may attempt to increase that income by placing controls and requirements on the drivers, such as assigning shifts, requiring the maintenance of trip sheets, and paying for all advertising.
- The drivers do not have a substantial investment in the business, are not subject to an entrepreneurial risk of loss, and do not have a distinct business of their own.
- The work performed by the drivers is a regular part of the taxicab company's business, and drivers can terminate or be terminated without any liability.

### IMPACT OF GOVERNMENTAL REQUIREMENTS

Local governments commonly mandate that a taxicab company exercise certain controls over taxicab drivers and the company's operation of vehicles. Depending on the jurisdiction, such controls may include, but are not limited to, driver dress codes, maintenance of trip records, restrictions on and requirements for the driver's use of the vehicle, response time goals and handling of dispatches, required color schemes, driver and company licensing, driver training, and a variety of requirements to ensure transportation accessibility and public safety. Such mandates are not viewed as being evidence of control and are given no weight in making the ultimate determination.

However, if the company expands upon or exceeds the government mandates, then the requirements are considered in determining the amount of control exercised over the drivers.

**MAJOR COURT CASE**

In Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board (1991) 235 CA 3d 1363; 1 Cal Rptr 2d 641], the Appeals Court held that the drivers who paid the taxicab company a fixed-fee to lease a taxicab were employees of the company. Therefore, any fixed-fee lease driver who operates in a manner similar to the drivers described in the Santa Cruz Transportation decision would be an employee. Refer to the chart below that lists the elements cited in the court decision and the weight the CUIAB and the courts will give to each.

KEY ELEMENTS IN THE SANTA CRUZ TRANSPORTATION CASE	WEIGHT GIVEN TO ELEMENTS IN THE SANTA CRUZ TRANSPORTATION CASE
The terms of the lease allowed the company to terminate the drivers.	The right to terminate at will is strong evidence of employment. The right to terminate conveys an inherent power of the company over the driver. The company could choose not to renew the lease of a driver without advance notice or liability. This would be strong evidence of an employment relationship and would be given <b>high</b> weight.
The drivers could be terminated under the lease agreement if they did not maintain good relations with the public.	The company exercised control over the actions and behavior of the drivers by requiring them to always have a good relationship with the public. Failure to do so would result in the termination of the driver. With this right, the company can demand many things of the driver, and the driver, fearing loss of his or her job, would be obliged to follow such demands. <b>High</b> weight would be given to this element.
The lease agreement designated the time period when the shift began and ended.	When the drivers are not allowed to set their own hours of work, the company is directing and controlling their services. This element is given <b>medium to high</b> weight.  When shift drivers lease a taxicab for 12 hours a day or 12-hour shifts over a period of a week and leases are allowed only when they are available for the shift requested, drivers cannot set their own hours and are not free to work when they choose.
The drivers were required to schedule their meal breaks with the dispatcher.	If the dispatcher has control over when breaks are taken, this is strong evidence of control over the drivers and would be given <b>high</b> weight as an employment element. If the drivers are only required to give notice of breaks to the dispatcher, the element would be given <b>low</b> weight.
The drivers were prohibited from using the taxicab for personal use.	The company controlled the use of the taxicabs by the drivers. This element would be given <b>medium</b> weight.
The drivers were required to accept charge slips from certain customers.	The company exercised control over the services by requiring the acceptance of alternative methods of payment. This was evidence that the company had the right to control the services, and that right was complete and authoritative. This alone is strong evidence of an employer-employee relationship and is given <b>high</b> weight.
The drivers were required to conform to a company dress code.	A specific dress code, such as the wearing of uniforms, is given <b>high</b> weight and is strong evidence of employment. A general dress code, (for example, "neat appearance") would be given <b>low</b> weight.
The drivers were required by the company to account for fares they received by a daily trip sheet and there was no evidence that the city required the drivers to maintain trip sheets.	Required reports are viewed as "review of work" which is strong evidence of the taxicab company's right to control the drivers. This element is weighted <b>high</b> as an indicator of employment. Having drivers complete city or governmental agency required reports is an element given <b>no</b> weight.

Table continued on next page.



**KEY ELEMENTS IN THE  
SANTA CRUZ TRANSPORTATION CASE (CONT.)**

**WEIGHT GIVEN TO ELEMENTS IN THE  
SANTA CRUZ TRANSPORTATION CASE (CONT.)**

The work did not require the expertise of a skilled professional.	Operating a taxicab does not require a high level of technical skill and this element would be given <b>high</b> weight. A lower level of technical skill is strong evidence of employment.
The drivers did not advertise their services.	If the company holds itself out as a taxicab service and does all advertising, this would be strong evidence that the drivers are working in the furtherance of the company's business and would be given <b>medium to high</b> weight.
The taxicab company operated a fleet of cabs for public carriage.	The taxicab company was in the business of providing taxicab services, not leasing taxicabs. This element would be given <b>high</b> weight.
The taxicab company's name was on the taxicab.	The company's name on the taxicab was an indication that the driver represented the taxicab company and the driver performed services in the furtherance of the company's business. This element would be given <b>medium to low</b> weight.
The drivers' work was part of the regular business of the taxicab company.	The drivers' services were performed as an integral part of and in direct furtherance of the company's business, which indicates employment. This element would be given <b>high</b> weight.
The taxicab company owned the taxicab.	The drivers did not have a significant investment in providing their services (for example, own their cab, own medallions or the permits necessary to operate a taxicab, etc.). This was strong evidence of employment and is given <b>high</b> weight. A daily lease is not considered a significant investment and does not create an entrepreneurial risk of loss associated with an independent contractor.
The taxicab company owned the municipal taxicab license.	The drivers operated under the company's license. This is an element receiving <b>high</b> weight as evidence of employment.
The drivers depended on the company's dispatcher for their livelihood.	If the drivers are required to use the company's dispatcher in order to secure business, this is strong evidence that the company is controlling the services performed by the drivers. This element would be given <b>high</b> weight.
The customers called the taxicab company for taxicab services; the taxicab company arranged for the performance of the services.	If the customers generally secure the services of the drivers through the company, this would be an employment element as the drivers depend on the taxicab company for business. If the drivers secure business on their own and could accept or reject referrals from the company dispatcher, this would be an indication of independent contractor status. This element would receive <b>high</b> weight.

**ADDITIONAL INFORMATION**

This information sheet describes the most common circumstances in the taxicab industry and how those circumstances affect whether a taxicab driver's services are performed as an employee or independent contractor. Questions regarding employment status determinations in the taxicab industry should be directed to:

Field Audit and Compliance Division—Central Operations, MIC 94  
P.O. Box 826880  
Sacramento, CA 94280-0001  
(916) 464-0331

Speech and hearing impaired persons can reach us at 1-800-547-9565.

Equal Opportunity Employer/Program. Auxiliary services and assistance available to persons with disabilities.

**PROOF OF SERVICE BY MAIL OR E-MAIL**

I declare that I am employed with Marron Lawyers, whose address is 5000 E. Spring St., Suite 580, Long Beach, California 90815; I am not a party to the within cause; I am over the age of eighteen years;

I further declare that on the date hereof, I served a copy of:

**EXHIBIT A TO THE  
APPLICATION OF TAXICAB PARATRANSIT ASSOCIATION OF  
CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN  
SUPPORT OF RESPONDENT JAN-PRO FRANCHISING INTERNATIONAL,  
INC.**

by placing a true copy thereof in a sealed envelope with postage fully prepaid and addressed as shown below and depositing the envelope in a United States Postal Service mailbox in Los Angeles County or by e-mail as indicated below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Long Beach, California, this 31st day of August 2020.



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Angelica Urbina

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **VAZQUEZ v. JAN-PRO FRANCHISING INTERNATIONAL**

Case Number: **S258191**

Lower Court Case Number:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/31/2020

Date

/s/Steven Rice

Signature

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