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To: Assemblymembers, California Employment and Labor Committee
From: V.B. Dubal, Associate Professor of Law
Re: Testimony; Dynamex Informational Hearing
Date: February 26, 2019

I. Thank you for the opportunity to share my research and expertise with the Assembly Committee today. My name is Veena Dubal. I am an associate professor of law at the University of California at Hastings College of the Law where I teach employment law.

II. Prior to joining the faculty at UC Hastings, I was a post-doctoral fellow at Stanford University, also my undergraduate alma mater. I received both my JD and my PhD from the University of California Berkeley School of Law.

III. For the last ten years, I have been studying what we now refer to as the "gig economy" from a legal, policy, and anthropological lens. My research has been published in top-tier law reviews and peer-reviewed journals, and it has been presented to policy-makers and academics in both the U.S. and in Europe. One of my articles was, in fact, recently cited by the California Supreme Court in the *Dynamex* decision.

IV. There are a number of misconceptions and pieces of misinformation about the California gig economy that I have uncovered in my years of engaged legal and anthropological research. [SLIDE]

a. The first is that the gig economy is new, brought on by technology and innovation. In fact, business models created to lower labor costs by utilizing independent contractor labor first proliferated in the 1970s.

b. The second misconception is that workers must be considered independent contractors in order to have flexibility and be independent. Based on an accurate legal reading of *Dynamex*, this is false.

c. The third and last myth I will dispel is that the *Dynamex* decision will destroy or deter innovation and business. It will not.

V. First, why from a historical and legal lens, is the gig economy not new or tied to technological innovation? The answer to this lies in the history of how we got two categories of workers—employees and independent contractors—for the purpose of social protections.

VI. As I show in my research and as Supreme Court Justice Neil Gorsuch pointed out in his recent unanimous *New Prime v. Oliviera* opinion, in the 1920s and 1930s, those who labored—whether they were taxi drivers, insurance salesmen, artists, or factory workers were commonly referred to as workers or as employees. Indeed, when the New Deal was passed, the term "independent contractor" did not have a distinct meaning outside of agency law.

VII. Eschewing the increased labor costs associated with the New Deal, clever business representatives in the mid 20th century turned to the 80th Congress for a legislative reprieve—much like they are doing to you today. The 80th Congress—also known as the Do-Nothing-Congress for its opposition to Truman's Fair Deal—

went on to carve-out so-called "independent contractors" from the Fair Labor Standards Act, the Social Security Act, and the National Labor Relations Act.

VIII. Importantly, Congress made these carve-outs despite and over a Presidential veto. [SLIDE] In June of 1948, President Truman explained why he was opposed to allowing businesses to escape liability to and for some workers. He said: "[this] resolution would exclude from the coverage…750,000 employees, consisting of a substantial portion of the persons working as commission salesmen, life-insurance salesmen, pieceworkers, truck drivers, taxicab drivers, miners, journeymen, tailors, and others . . .*I cannot approve legislation which would deprive many hundreds of thousands of employees, as well as their families, of … benefits when the need for expanding our social-insurance system is so great …*"

IX. By the 1970s, the independent contractor business model spread and took hold in a wide-variety of industries, including janitorial services, nail salons, taxi businesses, and even software companies. In California, for many decades, these workers have fought misclassification under what is commonly referred to as the "*Borello* standard"—a derivation of the common law of agency test.

X. A little understood reality is that California workers who labor in grey zones can be independent contractors for some laws and employees for others. There is a slightly different test for almost every federal law. [SLIDE] In California, the prevailing test for state law had been the *Borello* test. Under *Borello*, workers are employees for purposes of the California labor code if a fact-finder decides, using this unwieldy 11-factor test, that, considering the "totality of the circumstances," the worker is an employee. The subjective nature of this totality of the circumstances test has led to inconsistent outcomes on the same set of facts, befuddling both businesses and workers.

XI. Note that the most contested part of the *Dynamex* ABC test—part B (highlighted here)—the one that is being reported as being the most radical shift—is actually already a factor in the *Borello* test. *Dynamex* puts the burden on the employer to prove independent contractor status and simplifies the *Borello* test, facilitating clear, consistent legal decisions about employee status.

XII. <u>But notably, *Dynamex* does not simplify the test for ALL California employment laws</u>. Rather, the California Supreme Court was very clear that the ABC test only applies to <u>California wage orders</u>. In doing so, the Court was responding to the dystopian reality that those laboring as independent contractors in our state are sometimes making less than the minimum wage, putting a tremendous burden on California families who struggle to pay their rent and put food on the table.

XIII. This brings me to my next point. Given that *Dynamex* does not apply to California laws outside of wage orders, the test and its application DO NOT RESTRICT WORKER FLEXIBILITY. What the test does do is ensure that for each hour a worker labors, she gets the minimum wage. And if she labors for more than 8 hours in that day, then she gets overtime.

XIV. *Dynamex* does not change the test for employee status for workers' compensation, for unemployment insurance, and for other California employee protections. In *Garcia v. Border Transportation, LLC*, the California appellate court affirmed just 3 months ago that *Dynamex* only applies to wage orders and does not even extend to vehicle reimbursement laws.

XV. A lot of misinformation has proliferated across California industries since *Dynamex* was decided, and this misinformation has resulted in what I believe is a state of hysteria. Small businesses are afraid they will be upended, and workers are afraid they will lose the flexibility they need. I have talked to people from freelance journalists to moonlighting psychiatrists who say that they are being told that the *Dynamex* decision means they cannot do freelance work anymore. That is simply not true.

XVI. Certain professional workers are already considered "exempt" from California wage orders. [SLIDE] This class of professional workers includes most doctors, engineers, accountants, architects, many journalists, and even artistic professionals who perform work that is original or creative. The professional has to meet a salary test and a duties test. If she does, *Dynamex* and the minimum wage and overtime protections do not apply to her.

XVII. Even for those whom *Dynamex* clearly applies—nail salon workers, many construction workers, Uber drivers, DoorDash and Instacart workers, the decision does not mean that workers have to lose flexibility or freedom. These are threats made my companies who do not want to pay the very basic minimum wage. Given how easy it is to track active hours worked through an app on a smart phone, implementing *Dynamex* will require nothing more of companies than paying workers more—of sharing more of the profit pie with the very people whose labor produces wealth.

XVIII. And if you don't believe the law professor, let me draw attention to the analysis of a partner at Littler Mendelson—the premier employer defense firm—who represents many medium to large businesses in California, including Uber, Walmart, Apple, etc. [SLIDE] Here, a partner who specializes in misclassification writes that "Because *Dynamex* only applies to wage orders…it applies only to workers who are non-exempt employees…Thus, even if workers are 'employee' under the ABC test, the wage order would not apply." He also says, because the wage orders impact only a limited number of issues…it may be of little consequence if a worker is an employee for wage purposes."

XIX. So, who should be worried then? Not workers who are making the minimum wage, not professional workers who are exempt from wage orders, and certainly not workers who need or want flexibility and freedom on the job. The only people who should be worried about *Dynamex* are companies that—as a matter of business practice—underpay their workers. These are the companies like DoorDash and Instacart which are alleged to have taken tips from customers to compensate the base pay for their delivery drivers and like Uber which numerous studies have revealed pay their workers less than the minimum wage of most large cities.

XX. These companies say that *Dynamex* is retrograde, that it discourages innovation. *But let me be clear: there is nothing innovative or new about underpaying and overworking laborers.* The idea that what workers really need is not minimum wage protections but something else entirely—say, portable benefits, is false. Whatever you call them—employees or independent contractors or workers—everyone—every working Californian deserves the right to a wage that can support her family.

XXI. And let me add, on the topic of portable benefits, that the ACA, unemployment insurance, social security, minimum wage and overtime protections are ALL portable benefits. Workers can take these from job to job. If the legislature wants to add to this list of worker protections, then that is great. These workers need paid vacation; they need paid sick leave. *But please do not take the hard-fought for right to a minimum wage away from them.*

XXII. [SLIDE] Eighty years ago, when he fought for the first federal minimum wage, President Roosevelt famously argued, "No business which depends for its existence on paying less than living wages to its workers has any right to continue in this country." Time and technology have not changed this basic principle. These innovative, well-funded companies can pay workers what they deserve by law. It might mean spending less money settling misclassification cases, less money doled out to executives, less money paid to lobbyists, but the workers who drive the cars and trucks, who clean the homes, who build the buildings, who do our service work are the ones whose labor produces wealth for this state and they *deserve* to make living wages.

XXIII. Let me end by saying this. *Dynamex* is not a partisan issue. Democrats and Republicans across the political spectrum agree that secure work is essential to the health and vitality of California families. We all agree that if one works hard, one should be appropriately remunerated for that work such that one does not have to rely on public benefits to survive. And that is what *Dynamex* is about—something very simple that we can call agree on.