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Franchise industry dubious about Uber joining them

By **Jessica Mach**
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Stakeholders in the franchise industry are not convinced Uber could pull off a franchise model in California, but their bigger concern is how Uber's rebrand might impact efforts to secure an exception to the state's gig worker law.

Reports that Uber and Lyft are considering franchise models have circulated since a San Francisco judge issued a preliminary injunction against the companies on Aug. 10. The preliminary injunction, which has since been stayed by a court of appeal, required the companies to start complying with Assembly Bill 5 by reclassifying their drivers as employees instead of as independent contractors. *People of the State of California v. Uber Technologies Inc. et al.*, A160706 (Cal. App. 1st Dist., filed Aug 17, 2020).

In an email Wednesday, an Uber spokesperson referenced two possible franchise models — one in which drivers use their own cars, and another in which third parties could come on as franchisees and hire drivers themselves.

"In either case, drivers would likely earn a predetermined hourly wage for their time on-app — but, in exchange, fleets would need to monitor and enforce drivers' activity and efficiency, for instance by putting drivers into shifts, dictating where and when they must drive, and enforcing trip acceptance criteria," the spokesperson said, adding the fleet model might not be viable in California.



New York Times News Service

A protestor dressed as a baby cheers a caravan of Uber and Lyft drivers during a demonstration outside of Uber's headquarters in San Francisco on Thursday, Aug. 20.

Lyft spokesperson Julie Wood confirmed the company would focus its efforts on pushing for passage of Proposition 22, the ballot measure it is funding with Uber that would exempt rideshare drivers from AB 5.

The contention that Uber could transition to a franchise model has been met with skepticism by some stakeholders, especially since the franchise industry, like Uber, has been hit hard by AB 5, they say. The law was meant to target the gig economy but "accidentally wrapped franchising in there," said Filemon Carrillo, a partner at Mulcahy LLP who represents franchisors.

"Franchisors have been legitimately concerned about when and under what circumstances they may be found... by a court to be... a joint employer of the

workers who are employed by the franchisee," explained James M. Mulcahy, founder and managing partner of the same firm. A company that is a joint employer with its franchisee would have different legal obligations — and be exposed to different liabilities — than a franchisor that is merely lending support to a franchisee, he said.

In a blog post published last week, UC Hastings professor Vee-na Dubal noted that over the past two years, the 9th U.S. Circuit Court of Appeals has been split on the issue of whether franchisors are joint employers with their franchisees, or whether franchisors employ franchisees. The International Franchise Association has been trying to clarify this issue by lobbying for provision in AB 2257, a proposed bill that would

amend AB 5. With the provision, which has not been approved by legislators, "under no circumstances will AB 5 be interpreted to find that the franchisee's employees are also the employees of the franchisor," Mulcahy explained.

But Uber's hint that it could rebrand as a franchise company hurts this lobbying effort, Carrillo said, since the company has been explicit it is considering the change to avoid complying with AB 5. To avoid allowing Uber to escape liability, legislators would likely reject any further attempts by the franchise industry to secure an AB 5 exemption, the attorney added.

"If Uber is now the face of the entire issue, it could significantly harm the legitimate franchisors in this country," Mulcahy said.

Not all attorneys in the industry are so sure Uber couldn't pull off a franchise model.

Robert S. Boulter, who runs his own practice and represents franchisees and employees, said while he believed a model in which drivers are considered franchisees could be difficult to implement, a model involving third parties is within Uber's reach.

"With respect to the fleet model, that may have a little more promise for Uber because the drivers will be employees of the master franchisee, and the question will be... if there are employment laws that are being violated by the master franchisee, whether Uber and Lyft would be responsible," he said.

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