

## **REGULATORY ROULETTE: THE NEED FOR GUIDANCE REGARDING THE STATUS OF PROVIDERS OF ON-DEMAND TRANSPORTATION AS INDEPENDENT CONTRACTORS**

This paper presents an urgent request for clear industry guidelines that will assist California transportation businesses in appropriately classifying their self-employed independent contractor drivers. Such guidelines must take into account (1) the many controls imposed on passenger transportation businesses by the state of California and other local regulatory authorities, (2) the profound impact that changing technology has had on the industry; and (3) the importance of entrepreneurial opportunity in accurately assessing independent contractor status.

Every day, thousands of people are transported in California by heavily-regulated “on-demand” providers – taxis and airport shuttles. The “employment” status of the men and women operating these vehicles has been a topic of heated debate for many years, and the importance of the issue has been increasing. While operators of taxis, airport shuttles and other on-demand vehicles are now almost universally classified by businesses as independent contractors or franchisees, some state labor regulators have been aggressively challenging such classifications. They argue that the on-demand operators are subjected to such operational “control” that, despite their contractual status, they are *de facto* employees under state employment laws and the federal Fair Labor Standards Act (“FLSA”). The disconnect between antiquated “control” factors and the realities of the on-demand industry has caused a great deal of confusion and concomitant legislation about how these operators should be classified: as employees or as independent contractors? In the worst cases, government agencies, for example the Employment Development Department, have slapped businesses with extraordinary fines for misclassifying these operators. Other businesses have been completely destroyed because their structures did not match an outdated notion of what an employer/employee relationship should look like.

A major component of this problem lies in the outdated guidelines currently used by regulators to determine how an on-demand transportation business should treat its independent owner-operators. Due to tremendous advances in technology, the industry is fundamentally changed, but regulations have not caught up.

There is precedent for the promulgation of new industry guidelines and authority which provides the basis for such rules. In particular, the August 2009 decision of the California Court of Appeal in *Ali v USA Cab*, 176 Cal. App. 4th 1333, provides an excellent starting point for such a discussion in the context of taxi operations. Additionally, a December 2009 decision of the Northern District of California in *Kairy v. SuperShuttle International, Inc.*, 2009 U.S. Dist. LEXIS 121867, illustrates the interplay between governmental controls and court determinations of employee status. In addition to *Ali* and *Kairy*, other decisions by courts and administrative agencies, some of which are addressed in this paper, make it clear that the analysis of “employee” status must account for factors not included in the current, traditional approach used by the DIR to assess “control.”

The current approach is simply wrong, and new rules are needed.

In order to provide much-needed certainty and direction for this industry the independent contractor status of drivers should be presumed if companies and drivers adhere to rules which are clear and anchored in reality. This would allow companies and drivers to operate with the security of knowing that their independent contractor or franchise models will survive governmental scrutiny, and will not arbitrarily subject them to a “reclassification” which results in financial ruin. The industry welcomes government review, but just as our cooperation should be expected, the industry (and thereby consumers) does not deserve targeting by regulators operating with wide discretion under perplexing guidelines.

As a final introductory note, providers of on-demand transportation, as a whole, are part of an industry structure that is largely the same no matter the type of vehicle. However, because of the differences in the regulations imposed on different types of providers, this paper is split into two parts: the first, discussing taxi drivers, who are subject mostly to local regulation, and the second, discussing airport shuttles, which are additionally regulated by California’s Public Utilities Commission (PUC). This split will lay out the guidelines which should be applicable to each type of provider, while demonstrating the common ground that mandates new regulations for both.

## **I. INDEPENDENT CONTRACTORS IN THE TAXI INDUSTRY**

The taxi industry in California is subject to stringent regulation by various authorities and government agencies, including municipalities and local airport authorities. Notably, the industry is not subject to regulation by the California Public Utilities Commission, which *does* cover airport shuttles. As a result, requirements imposed on taxi drivers make them different from all other independent contractors – even airport shuttle operators. Because of profound changes in the way the taxi industry has historically done business, the standards applied to this unique group by regulators are unworkable and need to be repaired.

### **A. A BRIGHT-LINE RULE FOR PROPER CLASSIFICATION OF INDEPENDENT CONTRACTOR TAXI DRIVERS IS NEEDED.**

Businesses which operate in the on-demand transportation industry should not face financial ruin as the result of one judge or regulator’s subjective interpretation of vague “factors” laid out by applicable regulations. Owner-operator-based taxi systems account for tens of thousands of jobs in the state of California, and serve millions of passengers per year. These businesses are entitled to clarity and consistency, and should not be subject to inconsistent interpretations of outdated rules, especially when such interpretations can result in massive fines and/or expensive lawsuits. This can be achieved with relative ease: issuance of a clear set of guidelines for establishment and maintenance of independent contractor status for taxi drivers, based on existing regulatory authority and case law, and giving rise to a conclusive presumption of non-employee status.

Governmental agencies within the state of California have the power to issue guidelines based specifically on opinions by the state’s appellate courts. They have done so in the past when necessary. Such guidelines are necessary now.

#### **1. The unique nature of the industry warrants specific guidelines that acknowledge the heavy burden of third party regulation, the practical realities of the industry and the importance of entrepreneurial opportunity for taxi drivers.**

Control is a key issue. Most guidelines pertaining to independent contractors and franchisee drivers do not account for the unique regulations imposed on taxis and other common carriers of passengers. This creates a problem for businesses in this industry, as rules discussing employer “control” do not discuss the fact that real control over owner-operators is imposed by third party government agencies and simply “passed through” by the business. Current regulatory guidelines regarding worker classification are of limited use because they do not directly address the impact of governmental controls. Further, existing guidance merely suggests what facts are important to employer control, without stating expressly that such facts will or will not provide certain protection to businesses. Thus, documents like the *EDD Taxi Information Sheet*, discussed below, were more helpful once but now lack requisite certainty and do not appropriately account for third

party controls. Further, documents which do not acknowledge the nature of pass-through controls pose an even bigger problem for businesses being scrutinized by government regulators. The complexity of local and state controls, and their uniqueness in different local jurisdictions, is not fathomed by regulators tasked with only a passing knowledge of the industry. These regulators *also* lack appropriate guidance about the role of controls which are imposed by outside forces. These rules are imposed for good reason – consumer safety – but businesses cannot be punished by regulators for complying with them.

Existing regulations further fail to take into account the practical realities of the taxi industry. Due to sweeping advances in technology, taxi drivers are now able to operate independently of taxi companies – setting their own hours, conducting their own advertising, making use of personal cell phones and social networking tools like Facebook to grow their businesses, and processing their own customer payments. Case law and regulations which are based on an outdated conception of taxi operations are not helpful to business owners trying to structure their operations in compliance with the law, nor do they assist auditors charged with enforcing the law.

Finally, existing guidance does not accord proper weight to the importance of entrepreneurial opportunity in the independent contractor business structure. The Ninth Circuit has stated that it is important for courts to consider “the entrepreneurial aspects of the individual's business; risk of loss and opportunity for profit; and the individual's proprietary interest in his business.” *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966 (9th Cir. 1978).<sup>1</sup> These considerations are key to an understanding of independent taxi operators, who will succeed or fail based on their management of their businesses. Indeed, entrepreneurial opportunity is the hallmark of taxi operations, and the reason owners, drivers, owner-drivers and lessees insist that they are independent business people. In the unique structure of the taxi industry, the presence of entrepreneurial opportunity should be given special recognition – recognition not granted by guidelines that currently ignore or minimize the requirement.

2. The EDD's *Taxi Information Sheet* does not properly account for third party regulations, entrepreneurial opportunity or the practical realities of the taxi industry.

The decision of the California Court of Appeal in *Santa Cruz Transportation v. Unemployment Insurance Appeals Board*, 235 Cal. App. 3d 1363 (1991), resulted in the general type of guidelines needed by the taxi industry, albeit ones that do not properly account for either the controls imposed by third parties or the importance of entrepreneurial opportunity. Based on *Santa Cruz*, the Employment Development Department (EDD) issued its *Information Sheet for the Taxicab Industry* (DE 231TC), providing rules for taxi operations wishing to maintain independent contractor status.

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<sup>1</sup> This paper references cases under both California law and the National Labor Relations Act. Both use the same “common law” test to determine employee status, and neither defines “employer” or “employee.”

The *Information Sheet* lists 16 “indicators of employment” considered by the *Santa Cruz* court. For example, the *Sheet* states the *Santa Cruz* court determined that the fact that the defendant taxi company “owned the taxicabs and municipal taxicab license” was indicative of employee status. The *Sheet* purported to distill the findings of the *Santa Cruz* court into a simple reference tool for businesses. Unfortunately, it has limited applicability, creates ambiguity because the real-world business paradigm at its creation in the 1990s no longer exists in 2010, and does not provide meaningful assistance to businesses or regulators.

More troubling is the fact that the *Information Sheet* was suddenly revised in November 2009, reducing its formerly-extensive reliance on *Santa Cruz*, yet it continues to fall painfully short of serving its intended purpose. Detailed explanations of the weight allegedly given to each of the *Santa Cruz* factors was removed, and while this “weighting” was vague, it at least provided business owners with some notion of the relative importance of various factors. The revision also removed a detailed explanation of the role of driver leasing agreements in a determination of employee status. Where the revision had an opportunity to clarify rules for businesses and adjust to the reality of the industry, it has instead avoided all clarity and allowed confusion and differing interpretations to creep in as the *Sheet* has “backed down” to a bare statement of law. Businesses and regulators need a clear, detailed explanation of what considerations will make or break a determination of employee status: regulators, in order to consistently apply the rules; and businesses, in order to enable them to comply with the law. The revision thoroughly fails in both regards, compounding existing problems with the *Information Sheet*. The *Information Sheet*’s stated purpose is to provide guidance, but the new version eliminated almost all prior guidance and became so vague and useless that it will inevitably generate new problems.

But let’s discuss what is needed by the industry:

#### **“Pass Through”**

One of the most glaring, persistent problems with the EDD’s *Information Sheet* is that it, like the *Santa Cruz* opinion before it, fails to properly account for “pass through” controls that originate not with the putative “employer,” but with any number of local, state or federal authorities imposing regulations on taxi drivers. While the document contains a paragraph explaining that governmental controls “are not viewed as evidence of an employment relationship,” it is quick to explain that any control which is perceived to be in excess of the mandated control “will be considered evidence of direction and control over the drivers and is evidence of an employment relationship.” The document does not state that a taxi company which implements only those controls mandated by law has protected the status of its drivers as non-employees. This latter statement is what is needed by businesses in order to ensure the continued success and security of their operations. This almost flippant reference to the most important factor in a proper analysis of drivers in this industry is unacceptable and has catastrophic consequences for legitimate business enterprises.

### **Entrepreneurial Opportunity**

The *Information Sheet* also suffers from a failure to properly account for the importance and types of entrepreneurial opportunity and risk associated with the taxi industry, such as those discussed by the court in *Ali v. USA Cab* – an exceedingly relevant, contemporary case which denied class certification for a group of taxi drivers claiming employee status and, in the process of doing so, affirmed the factors cited in this paper and indicative of independent contractor status. The revised *Info Sheet* makes no mention of facts considered by the *Ali* court as tending to show independence: the driver’s provision of his own supplies such as map books and flashlights; the driver’s use of his own credit-card processing equipment; and the driver’s ability to hire others to work for him. Historic, society-changing advances in communication have greatly enhanced entrepreneurial opportunity – technology allows cabs to function as autonomous offices, and has created entrepreneurial independence largely never dreamed of. In this regard, the *Information Sheet* is mostly irrelevant to today’s taxi operations and has limited usefulness to taxi companies. It is thus irrational to persist in using it to judge current business practices. Fortunately, *Ali*, discussed below, is a valuable resource available to close the gap.

### **Practical Reality**

Finally, the *Information Sheet* fails to recognize industry advances in technology that have occurred in the two-plus decades since the *Santa Cruz* decision. These advances have fundamentally changed the business relationship between taxi companies and drivers, shifting much of the entrepreneurial risk and benefit from the taxi company to the independent drivers. Accordingly, the *Information Sheet* should be modified to account for these drastic changes.

By way of example, one factor in the *Information Sheet* that ostensibly supports a finding of an employer-employee relationship is referred to as the “same business factor.” The factor is described as the circumstance where “the drivers’ work was part of the regular business of the taxicab company.” Relying on this vague statement, and information contained in a prior version of the *Information Sheet*, one auditor recently determined that a taxi driver and taxi company were in the “same business” on these bare facts:

- (1) the taxi company advertised transportation services,
- (2) the drivers obtained business as a result of the taxi company’s advertisements, and
- (3) the public demanded taxi services from drivers.

Such facts fall woefully short of demonstrating that drivers perform the same work as the taxi company.

This conclusion represents a fundamental misunderstanding of the nature of the relationship between drivers and taxi companies: drivers further the business of taxi companies only to the extent that they purchase services from those companies. Like vendors at a farmers’ market, taxi drivers benefit from the passenger base gathered by the taxi company, and pay the taxi company for access to that benefit. Drivers make the fundamental, controlling business decisions that directly affect their ability to make money and differentiate their business from other drivers. For example, drivers must

decide whether the expense of subscribing to a dispatch service – or multiple dispatch services – will be offset/exceeded by the revenue generated. By contrast, taxi companies operate more like a service provider or broker of services. Drivers use taxi companies to purchase services such as dispatch, car maintenance, leasing services, advertising and other services that are required by state or local laws, but are not in the “same business” as the taxi company, which is merely a conduit. The mere purchase of services from another business does not an employment relationship make.<sup>2</sup>

It is possible that this misapplication of the “same business factor” is the result of an outdated perception of the taxi industry. More than three decades ago, the taxi company *was* in the business of providing transportation services. The company would place drivers in particular zones, and assign fares to particular drivers when orders came in. The company decided which calls went to which drivers and determined the location of those drivers at all times. The company could reduce the number of drivers in a fleet to ensure a high demand. Further, drivers could be fired for not picking up fares as directed by the company.

Technology has drastically altered this process. Today, the “controlling factors” belong to the driver. Calls received by a taxi company’s computerized dispatch system, almost universally, are made available to all drivers in a particular area, via computers in each taxi. Drivers who choose to make use of these computers can accept or reject fares offered by the dispatching system, without any penalty for “passing” on a given trip. In fact, they can subscribe to multiple dispatching systems and accept fares from a variety of taxi companies. On the other hand, drivers can also choose to forego use of computers, and instead advertise on their own and obtain fares directly from customers who call their cellular phones (as many taxi drivers do). Even more importantly for purposes of the “same business” analysis is the fact that drivers can choose which forms of payment they will accept, including credit cards - which they will process on their own machines. (Taxi drivers also keep all cash fares paid to them.) This modern system means that drivers do not receive any compensation whatsoever from the taxi company. Drivers are paid directly by their passengers, and the money they receive belongs to them. Clearly, in the real world, the control issue is often left to the drivers, whose discretion is much more absolute.

Developments in the industry have freed drivers to operate independently of taxi companies, further emphasizing that the “same business” factor must be re-examined. Drivers may purchase a variety of services from taxi companies, but retain discretion over many aspects of their operations, including what type of vehicle to drive (vans or wheelchair-accessible vehicles expand the fare base), the color schemes they wish to operate under and the hours they wish to keep.

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<sup>2</sup> We note that the independent contractor model, while pervasive, is not the only model of taxi operations. While most companies are moving in the direction of an independent contractor model, isolated companies still operate under the employee model. These companies still benefit from a *Taxi Information Sheet* that is deliberate and has absolute clarity in highlighting who is an independent contractor.

No longer are drivers subject to the control of the company because now drivers operate their own businesses. Drivers make business decisions that directly affect their ability to make money and differentiate their business from other drivers. The ability to control business decisions allows drivers to develop a niche in the on demand driver market. And a taxi company's business plan is shaped by the way it sells its services.

This change in relationship also shifted the entrepreneurial risk from the taxi company onto the driver. Previously, the taxi company generated income by the number of fares driven by its drivers. Drivers were paid a fixed rate for hours worked or by commission. With the advances in technology, drivers make choices for their businesses that shift the entrepreneurial risk onto the drivers. As noted above, drivers make business decisions that directly affect their ability to generate income. For example, a driver must decide whether to subscribe to dispatch services from the taxi company broker – an important decision that balances cost savings against reduced fare opportunities. The driver must weigh which option will provide him or her with the greatest profit. However, the taxi companies sell services to drivers on a fixed schedule to generate income whereas the drivers' income is generated by fares they collect from their customers. The drivers, therefore, bear the entrepreneurial risk because their choices determine their income-generating ability.

This profound change in the relationship between the company and drivers requires a practical application of the *Information Sheet* to the on-demand passenger transportation industry. *State Compensation Ins. Fund v. Brown*, 32 Cal. App. 4th 188 (1995), involving truck drivers, presents the proper approach: the court held that the trucking company functioned essentially as a "broker" of trucking services, such that truck drivers were found to be engaged in a distinct occupation from that of the truck company. The court understood that a nuanced look at the business relationship yields a more accurate application of the same business factor. A similarly nuanced approach, which recognizes the various relationships between companies and drivers, should be applied in the analysis of the *Information Sheet* factors. The logic that once led to the conclusion that taxi companies and drivers are in the same business simply no longer applies. A rigid application of these outdated notions and guidelines yields perverse results that harm business owners on both sides of the passenger transportation transaction. Both parties – business owners and regulators – need certainty in this arena.

Businesses in this important industry need to know, conclusively, that particular actions will create a presumption of independent contractor status that will withstand scrutiny.

Perhaps most importantly for the purposes of this paper, the EDD's use of *Santa Cruz* demonstrates that government agencies may rely on court decisions in promulgating industry rules, pursuant to procedures and guidelines set forth in the Administrative Procedures Act. The time has come to make use of available case law and practical industry knowledge to update industry rules.

3. Current DLSE guidance on this issue is outdated and does not account for the realities of the industry.

The current rules regarding classification of independent contractors, contained in the DLSE's *Enforcement Manual* at section 28.3.3, make use of outdated case law and do not properly account for either third party controls imposed on putative "employers" or the consequence of entrepreneurial opportunity. Moreover, such regulations are no longer relevant or realistic in the face of significant industry advances in technology.

The *Enforcement Manual* relies on the "economic realities" test for employment status outlined in *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). *Borello* involved share-farmers who were found to be employees of a grower, not independent contractors, and has been applied in a wide variety of contexts to determine employee status. The employer in *Borello* was not subject to the heavy regulation shouldered by passenger transportation businesses and also did not have the freedom presented by modern technology.

Section 28.3.3 describes the application of the *Borello* factors to the case of *Yellow Cab Cooperative v. Workers Compensation Appeals Board*, 226 Cal. App. 3d 1288, decided by the California Court of Appeal in 1991, but makes no mention of government regulations imposed on taxi drivers. It merely re-states the court's conclusion that "[t]he absence of control over details is of no consequence 'where the principal retains pervasive control over the operation as a whole.'" As explained in the *Ali* decision below, however, this "pervasive control" is largely imposed not by the purported employer, but by various government regulations.

The *Enforcement Manual's* treatment of this industry is outdated and incomplete, and tends to contribute to the confusion now plaguing transportation businesses in California. A clear statement that third party requirements (such as uniforms, trip-sheets, and safety requirements) do not convert independent owner-operator taxi drivers into employees is necessary to protect businesses. This guidance is presented by the *Ali* case, which should be used to update the *Manual*, according to standard DLSE procedure.

Further, the *Manual* does not properly account for the importance of entrepreneurial opportunity in the taxi industry. The guideline makes no mention of this crucial consideration, except to blandly recite the *Borello* factors without commentary. The document contains a brief paragraph noting that "investment" is one criterion for a finding of independent contractor status, but focuses only on ownership of the vehicle in use, ignoring other significant advantages of the independent contractor model, including freedom in scheduling, in hiring sub-contractor drivers, and the opportunity to increase profit based the skill of the driver.

Finally, the *Manual* suffers from a disconnect with the reality of the industry. It has not been updated for many years - it is a typewritten document in a computer age. As described above, taxi operations have taken advantage of significant advances in technology in the past 20 years, none of which are acknowledged by the *Manual*.

The DLSE *Enforcement Manual* needs to be amended, to be fair and effective, via procedures created precisely for this purpose. It needs to contain clear guidance for businesses engaged in on demand passenger transportation, including a presumption of independent contractor status for taxi drivers when businesses “pass through” control imposed by third parties and where the business structure provides significant entrepreneurial opportunity to drivers, including that afforded by technology.

### **Credible Action**

The existence of documents such as the EDD’s *Taxi Information Sheet*, while limited in their ability to create a bright-line rule and reduce business owner liability, demonstrates regardless that case law is appropriate for regulators to consider when creating guidelines. The *Information Sheet* is specifically based on state appellate decisions like *Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board* (1991) 235 Cal.App.2d 1363 and *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal. 3d 341. DLSE guidance is also based on *Borello*. This express reliance indicates that other court decisions, like that of the Court of Appeal in *Ali*, discussed below, are an appropriate source of revisionary guidance.

### **B. CASE LAW DEMONSTRATES THE PROPER APPLICATION OF BORELLO IN THE HEAVILY-REGULATED TAXI INDUSTRY.**

There is case law and regulatory authority available from which guidelines may be drawn, outlining clearly the true nature of pass-through regulations and the fact that they cannot logically form the basis of a determination of employee status. These cases further emphasize the importance of entrepreneurial opportunity in making a determination of independent contractor status. Such case law could be used to formulate clear guidelines for maintenance of independent contractor status for taxi drivers, compliance with which would create a presumption of proper classification and much-needed business protection.

#### **1. The *Ali* decision from the California Court of Appeal conducts an analysis of taxi driver status which properly accounts for third-party regulation and entrepreneurial opportunity.**

In July 2009, the California Court of Appeal issued its decision in *Ali v U.S.A. Cab*, 176 Cal. App. 4th 1333, denying a request for certification of a class action lawsuit brought by taxi drivers in San Diego who claimed they were employees, not independent contractors, of USA Cab. The decision garnered a great deal of attention in the business community, and was discussed widely among employers and employment-law firms. The case was important because the court specifically examined the aspects of plaintiffs’ businesses that tended to demonstrate that they were independent contractors. This examination was grounded in the reality of current industry operations.

Importantly, the *Ali* court acknowledged that the factors outlined in *Borello* are ill-applied in a heavily-regulated industry such as passenger transportation. The Court stated:

We are mindful of the general principles of *Borello* and its progeny, but they are not class certification cases, and their particular facts differ from those before the court...

*Ali* at p. 1349 (emphasis added).

The *Ali* decision acknowledged that taxis are regulated by outside entities and third parties, including local airport authorities. The case focused on certification of a class action brought by taxi drivers, and in doing so noted many factors that establish independent contractor status. The Court specifically acknowledged that taxis operating in San Diego County are subject to numerous requirements imposed by “federal and state governments, the City of San Diego and the Metropolitan Transit Development Board (MTDB),” and the San Diego Regional Airport Authority.

As is the case across the passenger transportation industry, the court explained that these regulations account for many of the requirements imposed on drivers, including “maintain[ing] a daily trip log and assist[ing] customers with baggage...not solicit[ing] customers, refus[ing] a fare, or be[ing] more than 12 feet from the taxi when in a taxi zone.” The decision also noted that USA Cab provided a training manual to its drivers only to remind them of the rules enacted/enforced by the aforementioned agencies.

Importantly, the Court applied *Borello* in a way that accounted for these pass-through regulations and acknowledged the entrepreneurial characteristics of the operation. Thus, despite the presence of certain “controls” that could be misread as establishing employee status, the Court concluded that USA Cab’s owner-operators were independent contractors because:

- They were not required to use USA Cab’s dispatch service, though it was available
- Many used their own maps, flashlights, tool kits, jumper cables, cellular phones, computers, GPS navigation systems and credit-card processing equipment, and decided whether they wanted to accept credit cards at all
- Many conducted their own advertising, including giving out business cards and personal cell phone numbers

The *Ali* Court was also presented with numerous other indications of independent operations:

- USA Cab did not collect any “commission or percentage of drivers’ fares” and did not “require them to make any accounting to USA Cab, although MTDB requires them to include fare amounts in their daily records”
- Drivers set their own work schedules. USA Cab did not “assign shifts to drivers or tell them whether or when to take breaks, how to obtain fares or what to charge”
- Drivers could have other drivers fill in for them, filled in for other drivers, and used their taxis for personal reasons

Such specific discussion gives the taxi businesses important information about their business models and permits them to structure their operations in conformance with specific guidelines. The *Ali* case is also notable for its understanding of the reality of daily taxi operations. This single case provides greater clarity than the *Taxi Information Sheet* and the DLSE guidelines, both of which were intended to provide guidance to businesses. This information should be incorporated into DLSE guidance on properly classifying independent contractors in the heavily-regulated taxi industry.

2. *SIDA of Hawaii* supports the *Ali* model of independent-contractor taxi drivers.

Even prior to *Ali*, the Ninth Circuit had ruled that taxi drivers may be properly classified as independent contractors despite “pass through” controls imposed by government regulatory agencies, based on the entrepreneurial freedom afforded by their work. The *SIDA* case provides further support for new guidelines.

In *SIDA of Hawaii v. National Labor Relations Board*, 512 F.2d 354 (9th Cir. 1975), the Court determined that taxi drivers who provided service at Honolulu International Airport were independent contractors and not employees. The case represents a trend that began in 1975 yet has become an absolute reflection of the industry—with added technology and entrepreneurial opportunity—as it is in 2010. The court concluded that drivers made “substantial personal investments in their taxi activities,” as evidenced by the following facts:

- Drivers purchased and maintained their own vehicles
- Drivers obtained all necessary city and state permits
- Drivers paid for their own health insurance, Social Security, unemployment benefits, and income taxes
- Drivers purchased their own automobile insurance
- Drivers paid a monthly rental fee to SIDA, as well as 50-cent trip fee for each trip out of the airport

The Court also concluded that drivers were “substantially independent in their operations,” since:

- Drivers chose when they wanted to work
- Drivers could “moonlight” for other taxi companies
- Drivers could make their own arrangements with clients and develop goodwill
- Drivers were not limited to any particular area of operation
- Drivers collected and retained all fares
- Drivers were “supervised” by SIDA only to the extent that SIDA used line operators at airports, as it was required to do by ordinance

Consistent with *Ali*, the *SIDA* court also stated that third party regulations which were merely passed through by SIDA were not indicative of the alleged employee status of drivers. The Court noted:

Several of the Association's regulations simply incorporate the requirements imposed on SIDA by its commercial contracts and certain state and local ordinances (e.g., presence of line operators at the airport, liability insurance requirements, and rules regarding the personal appearance of the drivers). The [National Labor Relations] Board has itself noted that the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship. Furthermore, we do not find the incorporation of the requirements of the SIDA-State of Hawaii contract to be inconsistent with an independent contractor relationship, in that such an incorporation benefits both parties by insuring continued operation under the contract.

*SIDA* at p. 359 (citations omitted).

The Northern District of California’s recent decision in *Kairy v. SuperShuttle International, Inc.* further supports the idea that government-mandated controls are not the equivalent of employer controls. *Kairy* was a class action brought by airport shuttle drivers, but its acknowledgment of the impact of governmental controls on a determination of employee status is very important. *Kairy* illustrates the proper resolution of the paradox facing the regulated passenger transportation industry: Compliance with regulations mandating control over operations (needed to ensure the safety and convenience of the public), must not be used to establish that the independent contractor drivers should be reclassified as “employees.” Otherwise, the very regulations issued to promote safety and quality of service to the public will instead cause services to be scaled back, and prices to skyrocket, to account for the inefficiencies, costs and other consequences of mandating use of employee drivers. A fuller discussion follows at Section 2A3, below.

It is frustrating that the EDD and other regulatory agencies, forced to understand the dynamics of many different businesses, fail to grasp the structure mandated by government entities.

### C. INDEPENDENT TAXI OPERATIONS ARE MUTUALLY BENEFICIAL.

The heavy third-party regulation of taxi drivers creates an environment where operations are most efficient and most successful under the independent contractor model. The cases cited above contain evidence that, but for the presence of third-party controls, there would be little question that taxi drivers were independent owner-operators and not employees:

[D]rivers do not in any practical sense render a service to SIDA for which they are compensated; rather, SIDA is merely an administrative creature which provides certain facilities and opportunities to the drivers for a price.

*SIDA* at p. 358.

The same could be said for most modern taxi companies.

The development of the industry, and integration of technological advances, has further reinforced the fact that taxi drivers are independent contractors and enabled them to work more efficiently as such:

- The rapid expansion of the World Wide Web allows independent owner-operators to advertise their services at a low cost, yet still reach a very wide audience (as very many drivers do). Thousands of orders are placed electronically by passengers every day, reaching drivers via Web or text messaging, without ever coming into contact with a taxi company.
- GPS technology assists drivers in avoiding traffic, mapping the shortest route to any destination, and to thereby maximize efficiency.
- On-board computers permit drivers to instantaneously view several available trips at the same time and thereby calculate their potential profit from each before accepting or rejecting it.
- The widespread availability of personal credit-card processing equipment frees drivers to accept any manner of credit cards (or choose to accept none at all).
- The use of cellular telephones has the potential to free drivers from being tied to a particular dispatch system, if they prefer.<sup>3</sup>

Taxi drivers function independently of the transportation marketers with whom they choose to affiliate, or from which they purchase a limited amount of services. Indeed, these drivers are not subject to company orders, direction or requirements that they pick

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<sup>3</sup> Some airport authorities do not allow drivers to pick up passengers at the airport if the vehicle is not identified with, or “flagged” as, a particular taxi company. This is to protect the consumer and create greater accountability for operators.

Significantly, this requirement is not imposed at every airport in the state. Guidelines dealing with independent taxi drivers must provide flexibility for the analysis of airport and other governmental rules. So-called “employers” which prohibit taxi drivers from providing personal phone numbers to clients, where this is in fact a regulation imposed by the local airport authority, cannot be accused of exercising control over these drivers of their own volition.

up certain fares – each driver is directly responsible for his economic gain and decision-making about his business. Along those lines, taxi (and shuttle) drivers do not turn their fares into the leasing company, but instead pay set fees for leasing equipment and purchasing dispatch services.

If we fail to bring sense and sensibility to enforcement in the taxi industry, the end result will be the loss of legitimate businesses serving the community and the emergence of rogue drivers operating ruthlessly and without regard for the consumer. Any doubt on this issue can quickly be eliminated by an internet search for “bandit” or “rogue” taxis in any metropolitan area of consequence in California. The industry wishes to work with regulators on clarity. Hopefully, the commitment will be mutual.

## **II. INDEPENDENT CONTRACTORS & FRANCHISEES IN THE AIRPORT SHUTTLE INDUSTRY**

As with the taxi industry, the airport shuttle industry is subject to heavy regulation. Airport shuttles are subject to many of the same *local* regulations imposed on taxi drivers; however, there is an additional level of regulation. Specifically, the airport shuttle industry is also regulated by California's Public Utilities Commission ("PUC"). The additional regulations imposed by the PUC further dictate industry operations. For example, under PUC regulations, airport shuttles may not "flag down" customers on the street or provide customers with a personal cell phone number to arrange service. Shuttles can make arrangements with private passengers to make non-airport trips, but current PUC regulations impose a reporting requirement for these "charter trips." Violations of PUC regulations can result in fines, citations and/or revocation of an operator's license. These governmental requirements are easily mistaken for the presence of employer control, but are in fact merely passed along to independent owner operators as their inherent responsibility.

Unlike the EDD's *Information Sheet for the Taxi Industry*, there is no guidance aimed specifically at independent owner-operators of airport shuttles. The general guidance available to businesses involved in the industry fails to recognize the unique, heavy regulation under which they operate, and thus is of limited use in helping these businesses achieve certainty and security. Further, guidance geared toward taxi drivers is not sufficient – airport shuttles are subject to unique rules not applicable to the taxi industry, and which mandate separate guidelines which deal with the specifics of this particular type of business. The consequence of ambiguity from a lack of guidance is that the family and collective businesses that have arisen in the airport shuttle industry will be lost.

Further, *FedEx v. NLRB*, discussed below, recognized the unique importance of entrepreneurial opportunity for independent contractor drivers. While existing guidelines often make mention of entrepreneurial opportunity as one factor in analyzing independent contractor status, it is not given appropriate consideration. As explained in more detail in *FedEx*, entrepreneurial opportunity is the hallmark of independent contractor status, and should be given particular consideration when making determinations of employee status in the on demand airport passenger transportation industry.

Unique in the on-demand transportation industry, airport shuttles are a statutorily-mandated public utility and provide a source of income for thousands of drivers and transport millions of passengers per year. They are a lifeline for airports and local businesses, and are key to airport security. Like the taxi industry, businesses in this industry are in need of precise guidelines for proper classification of their owner-operator drivers. As with taxis, these guidelines should provide a presumption of independent contractor or franchisee status when businesses comply with the rules. And finally – as with taxis – there is case law available from which the guidelines may be drawn.

A. CASE LAW OUTLINES A METHOD OF PROPER CONSIDERATION FOR AIRPORT SHUTTLE OPERATORS AS INDEPENDENT CONTRACTORS.

There is guidance pertinent to airport shuttle operations which demonstrates the starting point for a more appropriate analysis of independent contractor status in the heavily-regulated airport shuttle industry.

1. The M&M decision contains clear guidance regarding the impact of third-party regulations on a determination of employee status for airport shuttle drivers.

In October 2007, the California Unemployment Insurance Appeals Board issued its opinion in the case of *M&M Luxury Shuttle, Inc.*, dealing with the disputed employment status of airport shuttle operators who had signed independent contractor agreements with a shuttle company. *M & M Shuttle, Inc. v. Employment Development Department*, Case Nos. 2056607, 2056608 and 2056611, OA Decision No. 2056607. The Board concluded that the drivers were independent contractors of M&M, and issued nearly four pages of findings explaining precisely why this was so. Importantly, the Board explained that:

“The contract with the owner-operators, at first glance, looks like a recitation of control factors.... On closer examination, however, it becomes apparent that the controlling authorities are not [M&M] but the Public Utility Commission, the Airport Commission, the San Francisco Police Taxi Detail and the airport police. Each one of the elements of the contract relates to a requirement by one of these governing entities.”

“Other than these passed through rules, the petitioner has no authority or interest in or over the activities of the owner-operators or their vehicles.”

*M&M* at p. 3.

The Board’s findings could easily serve as the basis for guidance to the shared-ride transportation industry regarding the proper classification of independent contractor airport shuttle drivers.

For example, the Board noted that:

- Government regulations require drivers to use M&M’s color scheme and comply with a dress code
- Government regulations require drivers to maintain weigh bills and trip sheets
- Government regulations require drivers to keep their vehicles in good condition
- Government regulations mandated that all commercial casual ground transportation shuttles servicing San Francisco International Airport must have an airport operating permit
- Airport regulations restricted the number of permits that the airport could issue. Thus, at times, a moratorium prevents any new operators from entering the market

The Board concluded that airport shuttle drivers were, unquestionably, independent contractors:

Owner-operators do not perform any services for the petitioner. They are not employees. They are self-employed independent contractors who purchase privileges and services from the petitioner. The petitioner has no right to control the manner and means the owner-operators use to accomplish the desired result of generating more income from passengers going to and from SFO. The petitioner has no right to control the manner and means the owner-operators use to control expenses for fuel, maintenance, insurance, license, trip fees and services purchased from the petitioner.

*M&M* at p. 5.

*M&M* offers a rare glimpse of the type of guidance that is needed by airport shuttle industry operators. It properly accounts for stringent governmental regulation, and explains that this cannot form the basis of a determination of employee status, given the alleged employer's total lack of control over the rules imposed on its alleged employees.

2. *FedEx v NLRB* provides a bright-line rule for proper classification of independent contractors, based on entrepreneurial opportunity and third-party control, which can be applied to airport shuttle operators.

The U.S. Court of Appeals for the District of Columbia, discussing FedEx drivers, noted that the implementation of government regulations by an entity from whom independent contractors purchase services does not constitute employer control. The court stated, “[w]e have held that constraints imposed by...government regulations do not determine the employment relationship.” *FedEx Home Delivery v NLRB*, 563 F.3d 492 (D.C. Cir. 2008).

Even more importantly, the *FedEx* court considered the “entrepreneurial opportunity” of the drivers to be a key component in distinguishing them from employee drivers. The court stated that the “record here shares many...characteristics of entrepreneurial potential.” Among them:

- FedEx did not prescribe working hours, whether or when to take breaks, or subject drivers to discipline
- Drivers were responsible for providing and maintaining their own vehicles
- Drivers had to ensure that their vehicles were compliant with government regulations and other safety requirements
- Drivers were permitted to use their vehicles for personal use
- Drivers could incorporate, sell or transfer their businesses, and negotiate different rates with FedEx
- Drivers could service multiple routes, hire their own employees without FedEx's knowledge, and were responsible for paying these employees without any involvement by FedEx. The court noted “[t]his ability to hire ‘others to do the Company’s work’ is no small thing in evaluating ‘entrepreneurial opportunity.’”

The court's holding in this regard was consistent with Ninth Circuit precedent regarding the importance of entrepreneurial opportunity in maintaining independent contractor status:

“[T]he entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status. All but one of the owner-operators are doing business as corporations or partnerships; two own more than one truck, and sometimes engage in [outside] business; all have the right to employ their own helpers to assist them in making deliveries, and several do so, paying the relevant employment taxes themselves; and all have a substantial investment in their equipment, which is their responsibility to fuel, maintain, insure and generally keep up to Merchants' standards - and their own standards. The owner-operators thus retain the attributes and responsibilities of ownership over their trucks in spite of the fact that the trucks are leased to Merchants. It is also of significance that these deliverymen owned their trucks prior to signing with Merchants, and that it is Merchants' standard practice not to own any delivery trucks.”

*Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966 (9th Cir. 1978) (emphasis added).

Of course, neither *FedEx* nor *Merchants Home Delivery* was a case dealing with airport shuttle drivers,<sup>4</sup> but they provide valuable guidance as to the singular importance of entrepreneurial opportunity in the analysis of “independent” status, by way of examples from identical paradigms. The cases are important in presenting factors which demonstrate independent operations: the operator's ownership and maintenance of his own vehicle, the operator's responsibility for his own permits, and the operator's ability to purchase or operate one or more routes, pursuant to formation of a business entity or incorporation, and to hire others to work for him.

*FedEx's* emphasis on entrepreneurial opportunity as a bright-line test that will bring certainty to often-ambiguous or “either way” control analyses provides a starting point for the creation of a workable test for independent contractor status in the airport shuttle industry, and should be used to craft clear guidance to industry operators. It would be constructive for regulators, the industry and ultimately for consumers to better delineate the role of government to fairly and openly regulate and not allow confusion or ambiguity to force undue hardship on an industry.

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<sup>4</sup> In fact, on a continuum of relative independence, it is worth noting that airport shuttle drivers have decidedly more independence than delivery drivers, yet the *Fed Ex* and *Merchants Home Delivery* drivers were determined to be independent contractors. For example, delivery drivers must drive set routes, pick up and deliver all packages on these routes, and must drive set schedules and days. By contrast, airport shuttle drivers are not required to work set schedules. They may log into company dispatch systems and make themselves available to accept fares *whenever they want*. Additionally, they are not required to accept every fare offered to them via computerized “availability” systems. And, in fact, on a statistical basis, they accept only 25%-35% of fares/passengers available in company dispatch systems. (See Appendix “A,” an exemplar sampling of 5 airport shuttle drivers, reflecting that drivers only accept 10-30% of offered fares. (Taxi industry statistics are similar.)

3. *Kairy* re-affirms the importance of careful analysis of governmental regulation in the employer control discussion.

Finally, a recent decision in the *Kairy* class action lawsuit, brought by California airport shuttle operators, further emphasizes that application of the standard control analysis to drivers in the heavily-regulated airport shuttle industry will interfere with the carefully-considered rules aimed at promoting public safety without reducing services or increasing costs to the public. In *Kairy v. SuperShuttle International, Inc.*, 2009 U.S. Dist. LEXIS 121867, the Northern District of California explained that it did not have jurisdiction to hear plaintiffs' state-law-based claims that they were misclassified as nonemployees, due to "occupation" of the field by PUC regulations.

**The California PUC**

The California Public Utilities Commission is a constitutional agency which mandates that businesses maintain supervision and control over all of their operators (employees and independent contractors) to ensure public safety. PUC regulations specifically permit drivers to be classified as non-employees/independent contractors while they are serving as subcarriers to airport shuttle businesses.

The *Kairy* court stated:

[T]he PUC's regulations and decisions have determined that independent nonemployee status is permitted, notwithstanding the requirement that the [airport shuttle company] exercise 'complete supervision, direction and control' over the operations of the [airport shuttle driver]. The Court finds that any determination regarding the proper classification of the plaintiff drivers would have the effect of adjudicating the classification of Plaintiffs as either employees or nonemployees under the California claims. This Court lacks jurisdiction to make such a determination.

Because the PUC had already made a determination regarding employee classification in light of its own mandatory controls, the *Kairy* court found that it could not decide the matter without disturbing the Constitutional supremacy of the PUC. *Kairy* reaffirms that claims of *de facto* employee status based on control are incompatible with and contrary to the PUC's careful regulatory scheme, as set forth in PUC General Order 158 *et seq.* and the PUC's decision in *Prime Time Shuttle International*, 1996 Cal. PUC LEXIS 854. It thus provides broad support for the promulgation of new guidelines which expressly acknowledge the impact of governmental controls on a determination of employee status, as well as guidance to auditors, demonstrating that audits of airport shuttle companies must acknowledge, if not defer to, PUC regulations which specifically authorize "controlled" independent contractor fleets which operate as public utilities and which implement the PUC mission of maintaining public safety.

## B. FRANCHISING IN THE AIRPORT SHUTTLE INDUSTRY.

Another factor contributing to the continued viability of providers of on-demand transportation as independent contractors is the prevalence of franchise agreements in the airport shuttle industry. Government rules thus cannot be unyielding or subscribe to the idea that one business plan fits all: an employee-based plan is simply not realistic for many businesses.

Franchising is the standard method of doing business in the airport shuttle industry. Various California courts have confirmed that franchisors are permitted to establish significant controls over workers without creating an employment relationship; thus, airport shuttle companies are able to protect their trademarks and goodwill without becoming employers of shuttle drivers. In *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, the Court of Appeal stated that the franchisor must be permitted to exercise control over the quality or integrity of the trademark and goodwill of his business without becoming an employer. The Northern District of California reached this same conclusion in *Walker v. Pacific Pride Services*, 2007 U.S. Dist. LEXIS 87143, agreeing that the franchisor could require<sup>5</sup> its franchisees to keep their premises clean and safe without becoming their employer. Finally, in *Huse v. Auburn Honda*, 2005 U.S. Dist. LEXIS 45494, the Eastern District of California confirmed that a franchisor may provide training materials and conduct inspections without becoming an employer of its franchisees.

Numerous court opinions have specifically confirmed that franchise owners in the on demand transportation business are properly classified as independent contractors. *See, e.g., Erkgul Akgul v. Prime Time Transportation, Inc.*, 293 A.D.2d 631 (N.Y. App. Div. 2002); *In the Matter of the Claim of Jerzy Jarzabek*, 292 A.D.2d. 668 (N.Y. App. Div. 2002); *In the Matter of the Claim of Agha S. Rukh*, 208 A.D.2d. 1105 (N.Y. App. Div. 1994). These cases indicate that many providers have characteristics in common:

- Drivers provide their own vehicles, and are responsible for maintenance and insurance
- Drivers comply with uniform operating standards to maintain goodwill
- Drivers attend training programs
- Drivers are offered fares from a centralized dispatch service, but are not required to accept any particular trip, nor are they punished for declining or failing to accept any trip<sup>6</sup>

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<sup>5</sup> The exhortation of form over substance that has infected the traditional “control” analysis is underscored by *Walker*, e.g. the analysis has reached the point that plaintiffs’ lawyers and some regulators seriously contend that a contract term that independent contractors treat customers courteously is an “indicia” of employment. In such a world of analytical *reductio ad absurdum*, it is an apparent indication of freedom from control and “independence” that a contractor is only truly a contractor if they may treat a customer rudely, with hostility and dishonesty. Do regulators truly wish to impose such facetiousness on an industry that is a key component of the United States travel system, and on a riding public which the PUC is mandated to protect?

<sup>6</sup> This is a point which bears emphasizing. In the standard franchise model of airport shuttle operations, franchise owners select which trips, if any, they want to accept for that business day and which they wish to

- Drivers select the hours they wish to work
- Drivers can hire others to perform work for them, as long as those drivers meet minimum standards, usually set by regulatory authorities like the Department of Transportation
- Drivers can use their vehicles for other purposes, both business and personal

SuperShuttle has utilized the franchise model in its California locations since approximately 2002. As a result, turnover decreased from 200%, under an employee model, to approximately 10% per year, and productivity and customer satisfaction increased dramatically. Perhaps more importantly, the accident incident rate dropped 65%. SuperShuttle is not alone in its successful implementation of this mode, either: Cloud 9 Shuttle in San Diego has maintained the same model for its airport shuttle operations for more than ten years. In the PUC's decision regarding another airport shuttle, Prime Time Shuttle International, 1996 Cal. PUC LEXIS 854, the PUC noted that after Prime Time converted from an employee model to an independent contractor model, its accident rate dropped by 50%.

The Ninth Circuit has acknowledged that third party control “passed on” to franchisee drivers by the franchising entity does not constitute employer control:

Most of the facts which the Board [] asserts to be proof of Carnation's retention of the power to control its drivers are facts (economic rights and sanctions) which can be found in a variety of ‘franchise’ arrangements oriented toward brand-name protection and market penetration. In such cases there is no attempt to supervise the details of the work, and no assertion that the franchise holder is anything but an independent business man.

*Carnation Co. v. NLRB*, 429 F.2d 1130, 1133 (9th Cir. 1970)

Many aspects of the franchise system are also consistent with the “entrepreneurial opportunity” characteristic of independent contractor status. For example, franchisees are business owners – many make a large initial investment to purchase a franchise, and many incorporate or form a business association of some kind, sometimes with a partner or partners, in order to better manage their finances. They are responsible for ownership of their vehicle or fleet of vehicles, and for accompanying licenses and expenses associated with the business's operation. Many are able to increase their profits by negotiating lower insurance and repair rates with associates, friends, or the buying power of hundreds of franchisees operating under one brand. They are able to use their vans for secondary purposes, and increase the revenue associated with each vehicle in that way. They have the ability to purchase multiple franchises, building business enterprises that turn a significant profit, depending on the skill of the owner. Over time, they build equity

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decline. They are free not to log into the system at all, should they not wish to work that day. Appendix “A” contains a sampling of “accept/decline” charts from airport shuttle franchise operators – all of which demonstrate that these individuals decline far more trips than they accept. Any argument that these operators are “compelled” by “employer control” to accept particular trips is nullified by these simple charts.

in these businesses, and many are able to sell their franchises at a substantial profit. Franchisees are able to manage their businesses as they see fit – designating their operating hours and hiring employees to drive their vehicles. They are similarly responsible for paying, training and disciplining these employees.

The franchise system offers benefits not available to drivers under an employee model as well. Driver income under an employee model tends to track minimum wage. By contrast, franchise owners make substantially more based on the number of vehicles they own and the number of drivers they employ. They can associate with other franchisors and form partnerships or other business relationships. The franchise owner sets his own schedule, decides which days and hours he wants to work or to have his franchise in operation, and decides which trips he wishes to accept or decline<sup>7</sup>, based on profitability, timing, fuel efficiency, and other factors. He owns his own vehicle, and can begin his workday from home instead of reporting to a centralized holding lot. Most importantly, the franchise owner has acquired long-term security by virtue of his franchise agreement, which can range anywhere from one to ten or more years. A franchise owner's rights are enforceable pursuant to a binding franchise agreement, termination of which is regulated according to Federal Trade Commission and California Department of Corporations rules and regulations. (Adding to the “due deference” indicated by the PUC’s authorization of “control” independent contractors, DIR and EDD regulators should not overlook the fact that airport shuttle franchisee contracts are reviewed and approved by sister government agencies such as the California Department of Corporations and the FTC.)

In fact, the very existence of a franchise relationship indicates that the franchisor has obtained approval of from the California Department of Corporations and has complied with their requirements. However, many of these requirements appear to conflict with the traditional “control” factors analyzed under *Borello*, which indicates again that the on demand passenger transportation industry is in need of specific guidelines for maintaining proper classification of their drivers. In addition to the rules and regulations imposed by the California Department of Corporations, California’s Business and Professions Code imposes the following requirements:

- The franchisee’s right must be granted under a marketing plan or system prescribed in substantial part by the franchisor. (In order to implement a uniform system and plan, certain controls are inevitable.)
- The operation of the franchisee’s business must be substantially associated with an advertising or other commercial symbol designating the franchisor or an affiliate of the franchisor, such as a trademark, service mark, trade name, or logotype. (Again, efforts to implement such statutorily-required associations are often misconstrued as “controls.”)
- The franchisee must be required to pay, directly or indirectly, a fee or charge, known as a “franchisee fee,” for the right to enter into the business.

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<sup>7</sup> See Appendix “A.”

The uniformity of the franchise system is another significant benefit for franchisors, rather than an indication of employee status. The *SIDA* court, discussing independent contractor taxi drivers,

...disagree[d] with the [National Labor Relations] Board's contention that the rules and regulations are instruments of control for the benefit of *SIDA* as an entity; rather, they can more accurately be seen as being designed to enforce standards of conduct to which all of the drivers should adhere in order to promote the *SIDA* image for the mutual benefit of the Association and its drivers. Examples of such required conduct are that the drivers be neat and courteous, display the *SIDA* identification on their dome lights and uniforms, and follow the instructions of dispatchers and line operators.

*SIDA* at p. 358-359 (emphasis added).

Given the prevalence of franchise arrangements in the airport shuttle industry, it is evident that regulatory guidance must be updated to account for the unique situation of franchisee drivers. This system provides a motivated driver population and significant benefits, to the public and to drivers, not found in an employee system, based in substantial part on its offering of entrepreneurial opportunity. The presence of third party regulations, passed on to drivers by franchisors, cannot logically result in a determination that those drivers are employees.

### **III. CONCLUSION**

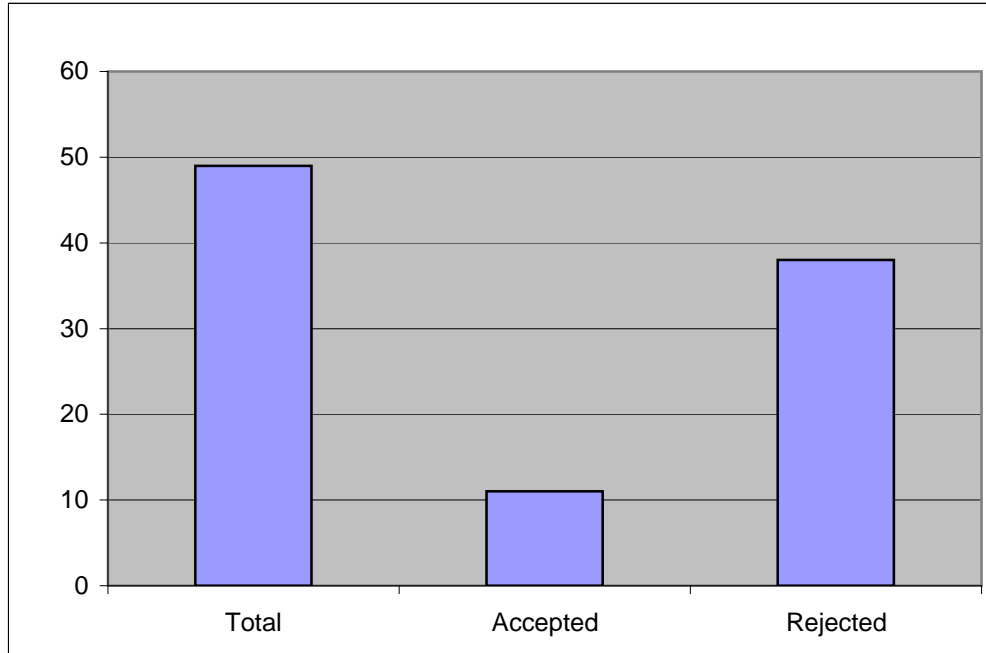
It is evident that the time has arrived for revision of agency guidelines which clearly guide businesses in properly classifying their independent contractors in the on-demand transportation industry. Existing guidelines, where they exist at all, are based on outdated notions of industry operations, and do not properly account for governmental controls which are “passed on” to drivers by the businesses from whom they purchase services and support. There is further a need for specific consideration of the differences between taxi and airport shuttle operations. Regulations affecting this important industry should focus on technology and entrepreneurial opportunity as the main indicators of independent contractor status.

The cases discussed in this white paper provide proper bases for formulation of industry guidelines which will result in increased security for business owners, by way of a “safe harbor” or conclusive presumption of independent contractor status for persons treated in accordance with the rules. Governmental agencies have acted in the past to provide this clarity, and should do so now.

# APPENDIX A

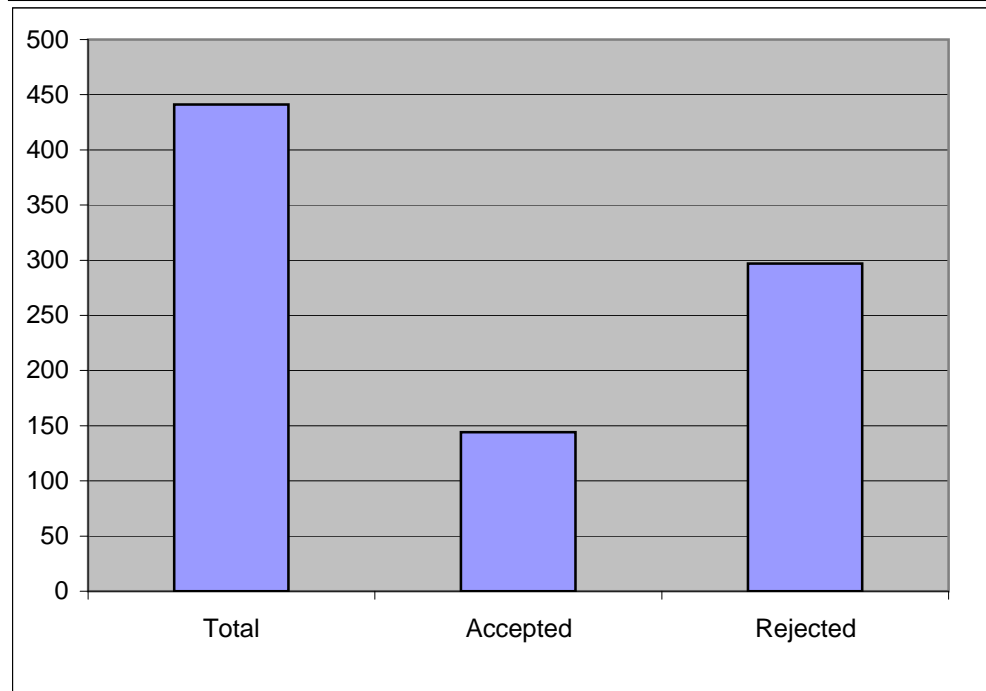
## DRIVER 1 Nov-08

Total 49  
Accepted 11  
Rejected 38



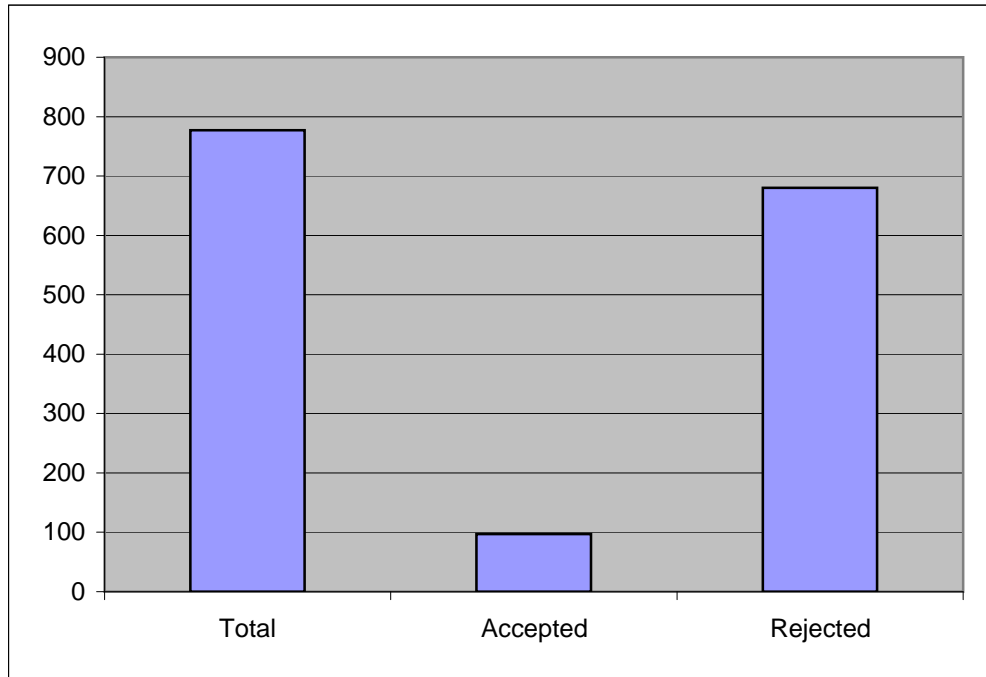
## DRIVER 2 Nov-08

Total 441  
Accepted 144  
Rejected 297



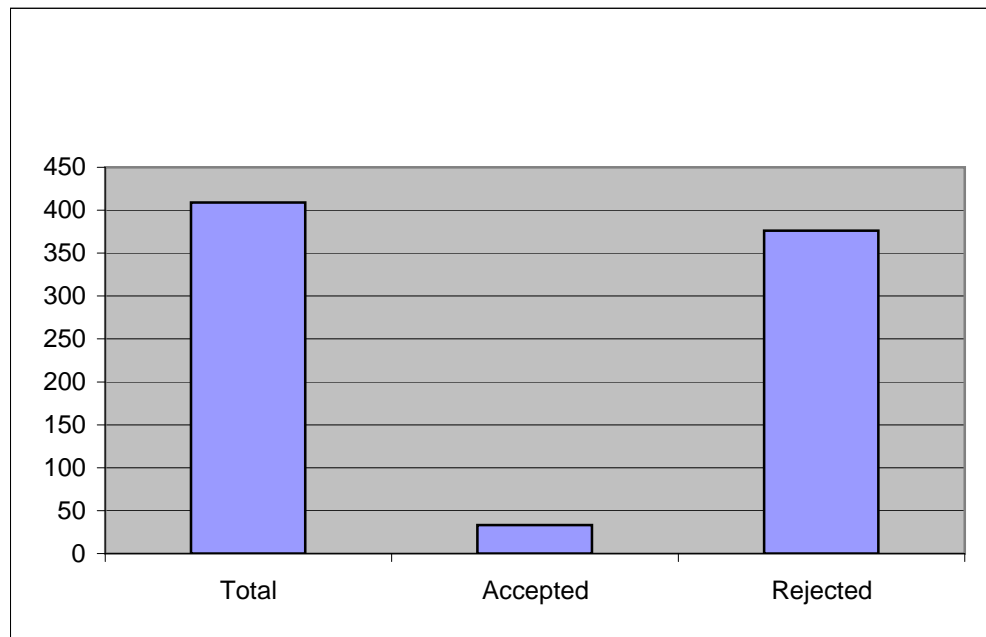
**DRIVER 3**  
**Nov-08**

Total 777  
Accepted 97  
Rejected 680



**DRIVER 4**  
**May-08**

Total 409  
Accepted 33  
Rejected 376



**DRIVER 5**  
**May-07**

Total 479  
Accepted 91  
Rejected 388

