

Testimony to the Senate State and Local Government Committee on House Bill 237

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Good morning, Chairman LaRose, Ranking Member Thomas and members of the committee. My name is Zach Schiller and I am research director at Policy Matters Ohio, a nonprofit, nonpartisan organization with the mission of creating a more prosperous, equitable, sustainable and inclusive Ohio. Thank you for the opportunity to testify today regarding House Bill 237.

Numerous states have approved legislation reflecting the national agreement between much of the insurance industry and transportation network companies (TNCs). We recommend that Ohio focus on doing that, and leave aside other sections of the bill, some of which are flawed or should be postponed for consideration.

Employment and labor provisions

One part of the bill that has not received much attention is its final section, which says that a variety of Ohio's labor and employment laws would not apply to transportation network companies and drivers. These include the minimum wage, workers' compensation, unemployment compensation, semi-monthly payment of wages, and the whistleblower protection law, among others. This section should be deleted from the bill because it would create confusion, could conflict with an upcoming Ohio Supreme Court ruling, and likely would have broad, negative consequences.

Take whistleblower protection. Removing this protection for TNC drivers removes protection for customers. Currently, this statute covers "any person who performs a service for wages or other remuneration for an employer." Suppose a driver for Uber, Lyft or any other TNC notified the employer about "a criminal offense likely to cause imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution," as the statute states. If the employer does nothing, and then fires the driver, shouldn't the driver be entitled to protection from such retaliation, just as other Ohio workers are? How will it serve the public to potentially allow misconduct to go unreported because drivers don't have this protection?

As others have pointed out, on-demand companies such as transportation network companies are performing a labor brokerage function that is not new. "Workers in these companies are performing the core work of their companies, the very essence of the employment relationship," noted a recent study by analysts at the National Employment Law Project. They noted elsewhere: "At bottom, the companies are not delivering technology to their customers and clients—they use technology to deliver labor to them."

A number of other companies supplying on-demand services classify their workers as employees, including grocery delivery service Instacart, courier service Shyp, parking service Luxe Valet, and meal delivery company Spry. As Forbes magazine reported recently, “In 2012 and 2013, it seemed like everyone building an on-demand start-up chose to start with an independent contractor workforce. Now, for those companies still around, it’s looking equally popular to convert that workforce to employees.” (see <http://www.forbes.com/sites/ellenhuet/2015/08/06/on-demand-sprig-switches-independent-contractors-to-employees/>) This does not keep such technology companies from growing and succeeding. It does, however, provide workers with basic protections that they need, including the minimum wage. Complying with Ohio’s \$8.10-an-hour minimum should not be difficult if indeed TNC compensation is as high as some companies have said.

One recent decision in California found an Uber driver to be an employee. “Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation,” said the labor commissioner’s office. “The reality, however, is that Defendants are involved in every aspect of the operation.” While different states have resolved this issue in different ways, there are reasons why you should not approve the employment-related provisions of House Bill 237 as currently constructed.

Here in Ohio, the state Supreme Court is considering a case in which the critical issue is whether a legislative definition of “employee” that includes an industry-specific exemption comports with the Ohio Constitution. Specifically, it is reviewing the decision of the 2nd District Court of Appeals that found outside sales staff at Cheap Escape Co. (doing business as JB Dollar Stretcher) to be covered by the state’s minimum wage law. The 2nd District held that the more narrow definition of “employee” found in R.C. 4111.14 is in conflict with the definition of employee found in Section 34a in Article II of the Constitution. It is possible that the legislative carve-out for the TNC industry could be contrary to the minimum wage protections guaranteed in the Ohio constitution. The General Assembly should wait until this decision has been made before creating additional exclusions from the law that may or may not stand up.

Removing the employment related provisions of HB 237 makes sense for another reason as well. Separate legislation (HB 355) has been introduced that would allow the Director of the Bureau of Workers Compensation to promulgate rules on the definition of employee in relation to several sections of the revised code. The bill is an attempt to deal with misclassification. Instead of approving the employee provisions of HB 237, which only covers one specialized segment of the transportation industry, the General Assembly should consider the larger issue, a complex one that has drawn national attention and considerable controversy. The U.S. Department of Labor recently issued guidance regarding the distinction between independent contractors and employees to try to curtail misclassification. We should not let this bill further muddy the definition of employee, when the issue should be and is being discussed in a broader context.

The bill also is silent on the applicability of a variety of other employment provisions to TNCs. For instance, the bill says nothing about 4113.18, which prohibits anyone from attempting to force an employee to buy goods or supplies from a particular person or company. This section would prevent a TNC from forcing an employee to buy a car from a particular dealership, for instance. The bill is similarly silent on the state law that requires employers to make sure their workers are safe, to provide safety devices and safeguards, and “to prescribe hours of labor reasonably

adequate to render such employment and places of employment safe...” (Section 4101.11) What distinguishes these worker protections from those that the TNCs will be able to avoid under HB 273?

Local preemption

In addition to creating some exemptions for TNCs in Ohio’s employment laws, House Bill 237 would preempt cities from adopting their own laws to license, register, tax or otherwise regulate TNCs. The Legislative Service Commission cited the Constitution’s home rule powers in its analysis of the bill and said, “Accordingly, a statute enacted by the General Assembly that purports to limit that constitutional authority may be invalid as applied to municipal corporations.” Other states such as Washington have decided not to include such local preemption in their state laws. In approving its version of the insurance agreement recently, the Illinois legislature included language signed into law by Gov. Bruce Rauner preempting localities from regulating TNCs in a manner that is less restrictive than the state law. We should follow Illinois’s example.

Some cities in regulating this industry include safety regulations aimed at protecting the general public. For instance, Cincinnati requires annual inspections for TNC vehicles, including a specific list of items to check. After Cincinnati passed its ordinance last year, the move was applauded on the Uber web site (see “Cincy on the move with new ridesharing ordinance,” at <https://newsroom.uber.com/cincinnati/2014/10/cincy-on-the-move-with-new-ridesharing-ordinance/>). Cities should retain their ability to exceed state requirements with such provisions.

The bill’s anti-discrimination language also is weak. While it appropriately bans TNCs from charging an additional fee for a person with a disability on the basis of that disability, it leaves it up to the companies to promulgate nondiscrimination policies without giving any direction as to what those policies should contain. Meanwhile, it provides that drivers aren’t agents of the company unless they have a written contract to that effect. This could mean that if a TNC driver doesn’t pick someone up because of their skin color, even if that violates the TNC’s own policy, the company could not be found at fault. That would be so even if a number of drivers did so. This issue deserves further consideration.

Taxation

The bill also says nothing about taxation. This is an area that legislators should take a closer look at. It appears that taxi operators and TNCs are not always following existing requirements that sales tax be collected on intrastate transportation by motor vehicle. Data from the Ohio Department of Taxation show that during the second half of calendar 2014, just 544 vendors who filed under the classification of taxi service, along with another 135 limousine service providers, collected the sales tax.

It seems fairly clear that this does not constitute the full universe of such services. According to the U.S. Census Bureau, there were 3,102 nonemployer establishments providing taxi or limousine service in Ohio in 2013, with receipts of \$68.66 million. The vast majority were individual proprietorships. In 2012, according to the Census Bureau’s Economic Census, 61 employers classified as taxi service providers had revenue of \$29.79 million (another 63 establishments

providing limousine service had revenue of \$35.76 million. Together, taxi and limousine services had 1,150 employees).

Clearly, there are far more establishments providing these services than there are collecting sales tax. Based on the state sales tax rate of 5.75 percent, their revenue totals suggest that such tax collections should amount to about \$7.7 million a year. Fiscal Year 2014 collections totaled \$1.93 million (the taxi service industry alone totaled just \$638,088). Some service providers may have classified themselves under another industry, so some tax may be collected that doesn't show up in these industry classifications. Others may not meet the definition of a taxable transportation service or may not be required to collect tax because the service is being provided to entities that are exempt from the tax (take, for example, private transportation services provided via contracts with local school districts). But it does not seem that the state is receiving all of the sales tax that it should.

We recommend that legislators review sales-tax collection by this industry, enforcement by the state, and what measures might be taken to improve compliance. Be they TNCs or taxi services, they should be collecting tax as the state requires. This subject should be reviewed as a part of any overhaul of industry regulations—and new privileges should not be extended until we can be surer that the beneficiaries are in compliance with Ohio's tax laws.

Thank you for allowing me to testify on this legislation. I am happy to answer any questions that you or any of the other members of the committee may have.

*Policy Matters Ohio is a nonprofit, non-partisan research institute
with offices in Cleveland and Columbus.*