

September 26, 2012

Honorable Robert Dresser  
Board Chair  
California Unemployment Insurance Appeals Board  
2400 Venture Oaks Way  
Sacramento, CA 95833

Re: **Friend of the Board Brief by National Employment Law Project**  
*Supershuttle International, Inc.*, AO-279534, ALJ Decision No. 3214568  
*Supershuttle Los Angeles, Inc.*, AO-279535, ALJ Decision No. 3214569  
*Supershuttle of San Francisco, Inc.*, AO-279536, ALJ Decision No. 3214570  
*Sacramento Transportation System, Inc.*, AO-279537, ALJ Decision No. 3214571

Dear California Unemployment Insurance Appeals Board:

The National Employment Law Project (“NELP”) files this letter brief as a Friend of the Board, pursuant to 22 Cal. Code Regs. § 5105(f), and respectfully requests that the California Unemployment Insurance Appeals Board (“CUIAB” or “Board”) uphold the decision of the Administrative Law Judge (“ALJ”) in these cases. NELP is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP’s areas of expertise include the workplace rights of contingent or nonstandard workers under employment and labor laws, including state unemployment laws. NELP has represented workers misclassified as independent contractors in state and federal courts and before public agencies around the country. NELP has also testified before the U.S. Congress in 2007 and 2010 on the problems of independent contractor misclassification, and works closely with state agencies and legislatures seeking to close loopholes exploited by employers.

NELP writes in support of van drivers who carried Supershuttle’s customers to and from the Sacramento, San Francisco, and Los Angeles airports. The drivers worked for Supershuttle International, Supershuttle Los Angeles, Inc., Supershuttle of San Francisco, Inc., and Sacramento Transportation System, Inc. (collectively “Supershuttle”).

On March 12, 2010, the California Employment Development Department (“EDD”) issued tax assessments against Supershuttle based upon the determination that it had misclassified its drivers as independent contractors for purposes of unemployment insurance. Supershuttle petitioned for reassessment, arguing that it had properly classified the drivers under California’s Unemployment Insurance provisions. In a series of decisions, the ALJ upheld EDD’s assessment, concluding that Supershuttle had misclassified its drivers and thus owed back taxes. Supershuttle now appeals those ALJ rulings.

We write to highlight two primary points. First, under the test for “employee” under California law, Cal. Unemp. Ins. § 621(b), Cal. Code Regs. tit. 22, § 4304-1(a)-(b), the EDD and ALJ properly found that the Supershuttle drivers qualify as covered employees. Second, Supershuttle’s argument that

its workers are independent contractors raises key public policy concerns that the Board should consider when ruling. Supershuttle attempts to classify its workers as independent contractors – people in business for themselves – enabling the company to underpay and overwork its workers, lower its labor costs and avoid paying payroll taxes and other insurance premiums. The cumulative societal impact of employers’ abuse of the independent contractor designation is substantial. Federal and state governments have lost billions of dollars in unpaid funds; law-abiding employers feel pressure to concoct similar schemes in order to stay competitive; and millions of workers lack vital labor protections to which they are otherwise entitled. We thus urge the Board to uphold the ALJ’s ruling.

***The ALJ Properly Concluded that the Supershuttle Drivers Were Employees and Not Independent Contractors Under the Common Law Test for Employment.***

California’s Unemployment Insurance Code provides that, “[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.” Cal. Unemp. Ins. § 621(b). When determining whether such an employment relationship exists, this test examines whether the employer had “right to control the manner and means” of the work, including considerations of control and the right to discharge an employee at will. *Messenger Courier Ass’n of the Ams. v. CUIAB*, 175 Cal. App. 4th 1074, 1095 (Cal. Ct. App. 2009). However, “if evidence of those criteria is not dispositive,” the Board must consider additional factors “that are significant in relationship to the service being performed.” *Id.* (quoting Cal. Code Regs. tit. 22, § 4304-1(a)-(b)). These additional factors specifically include whether services performed are an integral part of the regular business of the employer. *Id.*, *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.*, 235 Cal. App. 3d 1363, 1376 (Cal. Ct. App. 1991) (citing *S.G. Borello & Sons, Inc. v. Dep’t of Indust. Rel’n*, 48 Cal. 3d 341, 357 (Cal. Ct. App. 1989)). In addition, the Board may also consider which party provides the instrumentalities and facilities for work, and whether the putative employer controls the premises, the skill necessary for the occupation, the length of time for services to be performed, the method of payment, and whether the parties believe they are creating an employment relationship. *Messenger Courier*, 175 Cal. App. 4th at 1095; *Tieberg v. Cal. Unemployment Ins. App. Bd.*, 2 Cal. 3d 943, 950 (Cal. 1970). Importantly, the parties’ mistaken belief that they were entering into an independent contracting relationship is not conclusive. *Grant v. Woods*, 71 Cal. App. 3d 647, 654 (Cal. Ct. App. 1977). All of these factors are meant to determine whether the individual is an “employee,” or an independent businessperson.

In his decision, the ALJ noted that the drivers performed services integral to the regular business of Supershuttle, provided non-professional skills, and expected the work relationship to last for ten years at a time—all indicia of employment under California law. *Messenger Courier*, 175 Cal. App. 4th at 1095; *Tieberg*, 2 Cal. 3d at 950. The ALJ also found that the drivers could not exercise any entrepreneurial abilities without their connection to Supershuttle, and that Supershuttle provided substantially more infrastructure necessary to the work than the drivers. As such, Supershuttle failed to meet its burden of establishing an independent contractor relationship, *Santa Cruz Transportation*, 235 Cal. App. 3d. at 1367, and should not prevail now.

***Employer Misclassification of Workers as Independent Contractors Imposes Significant Societal Costs, Including Billions of Dollars in Lost State and Federal Government Funds.***

Employment schemes like Supershuttle’s that misclassify workers as independent contractors pose serious concerns in today’s economy, and the problem is growing. Employers increasingly

misclassify employees as independent contractors, denying them protection of workplace laws, robbing unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reducing federal, state, and local tax withholding and revenues. Between February 1999 and February 2005, the number of workers classified as independent contractors in the United States grew by 25.4 percent.<sup>1</sup> A 2000 study commissioned by the U.S. Department of Labor found that up to 30% of audited employers misclassified workers.<sup>2</sup> As the United States Government Accountability Office (GAO) has concluded, "employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans."<sup>3</sup>

Federal and state governments suffer significant loss of revenues due to independent contractor misclassification in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. Between 1996 and 2004, \$34.7 billion of federal tax revenues went uncollected due to the misclassification of workers."<sup>4</sup> A 2009 GAO report estimated that independent contractor misclassification cost federal revenues \$2.72 billion in 2006.<sup>5</sup> The Internal Revenue Service's (IRS) most recent estimates of misclassification costs are a \$54 billion underreporting of employment tax, and losses of \$15 billion in unpaid FICA taxes and unemployment insurance taxes.<sup>6</sup> Misclassification of this magnitude exacts an enormous toll: researchers found that misclassifying just one percent of workers as independent contractors would cost unemployment insurance trust funds \$198 million annually.<sup>7</sup>

California's treasury is losing hundreds of millions of dollars in unemployment insurance, workers' compensation, and general income tax revenues due to independent contractor misclassification.<sup>8</sup> California has a registered employer community of more than 1.3 million employers that pay over \$778 billion in wages annually.<sup>9</sup> Employers, however, fail to report billions of dollars to state agencies—and random audits conducted by state investigations likely result in an undercount of violations and of unpaid taxes. In Fiscal Year 2009, the California EDD reported that employers failed

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<sup>1</sup> U.S. General Accounting Office, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656, App. III. Tbl.4 (July 2006) (showing changes in size of contingent workforce).

<sup>2</sup> Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* i-iv (2000), available at <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> 156 Cong. Rec. S7135-01, S7136 (daily ed. Sept. 15, 2010).

<sup>5</sup> U.S. General Accounting Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009).

<sup>6</sup> Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed* (February 4, 2009), available at <http://www.treas.gov/tigta/auditreports/2009reports/200930034fr.pdf>.

<sup>7</sup> De Silva, *supra*, i-iv.

<sup>8</sup> Sarah Leberstein, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (2011), available at <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1>.

<sup>9</sup> Email from Greg Riggs, Deputy Director, Policy, Accountability, and Compliance Branch, California Employment Development Department, to Maurice Emsellem, National Employment Law Project, Feb. 13, 2012 (on file).

to report or underreported \$1.3 billion in wages, mostly due to misclassification; in the first two quarters of FY 2010-11 alone, California's employers failed to report or underreported \$2.3 billion.<sup>10</sup> A 2009 California EDD study found that 29 percent of audited employers had misclassified workers, a figure amounting to \$137 million in lost income taxes. A national evaluation found that employers in California underreport unemployment taxes at rates that far exceed most other states at 7.46 percent.<sup>11</sup> Between 2006 and 2008, the number of unreported employees increased by nearly a third. During this three year period, the EDD assessed a total of \$137,563,940 in unpaid payroll taxes, charged \$25,392,095 in labor code citations, and assessed \$48,343,008 in employment fraud cases.<sup>12</sup>

The failure of employers to pay their fair share of unemployment taxes also places a severe burden on California's unemployment trust fund and treasury at a time when the state can least afford to lose additional revenue. California is currently borrowing \$9.6 billion from the federal government to pay state unemployment benefits and the state is paying over \$300 million annually in federal interest payments alone.<sup>13</sup> Employers' failure to report misclassified workers undoubtedly places added stress on an already limited trust fund. Likewise, Supershuttle's misclassification of its workers as independent contractors hurts low-wage workers and law-abiding businesses. Permitting such schemes to continue permits the wage standards floor to drop, and costs the states billions of dollars in lost payroll and tax revenue.

For the foregoing reasons, we urge that the Board uphold the decision of the ALJ.

Respectfully submitted,



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<sup>10</sup> *Id.*

<sup>11</sup> De Silva, *supra*, at 60.

<sup>12</sup> California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities* (2009), available at [http://www.edd.ca.gov/pdf\\_pub\\_ctr/report2009.pdf](http://www.edd.ca.gov/pdf_pub_ctr/report2009.pdf).

<sup>13</sup> U.S. Department of Labor, UI Budget: Trust Fund Loans, <http://workforcesecurity.doleta.gov/unemploy/budget.asp#tfloans> (last visited Sept. 25, 2012).

## PROOF OF SERVICE

I, Michelle Rodriguez, am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is National Employment Law Project, 405 14th St. Suite 1400, Oakland, California 94612. I am readily familiar with this organization's practice for collection and processing of correspondence for mailing with the United States Postal Service. On September 26, 2012, I mailed a true and correct copy of the following documents:

**Friend of the Board Brief by National Employment Law Project, for *Supershuttle International, Inc.*, AO 279-534, *Supershuttle Los Angeles, Inc.*, AO-279535, *Supershuttle of San Francisco, Inc.*, AO-29536, *Sacramento Transportation System, Inc.*, AO-279537, in a sealed envelope, with postage fully prepaid, addressed as follows:**

Super Shuttle International, Inc.  
c/o Marron & Associates Lawyers  
Paul Marron Esq.  
320 Golden Shore, Ste. 410  
Long Beach, CA 90802

EDD Legal Office  
MIC 53  
PO Box 826880  
Sacramento, CA 94280

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on September 26, 2012, at Oakland, California.



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Michelle Rodriguez