BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
UBER TECHNOLOGIES, INC. **1455 Market Street, Suite 400** **San Francisco, CA 94103** **Employer**	**1594663** **DECISION AFTER RECONSIDERATION AND ORDER OF REMAND**

The California Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

On August 1, 2022, the Division of Occupational Safety and Health (Division) issued Uber Technologies, Inc. (Uber) one citation, alleging Uber violated three safety orders related to individuals providing services as drivers. Citation 1, Item 1, asserted a General violation of California Code of Regulations, title 8, section 3203, subdivision (a),[1] alleging several instances of a failure to establish, implement, and maintain an effective Injury and Illness Prevention Plan (IIPP). Citation 1, Item 2, asserted a Regulatory violation of section 3203, subdivision (b), alleging that Uber failed to maintain required records. Citation 1, Item 3, asserted a General violation of section 3205, subdivision (c), alleging several instances of a failure to implement, establish, and maintain an effective COVID-19 Prevention Program.

Uber timely appealed the citations, asserting that the safety orders were not violated, the classifications were incorrect, the abatement requirements were unreasonable, and the proposed penalties were unreasonable. Uber also asserted affirmative defenses.

Order Granting Party Status:

On March 15, 2023, LaShon Hicks, James Jordan, Roberto Moreno, and Karen VanDenBerg (collectively "the Drivers") filed a motion for party status. The motion was filed pursuant to section 354, subdivision (b). The Drivers' motion alleged, among other things, that they were active on Uber's platform, that they picked up and dropped off passengers for Uber, and that Uber violated numerous safety orders. The Drivers specifically alleged that Uber failed to establish, implement, and maintain an effective IIPP and COVID-19 Prevention Program. The Division filed a "Joinder" to the Drivers' motion, Uber filed objections to the motion, and the Drivers filed a reply.

[1] Unless otherwise specified all references are to title 8 of the California Code of Regulations.

On May 8, 2023, an Administrative Law Judge (ALJ) of the Board issued an Order Granting Party Status. The ALJ's order, however, "pertain[ed] only to the motion for party status" and was "not a final determination on the merits of the issue as to whether the Drivers are employees or independent contractors within the jurisdictional context at issue between the parties." (Order on Motion for Party Status, p. 2.)

Order Granting Motion to Compel:

On December 15, 2022, pursuant to sections 372 and 372.1, the Division served upon Uber a request for identification of witnesses and a request for access to documents. Uber responded on January 20, 2023. Uber's responses asserted various objections but identified no witnesses by name and provided no documents.

On March 30, 2023, after meeting and conferring, the Division filed a motion to compel pursuant to section 372.6. Uber filed an opposition.

On April 21, 2023, after the Division filed its motion to compel, but before the ALJ issued an order on the motion, the Division issued a First Amended Request for Production of Documents. These requests were relatively extensive and consisted of ten pages of requests for production, covering a range of topics. The Division purportedly prepared the First Amended Request for Production of Documents to accommodate Uber's request for greater specificity with regard to some of the categories of documents in its first request.

On May 10, 2023, the ALJ granted the Division's motion to compel and ordered Uber to respond to the discovery requests. The Order states, "The Division's motion to compel Uber to comply with its discovery requests for production of documents and identification of witnesses is GRANTED and Uber is ordered to immediately begin to comply with the Division's requests for discovery." (Order Granting Motion to Compel, p. 1.)

Petitions for Reconsideration:

On June 12, 2023, Uber filed a Petition for Reconsideration challenging the ALJ's Order Granting Third Party Status.[2] Uber asserts that the passage of Proposition 22, and the enactment of Business and Professions Code section 7451, means that the Drivers are independent contractors. Uber's petition argues that the Order Granting Party Status was wrongly decided, asserting that the Drivers did not, and cannot, make the requisite showing that they were affected employees. Uber also argued that the Drivers held the burden, as part of their motion for party status, to demonstrate that the four conditions for independent contractor status set forth in Business and Professions Code section 7451 were not satisfied, and that the Drivers failed to meet that burden. The Board took the petition under submission.

[2] This petition will be referred to as the "Party Status Petition."

On June 14, 2023, Uber filed a Petition for Reconsideration challenging the ALJ's Order Granting the Motion to Compel.[3] Uber's petition argues that the Division lacked jurisdiction to issue the citations or serve discovery, and that the Board exceeded its jurisdiction by compelling discovery responses. Further, assuming jurisdiction exists, Uber argues that the Division's discovery requests exceeded the scope of permissible discovery under the Board's regulations. The Board took the petition under submission.

In making this decision, the Board has engaged in an independent review. The Board additionally considered the pleadings and arguments filed by the parties.

ISSUES

1. Does the passage of Proposition 22 deprive the Division and Appeals Board of jurisdiction over Uber as a matter of law?

2. Was the Order Granting Party Status correctly decided?

3. Was the Order Granting Motion to Compel correctly decided?

DECISION AFTER RECONSIDERATION

1. Does the passage of Proposition 22 deprive the Division and Appeals Board of jurisdiction over Uber as a matter of law?

Both of Uber's petitions argue that the Protect App-Based Drivers and Services Act (Proposition 22) (Bus. & Prof. Code, §§ 7448-7467), deprives the Division and Appeals Board of jurisdiction over this matter. We first address this jurisdictional argument.

The California Occupational Safety and Health Act (OSH Act) was created "for the purpose of assuring safe and healthful working conditions for all California working men and women[.]" (Lab. Code, § 6300.) To that end, the OSH Act requires employers to maintain a safe and healthful place of employment. (Lab. Code, §§ 6300, 6400, 6401, 6403.) To enforce the OSH Act, the Division inspects workplaces and issues citations for violations of safety orders. (Lab. Code, §§ 142, 6307, 6308, 6317.) However, an entity is subject to the Division's enforcement jurisdiction only if it is an "employer" under the OSH Act. (*Strategic Outsourcing Inc*., Cal/OSHA App. 10-0734, Denial of Petition for Reconsideration (Sept. 16, 2011).) An entity's status as an employer is a jurisdictional question. (*Gonzalo Olascoaga dba Gonzalo Olascoaga*, Cal/OSHA App. 13-2097, Decision After Reconsideration (Nov. 24, 2015).)

Here, Uber argues that "jurisdiction is precluded completely by Proposition 22[.]" (Discovery Petition, p. 3.) Uber asserts that the drivers mentioned in the citations "are independent contractors pursuant to section 7451[4] 'in spite of' any contrary conclusion that might result from the application of the Labor Code or DIR regulation and/or opinions. For this reason, the Division is without subject matter jurisdiction to pursue this case or seek discovery." (Discovery Petition,

[3] This petition will be referred to as the "Discovery Petition."
[4] Bus. & Prof. Code, § 7451.

p. 18; see also Party Status Petition, p. 8.) Uber argues that "the Division believes it can ignore Proposition 22, issue citations without colorable evidence that it has jurisdiction, and commandeer the Appeals Board to allow unbridled discovery regarding irrelevant matters; matters that have nothing to do with either the citations or the Division's jurisdiction, which Uber disputes exist. The Division's conduct is contrary to the plain language of section 7451." (Discovery Petition, p. 2.) Uber further states,

> The Division contended that section 7451 is an "affirmative defence [sic]." That is incorrect. Section 7451, along with the rest of the provisions enacted by Proposition 22, are set forth in Division 3, Professions and Vocations Generally. (Bus. & Prof. Code §§ 5000-9998.11.) Specifically, Division 3 relates to various professions and vocations, each chapter of that division applying general standards/rules upon a particular profession or vocation. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 772 [72 Cal.Rptr.2d 624, 952 P.2d 641].) App-based drivers and services are one such regulated profession and vocation under Division 3. Therefore, Section 7451 and Proposition 22 are articulations of standards governing app-based drivers generally, regardless of whether they are involved in litigation or an administrative process. These provisions are no more affirmative defenses than the statutes governing accountants (§§ 5000-5158) or attorneys (§§ 6000-6243). Additionally, the Division points to nothing within section 7451 to support the contention that it was intended as an affirmative defense. The Division's argument ultimately relies solely on the Labor Code, which contravenes the entire express purpose of Proposition 22.
>
> The Division may not use the administrative process to enforce section 7451, or to impose an administrative remedy such as holding drivers to be employees. This is because claims for unfair business practices must be pursued in a "court of competent jurisdiction," which means a court, not an administrative process. (*Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1329-1331 [holding that an action under 17200 may only be brought in a "court"].) The Appeals Board cannot circumvent these jurisdictional restrictions by relegating section 7451 to an affirmative defence [sic].

(Party Status Petition, pp. 8-9.) Uber also argues that Business and Professions Code section 7451 is not subservient to the Labor Code's presumption that all persons providing labor or services are employees until an employer proves otherwise. Rather, Uber asserts that, "section 7451 applies 'notwithstanding' the Labor Code; it controls over any contrary Labor Code provisions, including section 2775(b)(1)." (Discovery Petition, p. 19.)

The Division, for its part, argues that Business and Professions Code section 7451 merely creates an additional jurisdictional affirmative defense, but only if Uber can establish the four identified conditions set forth therein. (Answer to Party Status Petition, pp. 6-7; Answer to Discovery Petition, pp. 11-13.)

The Board may consider Uber's jurisdictional challenge. The Board, like other administrative agencies, is empowered to determine "whether a given controversy falls within the statutory grant of jurisdiction." (*Pub. Emp. Rels. Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1828.) The Board's authority includes determinations regarding the scope of the Division's enforcement jurisdiction, e.g., whether a worker is an employee or an independent contractor under applicable statutory provisions. (See, e.g., *Buzek Construction, Inc.*, Cal/OSHA App. 1203246, Decision After Reconsideration (Mar. 24, 2019).) As the Division points out in its Answer, the Board has routinely evaluated whether it retains jurisdiction in a particular case. (Division's Answer to Discovery Petition, pp. 11-12, citing *Kenneth L. Poole, Inc*., Cal/OSHA App. 90-278, Decision After Reconsideration (Apr. 18, 1991), *Yellow Freight System, Inc*., Cal/OSHA App. 94-2565, Decision After Reconsideration (July 23, 1999).)

The parties' jurisdictional arguments center on the proper interpretation of two statutes, Business and Professions Code section 7451 and Labor Code section 2775, requiring a careful analysis of each.

We first consider Labor Code section 2775, and its statutory and jurisprudential background. On September 18, 2019, following the California Supreme Court's decision in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903,[5] the California Legislature passed AB 5, which codified the ABC test (discussed below) for determining employee status via Labor Code section 2750.3. Subsequently, the Legislature adopted AB 2257, which repealed Labor Code section 2750.3 but re-codified the ABC test as Labor Code section 2775. The ABC test remains codified in Labor Code section 2775, subdivision (b)(1). That section states,

> (b) (1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.

[5] The *Dynamex* decision held that the ABC test applies to determine whether a worker is an employee or independent contractor under the wage orders. (*Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.)

> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The Legislature "made clear that it was broadly adopting the *Dynamex* holding for purposes of all benefits to which employees are entitled under the Unemployment Insurance Code, the Labor Code, and all applicable wage orders." (*People v. Uber Technologies, Inc*. (2020) 56 Cal.App.5th 266, 278, citing § 2775, subd. (b)(1).) Accordingly, absent some specific exception, we apply Labor Code section 2775's ABC test to determine whether a person is an employee or independent contractor, and whether a hiring entity is an employer.[6]

Under Labor Code section 2775, subdivision (b)(1), a person that provides labor or service for remuneration is an employee, rather than an independent contractor, unless the hiring entity demonstrates that all three of the "A," "B," "C" conditions are satisfied (hence the "ABC" test). "This test places the burden on 'the hiring entity to establish that the worker is an independent contractor' . . . and to do so by meeting all three factors in the ABC test." (*People v. Uber Technologies, Inc*., *supra*, 56 Cal.App.5th 266, 287, citing *Dynamex Operations W. v. Superior Court*, *supra*, 4 Cal.5th at 957.) If the ABC test were to apply and it is found that the referenced drivers provided labor or services for remuneration, arguments exist that the drivers will be presumed to be employees and Uber their employer, whereupon this matter would be deemed to fall within the jurisdiction of the Division and Board, absent Uber's satisfaction of the ABC elements.[7]

However, after the Legislature's codification of the ABC test in Labor Code section 2775, the California voters passed Proposition 22. (Bus. & Prof. Code., §§ 7448-7467.) The stated purpose of Proposition 22 is "[t]o protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state." (Bus. & Prof. Code, § 7450, subd. (a).) Proposition 22 accomplishes its stated purpose through the addition of Business and Professions Code section 7451, which states,

> Notwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met:
> (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which

[6] The ABC test set forth in Labor Code section 2775 is subject to some statutory exceptions, which we need not address here. (See Lab. Code, §§ 2775-2787.)

[7] Notably, in *People v. Uber Technologies, Inc*. (2020) 56 Cal.App.5th 266, 297-298, the Appellate Court stated, "Based on the breadth of the term 'hiring entity' as well as the conspicuous absence of an express exemption for ride-sharing companies in the statutory scheme . . . we have little doubt the Legislature contemplated that those who drive for Uber and Lyft would be treated as employees under the ABC test."

> the app-based driver must be logged into the network company's online-enabled application or platform.
> (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
> (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
> (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

(Bus. & Prof. Code, § 7451.) Business and Profession Code section 7451 is the keystone of Proposition 22. Indeed, it is the only portion of Proposition 22 that, if deemed invalid, invalidates the entirety of the enactment. (Bus. & Prof. Code., § 7467.) All other provisions are severable.

Proposition 22 conditionally provides app-based drivers benefits, including: a health care subsidy for drivers meeting certain minimum requirements for hours spent providing services (as opposed to waiting to provide services); a minimum earnings guarantee based on time spent providing services; occupational accident insurance; and contract, anti-discrimination, and termination rights. (Bus. & Prof. Code, §§ 7452–7456, 7463, subd. (j).)

Uber argues that Proposition 22 classifies the drivers referenced in the Division's citations (and those referenced in the motion for party status) as independent contractors as a matter of law, and prevents any determination that they are employees under Labor Code section 2775, thereby depriving the Division and Board of jurisdiction. However, for reasons we explain *ante*, we conclude that Proposition 22 does not conclusively classify the drivers as independent contractors as a matter of law. Rather, to decide Uber's jurisdictional challenges, and to determine which statute controls, we must necessarily resolve issues of fact, requiring remand to the ALJ for receipt of evidence.

In determining whether Business and Professions Code section 7451 conclusively precludes the Division's jurisdiction, and prevents application of Labor Code section 2775, we apply the rules of statutory construction. We start with the respective texts of the statutes, which generally provide the most reliable indicator of legislative intent. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 956 ["Instead of starting with the statutes' purposes, the Court of Appeal should have started with their respective texts."]; *Tan v. Appellate Division of Superior Court* (2022) 76 Cal.App.5th 130, 136; *People v. Cruz* (1996) 13 Cal.4th 764, 774-775; *Katz v. Los Gatos-Saratoga Joint Union High School Dist*. (*Katz*) (2004) 117 Cal.App.4th 47, 54.) The words of the statutes must be given their "ordinary and usual meaning." (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 146; see also *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037, citing *People v. Loeun* (1997) 17 Cal.4th 1, 9 ["'Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. [Citation.]'"].) In interpreting statutes, we must be "careful 'not to insert what has been omitted, or to omit what has been inserted.'" (*Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1709, quoting Code Civ. Proc., § 1858.) We are also bound to '"give

meaning to every word of a statute if possible, and should avoid a construction making any words surplusage.'" (*DeNike v. Mathew Enterprise, Inc*. (2022) 76 Cal.App.5th 371, 384, quoting *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.) We must presume that every part of the statute serves "a useful function." (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476, quoting *Clements v. T. R. Bechtel Co*. (1954) 43 Cal.2d 227, 233.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; see also *Tan v. Appellate Division of Superior Court*, *supra*, 76 Cal.App.5th at 136.) If the language is susceptible to more than one interpretation, we may also look to "the apparent purpose of the statute, the legislative history, the canons of statutory construction, and public policy." (*Tan v. Appellate Division of Superior Court*, *supra*, 76 Cal.App.5th at 136; see also *Medical Board v. Superior Court* (2001) 88 Cal.App.4th 1001, 1012-1014.)

When reviewing the plain text of the statutes, we first observe that Proposition 22—specifically Business and Professions Code section 7451—applies to a narrower class of persons than Labor Code section 2775. Business and Professions Code section 7451 solely governs the relationship between "app-based drivers" and a "network company." Although the parties' arguments appear to assume that the "drivers" referenced in the Division's citations were "app-based drivers" within the coverage of Proposition 22, such an assumption may not be warranted. Proposition 22 supplies a special definition for the term "App-based driver" as used in that chapter. It defines an "App-based driver" to mean "an individual who is a DNC courier, TNC driver, or TCP driver or permit holder; and for whom the conditions set forth in subdivisions (a) to (d), inclusive, of Section 7451 are satisfied." (Bus. & Prof. Code, § 7463, subd. (a) [underline added].) We are bound by these special definitions. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1191.) Absent a stipulation between the parties or receipt of evidence demonstrating the referenced conditions have been satisfied, we have no basis for concluding this case actually involves "app-based drivers." There are also other special definitions that may be relevant to the analysis. However, the parties' arguments scarcely address the special definitions at all.

Even if our statutory analysis excludes the special definition of "app-based driver," we still cannot resolve whether the drivers are independent contractors under Proposition 22 for much the same reason. The plain text of Business and Professions Code section 7451, as we shall explain, makes clear that independent contractor status is contingent on satisfaction of four conditions.

Business and Professions Code section 7451 states, "Notwithstanding any other provision of law . . ., an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met[.]" (Bus. & Prof. Code, § 7451 [underline added].) It then identifies four conditions. When the statute is read in context, harmonized, and all of its terms given meaning, the statute specifies that four conditions must exist for independent contractor status to be achieved. The term "if" must be given its plain meaning, which can be derived by looking at its dictionary definition. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement,* (2011) 192 Cal.App.4th 75, 82-83.) The term "if" means "a: in the event that," "b: allowing that," "c: on the assumption that,"

and "d: on condition that."[8] The use of the term "if" demonstrates independent contractor status is contingent. In other words, the use of the word "if" connotes that independent contractor status is contingent on satisfaction of the identified four conditions. We cannot excise this conditional language from the statute. Moreover, we cannot determine whether the specified conditions have been met without the receipt of evidence.

When discussing Business and Professions Code section 7451, Uber gives great weight to its prefatory phrase "Notwithstanding any other provision of law…" Uber essentially argues that the use of this "notwithstanding" phrase means that we cannot apply or consider the Labor Code or DIR[9] regulations and/or opinions at all, even when the four specified conditions have not been satisfied. However, it is well-settled that such a prefatory "notwithstanding" phrase expresses an intent to override only contrary law. (*People v. Fuentes* (2016) 1 Cal.5th 218, 227; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 983.) "This '[n]otwithstanding' phrase means that 'only those provisions of law that conflict with' [that statute]—'not … every provision of law'—are inapplicable." (*Fuentes*, *supra*, 1 Cal.5th at 227, quoting *Arias*, *supra*, 46 Cal.4th at 983.) In other words, the prefatory "phrase has a special legal connotation; it is considered an express legislative intent that the specific statute in which it is contained controls in the circumstances covered by that statute, despite the existence of some other law which might otherwise apply to require a different or contrary outcome." (*Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1125-1126.)

It is important to note that Labor Code section 2775 and Business and Professions Code section 7451 are not always necessarily inconsistent or contrary to one another. Because Business and Professions Code section 7451 specifies that independent contractor status is contingent (as discussed above), we see no possibility for a conflict between Business and Professions Code section 7451 and Labor Code section 2775 unless and until the specified conditions in the former statute are satisfied. When those four conditions are not satisfied, the two laws are not contrary, and we believe the "notwithstanding" phrase is irrelevant to our analysis, as it only applies to override contrary law.[10] Absent satisfaction of those four elements, there is nothing that prevents Business and Professions Code section 7451's coexistence with the ABC test in Labor Code section 2775.

On the other hand, where the specified conditions in Business and Professions Code section 7451 have been satisfied to achieve independent contractor status, we do believe it will override "any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations" that would achieve a contrary result. (Bus. Prof. Code, § 7451.)

Ultimately, Business and Professions Code section 7451 plainly conditions independent contractor status on four specified criteria. Because the language is plain, we need not resort to other rules of construction. "If there is no [statutory] ambiguity, then we presume the lawmakers

[8] Merriam-Webster Dictionary (Online) <https://www.merriam-webster.com/dictionary/if> [accessed 12/26/24].
[9] DIR is a reference to the Department of Industrial Relations.
[10] In our view, while the "notwithstanding" phrase tells us that Business and Professions Code section 7451 will override contrary law, that prefatory phrase does not, by itself, tell us which laws are contrary. Rather, we must look elsewhere within the text of the statute, viewing the entire statute in its broader context, to determine what other laws are actually contrary, which leads us to the remaining conditional text in Business and Professions Code section 7451.

meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; *McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 215.) However, to the extent ambiguity still remains, this conclusion is supported by other rules of construction.

Uber cites to Proposition 22's Statement of Purpose in support of its assertion that Business and Professions Code section 7451 deprives the Division of jurisdiction. (E.g., Party Status Petition, pp. 5-6; Discovery Petition, p. 16.) "'[F]indings and statements of purpose in a statute's preamble can be illuminating if a statute is ambiguous[,]" but are "not binding in the interpretation of the statute" and "may not overturn the statute's language.'" (*Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 153, quoting *Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1103 [other citations omitted].) Proposition 22's Statement of Purpose states, among other things, that it serves "[t]o protect the basic right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state." (Bus. & Prof. Code, § 7450.) We do acknowledge that Proposition 22's statutory preambles reflect the intent to protect app-based drivers' right to choose to work as independent contractors. Nevertheless, the preambles express no intent to establish independent contractor status *unconditionally* as a matter of law. The preambles fail to support the assertion that the drivers are independent contractors even when the specified statutory requirements in Business and Professions Code section 7451 have not been met. We will not construe general language in a preamble in a manner that contradicts the express language of Business and Professions Code section 7451. (See *Jackpot Harvesting Co., Inc. v. Superior Court*, *supra*, 26 Cal.App.5th at 154.)

Where statutory language is ambiguous, courts may also consider the history of the enactment. (*McLaughlin v. State Bd. of Education*, *supra*, 75 Cal.App.4th at 215-216.) Ballot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure. (*Ibid.*; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) Uber's petitions make no reference to the proposition history, waiving the point for purposes of its interlocutory petition. (Lab. Code, § 6618.[11]) However, we do briefly observe that "[l]egislative history, even when appropriately considered, cannot be used to contradict language that the [lawmakers] decided to include in the statute." (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 755, citing *An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal.App.4th 1418, 1437.) As noted above, Business and Professions Code section 7451 incorporates conditional language. "We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

We also observe that multiple rules of construction buttress our conclusion that Business and Professions Code section 7451 does not automatically or unconditionally preclude application of Labor Code section 2775, or a finding of employee status thereunder. We briefly recite several of those rules here, and then discuss how they apply *ante*.

[11] Section 391 of the Board's rules states, "A petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the order or decision to be unjust or unlawful, and every issue to be considered by the Appeals Board on reconsideration. Any objection or issue not raised in the petition for reconsideration is deemed waived by the petitioner."

We first consider the presumption against implied repeals. Uber essentially argues that Proposition 22 effected an implied repeal[12] of Labor Code section 2775 as to the drivers. A repeal by implication occurs "'where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier[.]'" (*Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1018, quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal. App. 2d 41, 54; see also *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838, *State Dept. of Public Health v. Superior Court*, *supra*, 60 Cal.4th at 955-956.) However, it is well settled that all presumptions are against a repeal by implication, including partial repeals. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC*, *supra*, 61 Cal.4th at 838.) We will find an implied repeal only when the two statutes cannot be rationally harmonized, "and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1018, quoting *Garcia v. McCutchen, supra*, 16 Cal. 4th at 477; see also *State Dept. of Public Health v. Superior Court*, *supra*, 60 Cal.4th at 955-956.) As discussed below, we find considerable support for rationally harmonizing the two statutes, and little basis for finding them irreconcilable or clearly repugnant.

We next consider the rule that a specific statute prevails over a general. The principle that a specific statute will prevail over a general only applies "'when the two sections cannot be reconciled.'" (*Garcia v. McCutchen*, *supra*, 16 Cal.4th at 478, quoting *People v. Wheeler* (1992) 4 Cal.4th 284, 293; see also *Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1017-1018.) "If we can reasonably harmonize '[t]wo statutes dealing with the same subject,' then we must give 'concurrent effect' to both, 'even though one is specific and the other general. [Citations.]'" (*Ibid*. [other citations omitted]; see also *Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1017.) Again, as we find the two provisions can be reconciled (as discussed *ante*), this rule does not require us to find that Business and Professions Code section 7451 prevails over Labor Code section 2775.

These well-settled rules and others[13] share the command that we attempt to harmonize Labor Code section 2775 and Business and Professions Code section 7451 to the extent reasonably possible, particularly before finding an implied repeal or that a specific statute prevails over a general. (*Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1014-1018.) As the California Supreme Court stated in *State Dept. of Public Health v. Superior Court*, *supra*, 60 Cal.4th at 955-956,

---

[12] An express repeal generally requires an overt and explicit abrogation of a prior statute. (*Cal. Corr. Peace Officers Ass'n v. Dep't of Corr*. (1999) 72 Cal.App.4th 1331, 1339.) For reasons already explained, there is no indication, and we do not find, that Proposition 22 effected an express repeal of Labor Code 2775.

[13] Other rules may potentially apply including the rule pertaining to statutes in pari materia, which holds that "'statutes relating to the same subject matter—should be construed together.'" (*Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1015-1016, quoting *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 50.) Statutes that are in pari materia should be read together and harmonized if possible, even when present in different codes. (*Bd. of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691, 699; *County of Placer v. Aetna Casualty & Surety Co*. (1958) 50 Cal.2d 182, 188-189.) Business and Professions Code section 7451 and Labor Code section 2775 can be considered in pari materia, as they both have the same purpose, determining whether a person is an employee or independent contractor, requiring that we harmonize them if possible.

> We have recently emphasized the importance of harmonizing potentially inconsistent statutes. "'A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject.' [Citation.] Thus, when '"two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.' [Citation.] Accordingly, they 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.' [Citation.]"' [Citation.]

The fact that Labor Code section 2775 and Business and Professions Code section 7451 are in different codes does not alter our obligation to harmonize these statutes. (See, e.g., *Moreno v. Bassi* (2021) 65 Cal.App.5th 244, 256, citing *Walters v. Weed* (1988) 45 Cal.3d 1, 9.) "[T]here is a well-recognized rule of statutory construction that the codes blend into each other, and are to be regarded as constituting but a single statute." (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1428, quoting *Proctor v. Justice's Court of Berkeley* (1930) 209 Cal. 39, 43.)

We conclude that ample room for harmonization exists here. Business and Professions Code section 7451, by its plain terms, will only prevent application of Labor Code section 2775 in those cases where the facts demonstrate that all four specified conditions in section 7451 have been satisfied, thus classifying a person as an "independent contractor." Where the four conditions are not satisfied, there is no reason that Labor Code section 2775 may not concurrently apply. [14]

Moreover, when the conditions are satisfied to achieve independent contractor status under Business and Professions Code section 7451, there is room for harmonization of the two statutes by treating Business and Professions Code section 7451 as an exception to, rather than a repeal of, Labor Code section 2775. "[T]he canon that the specific statute prevails over the general requires that the former be treated as an exception to, not as a replacement for, the latter where both statutes are not so inconsistent that they cannot have concurrent operation. Otherwise, the canon would authorize an implied repeal of a general statute, without satisfying the stringent standards required for such drastic judicial action." (*Medical Board v. Superior Court*, *supra*, 88 Cal.App.4th at 1018.)[15]

---

[14] Additionally, as one court observed, "even if Business & Professions Code § 7451's four conditions were satisfied, that section does not ***require*** a network company to treat a worker as an independent contractor. Given that, it appears that a network company may, in any event, opt to proceed on an employer-employee basis. That option undermines any inference that Business & Professions Code § 7451 (on the one hand) and Labor Code § 2775 and the wage orders (on the other hand) are mutually exclusive of one another." (*Hassell v. Uber Techs*., 2021 U.S. Dist. LEXIS 115373; 2021 WL 2531076 (N.D. Cal. 2021).)

[15] As noted by the California Supreme Court, "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later

In summary, we cannot determine that an app-based driver is an independent contractor under Business and Professions Code section 7451, nor conclude that Labor Code section 2775 does not apply, without considering questions of fact, i.e., whether the four conditions in the former statute have been satisfied. It is well settled that "[w]hen the jurisdiction depends on the existence of certain facts, the agency may determine whether or not those facts exist." (*SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 192 [quoting 2 Cal.Jur.3d (2007) Administrative Law, § 446, p. 514].) Here, because no hearing has occurred and no evidence received, the relevant jurisdictional inquiry is premature.

This matter is remanded to the ALJ to develop the factual record regarding the jurisdictional issues, including whether the four conditions set forth in Business and Professions Code section 7541 have been satisfied. We additionally advise the ALJ to evaluate whether bifurcation of the jurisdictional issues is appropriate.

2. Was the Order Granting Party Status correctly decided?

Having found Uber's jurisdictional argument premature, we next consider whether the ALJ properly granted the Drivers' motion for party status.

Assuming, *arguendo*, that the Appeals Board proceedings were not barred jurisdictionally as a matter of law, Uber contends that the Drivers' motion for party status should not have been granted because the Drivers failed to plead and prove that Uber did not meet the conditions set forth in Business and Professions Code section 7451 that establish their independent contractor status. (Party Status Petition, pp. 10-11.) However, we reject Uber's assertion that the Drivers must plead or prove that Uber failed to meet the required conditions in Business and Professions Code section 7451 as part of their motion for party status.

Section 354 of the Board's rules governs motions for party status and sets forth a simple mechanism for an "affected employee" to become a party. It states,

> (b) An affected employee or authorized representative of an affected employee shall be made a party to a proceeding upon motion made in accordance with Section 371. When more than one affected employee or more than one authorized employee representative qualify for party status in a proceeding, each may be granted party status in accordance with Section 350.1. A motion for party status shall be heard by the Administrative Law Judge within 30 days of filing.

it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication." (*In re Williamson* (1954) 43 Cal. 2d 651, 654, quoting *People v. Breyer* (1934) 139 Cal.App. 547, 550.)

Board regulations define the term "affected employee" as "an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties[.]" (§ 347, subd. (c).)

The Board has held that motions for party status are evaluated under "a liberal pleading standard[.]" (*The Geo Group, Inc. dba Golden State Annex*, Cal/OSHA App. 1609228, Decision After Reconsideration (Jan. 10, 2025), citing § 354, subd. (a)—["[W]e find that a liberal pleading standard for party status is consistent with Board regulations and precedent, analogous California authorities, federal OSHA guidance, and the overarching goal of encouraging participation of affected employees in Board proceedings."].) Parsing the definition of an "affected employee," the Board has held that the moving party must simply allege that (1) they are an employee of the cited employer; (2) they were exposed to the alleged hazard described in the citation; and (3) their exposure occurred as a result of their assigned duties. (*Ibid*.)

Here, when viewed under a liberal pleading standard, the Drivers met their burden through their various allegations. As the ALJ correctly noted,

> The Drivers' motion for party status sets forth that the Drivers are, or were, natural persons laboring in the service of Uber as the motion plainly avers "each Driver has worked for Uber." The motion also describes a variety of alleged hazards to which it asserts the Drivers were exposed. As such, the Drivers sufficiently alleged that they are affected employees warranting party status pursuant to section 354. Accordingly, the motion for party status is hereby GRANTED.

(Order Granting Party Status, p. 2.)

Uber fails to justify its assertion that the Drivers must affirmatively allege Uber's non-compliance with Business and Professions Code section 7451 as part of their motion. Section 354 imposes no such requirement, and we are not inclined to read such a requirement into the regulation. Further, the plain text of Business and Professions Code section 7451 does not support Uber's assertion that the Drivers must plead Uber's non-compliance with the statute. Business and Professions Code section 7451 is completely silent as to who carries the burden of proof to show the existence, or absence, of the four conditions that establish independent contractor status.[16]

Uber also erred when it asserted that the Drivers must meet an evidentiary burden when filing their motion. The Board has held that there is no evidentiary burden that applies to motions

[16] Uber fails to justify its assertion that either the Drivers, as part of their motion for party status, or the Division, as part of their prima facie case, must allege and prove the absence of the conditions for independent contractor status set forth in Business and Profession Code section 7451. A contention is waived where a party fails to cite to appropriate legal authority. (*Shimmick Construction Company*, *Inc*., Cal/OSHA App. 1080515, Denial of Petition for Reconsideration (Mar. 30, 2017); see also Lab. Code, § 6618.) In any event, at this interlocutory stage, we need only hold that no such burden arises as part of the Drivers' motion for party status. If disputes remain regarding the burden of proof at hearing, the parties can brief, and the ALJ can address, that issue prior to the hearing. We do, however, observe that at least one court has held that "the statute is written so that Uber has to first show that it complies with section 7451's requirements before its drivers can be classified as independent contractors." (*James v. Uber Techs. Inc.*, 338 F.R.D. 123, 145 (N.D. Cal. 2021).)

for party status. (*The Geo Group, Inc. dba Golden State Annex*, *supra*, Cal/OSHA App. 1609228 ["Nothing in the text of section 354 explicitly imposes an evidentiary burden."].) As the ALJ correctly noted, "Section 354 does not explicitly require that an individual seeking party status prove through an evidentiary showing that they are an affected employee in order to be granted party status. This is evident because section 354 does not require a declaration in support of the motion for party status and it does not require an evidentiary hearing for a factual determination in connection with the motion." (Order Granting Party Status, p. 2.) "To impose an evidentiary burden on affected employees before they gain party status, without any right to discovery or other means to obtain such evidence, would place an unnecessary hurdle on such participation." (*The Geo Group, Inc. dba Golden State Annex*, *supra*, Cal/OSHA App. 1609228.) Further, as we stated in *The Geo Group, Inc*., *supra*, Cal/OSHA App. 1609228,

> The Board has little interest in transforming every motion for party status into a substantive evidentiary hearing—with all the fiscal and administrative burdens that such a hearing would entail for the Board and the parties—solely to determine whether the moving party is an "affected employee." Moreover, the Board has a separate interest: enabling affected employees to participate in appeals with as few unnecessary obstacles as possible.

Consequently, we affirm the order of the ALJ granting party status.[17] However, "[t]o be clear, we emphasize that a grant of party status is not a determination as to any substantive legal issue. While *party status* may be granted without an evidentiary showing, the Division still bears the evidentiary burden of proving all *substantive* issues" necessary to affirm the citations. (*The Geo Group, Inc. dba Golden State Annex*, *supra*, Cal/OSHA App. 1609228.) As the ALJ noted, "this is not a final determination on the merits of the issue as to whether the Drivers are employees or independent contractors within the jurisdictional context at issue between the parties." (Order Granting Party Status, p. 2.)

3. Was the Order Granting Motion to Compel correctly decided?

The Board's rules of practice permit, among other discovery devices, requests for the identity of witnesses and for access to documents. (§§ 372, 372.1.) California Code of Regulations, title 8, section 372, states,

> After initiation of a proceeding, a party, upon written request made to another party, is entitled to obtain prior to the hearing the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at

[17] Uber also argues that it will suffer immediate and irreparable harm if the Drivers are joined as parties because they will have access to discovery, which includes confidential and proprietary documents. (Party Status Petition, p. 12; Discovery Petition, p. 4.) Uber summarily argues that a protective order will not be sufficient to protect its interests. (*Ibid*.) However, assuming such confidential documents exist and that they are a proper subject of discovery (points that we cannot evaluate at this juncture as discussed *ante*), Uber has not convinced us that a protective order will be insufficient to protect its interests. In most cases, we believe that the ALJ has sufficient discretion to prepare an adequate protective order. The ALJ should, however, carefully evaluate whether an appropriate protective order is needed in this case.

> the hearing. […] A request under this section for a list of witnesses to be called may be satisfied only by the service of a list of witnesses.

Section 372.1, states,

> After initiation of a proceeding and prior to the hearing, a party, upon written request made to another party, is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of the other party:
>
> (a) Any statements of parties or witnesses relating to the subject matter of the proceeding;
>
> (b) All writings or things which the party then proposes to offer in evidence;
>
> (c) Any other writing or thing which is relevant and which would be admissible in evidence;
>
> (d) Inspection and investigative reports made by or on behalf of the Division or other party pertaining to the subject matter of the proceeding, to the extent that such reports
>
> (1) Contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis of the proceeding, or
>
> (2) Reflect matters perceived by the Division in the course of its inspection, investigation or survey, or
>
> (3) Contain or include by attachment any statement or writing described in (a) to (c), inclusive, or summary thereof.

On December 15, 2022, the Division served upon Uber a request for the identity of witnesses and a request for production of documents. Except for the use of special definitions, the bulk of the requests were modeled after the permissible categories set forth in sections 372 and 372.1, listed above. Uber objected to the discovery requests, providing no documents and identifying no witnesses by name.

The Division and Uber subsequently met and conferred over Uber's discovery responses. According to the Division, Uber agreed that it would produce all non-privileged documents relating to its compliance with Proposition 22 no later than March 17, 2023. (Division Motion to Compel, p. 5.) The Division also asserts that Uber did not provide any documents by that deadline. (*Ibid*.) The Division subsequently filed a motion to compel, and Uber filed an opposition.

While the motion to compel was pending, on April 21, 2023, the Division served a First Amended Request for Production of Documents and Things based upon Uber's counsel's request for more specificity in the Division's discovery requests. (Division's Answer to Discovery Petition, p. 4.) The amended request was ten pages in length and sought numerous categories of documents. (Discovery Petition, pp. 10-14.) Uber's Discovery Petition asserts that it "specifically objected that the new requests were not relevant to the jurisdictional inquiry and replaced the first request, thereby waiving the Division's motion to compel." (Discovery Petition, p. 14.)

On May 10, 2023, after several status conferences, the ALJ granted the Division's motion to compel and ordered Uber to respond to each of the discovery requests. The Order states, "The Division's motion to compel Uber to comply with its discovery requests for production of documents and identification of witnesses is GRANTED and Uber is ordered to immediately begin to comply with the Division's requests for discovery." (Order Granting Motion to Compel, p. 1.)

Uber's Discovery Petition predominantly focuses on, and attacks, the Division's First Amended Request for Production of Documents and Things. (Discovery Petition, pp. 20-22.) Uber states, "Given ALJ Jessup's inclination to allow the First Amended Requests to control, Uber is focusing on them here." (Discovery Petition, p. 21.) Uber asserts that these amended requests replaced and superseded the original requests, thereby mooting the motion to compel. (Discovery Petition, p. 14.) Uber also argues that amended requests exceeded those permitted by the Board in *Fedex Ground,* Cal/OSHA App. 13-1220, Decision After Reconsideration (Sept. 17, 2014). (Discovery Petition, p. 20.)

After a careful review of the record, we conclude that the Division's motion to compel has been rendered moot by its subsequent actions. It appears to us—and the record does not support a contrary indication—that the Division's First Amended Discovery Requests replaced and superseded the Division's original requests, thereby rendering moot its motion to compel. The Division's motion to compel was brought on its December 15, 2022, requests for access to documents. However, by amending the requests, the Division rendered the original requests moot. Indeed, we know of no authority suggesting that the original requests remain operative after they have been amended. Relevant here, the word "amend" means to "change or modify (something) for the better" or "to alter;" *"especially*: to alter formally by modification, deletion, or addition."[18] Although discussions may have occurred during the various status conferences that might otherwise support the ALJ's actions, those discussions are not part of the record before us. Therefore, we are compelled to overturn the ALJ's order compelling further responses to a request that had been rendered moot by amendment. That portion of the ALJ's order is vacated.

The Division has not yet filed, and the ALJ has not ruled upon, a motion to compel regarding the amended requests, therefore, the propriety of those requests is not yet before the ALJ or the Board, and we decline to speculate on the correct outcome of such a motion. However, we do remind the parties that a request for access to documents need not mirror section 372.1 exactly so long as it is seeking the information permitted by the Board's rules. As we noted in *Fedex Ground*, *supra*, Cal/OSHA App. 13-1220, "[a] party must respond to a discovery request, regardless of its title, to the extent the request can reasonably be construed as seeking the witness information and/or the types of documents enumerated by regulation and statute within Cal. Code

[18] Merriam-Webster Dictionary (Online) <https://www.merriam-webster.com/dictionary/amend> [accessed 1/6/25].

Regs., tit. 8, sections 372 and 372.1, and Government Code section 11507.6." In other words, the form of the request is not material, it is the scope of the request that is determinative. (See, e.g., *Romero v. Hern* (1969) 276 Cal.App.2d 787, 794.)

Finally, we see no error, and Uber does not identify any, in the ALJ's discovery order to the extent it compelled further responses to the request for identity of witnesses. Therefore, that portion of the ALJ's order on the Division's motion to compel is affirmed.

DECISION

This matter is remanded to the ALJ for further proceedings consistent with the guidance set forth herein.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 01/24/2025

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
Uber Technologies, Inc. **1455 Market Street, Suite 400** **San Francisco, CA 94103** **Employer**	**1594663** ***ERRATA* TO DECISION AFTER RECONSIDERATION AND ORDER OF REMAND**

This errata cures a clerical error in the Decision After Reconsideration (DAR), with the remainder of the DAR unaffected. The term "*ante*" where used in the DAR—e.g., at page 7, second full paragraph, second sentence, and page 10, last sentence—should instead say "*infra*".

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 02/06/2025