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PROPOSITION 22 PASSED!

SO WHAT'S NEXT FOR NY, CALIFORNIA & THE U.S.?

In the immediate wake of A.B. 5, many commentators opined that the ABC test likely makes it difficult—if not impossible—for “gig economy” companies like Uber and Lyft to designate their workers as independent contractors.¹ A.B. 5, which took effect in January 2020, codifies a three-factor “ABC” test that presumes workers are employees, not independent contractors, unless all three factors are met. If a business fails to meet any one of the three criteria, it fails the ABC test. Part B of the test, which asks “does the worker perform work that is outside the usual course of the hiring entity’s business?,” is the biggest hurdle for transportation network companies (“TNCs”), which have consistently argued—to little avail—that they are technology companies, not transportation companies.² In August 2020, a California state judge said Uber and Lyft failed this part of the test because their business is, in fact, providing rides and ordered the companies to treat their drivers as employees notwithstanding the outcome of a ballot measure known as Proposition 22 or “Prop 22.”³

California’s Proposition 22, which passed with 58% of the vote⁴ during the November 3, 2020 general election, carves out app-based ride-hailing and delivery drivers—but not taxis or other for-hire vehicles unless they are providing service through a TNC—from A.B. 5.⁵ The ballot measure was the result of a campaign by Uber and Lyft, along with on-demand delivery platforms

¹ See, e.g., Cynthia Estlund, *What Should We Do After Work?*, 128 YALE L.J. 254, 326 n.181 (2018) (“Commentators have pointed out that Uber and many other ‘gig economy’ firms will be especially hard pressed to meet the second part of the [Dynamex] test.”) (citing Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES, Apr. 30, 2018, www.nytimes.com/2018/04/30/business/economy/gig-economy-ruling.html); The Harvard Law Review Association, *Labor and Employment Law-Worker Status-California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors*, 133 Harv. L. Rev. 2435, 2439 (2020) (“[I]t would probably be a stretch for Uber to argue that its drivers are not necessary to its business⁵⁰ or to claim their work (driving) is not continuously performed.”).

² See *O’Conner v. Uber Technologies, Inc.*, (N.D. Cal. 2015) 82 F.Supp.3d 1133, 1141 (finding this argument “fatally flawed in numerous respects.”); *Cunningham v. Lyft, Inc.* (D.Mass May 22, 2020) 2020 WL 2616302, at *10 (rejecting the argument that Lyft is “merely ‘connecting’ riders and drivers” and finding “Lyft’s business—from which it derives its revenue—is transporting riders.”); *Namisnak v. Uber Technologies, Inc.* (N.D. Cal. Mar. 12, 2020) --- F.Supp.3d ---, 2020 WL 1283484, at *4 (“Uber’s claims that it is not a ‘transportation company’ strains credulity.”); *Crawford v. Uber Technologies, Inc.* (N.D. Cal. Mar. 1, 2019) 2018 WL 1116725, at *4 (rejecting Uber’s argument that it is not “primarily engaged in the business of transporting people,” but instead is a “technology company that is engaged in the business of facilitating networking between drivers and riders.”); *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1078 (“the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one.”); *Rogers v. Lyft, Inc.*, 2020 WL 1684151, at *2 (“Lyft drivers provide services that are squarely within the usual course of the company’s business, and Lyft’s argument to the contrary is frivolous.”).

³ The case is *People of the State of California v. Uber Technologies Inc.*, case number CGC20584402, in the Superior Court of the State of California, County of San Francisco.

⁴ <https://electionresults.sos.ca.gov/returns/ballot-measures>

⁵ See Cal. Proposition 22, “Exempts App-Based Transportation and Delivery Companies from Providing Employee Benefits to Certain Drivers. Initiative Statute,” Cal. Att’y Gen., Initiative No. 19-0026 (2020), <https://www.oag.ca.gov/system/files/initiatives/pdfs/19-0026A1%20%28App-Based%20Drivers%29.pdf>.

DoorDash, Instacart, and Postmates, to change California law so they could continue to classify these gig economy workers as independent contractors, not employees.⁶ The “Yes on 22” campaign made the ballot measure the most costly in the history of California, spending more than \$205 million on bombarding Californians with billboards, mailers, and digital, print, and TV ads to get them to, well, vote “yes” on 22.⁷

In its messaging to voters, Yes on 22 argued that a “no” vote would force Uber and Lyft to sever ties with thousands of drivers and take away drivers’ freedom and flexibility, in addition to reducing service and increasing prices for riders. In the lead up to the election, Yes on 22 also tried to persuade voters that Prop 22 would advance racial and social justice,⁸ decrease drunk driving,⁹ and generally save lives.¹⁰

The passage of Prop 22 is seen as a significant victory for app-based companies that rely on independent contractors. Having to reclassify these gig workers as employees would pose a threat to their business model because of the added costs associated with employee-drivers.¹¹ And Uber and Lyft both threatened to leave the Golden State—at least temporarily—if required to reclassify their drivers.¹² While Prop 22’s passage lets these ride-hailing companies avoid the costs of employing their drivers, they will still be required to offer drivers some basic job protections, including minimum earnings, healthcare subsidies, insurance to cover on-the-job injuries, and vehicle insurance.¹³

WHAT’S IN PROPOSITION 22?

Prop 22, which creates the Protect App-Based Drivers and Services Act,¹⁴ classifies ride-hailing and delivery drivers as independent contractors unless the app sets drivers’ hours, requires acceptance of specific ride or delivery requests, or restricts drivers’ from working for other

⁶ See Kate Conger, *Uber, Lyft and DoorDash Pledge \$90 Million to Fight Driver Legislation in California*, N.Y. TIMES, Aug. 29, 2019, www.nytimes.com/2019/08/29/technology/uber-lyft-ballot-initiative.html,

⁷ California Fair Political Action Commission, *Top Contributors List*, <http://www.fppc.ca.gov/transparency/top-contributors/nov-20-gen.html>; Cal-Access, <http://cal-access.sos.ca.gov/default.aspx>.

⁸ <https://www.marketwatch.com/story/protesters-call-ubers-antiracism-billboards-hypocritical-and-offensive-11599686425>

⁹ <https://www.sacbee.com/news/politics-government/capitol-alert/article246646873.html>

¹⁰ <https://www.cnet.com/news/uber-lyft-door-dash-181-million-campaign-war-chest-goes-heavy-on-ad-blitz/>

¹¹ Uber Technologies, Inc., Registration Statement (Form S-1) (Apr. 11, 2019),

www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm#toc647752_2.

¹² See Laura Feiner, *Uber CEO Says Its Service Will Probably Shut Down Temporarily in California if It’s Forced to Classify Drivers as Employees*, CNB.COM, Aug. 12, 2020, www.cnbc.com/2020/08/12/uber-may-shut-down-temporarily-in-california.html; Lora Kolodny, *Lyft Reports Dramatic Revenue Drop of 61% But Points to Uptick in Rides in July*, CNBC.COM, Aug. 12, 2020, www.cnbc.com/2020/08/12/lyft-earnings-q2-2020.html.

¹³ See Proposition 22, art. 3 (compensation), art. 4 (benefits), and art. 5 (antidiscrimination and public safety).

¹⁴ The Act adds a new Chapter 10.5 to Division 3 of the California Business and Professions Code.

companies. The proposition applies to TNCs¹⁵ as well as charter-party carriers of passengers (TCP)¹⁶ if the driver is transporting passengers through an online-enabled app or platform and to couriers working for a delivery network company (DNC), such as Uber Eats, GrubHub, and Instacart.¹⁷

Under Prop 22, app-based delivery and ride-hail companies are required to offer their drivers certain alternative benefits, including minimum compensation, insurance to cover on-the-job injuries, automobile accident insurance, healthcare subsidies for qualifying drivers, protection against harassment and discrimination, and mandatory contractual rights and appeal processes. Companies will be required to pay drivers at least 20% more than the minimum wage, plus 30 cents per mile to cover expenses, with the potential to earn more, and without limits on how much drivers can make.¹⁸ Eligible drivers will receive a healthcare stipend that is consistent with employer contributions under the Affordable Care Act.¹⁹

Researchers caution that the benefits drivers will receive under Prop 22 may be less than Uber and Lyft suggest. A study by U.C. Berkley found that, even though Prop 22 includes an earnings minimum equal to 120% of the local minimum wage (\$13 per hour for California in 2020), “the promises in the proposition were worth the equivalent of only \$5.64 per hour,” once you factor in expenses.²⁰ In addition, the National Employment Law Project and the Partnership for Working Families found that Prop 22 “does not explicitly protect immigrant workers from discrimination” and in fact “makes it harder for workers to bring discrimination claims against these companies by shortening the time a worker has to file.”²¹

Prop 22 is more than worker classification and benefits for drivers. It also criminalizes impersonation of such drivers, restricts local regulation of app-based drivers, and extends the same background checks that are required of TNC drivers to app-based delivery drivers and couriers.²²

¹⁵ Under Proposition 22, TNC has the same definition as Cal. Pub. Util. Code § 5431(c) (“Transportation network company” means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.”).

¹⁶ Under Proposition 22, TCP has the same definition as the Cal. Pub. Util. Code § 5360 (“Subject to the exclusions of Section 5353, ‘charter-party carrier of passengers’ means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state. ‘Charter-party carrier of passengers’ includes any person, corporation, or other entity engaged in the provision of a hired driver service when a rented motor vehicle is being operated by a hired driver.”)

¹⁷ Proposition 22, art. 1 (DNCs are businesses that maintain an online-enabled app or platform to facilitate on-demand delivery services.).

¹⁸ Proposition 22, § 7453.

¹⁹ *Id.* at § 7454.

²⁰ Ken Jacobs and Michael Reich, *The Effects of Proposition 22 on Driver Earnings: Response to a Lyft-Funded Report by Dr. Christopher Thornberg*, Aug. 26, 2020, https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver-earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/#_edn1.

²¹ <https://www.nelp.org/publication/prop-22-harms-people-color-first-worst/>

²² Proposition 22 §7458.

Perhaps spurred by attacks by persons posing as Uber and Lyft drivers who lure passengers into their vehicles,²³ Prop 22 will impose a minimum \$10,000 fine and up to six months in jail for impersonating a rideshare or delivery driver.²⁴ It also adds an additional five years to sentences if the impersonation is in the commission of a felony that inflicts great bodily injury to another.

Prop 22 also preempts local regulation of app-based driver compensation and gratuities; driver scheduling, leave, health care subsidies, and any other work-related stipends, subsidies, or benefits; driver licensing and insurance requirements; and driver rights with respect to a network company's termination of an app-based driver's contract.²⁵ By occupying these fields, this ensures that rideshare and delivery drivers and companies are not subject to a patchwork of regulations by the more than 500 cities and counties in California.

WHAT'S NEXT IN CALIFORNIA?

The California Attorney General, along with the city attorneys of Los Angeles, San Francisco, and San Diego, sued Uber and Lyft in May 2020, seeking an injunction forcing the companies to reclassify their drivers as employees under A.B. 5. In August 2020, the trial court granted the state's request, saying the state has an "overwhelming likelihood" of showing that the companies "cannot possibly satisfy the 'B' prong of the test" if the case goes to trial.²⁶ A unanimous appeals court panel upheld that decision less than two weeks before the November 3rd election, when voters went to the polls to decide the fate of Prop 22, and gave Uber and Lyft 30 days to reclassify drivers as employees.²⁷ Now, the question is whether Uber and Lyft will be required to retroactively treat their drivers as employees from the time the ABC test became law in California up until Prop 22 is certified next month.²⁸

WHAT'S NEXT ON FEDERAL, STATE & LOCAL AGENDA? –

NEW YORK, SEATTLE & DC!

²³ <https://www.cnn.com/2020/02/09/us/fake-uber-lyft-driver-alleged-prowler-trnd/index.html>

²⁴ Proposition 22 § 7462.

²⁵ Proposition 22, art. 7.

²⁶ The case is *People of the State of California v. Uber Technologies Inc.*, case number CGC20584402, in the Superior Court of the State of California, County of San Francisco.

²⁷ The cases are *People of the State of California v. Uber Technologies Inc. et al.*, case number A160706, and *People of the State of California v. Lyft Inc. et al.*, case number A160701, both in the California Court of Appeal, First Appellate District.

²⁸ Prop 22 will go into effect five days after the California Secretary of State certifies the election. According to the California Secretary of State, results will be certified by December 11, 2020.

<https://electionresults.sos.ca.gov/returns/ballot-measures>.

Politico reported that Uber CEO Dara Khosrowshahi said in an earnings call with investors after Prop 22 passed that, “going forward, you will see us more loudly advocate for new laws like Prop 22, which we believe strikes the balance between preserving the flexibility that drivers value so much, while adding protections that all gig workers deserve,” adding that “it’s a priority for us to work with governments across the U.S. and the world to make this a reality.”²⁹ Echoing Khosrowshahi, in an earnings call with Lyft investors, CEO Logan Green said, looking “beyond California” Prop 22 “can provide a model for other states.”³⁰ Lyft President and co-founder John Zimmer told investors on the call that he strongly believes policy makers on the federal level will see this as a watershed moment and “recognize that the model that voters backed in California makes sense.”³¹ Anthony Foxx, Lyft Chief Policy Officer—and former U.S. Transportation Secretary under President Obama—made similar statements to Yahoo! Finance, saying that he hopes leaders across the country, including at the federal level, will acknowledge that there is another way to handle the “problem” of gig workers and work with the app companies.³²

President-elect Joe Biden and Vice President-elect Senator Kamala Harris, supported A.B. 5 and came out against Proposition 22.³³ Mr. Biden also strongly supports the Protecting the Right to Organize (“PRO”) Act,³⁴ a federal law that would use the ABC test for deciding whether workers can form unions and also roll back “right-to-work” laws.³⁵ House Democrats passed the PRO Act in February 2020, but the partisan bill stalled in the Republican-held Senate. Mr. Biden’s campaign website includes a promise that, as President, he “will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws” to ensure “gig economy” workers “receive the legal benefits and protections they deserve.”³⁶

At the state and local levels, gig worker rights have been percolating around the country. In September 2020, the Seattle City Council passed a new pay formula law for Uber and Lyft drivers that is meant to ensure they earn a minimum wage (\$16.39 per hour for Seattle, Wash. in 2020).³⁷

²⁹ <https://www.politico.com/states/california/story/2020/11/05/uber-ceo-sees-california-ballot-initiative-as-a-model-for-other-states-9424660>

³⁰ <https://investor.lyft.com/events/event-details/lyft-third-quarter-2020-earnings-call>

³¹ *Id.*

³² <https://money.yahoo.com/lyft-chief-policy-officer-passage-223947729.html>

³³ Joe Biden (@JoeBiden), Twitter (May 26, 2020, 10:38 PM),

<https://twitter.com/joebiden/status/1265472291099549699?lang=en> (“Last year California passed #AB5, affording gig workers protections and benefits like a minimum wage and overtime pay. Now, gig economy giants are trying to gut the law and exempt their workers. It’s unacceptable. I urge Californians to vote no on the initiative this November.”); Kamala Harris (@KamalaHarris), Twitter (Jul. 3, 2020, 5:58 PM),

<https://twitter.com/KamalaHarris/status/1279172640817786881> (“We cannot allow giant gig corporations to exempt themselves from providing essential protections and benefits for their workers. I urge Californians to join me in standing with these essential workers by voting NO on Prop 22.”).

³⁴ <https://joebiden.com/empowerworkers/#>

³⁵ Protecting the Right to Organize Act of 2019, H. R. 2474, 116th Cong. (2019–2020).

³⁶ <https://joebiden.com/empowerworkers/#>

³⁷ Seattle, Wash., Ordinance 126189 (Oct. 8, 2020),

<https://seattle.legistar.com/ViewReport.aspx?M=R&N=Text&GID=393&ID=4073013&GUID=83A18BE3-7595-43B3-8487-E4B040A792CA&Title=Legislation+Text>

Modeled on New York City’s minimum driver pay law that was passed in 2018, the Seattle law requires ride-hailing companies to pay drivers rates high enough to account for their waiting time and expenses. Seattle and New York City are the only two U.S. cities to pass such regulations, but these, along with A.B. 5, are part of broader efforts around the country to reregulate ride-hailing companies.

Lawmakers in other areas of the country who are looking to do something like A.B. 5 may think twice after Prop 22. According to Lyft, more than 120,000 drivers signed up to be part of the effort to pass Prop 22.³⁸ And voters effectively smacked down both the legislature and the courts in handing Yes on 22 a decisive win. This could be a warning shot to Democrats and send reform-minded lawmakers down a different path than A.B. 5. With Prop 22, California now has a pathway for independent work to have some benefits associated with it. Referred to as the “third way” or hybrid model, this employment model lets workers set their own hours and gives them portable benefits, and could include a form of collective bargaining known as sectoral bargaining.

The Independent Drivers Guild responded to California’s passage of Prop 22 by calling on state legislatures in New York, New Jersey, and other states to enact legislation that would give gig workers collective bargaining rights. “California’s experience should light a fire under pro-worker state legislatures across the country. States need to act now to stand up for their workers,” said Brendan Sexton, Executive Director of the Independent Drivers Guild. “Worker power through collective bargaining, not ballot measures and protracted legal battles, is the only real long-term solution for gig workers,” Sexton added.³⁹

As for New York, all signs pointed to 2020 being the year that the ABC test would come to the Empire State. In late 2019, the New York legislature held hearings about gig workers, and introduced two pieces of legislation that would change gig worker status. One bill (S6699/A8721) would establish the ABC test for determining worker classification broadly.⁴⁰ Another bill (S6538/A8343) would give limited benefits and collective bargaining protections to a new class of “dependent workers” for app-based labors.⁴¹ More importantly, Governor Andrew M. Cuomo vowed to extend employee protections to workers in the “exploitive, abusive”⁴² gig economy and included legislation in his Executive Budget Bill for 2020-2021 to study the issue more broadly

³⁸ Lyft, Press Release, *Lyft Announces Third Quarter Results* (Nov. 10, 2020), <https://investor.lyft.com/static-files/0cee3e98-d82c-47e9-a5e4-75709abf5d46>

³⁹ <https://drivingguild.org/nyuber/>

⁴⁰ See N.Y. Senate-Assembly Bill S6699, A8721 (2019–2020).

⁴¹ Chris Opfer and Keshia Clukey, *Uber, Lyft Drivers Could Form Unions Under New York Proposal*, Bloomberg Law (Dec. 2, 2019), <https://news.bloomberglaw.com/daily-labor-report/new-york-proposal-aims-to-let-uber-lyft-drivers-form-unions>.

⁴² N.Y. Governor Andrew M. Cuomo, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Outlines 2020 Agenda: Making Progress Happen* (Jan. 8, 2020), www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-outlines-2020-agenda-making-progress-happen; N.Y. Governor Andrew M. Cuomo, *2020 State of the State*, at 101–102, www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2020StateoftheStateBook.pdf.

and allow the NYS Department of Labor to introduce ABC test regulations.⁴³ But then COVID-19 struck. The gig economy legislation fell out of the budget, and the two bills that would change gig worker status stalled. Ultimately, the state passed no worker protection laws before the legislative session ended.

After Prop 22 passed, Crain New York's reported that, according to New York Sen. Diane Savino—a co-sponsor of the Dependent Workers Act—gig-economy players “that fought for Proposition 22 have been ‘at the table’ with lawmakers in Albany for months, working on a solution that provides ‘the flexibility of gig economy but creates the protection we all know workers need.’”⁴⁴ Savino said she plans to introduce such a bill by January 2021.

In sum, this is simply the beginning, and not the end of the classification battle. On one side, you have drivers who are divided about whether to stay independent or unionize as employees – yet all drivers agree on one thing, that they want higher wages and benefits. On the other side are the TNCs, which are emboldened by the passage of Prop 22, and seem likely to begin a national tour to pass laws similar to the ballot proposition in California. TNCs are likely to take a cookie-cutter approach as they did for the passage of the California TNC licensing law which gave them regulatory birth, and which was copied in almost every state over the last several years. The new proposed model template for TNC labor regulation has been born, and it will be interesting to see how it is developed and tweaked in other states. TNCs are unlikely to push for any unionization, and will likely insist on preemption provisions to ensure that cities like NYC and Seattle are precluded from having their own minimum or living wages that deviate from the Prop 22 structure.

I fail to see the Constitutional authority for Congress and the President to take action on this topic, as under the 10th Amendment of the Constitution, such matters are reserved for States (with the exception of federal contractors and interstate transportation licensed by the Federal Motor Carrier Safety Administration). One thing is for certain though, since Prop 22 only applied to TNCs and not to the taxicab or limousine industries, an already uneven regulatory playing field for licensing has become entirely lopsided – with many incumbent taxi and limousine operators now faced with the choice of classifying their drivers as employees, becoming TNCs themselves, or going out of business, should this movement unfold as it did in California.

⁴³ See N.Y. Senate-Assembly Bill S6699, A8721 (2019–2020); Part GGG, Transportation, Economic Development and Environmental Conservation Article VII Legislation, FY 2021 New York State Executive Budget, (Jan.13, 2020), available at www.budget.ny.gov/pubs/archive/fy21/exec/artvii/ted-bill.pdf.

⁴⁴ Ryan Deffenbaugh, *As Uber Celebrates Gig-Economy Win in California, the Battle Heads to Albany*, CRAIN'S N.Y., Nov. 4, 2020, <https://www.craigslist.com/technology/uber-celebrates-gig-economy-win-california-battle-heads-albany>.