

November 5, 2020

California Voters Approve Independent Contractor Status for App-Based Rideshare and Delivery Drivers

Summary

On November 3, California voters appear to have approved Proposition 22, allowing app-based rideshare and delivery companies to engage drivers as independent contractors, instead of being required to hire drivers as employees. Proposition 22 overrides Assembly Bill 5 (AB 5), signed in September 2019, in the specific context of app-based drivers. It does not affect the applicability of AB 5 to workers in other industries. Nonetheless, its passage will have important consequences for thousands of gig economy workers in California, and it could give support to potential future ballot initiatives and/or lawsuits pushing for additional exceptions to AB 5 or against AB 5 more generally.

AB 5 Background

AB 5 codifies the “ABC test” for determining whether a worker is an employee or independent contractor of a hiring entity. In 2018, the Supreme Court of California held (in *Dynamex Operations West, Inc. v. Superior Court*) that the ABC test applies for purposes of California wage orders (which regulate entitlements like overtime and meal and rest breaks). AB 5 expands the test so that it also applies to other provisions of the state labor code and unemployment insurance. The test requires that all three of the following requirements be satisfied in order for a person to be considered an independent contractor, as opposed to an employee of a hiring entity:

- A. The individual is free from control and direction of the company;
- B. The individual performs work outside the usual course of the company’s business; and
- C. The individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Before the enactment of AB 5 and the 2018 *Dynamex* decision, California courts and agencies applied a multi-factor balancing test to assess independent contractor classification. Practically, AB 5 has made it more challenging for California employers to assert that a worker should be classified as an independent contractor, by requiring all three of its prongs to be met and especially by setting a requirement regarding the “usual course of the company’s business.”

Key Points of Proposition 22

Proposition 22 allows drivers for app-based transportation (rideshare) and delivery companies to be classified as “independent contractors,” not “employees,” unless a company sets drivers’ hours, requires acceptance of specific ride or delivery requests, or restricts working for other companies. As independent contractors, app-based drivers are not covered by various state employment laws—including those regulating minimum wage, overtime, unemployment insurance, and workers’ compensation.

However, Proposition 22 entitles app-based drivers to certain protections and benefits including: (i) 120% of the local minimum wage for each hour a driver spends driving, but not time spent waiting; (ii) healthcare subsidies for drivers who normally work more than 15 hours per week (not including waiting time); (iii) the opportunity to purchase occupational accident insurance to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online with a network company’s online-enabled application or platform; and (iv) limits on working more than 12 hours in a 24-hour period for a single rideshare or delivery company. Proposition 22 also prohibits workplace

discrimination and requires companies to develop sexual harassment policies, conduct criminal background checks, and mandate safety training for drivers.

Potential Implications

While Proposition 22 applies solely to app-based drivers, the creation of an exception to AB 5 for thousands of gig economy workers could give legislators or ballot initiative proponents additional arguments for various other exceptions from the ABC test or perhaps even nullification of AB 5 in whole.

For advice or assistance in dealing with these important changes, or the various approaches to them, please contact any member of the Ropes & Gray [employment](#) group.