Class Actions : The Many-Headed Hydra of App-Based Driver Classification

By Rachel Terp

■ Introduction

Proposition 22 was a last-ditch effort funded and led by Uber, Lyft, DoorDash, Instacart, Postmates, and other tech companies to buy a loophole in California's worker protection laws. It worked, at least for now. As of December 16, 2020, most app-based drivers are, arguably, independent contractors under California law.

The lead up to Proposition 22's approval and enactment could hardly have been more dramatic or high stakes, and the drama continues into 2021. The California Supreme Court's 2018 *Dynamex* decision, codified by the state legislature in 2020, left little space for app-based rideshare and delivery companies to credibly justify classifying drivers as independent contractors. California's courts were on the precipice of enjoining Uber and Lyft to treat drivers as employees. Then, California voters passed Proposition 22, which makes app-based drivers independent contractors under specific circumstances. Within days of the new law taking effect, large employers announced plans to outsource jobs to gig-companies, and the Service Employees International Union ("SEIU") petitioned the California Supreme Court for a writ challenging Proposition 22's constitutionality. The Court denied the writ, directing the SEIU to start its claim at the trial court level.

This article describes these developments and Proposition 22's possible impacts on independent contractor litigation, both ongoing and potential.[1]

A Disruptive Theory

For the last decade, companies including Uber and Lyft have provided convenient ridesharing services that pair consumers with drivers on a massive scale through smartphone application technology. These app-based companies and others – like DoorDash, Instacart, and Postmates, which specialize in food delivery – have kept labor costs low by treating drivers as independent contractors.[2] Treating drivers like independent contractors permits companies to avoid the statutory and regulatory workplace protections extended to employees.

In California, these protections include state anti-discrimination and retaliation laws; "wage and hour" protections, such as minimum wages, overtime, paid sick-leave, meal and rest periods, and indemnification for work-related expenses; family medical leave rights; workers' compensation; state disability insurance; collective bargaining rights; and workplace safety provisions – most recently, protections addressing COVID-19.[3]

In case after case brought by drivers seeking to be treated as employees, these gig-companies argued, unsuccessfully, that they were mere technological platforms for linking drivers with consumers, rather than transportation or delivery businesses, or at least that their drivers were independent contractors.[4] Advocates for workers' rights argued instead that Uber, Lyft, DoorDash, Instacart, and Postmates are in the business of transporting passengers, groceries, and hot meals, and rely on their drivers to do so, making those drivers employees under California law.

■ Supreme Court Decision

Workers rights' advocates found support for their arguments at the California Supreme Court. In *Dynamex Operations W. Inc. v. Superior Court*,[5] the Court clarified that the legal standards for determining whether a worker is properly classified as an independent contractor under California's Industrial Welfare Commission's Wage Orders include the "ABC" test.[6]

1 For further background reading, the California Labor & Employment Law Review has previously published on topics related to this article. See, e.g., *Sansanowicz, Wage and Hour Case Notes* (2018) Vol. 32, No. 4, Cal. Lab.& Employment L.Rev. 11, 11-12 (discussing *Dynamex*); Kalt, et al., *New Employment Laws for 2020* (2020) Vol. 34 No. 1, Cal. Lab.& Employment L.Rev., 1, 3-4 (discussing AB 5); Kalt, et al., *New California Employment Laws (2021)* Vol. 35 No. 1, Cal. Lab.& Employment L.Rev. 1, 4 (discussing AB 2257); Kosch, et al., *Wage And Hour Case Notes* (2021) Vol. 35 No. 1, Cal. Lab.& Employment L.Rev. 16, 17-18 (discussing *People v. Uber Tech., Inc.* appellate decision).

2 *E.g., Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2020) National Employment Law Project, p. 1 <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/> (as of Feb. 9, 2021).

3 *See* Cal. Lab. Code, §§ 3212.86-88, 6325, 6409.6, 6432.

4 *E.g., Cotter v. Lyft, Inc.* (N.D.Cal. 2015) 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."); *O'Connor v. Uber Techs., Inc.* (N.D.Cal. 2015) 82 F.Supp.3d 1133, 1141-1142 ("Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs"). *See also Crawford v. Uber Techs., Inc.* (N.D.Cal. Mar. 3, 2018) No. 17-cv-02664, 2018 WL 1116725, *3-4 (in the context of determining applicability of the Americans with Disabilities Act, Uber's argument that it is merely a technology company "miss[es] the mark").

5 (2018) 4 Cal.5th 903 (*Dynamex*).

6 The wage orders include three definitions for whether a hiring entity employs a worker. To "employ" under the wage orders means: "'(a) to exercise control over the wages, hours, or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.'" *See Dynamex, supra*, 4 Cal.5th at 914-915 (quoting *Martinez v. Combs* (2010) 49 Cal.4th 35, 64) (emphasis in the original). *Dynamex* expressly adopted the ABC test for determining whether a hiring entity "suffer[s] or permit[s] [an individual] to work" so as to employ them. *Id.* at 916-17.

Under the ABC test, a worker is considered an employee and not an independent contractor unless the hiring entity can prove the following three criteria apply: (A) the worker is free from the control and direction of the hiring entity in connection with performing the work, both under contract and in fact; (B) the worker performs work outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[7] Because the ABC test is stated in the conjunctive, if any of these prongs do not apply to the working relationship, then the worker is an employee for purposes of the wage orders.[8]

The Court explained that the "exceptionally broad" suffer-or-permit test for employee status under the wage orders recognized the unequal bargaining position of workers whose "fundamental need to earn income for their families' survival may lead them to accept work of substandard wages or working conditions."[9] The wage orders are "intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect," while preventing unfair competition by businesses willing to stretch workers thin and pass associated burdens onto taxpayers.[10]

In applying prong B to the facts in *Dynamex*, the California Supreme Court found common evidence could resolve this issue, as the workers were delivery drivers for Dynamex; Dynamex was in the delivery service business; and "Dynamex obtains the customers for its deliveries, sets the rate that customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its tracking and recordkeeping system."[11]

Under the ABC test, Dynamex's delivery drivers were similarly positioned to drivers working at Uber, Lyft, and similar companies. App-based ridesharing and delivery companies would not exist without their drivers,[12] who are clearly employees based on prong B of the ABC test. Setting the stage for further confrontation, even after *Dynamex*, the leading app-based ridesharing and delivery companies continued to misclassify drivers as independent contractors.[13]

■ ABC Statutes

Workers rights' advocates also found support for their arguments in the California State Legislature. In 2019, driven by concerns about the gig economy and ongoing misclassification, the state legislature passed Assembly Bill 5 ("AB 5"), effective January 1, 2020, which codified *Dynamex*'s ABC test. AB 5 recognized the "misclassification of workers as independent contractors" as a "significant factor in the erosion of the middle class and the rise of income inequality" in California.[14] AB 5's express intent was to stop the widespread, exploitative, practice of misclassifying workers:

> It is [] the intent of the Legislature [] to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.[15]

AB 5 and a follow-up bill, Assembly Bill 2257 ("AB 2257"), which took effect on September 4, 2020, expanded the application of the ABC test to all provisions of the Labor Code, wage orders, and Unemployment Insurance Code. The ABC statutes permit the Attorney General, private attorneys general, and specified localities to obtain injunctive relief to combat independent contractor misclassification,[16] thereby avoiding barriers to enforcement created by employee arbitration and class action waivers.

AB 5 and AB 2257 included exceptions to the bright-lined conjunctive ABC test for specified professional services and industries. For these carved-out businesses, the less rigorous *Borello* test applies for determining whether a worker is appropriately classified as an independent contractor.[17]

7 *Ibid.*
8 *Id.* at 917.
9 *Id.* at 952.
10 *Ibid.*
11 *Id.* at 965.
12 *See* footnote 5, *supra*.
13 *See* Bollag, *Uber Says It Won't Reclassify Its Drivers Despite Passage of New California Labor Rule* (Sept. 11, 2019) Sacramento Bee (published) <https://www.sacbee.com/news/politics-government/capitol-alert/article234985737.html> (as of Feb. 11, 2021).

14 AB 5, § 1 subd. (c).
15 *Id.* at § 1 subd. (e).
16 *Id.* at § 2; Cal. Lab. Code, § 2750.3 subd. (j).
17 Cal. Lab. Code, § 2775 subd. (b)(3). *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. The Court in *Borello* analyzed a work relationship based on a written "farmshare agreement," rather than a wage order. *Id.* at 345. In both *Dynamex* and the more recent *Vazquez v. Jan-Pro Franchising Int'l, Inc.* decisions, the California Supreme Court pointed out that the *Borello* decision did not address the question of employer versus independent contractor status under the wage orders. *Dynamex, supra*, 4 Cal.5th at 946-848; *Vazquez v. Jan-Pro Franchising Int'l, Inc.* (Jan. 14, 2021 No. S258191), 2021 WL 127201, at *1 (Jan-Pro). Arguably, AB 5 applies the *Borello* standard to the wage orders for the first time, potentially to the detriment of workers who fall within the ABC statutes' exceptions but who previ-

The long-recognized *Borello* test balances on roughly ten factors, with the principal test being whether the hiring entity retained the "right to control the manner and means of accomplishing" the job, and the strongest evidence thereof being whether the worker could be fired without cause.[18]

Under AB 5 and AB 2257, all workers are still considered employees by default. Hiring entities are responsible for using either the ABC test or *Borello* test, if they fall within an exception, to prove a worker's independent contractor status. Despite lobbying efforts, the legislature did not provide exceptions for app-based sharing and delivery businesses.

■ Government Enforcement Actions

Dynamex and the ABC statutes clarified that drivers for Uber, Lyft, and similar companies were employees under California law. Still, the companies did not re-classify their drivers, and on January 8, 2020, Uber and Postmates filed *Olson, et al. v. State of California, et al.*, an action challenging AB 5 on federal and state constitutional grounds including the Equal Protection, Due Process, and Contracts Clauses.[19] These aggressive tactics were met with government enforcement actions.[20]

Most notably, on May 5, 2020, the Attorney General of California and several city attorneys brought a civil enforcement action, *People v. Uber Technologies, Inc., et al.*, alleging harm to misclassified drivers, to competitor businesses, and to members of the public who bear the burden of lost tax revenues and increased social-safety-net expenditures.[21] The government sought restitution based on wage violations under California's Unfair Competition Law, Business and Professions Code section 17200, *et seq.* ("UCL") and injunctive relief.

The Attorney General moved for interim injunctive relief under the UCL and AB 5. The trial court granted a preliminary injunction restraining the companies from classifying drivers as independent contractors in violation of AB 5, but stayed the decision to permit defendants to appeal.[22] On October 22, 2020, the First District Court of Appeal affirmed the trial court's order.[23]

Considering a question of first impression for California courts – "whether, under the ABC test as adopted in *Dynamex* and codified in Labor Code section 2775, ride-hailing drivers for Uber and Lyft are employees or independent contractors" – the court found ample support for the trial court's determination that drivers performed services within the usual course of defendants' business and were therefore employees: "Defendants' businesses depend on riders paying for rides. The drivers provide the services necessary for defendants' businesses to prosper, riders pay for those services using defendants' app, and defendants then remit the drivers' share to them."[24] The court described defendants' chances of prevailing on Prong B as "daunting."[25]

Further, the court found no abuse of discretion in the trial court's conclusion that rectifying the demonstrated harm to workers "more strongly serves the public interest than protecting Uber, Lyft, their shareholders, and all of those who have come to rely on the advantages of online ridesharing delivered by a business model that does not provide employment benefits to drivers."[26] The court observed, "a party suffers no grave or irreparable harm by being prohibited from violating the law."[27]

On February 10, 2021, the California Supreme Court denied the defendants' petition to vacate and de-publish.[28]

■ A Disruptive Proposition

Court enforcement was imminent, and the legislature was immovable, but the app-based rideshare and delivery companies had another card to play.

In late-2019, Uber, Lyft, and DoorDash each contributed $30 million to fund a 2020 ballot initiative called the "Protect App-Based Drivers and Services Act" or Proposition 22. Instacart and Postmates added millions more. By the end of 2020, these five companies poured over

ously would have been entitled to the full protection of the wage orders and other labor code provisions.

18 *Borello, supra*, 48 Cal.3d at 351.

19 (C.D.Cal., Jan. 8, 2020) No. CV19-10956. The trial court denied plaintiffs' motion for preliminary injunction in that case. *Olson, et al. v. State of California, et al.* (C.D.Cal., Feb. 10, 2020) No. CV1910956, 2020 WL 905572. Plaintiffs appealed. *Olson, et al. v. State of California, et al.* (9th Cir. 2020) No. 20-55267.

20 *E.g., Lilia García-Brower v. Uber* (Super. Ct. Alameda County, 2020, No. RG20070281); *Lilia García-Brower v. Lyft* (Super. Ct. Alameda County, 2020, No. RG20070283); *People v. Maplebear, Inc. dba Instacart* (No. D077380, app. Pending); *People v. DoorDash, Inc.* (Super. Ct. S.F. City and County, 2020, No. CGC20584789).

21 (Super. Ct. S.F. City and County, 2020, No. CGC20584402).

22 *Ibid.*

23 *People v. Uber Techs., Inc.* (2020) 56 Cal.App.5th 266, as modified on denial of reh'g (Nov. 20, 2020), petn. for review pending, petn. filed Dec. 1, 2020 (No. S265881). When analyzing a request for a preliminary injunction, a trial court considers the moving party's likelihood of success on the merits and the relative interim harm to the parties in granting or denying the motion. In this case, the court applied a variation of the legal standard that provides broad discretion to the courts where a government enforcement action seeks to enjoin an alleged violation of a law that specifically provides for injunctive relief. *Id.* at 283-84 (adopting the standard articulated in *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, a case involving enforcement of a zoning ordinance that expressly authorized injunctive relief).

24 *People v. Uber Techs., Inc., supra*, 56 Cal.App.5th at 295.

25 *Id.* at 301.

26 *Id.* at 312-313.

27 *Ibid.*

28 *People v. Uber Techs., Inc.* (Feb. 10, 2021, No. S265881), California Courts, "Case Information," <https://www.courts.ca.gov/10029.htm> (as of Feb. 11, 2021.)

$200 million into promoting Proposition 22; outspending opponents by a ratio of 10:1.[29]

The backers of Proposition 22 spared no expense marketing this attempt to buy their way out of complying with the same state laws every other employer in California, large and small, must follow. Backers promoted Proposition 22 with promises of "freedom" and "flexibility" for drivers[30] and threats that the proposition's failure would lead to job loss and the wholesale exit of some gig services from California.[31] Uber's communications to its drivers about potential job loss if Proposition 22 failed were aggressive enough to land the company in court, again.[32]

However, flexibility and employment can go together.[33] As California Attorney General Xavier Becerra put it:

> California is America's economic engine because innovation and worker rights go hand in hand. Any company that suggests otherwise is peddling a false choice.[34]

And, as the Court of Appeal reasoned in granting the Attorney General's preliminary injunction, "the People contend, again correctly, nothing in the preliminary injunction prevents defendants from allowing drivers to maintain their flexibility rather than assigning rigid shifts."[35] Furthermore, evidence suggests that many gig workers would give up some schedule flexibility in exchange for regular and reliable schedules as well as guaranteed benefits.[36]

The marketing campaign worked. On November 3, 2020, voters passed Proposition 22 with 58.6% voter approval.[37] Just when California courts were about to enjoin gig-companies from continuing to deny hundreds of thousands of workers vital legal protections, Proposition 22 stripped these essential, low-wage workers of a century of employment and labor protections in the midst of an ongoing worldwide pandemic. The very industries AB 5 aimed to cover bought their way into an exemption from it.

■ Proposition 22

Proposition 22 creates a new exception to the ABC statutes' presumption of employment for app-based rideshare and delivery drivers for transportation or delivery network companies. If certain conditions are met, these drivers are considered independent contractors under California law.[38]

Control

Under Proposition 22, app-based drivers are properly classified as independent contractors if:

(a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which 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.[39]

All of these conditions must be met for the driver to be considered an independent contractor.[40] Further, app-based drivers may only be terminated on grounds set forth in a written agreement, and termination decisions are subject to a mandatory appeals process.[41]

Proposition 22 provides a significantly more permissive standard than the ABC test or *Borello* test for determining whether a worker is properly classified as an independent contractor. Indeed, under Proposition 22, it is arguable that an otherwise compliant hiring entity could require workers to wear uniforms, work within proscribed geographic locations, cap the maximum number of hours a

29 Cal-Access, "Homepage," <http://cal-access.sos.ca.gov/> (as of Feb. 1, 2021).

30 Cal. Bus. & Prof. Code, § 7449 subds. (a) & (e).

31 Bellon, *Uber, Lyft Prepare to Shut Down California Ride Service on Friday* (Aug. 20, 2020) Reuters <https://www.reuters.com/article/uber-california/uber-lyft-prepare-to-shut-down-california-rides-service-on-friday-idUSL8N-2FM545> (as of Feb. 9, 2021).

32 *Valdez, et al. v. Uber Techs., Inc., et al.* (Super. Ct. S.F. City and County, 2020, No. CGC20587266), voluntarily dismissed Dec. 4, 2020.

33 Sachs, *Uber's Flexibility Myth: Reprise* (Aug. 19, 2020) On Labor, Blog <https://onlabor.org/ubers-flexibility-myth-reprise/> (as of Feb. 9, 2021); Benisinger, *Other States Should Worry About What Happened in California* (Nov. 6, 2020) N.Y. Times, Opinion <https://www.nytimes.com/2020/11/06/opinion/prop-22-california-labor-law.html> (as of Feb. 9, 2021);

34 *Bellon, et al.*, California court ruling gives voters last word over Uber, Lyft worker rights (Aug. 20, 2020) Reuters <https://www.reuters.com/article/idUSKBN25G21S?edition-redirect=ca> (as of Feb. 9, 2021).

35 *People v. Uber Techs., Inc., supra*, 56 Cal.App.5th at 307.

36 *See, e.g., Worker Ownership, COVID-19, and the Future of the Gig Economy* (Oct. 2020) UCLA Labor Center & SEIU-UHW, pp. 4, 19 <https://www.labor.ucla.edu/wp-content/uploads/2020/10/UCLA_coop_report_Final-1.pdf> (as of Feb. 9, 2021)

37 Cal. Sec. of State Alex Padilla, *Statement of Vote, General Election November 3, 2020*, p. 14, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf > (as of Feb. 1, 2021).

38 Cal. Bus. & Prof. Code, § 7448, et seq. This article does not purport to cover all details of Proposition 22.

39 Cal. Bus. & Prof. Code, § 7451.

40 *Ibid.*

41 Cal. Bus. & Prof. Code, § 7452.

driver may work, assign managers to drivers, require attendance at uncompensated mandatory trainings, and include numerous grounds for termination in the driver's contract. However, the more control covered companies choose to exert, the more they open themselves up to possible liability for independent contractor misclassification under the federal Fair Labor Standards Act's ("FLSA") "economic reality" test, which focuses on the worker's dependence on the hiring entity,[42] and shares similarities with the *Borello* test.[43]

Benefits

Proposition 22 purports to provide the following benefits to drivers in lieu of employment: a higher-than-minimum-wage earnings "guarantee"; compensation for vehicle expenses; healthcare subsidies for qualifying drivers; occupational accident insurance to cover on-the-job injuries; automobile accident insurance; and discrimination and sexual harassment protections.[44]

The actual benefits under Proposition 22, however, offer less protection than what is available to California employees.

Earnings Guarantee - Wages & Costs

Proposition 22 establishes a "net earnings floor," described as "guaranteed minimum" compensation comprised of (1) 120 percent of the applicable state or local minimum wage and (2) 30 cents per mile, adjusted for inflation.[45] These minimum wage and mileage reimbursements are limited to "engaged time" or "engaged miles," measured from the driver's acceptance of a rideshare or delivery request to the task's completion.[46]

The promise of higher than minimum wage pay is untrue, however, if compared to what an employee would earn for the same work. Waiting time, a necessary part of a driver's work for which California employees are typically compensated,[47] is not considered compensable time for app-based drivers under Proposition 22. According to one study funded by Uber and Lyft, waiting time comprised roughly one-third of the time rideshare drivers spent online.[48] Other studies have concluded, on this and other bases, that Uber and Lyft drivers are in fact likely to earn less than the state minimum wage for all hours worked.[49]

Proposition 22 does not provide an overtime rate of pay, so drivers who work long hours can also expect to earn less than minimum wage employees working the same overtime hours.[50]

Proposition 22's vehicle compensation guarantee also deprives drivers of the actual cost of cruising to find jobs or travelling to higher demand areas, which one study estimated costs $3.83 per hour.[51] The mileage reimbursement in Proposition 22 is almost $0.30 cents per mile less than the IRS mileage rate. By contrast, if these drivers were employees, they would be entitled to a full reimbursement of gas and vehicle expenses.[52]

Health Benefits, Occupational Accident Insurance for on-the-Job Injuries, Automobile Accident Insurance

Proposition 22 offers limited healthcare subsidies and insurance for accidents and work-related injuries, but the availability of these benefits is, among other things, limited to the time when an employee is "engaged" or otherwise "online."[53] Because the drivers are independent contractors, they are also excluded from the state's workers' compensation and state disability insurance systems.

Discrimination and Harassment

Proposition 22 provides limited workplace discrimination and harassment protections to drivers. Immigration status is not included as a protected characteristic in the law's anti-discrimination provisions.[54] Covered employers

42 *See, e.g., Goldberg v. Whitaker House Co-op, Inc*. (1961) 366 U.S. 28, 33; *Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 301; *Donovan v. Sureway Cleaners* (9th Cir. 1981) 656 F.2d 1368, 1370; *Real v. Driscoll Strawberry Assocs., Inc*. (9th Cir. 1979), 603 F.2d 748, 754.

43 Indeed, President Biden has stopped the Trump administration's rule regarding employee classification under the FLSA from going into effect and proposed withdrawing the rule altogether, thereby beginning to make good on his campaign promises to aggressively police employers who misclassify workers under the FLSA and potentially creating additional avenues for workers' advocates to pursue claims against gig-companies. See Bloom, White House "Regulatory Freeze" Memo Dooms DOL Independent Contractor Rule (Jan. 22, 2021) Nat. L.Rev.https://www.natlawreview.com/article/white-house-regulatory-freeze-memo-dooms-dol-independent-contractor-rule (as of Feb. 11, 2021); Bloom, DOL Begins Withdrawal of Trump-Era Opinion Letters (Jan. 27, 2021) Nat. L.Rev., https://www.natlawreview.com/article/dol-begins-withdrawal-trump-era-opinion-letters (as of Feb. 11, 2021); see Brecher, Biden DOL Proposes Withdrawal of Former Administration's Joint Employer and Independent Contractor Final Rules (Mar. 12, 2021) Nat. L.Rev., https://www.natlawreview.com/article/biden-dol-proposes-withdrawal-former-administration-s-joint-employer-and-independent (as of Mar. 16, 2021).

44 Cal. Bus. & Prof. Code, §§ 7449 subd. (f), 7450 subd. (c).

45 Cal. Bus. & Prof. Code, § 7453 subd. (a) & (d)(4).

46 Cal. Bus. & Prof. Code, §7463 subds. (j) & (i).

47 *Mendiola v. CPS Sec. Sols., Inc.* (2015) 60 Cal.4th 833, 836 (reaffirming that on call employees in California must usually be paid for that waiting time).

48 Balding, et al., *Estimating TNC Share of VMT in Six U.S. Metropolitan Regions* (Revision 1) (Aug. 6, 2019) Fehr & Peters, p. 9 <https://drive.google.com/file/d/1FIUskVkj9lsAnWJQ6kLhAhNoVLjfFdx3/view> (as of Feb. 2, 2021).

49 Fuentes, et al., *Rigging the Gig: How Uber, Lyft, and DoorDash's Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers* (Jul. 2020) Partnership for Working Families and National Employment Law Project, pp. 10-11, <https://s27147.pcdn.co/wp-content/uploads/Rigging-the-Gig_Final-07.07.2020.pdf> (as of Feb. 1, 2021); Jacobs, et al., *The Uber/Lyft Ballot Initiative Guarantees only $5.64 an Hour* (Oct. 31, 2019) UC Berkeley Lab. Ctr., Berkeley Blog <https://blogs.berkeley.edu/2019/10/31/the-uber-lyft-ballot-initiative-guarantees-drivers-only-5-64-an-hour/> (as of Feb. 1, 2021). As the UC Berkeley Labor Center study put it, "not paying for [waiting] time would be the equivalent of a fast food restaurant or retail store saying they will only pay the cashier when a customer is at the counter." *Ibid.*

50 Fuentes, et al., *supra*, footnote 50, at pp. 10-11.

51 Jacobs, et al., *supra*, footnote 50.

52 Cal. Lab. Code, § 2802.

53 Cal. Bus. & Prof. Code, § 7455.

54 Cal. Bus. & Prof. Code, § 7456 subd. (a).

are required to develop sexual harassment prevention policies; however, Proposition 22 undermines compliance by creating various "processes" for reporting, without detailing how a driver could seek or attain remedies.[55] Proposition 22 provides no protections for workers harassed by passengers in the rideshare context.[56]

Other Requirements

Proposition 22 also requires covered companies to conduct criminal background checks,[57] provide safety trainings on specific topics,[58] and institute "zero tolerance" policies related to drug or alcohol use.[59]

■ Employers Take Advantage of Proposition 22 Loophole

Ironically, since it became law, Proposition 22 has made headlines as a job killer. Albertsons Companies, one of the country's largest grocery conglomerates, has confirmed plans to layoff non-unionized in-house delivery drivers at Albertsons, Pavilions, Safeway, and Vons around the state with the intention of out-sourcing the work to DoorDash.[60] Other employers are likely to follow suit.

Some employers may also try to rebrand themselves as transportation or delivery network companies covered by Proposition 22.

■ Constitutional Challenge

Proposition 22 became state law on December 16, 2020, but Labor had another card to play. On January 12, 2021, the SEIU filed an emergency petition for writ of mandate and request for expedited review directly to the California Supreme Court seeking its declaration that Proposition 22 is invalid and unenforceable.

In *Castellanos, et al. v. State of California, et al.*, the petitioners argued that Proposition 22: (1) limits the legislature's constitutional power to extend workers compensation benefits; (2) defines "amendment" in a manner that usurps the inherent power of the courts; and (3) violates the single-subject rule.[61]

First, Article XIV, section 4 of the California Constitution gives the legislature "plenary power . . . to create, and enforce a complete system of workers' compensation." Petitioners argued that by removing the Legislature's power to extend workers' compensation benefits to app-based drivers, Proposition 22 unconstitutionally interferes with the legislature's unlimited authority over the workers' compensation system.[62]

Second, Article II, section 10 of the California Constitution prohibits the legislature from amending an initiative statute without voter approval unless the initiative permits such an amendment. Near the end of Proposition 22, two sections expressly identify legislative actions that would "constitute[] an amendment" to the measure -- those that regulate app-based drivers differently based on their classification status, and those that authorize collective bargaining on behalf of app-based drivers.[63] Petitioners argued that by doing so, "the drafters have impermissibly usurped this Court's authority to 'say what the law is' by determining what constitutes an 'amendment' and have impermissibly invaded the Legislature's broad authority to legislate in areas not substantively addressed by the initiative."[64]

Third, they argued, Proposition 22 violates the "single-subject rule" by including these amendment provisions on subjects not substantively addressed in the measure, in language that most voters would not understand. Proposition 22 deceived voters because it did not tell voters "they were voting to prevent Legislature from granting the drivers collective bargaining rights, or to preclude the Legislature from providing incentives for companies to give app-based drivers more than the minimal wages and benefits provided by Proposition 22."[65]

While the California Supreme Court declined to hear the writ on February 3, 2021, the Court did so without prejudice. On February 11, 2021, the SEIU and rideshare drivers filed their constitutional challenge in Alameda County Superior Court,[66] where they will likely seek a statewide injunction against the enforcement of Proposition 22.

■ Other Ongoing Litigation

For the numerous pending government and private actions,[67]

55 Cal. Bus. & Prof. Code, § 7457 subd. (a).

56 Cf. Cal. Gov. Code § 12940 subd. (j)(1) (extending employer's liability to prevent harassment to "nonemployee" harassers).

57 Cal. Bus. & Prof. Code, § 7458 subd. (a). Proposition 22 also permits credit checks. *Id.* § 7458 subd. (f)

58 Cal. Bus. & Prof. Code, § 7459.

59 Cal. Bus. & Prof. Code, § 7460.

60 Bote, *Safeway to Replace Delivery Workers with DoorDash Drivers – but Says It's Not Tied to Prop. 22* (Jan. 25, 2021) SFGATE <https://www.sfgate.com/bayarea/article/Safeway-will-replace-delivery-workers-with-15847851.php> (as of Feb. 1, 2021).

61 (2021, No. S266551) petn. at 10-13.

62 *Id.* at 11.

63 Cal. Bus. & Prof. Code, § 7465 subds. (a), (b), & (c)(3)&(4).

64 (2021, No. S266551) petn. at 12.

65 *Ibid.*

66 *Castellanos v. Uber Techs., Inc.* (Alameda Super. Ct.) filed Feb. 11, 2021.

67 *See, e.g., Ibid.*; footnotes 21 and 22, *supra; Postmates Inc. v. 10,356 Individuals* (C.D.Cal. Apr. 15, 2020) No. CV202783, 2020 WL 1908302; *James v. Uber Techs. Inc.*, (N.D.Cal. Jan. 26, 2021) Case No. 19-cv-06462, 2021 WL 254303. *Nicholas v. Uber Techs., Inc.* (N.D. Cal. Dec. 7, 2020) Case No. 19-CV-08228, 2020 WL 7173249

there is uncertainty in many directions.

Looking forward, the constitutional challenge to Proposition 22 creates uncertainty. So long as it remains in effect, the government and drivers may sue as independent contractors for violations of Proposition 22's requirements, e.g., under the UCL for under payments, or under California's Unruh Civil Rights Act for discrimination and harassment.[68] Under appropriate circumstances where employers assert sufficient control, these parties may sue asserting that drivers are employees under the FLSA. The most daring litigants may sue under the Labor Code, arguing that the presumption of employment applies, and that it is the gig defendant's burden to show that Proposition 22 applies.

Looking back, the language of Proposition 22 is silent on the subject of retroactivity. Thus, for cases covering time worked before December 16, 2020, restitution is possible for that period, but injunctive relief such as reclassification or required recordkeeping is unlikely to be available. DoorDash, and other defendants, have begun to argue that Proposition 22 applies retroactively.[69] A sliver of certainty came down on January 14, 2021. In *Vazquez v. Jan-Pro Franchising Int'l, Inc.* the California Supreme Court unanimously held that the 2018 *Dynamex* decision applies retroactively to all similarly worded wage orders.[70]

■ Conclusion

As lawyers for drivers and companies continue to clash in the courts and the legislature, the widespread practice of classifying app-based drivers as independent contractors carries on, but for how long and in what form remains to be seen. The fight, of course, takes place not only in legal forums but also among the drivers themselves, many of whom continue to organize.[71]

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68 Cal. Bus. & Prof. Code, §§ 7456 subd. (b), 7457 subd. (c).

69 *See People v. DoorDash, Inc.* (Super. Ct. S.F. City and County, 2020, No. CGC20584789), demurrer filed Dec. 21, 2020; James, supra, 2021 WL 254303, **17-18 (granting class certification in wage and hour case brought by drivers and holding that Proposition 22 does not apply retroactively).

70 *Jan-Pro, supra*, 2021 WL 127201.

71 *See, e.g., Opt Out of Arbitration for All Gig Companies*, Rideshare Drivers United, <https://www.drivers-united.org/uber-arbitration-opt-out> (as of Feb. 10, 2021).