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The Bill That Disrupted the Gig Economy: AB-5 and Uber's Troubling Response



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Taken effect on January 1st, California's [Assembly Bill 5](#) ("AB-5") has created a great deal of controversy. Supporters of the law praise it for its attack on inequality in the workplace, while gig-based companies, like Uber and Postmates, have filed [complaints](#), alleging that it is unconstitutional. Signed into law in September 2019, the statute codifies the ruling of *Dynamex Operations West Inc. v. Superior Court of Los Angeles*, a decision by the California Supreme Court that restricts employers from labeling its workers as independent contractors. In *Dynamex*, the court created a new standard of presumption that all workers are employees, ensuring gig economy workers are entitled to benefits such as workers' compensation and minimum wage. AB-5 places the burden on the employer to adhere to the newly adopted "ABC test" before a worker may be labeled as an independent contractor.

Under the “ABC test”, a worker is deemed an employee unless the employer can prove: (A) the worker is free from control of the entity when performing the work; (B) the worker performs work that is outside the usual course of the business; and (C) the worker is customarily engaged in an independently established trade or business of the same nature as the work performed. To overcome the presumption that a worker is an employee, each of these requirements must be satisfied. Specific occupations are exempted, however, and these occupations are governed by the old *Borello* classification.

Borello & Sons, Inc. v. Department of Industrial Relations was a California Supreme Court case, in which the court held that the test to categorize an independent contractor is a “right to control” test. The “right to control” test mainly determines whether the person with whom the service is rendered, has the right to control the manner and means of accomplishing the result desired. Some secondary factors are considered, such as the kind of occupation, method of payment, and the right to discharge at will. These specific exempt occupations include insurance agents, certain health care professionals, and direct sales representatives.

What may appear as a well-intended bill, meant to improve the lives of the working people, is likely to be problematic down the line by decreasing employment opportunities and making it more inconvenient and costly for users of these gig services. A major manifestation of this issue is found in Uber’s response to the bill. Uber is intent on keeping their drivers from becoming employees, with the fear that it will **add some \$500 million a year** to its labor costs. Uber promptly filed a **lawsuit** in federal court challenging the constitutionality of AB-5 and sent an **email** to more than 150,000 California drivers and millions of passengers, notifying a change in the way they conduct the service. Uber warned that these laws may be harmful, but stated that the goal is to keep as many qualified drivers as possible. The new changes for California drivers includes drivers seeing more trip information ahead of time, such as the distance, destination and estimated fee. Drivers may also reject requests without a penalty, or refuse to accept rides to certain neighborhoods. It is clear that the intent behind these changes are to show that the drivers are free of control from Uber when performing the work, thereby meeting prong (A) of the “ABC” test. However, allowing drivers to reject a trip request without any penalty may lead to more rejections of shorter trips, making the wait-time longer for passengers. There is also a risk of discrimination against lower-income, underprivileged individuals, as drivers may choose to reject trips to certain neighborhoods.

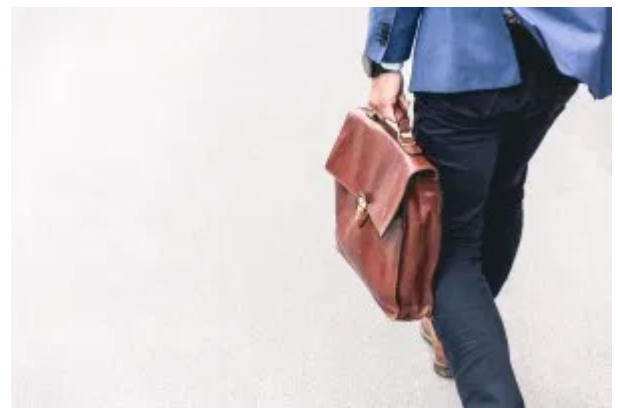


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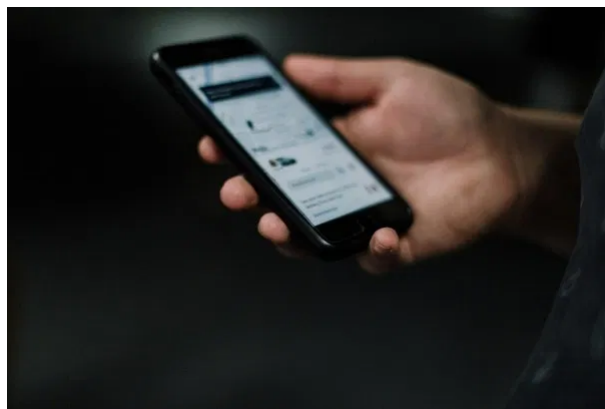


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Additionally, Uber has removed “Quest” promotions, in which drivers were offered a payout if they completed a certain number of trips in a given period. Uber established “Quest” in 2016, and it served as a driver incentive. The feature was integrated into the drivers’ application to allow drivers to track their number of trips in a certain time period, and reward them for completing a certain amount of trips. For instance, on an event such as New Year’s Eve, drivers received a “Quest” offer of a **\$125 payout** for completing 12 trips. These payouts previously made Uber appear to be an employer, not merely serving as a technology

platform. In its place, Uber implemented a **new feature** in which a driver who completes a certain number of “Quest” trips will get a lower service fee. For each trip a driver makes, depending on the distance and type, a maximum of 25% of the total fare is taken as Uber’s service fee. For example, if a driver takes fifty “Quests” and then completes 75 trips, a lower service fee will be applied for the last 25 trips. Uber claims that this lowered service fee will allow drivers to “take home more of [their] earnings.” However, with the large number of trips that drivers have to complete before the service fee is lowered, and the continued trips they have to make for the lowered fee, drivers will have to expend more of their time and energy. Moreover, it is unclear how much of a lower fee drivers will receive, and the percentage will only be deducted from their fares, instead of a lump sum payout as before, thus further disadvantaging drivers.

Another significant feature being tested is the ability for drivers to set their own fares—higher or lower than Uber’s pre-set price. A major concern is that this feature will essentially pit drivers against each other, forcing them to compete for riders, incentivizing lower prices, and driving down earnings. This would make it more difficult for drivers to make a proper wage when many are already from low-income households.



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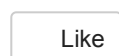
It is clear that Uber is attempting to make the case that drivers are operating on their own, with minimum control from Uber.

However, these new changes appear to make it more difficult and costly for passengers, in addition to creating an air of uncertainty and doubt over the outcome for drivers. Uber’s intent on appearing as a technology platform, rather than a transportation provider, is also unlikely to succeed. Under the ABC test, Uber must entirely relinquish the control to workers, letting them set prices and fares in order to meet prong (A), and thus able to categorize their drivers as independent contractors. Given the unlikelihood that Uber will be able to classify their drivers as independent contractors, and the large cost Uber will incur from classifying their drivers as employees, the fate of many drivers is uncertain. However, it is clear that the drivers who rely on Uber as their sole occupation, and the passengers who rely on Uber’s fast and affordable services, will ultimately suffer.

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