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The Gig Economy's Battleground – California Proposition 22

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The Gig Economy's Battleground – California Proposition 22

This November, California voters will have the chance to voice their opinion in the ongoing battle between app-based tech companies and the state of California. These companies want to continue classifying their drivers as independent contractors even though the state of California has determined these drivers are employees. So far, Uber, Lyft, and Doordash have spent $110 million backing Proposition 22, titled the "Save App-Based Drivers & Services Act." These companies are hoping California voters will give them the relief they have not been able to receive through the courts or the state. This article analyzes Prop 22 in light of the employment benefits granted to these drivers under California law.

How Did We Get Here?

Almost ten years have passed since the giant pink mustaches and Uber cars started popping up on the streets of San Francisco. Uber and Lyft built their companies around classifying their drivers as independent contractors to vastly cut costs for liability, payroll, and other benefits. Their business model attracted not only many venture capitalists who invested billions into their companies, but also inspired the creation of even more app-based delivery companies like Postmates, Doordash, and Instacart.

In 2018, as app-based rideshare and delivery companies proliferated the market, the California Supreme Court, in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, announced a new test to determine whether a worker is an independent contractor. The test was intended to broaden the definition of an employee, as the court noted misclassifying workers was a growing issue. The new test creates a presumption that all workers are employees and places the burden on the employer to prove the worker is an independent contractor. An employer can prove independent contractor status by satisfying the three-prong test, known as the ABC test:

(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.

(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.

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In light of the court's decision, the California state legislature codified the Dynamex decision into Assembly Bill 5 (AB-5) to ensure the three-part test applies to the California Labor Code, the unemployment insurance code, and all wage orders. The legislature mirrored the California Supreme Court's opinion by noting there is a clear connection between misclassification of workers and the "erosion of the middle class and the rise of income inequality." Uber and Lyft refused to comply, promptly started pushing Prop 22, and began challenging the legislation in court – a battle they have largely lost.

The pandemic further intensified the battle as drivers have been denied state unemployment since Uber and Lyft do not pay into the California's unemployment fund. A UC Berkeley study found Uber and Lyft have saved over $413 million dollars by not paying into California's unemployment fund for the last five years. During the midst of the pandemic in May of 2020, California Attorney General Xavier Becerra filed an injunction in California

state court against Uber, Lyft, and other app-based delivery companies to force them to start classifying their drivers as employees in compliance with AB-5. On August 10, 2020, Judge Ethan Schulman, of the San Francisco Superior Court, rejected the companies' arguments that their drivers satisfy the three-prong test and gave these companies 10 days to comply. Judge Schulman noted that these companies are "thumbing their noses to the California Legislature, not to mention the public officials who have primary responsibility of enforcing AB-5" by refusing to comply with a clear legal obligation to classify their drivers as employees.

Uber and Lyft immediately appealed the trial court's decision. On the day Uber and Lyft were ordered to comply, August 20th, the appeals court delayed ruling on the injunction until October 13th, when oral arguments will be held. In the meantime, Uber and Lyft must submit briefs with affidavits from the CEOs with a plan for complying with AB-5 if their appeal and Prop 22 both fail. Now Uber and Lyft are hedging their bets with Prop 22.

What is Prop 22?Proposition 22, titled the "Protect App-Based Drivers & Service Act," will exempt app-based drivers from the protections granted under AB-5. Under the three-part test, drivers for these companies qualify as employees. Prop 22 will carve out an exemption for app-based tech companies so they will not have to pay for employment benefits.

Although Prop 22 is offering benefits such as "guaranteed minimum earnings" and health subsidies, many drivers are unaware that AB-5 has granted them many benefits; benefits that Lyft and Uber are denying them due to their noncompliance. Under federal and California state law, employees are entitled to benefits such as minimum wage and overtime, expense reimbursement, worker's compensation, paid family leave, paid sick days, unemployment compensation, disability insurance, protections from retaliation and discrimination, health and safety protections, among others.

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So, although Prop 22 is granting benefits that these drivers do not currently have, the benefits included in Prop 22 fall staggeringly short of the benefits granted to employees under California law.

What Does Prop 22 Promise? The Yes on Prop 22 campaign promises several benefits. These include guaranteed minimum earnings, 30 cents per mile compensation towards expenses, a health care subsidy for drivers who work at least 15 hours a week, medical and disability coverage for injuries that occur on the job, and protections against discrimination and sexual harassment. Although these benefits are better than the protection drivers currently receive, the benefits Prop 22 offers are not as helpful as they seem for several reasons.

First, Prop 22 guarantees minimum earnings of 120% the minimum wage during "engaged time." The Proposition defines "engaged time" as the time between when a driver accepts a ride or delivery until the time the driver completes the rideshare or delivery request. Since independent contractors do not have minimum wage protections, the companies can pay drivers by assignment and therefore do not have to pay drivers for the time they wait for passengers or deliveries. As a result, a Berkeley study found drivers spend about 33% of their time waiting on assignments, which means drivers get paid for only 67% of their time. Conversely, if drivers were classified as employees, they would be paid for the entire time they are logged into the app. Second, Prop 22 offers 100% of the average Affordable Care Act (ACA) contribution for the average California premium for drivers who work more than 25 hours a week in "engaged time." However, the legislation's definitions reveal these companies will cover only 82% of the average California premium – a low-cost health insurance plan. Even further, since drivers spend an average of 33% of their time waiting for assignments, a driver will need to work more than 33 hours per week for a chance to

qualify. Prop 22 also offers a 41% subsidy for drivers who work between 15 and 25 hours. But again, when factoring in average waiting time, a driver must work 20-33 hours per week in order to qualify.

Third, Prop 22 offers occupational accident insurance for injuries that occur while the driver is online. The insurance payment is calculated by aggregating the driver's earning from all app-based companies the driver works for. However, the proposition prohibits a driver from collecting the insurance if the injuries occur while the driver is logged onto another app. Ironically, a UC Riverside study circulated by the Yes on 22 campaign states that Lyft found 55% of its drivers log on to more than one app at a time. So, while these companies acknowledge that drivers log into multiple apps for steady work, they concurrently penalize the drivers by refusing insurance coverage.

Finally, one of the most important provisions of Proposition 22, is the process for amendment by statute. Any amendment to the legislation must be passed by a staggering 7/8 majority of all members in each house. The statute must also be "consistent with, and further[] the purpose of, this chapter." In turn, the proposition significantly hinders state and local governments' ability to regulate how these app-based companies treat their drivers.

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Prop 22 Was Written by App Companies, For App Companies Although many app-based drivers love the flexibility of hours in independent contracting work, California voters must take a hard look at who this proposition was written to protect. A recent study conducted in San Francisco found an overwhelming majority – 78% of the app-based driving workforce are people of color. Conversely, the tech industry has stayed predominately white with salaries averaging over $100,000. In 2018 alone, Uber's CEO, Dana Khosrowshahi, was granted a salary package that was valued at over 45 million dollars. The passage of Proposition 22 will solidify the rideshare and delivery app-based business models, which have benefited those at the top far more than those on the front lines – an all too familiar story. With little availability for recourse and a staggeringly difficult amendment process, Prop 22 stands to create a near-permanent exception for present and future app-based delivery and rideshare companies.

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Rebekah Didlake is a member of the GGU Law class of 2022. She is a Bay Area native and holds an B.A. International Relations and a minor in Journalism from San Francisco State University. Currently, Rebekah serves as the President of the Labor and Employment Law Society and the Vice-President of both Students for a Sensible Drug Policy and the National Lawyers Guild.

1 Comment

Michael Angelo Tata says:
September 23, 2020 at 12:41 am

Thanks for kicking off the SW blog posts for 2020! I always feel us edging closer and closer toward a post-labor society, and your writing only intensifies the tug of that gravity for me. I wonder what happens to Marx when labor is de-fetishized. Which is also to ask: what impact will the looming Prop 22 decision have on post-laborism? "Gigs" are almost rock & roll language. And yet their whimsical CBGB fun masks a terrible truth about disenfranchisement.

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