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COMMENT

THE *DYNAMEX* DICHOTOMY AND THE PATH FORWARD

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INTRODUCTION

Maria Alvarez, Gary Branson, and Max Galvan share a common misfortune. Maria Alvarez was a janitor who cleaned theaters in Los Angeles, California, where she earned about $5 per hour with no days off, sick days, or holidays.[1] This was until she was fired after being injured on the job and requesting a lighter workload.[2] Gary Branson drives 60 hours per week for Uber and is still homeless.[3] Max Galvan is a truck driver in Southern California making only $10 per hour despite working for the same company more than 13 years.[4] These workers share the common fate of being misclassified as independent contractors, and thereby being deprived of access to basic employee protections and benefits.[5] Some employers misclassify their employees as independent contractors to reduce their labor costs, such as workers' compensation insurance, payroll taxes, and wages.[6] Misclassification is highly prevalent in trucking, construction, and janitorial services.[7] Most recently, independent contractor misclassification has also been notable in the gig economy.[8]

The gig economy is a collection of markets that connects consumers with on-demand service providers ("gig workers"), and it has revolutionized the way in which consumers seek and receive services, such as transportation and household tasks.[9] The ease of calling an Uber or Lyft, as opposed to hailing a cab, led to a decrease in arrests for driving under

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[1] Gene Maddaus, *How America's Biggest Theater Chains are Exploiting Their Janitors*, VARIETY, https://variety.com/2019/biz/features/movie-theater-janitor-exploitation-1203170717/ (last visited Dec. 30, 2019).

[2] *Id*.

[3] Carolyn Said, *He Drives 60 Hours Per Week for Uber. He's Still Homeless*, *Campaigns*, INDEP. DRIVERS GUILD, https://drivingguild.org/about/ (Sept. 23, 2019, 9:43 AM), https://www.sfchronicle.com/business/article/He-drives-60-hours-a-week-for-Uber-He-s-still-14457115.php.

[4] Rebecca Smith et al., *The Big Rig: Poverty, Pollution, and The Misclassification of Truck Drivers at America's Ports*, NELP & CHANGE TO WIN 5 (Dec. 8, 2010), https://teamster.org/sites/teamster.org/files/povertypollutionandmisclassification.pdf.

[5] *See* Maddaus, *supra* note 1; Said, *supra* note 2; Smith *supra* note 3.

[6] Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP (Dec. 19, 2017), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.

[7] *See* Dr. Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, PLANMATICS, INC. iii (Feb. 2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf; Sara Hinkley et al., *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*, UC BERKELEY LABOR CTR. (Mar. 8, 2016), http://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf.

[8] Stephanie L. Alder-Paindiris, *Independent Contractor Claims Proliferate*, Nat'l Law Rev. (Dec. 12, 2019), https://www.natlawreview.com/article/independent-contractor-claims-proliferate.

[9] Nathan Heller, *Is the Gig Economy Working?*, NEW YORKER (May 15, 2017), https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working.

the influence in major cities.[10] Similarly, it transformed the way in which many workers seek and perform work, as many gig workers enjoy flexibility and control over their work schedule.[11] Gig workers can work for multiple platforms and also have authority over how much they work.[12] Some have hailed that Uber and, more broadly, gig-economy work, represents the future of work,[13] but this is a troubling proposition. Gig-economy work is largely founded on a model that relies on classifying most of its workforce as independent contractors who, as opposed to employees, do not receive benefits such as overtime or sick pay and are not covered by minimum-wage laws or workers' compensation benefits.[14]

The increasing prevalence of employers classifying their workers as independent contractors spurred a debate about when it is appropriate to employ independent contractors, as opposed to employees. In April 2018, the California Supreme Court issued a landmark decision in *Dynamex Operations West v. Superior Court.*[15] *Dynamex* provided a new test for determining whether a worker should be classified an employee or an independent contractor.[16] The new test provides increased protections against the misclassification of workers as independent contractors by creating a presumption of employee status.[17] In September 2019, the California Legislature codified the *Dynamex* test and clarified its application by approving Assembly Bill 5 ("AB 5").[18]

This Comment posits that the *Dynamex* decision created a dysfunctional dichotomy by bringing many misclassified workers into the purview of the Industrial Welfare Commission's ("IWC") Wage Orders, while excluding the same workers from other protections and benefits that employees are entitled to under the Labor Code. By codifying the "ABC" Test into the Labor Code, AB 5 corrected some of the inconsis-

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[10] Gary Richards, *DUI Arrests Down Sharply in California Cities – Thanks to Lyft and Uber?*, MERCURY NEWS (May 15, 2018, 12:12 PM), https://www.mercurynews.com/2018/05/10/drunk-driving-arrests-decline-in-some-cities/.

[11] James Sherk, *The Rise of the "Gig" Economy: Good for Workers and Consumers*, HERITAGE FOUND. 3-4 (Oct. 7, 2016), http://thf-reports.s3.amazonaws.com/2016/BG3143.pdf.

[12] Sherk, *supra* note 10, at 6.

[13] *See,* Lawrence Mishel, *Uber and the Labor Market: Uber Drivers' Compensation, Wages, and the Scale of Uber and the Gig Economy*, ECON. POL'Y INST. 1 (May 15, 2018), https://www.epi.org/files/pdf/145552.pdf (commenting on *Dispatches From the New Economy: The On-Demand Economy and the Future of Work*, INTUIT (Jan. 28, 2016), https://www.slideshare.net/Intuit Inc/dispatches-from-the-new-economy-the-ondemand-workforce-57613212/14-The_ondemand_economy_is_accelerating).

[14] Bloomberg Opinion Editorial Board, *California Could be a Model for Gig Economy Fairness*, BLOOMBERG (Jan. 24, 2019, 2:00 AM), https://www.bloomberg.com/opinion/articles/2019-01-24/california-gig-economy-regulations-a-grand-bargain-is-possible.

[15] Dynamex Operations W. v. Superior Ct., 4 Cal. 5th 903 (2018).

[16] *Id.* at 916.

[17] *Id.* at 954-55.

[18] CAL. LAB. CODE § 2750.3 (2020).

tency that *Dynamex* created. Nevertheless, while *Dynamex* and AB 5 provide a critical framework for combating misclassification and the resulting worker exploitation, this Comment argues that they fall short of bringing misclassified independent contractors into the purview of the most important employee right: collective bargaining.

Accordingly, this Comment proposes a framework that would afford misclassified independent contractors the right to collectively bargain with the party employing them. This Comment explores the potential for a statewide labor relations scheme specifically for independent contractors, as well as the guild model as pathways for collective bargaining. Part I defines the problem of independent contractor misclassification and provides an overview of the *Dynamex* decision, relevant background, and subsequent decisions interpreting *Dynamex*. Part II highlights the shortcomings of *Dynamex* in adequately addressing the independent contractor problem. Part III discusses Assembly Bill 5 as a promising solution to combating misclassification. Finally, Part IV provides recommendations for a path to collective bargaining for workers misclassified as independent contractors.

I. AN OVERVIEW OF INDEPENDENT CONTRACTOR MISCLASSIFICATION

While employees in the United States are largely protected by various state and federal laws, workers classified as independent contractors do not enjoy safeguards against exploitation and abuse.[19] According to the Internal Revenue Service, an independent contractor is someone who is self-employed and performs services that are not subject to control by an employer.[20] The United States Department of Labor estimates that there are 10.6 million workers classified as independent contractors in the country.[21] Employers may avoid costs and legal obligations by misclassifying workers as independent contractors.[22] A study found that between 10% and 30% of employers misclassify their workers.[23]

[19] *See* Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP (Dec. 19, 2017), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.

[20] Internal Revenue Service, *Independent Contractor Defined*, IRS (last updated Apr. 24, 2018), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined.

[21] Econ. News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Contingent and Alternative Emp't Arrangements Summary (June 7, 2018), https://www.bls.gov/news.release/conemp.nr0.htm.

[22] Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55 (2015).

[23] de Silva et al., *supra* note 6.

Misclassified workers are not entitled to minimum wage, overtime compensation, family and medical leave, unemployment insurance, workers' compensation benefits, or protections against workplace discrimination.[24]

Worker misclassification may harm the labor market by providing an unfair competitive advantage to employers who misclassify workers.[25] The Internal Revenue Service estimates that misclassification costs federal revenues $1.6 billion annually.[26] By avoiding increased labor costs, businesses that misclassify workers gain an advantage over businesses that follow the law and incur corresponding labor costs.[27] For example, misclassifying employees shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses each year.[28]

When there is no clear standard for employers to discern who can be an independent contractor or who can be an employee, employers struggle to comply with the law. The employer may be incentivized to classify workers according to the employer's best interest rather than the legally appropriate classification.[29] Workers are even less likely than employers to be aware of misclassification, or to pursue a remedy for misclassification.[30]

In response to the growing number of statistics about the harms of worker misclassification, several states across the country have enacted statutes that alter the requirements for classifying a worker as an independent contractor, and the enforcement structure against employers who misclassify workers.[31] Some states, such as Massachusetts, have adopted the "ABC" Test in their statutory definition of independent contractor.[32] The "ABC" Test is a three-prong test that consists of the following factors: (A) the worker is free from employer direction and control; (B) the

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[24] U.S. Dep't of Labor, Wage & Hour Div., *Employee Misclassification as Independent Contractors*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/workers/misclassification/ (last visited Nov. 15, 2018); *Coverage*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/employers/coverage.cfm (last visited Nov. 15, 2018).

[25] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 39 (2009), https://www.gao.gov/assets/300/293679.pdf.

[26] *Id*.

[27] Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NELP 4 (May 2016), https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.

[28] *Id.*

[29] Deknatel & Hoff-Downing, *supra* note 21, at 65.

[30] *Id.*

[31] *Id.* at 58.

[32] *Id.* at 65.

service performed is outside the usual course of business of the employer; and (C) the individual is customarily engaged in an independently established trade, profession, occupation, or business of the same nature as that involved in the service performed.[33] For example, under Massachusetts' "ABC" Test there is a presumption of employee status that is rebuttable only when the employer can prove all three factors.[34]

The California Legislature adopted the "ABC" Test later. However, the California Legislature recognized the harms that result from misclassification as early as 2011, when it passed a law rendering it unlawful to willfully misclassify individuals as independent contractors.[35] The law imposes civil penalties of $5,000 to $25,000 per violation.[36]

A. CALIFORNIA LAWS PROTECTING EMPLOYEES

The California Legislature created the Industrial Welfare Commission ("IWC") in 1913 to regulate the hours, wages, and conditions of employment.[37] Though the IWC was founded to protect women and minors, its authority and scope has grown to include all employees in California.[38] The IWC issues Wage Orders setting meal and rest break requirements, minimum wage, and overtime pay for employees.[39] Presently, there are 18 different Wage Orders.[40] Each Wage Order applies to a discrete class of workers based on the nature of their work.[41] For example, Wage Order 9 applies to workers in the transportation industry and includes provisions requiring that work is paid at one-and-one half the rate of regular pay after eight hours and twice the rate of pay after 12 hours of work.[42] It also requires that employers provide meal periods of at least 30 minutes after five hours of work, among other things.[43] It is important to distinguish the Wage Orders, which govern the specifically enumerated requirements therein, from the broader California Labor Code, which is written and amended by the California Legislature.[44]

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[33] *Id.* at 65; MASS. GEN. LAWS ch. 149, § 148B(a)(1)-(3) (2014).

[34] *Id.*; § 148B(a)(1)-(3) (2014).

[35] S.B. 459, Reg. Sess. (Cal. 2011).

[36] *Id.*

[37] Martinez v. Combs, 49 Cal. 4th 35, 52 (2010).

[38] *Id.* at 55.

[39] CAL. CODE REGS. tit. 8, § 11010 (2018).

[40] Martinez, 49 Cal. 4th at 57.

[41] Indus. Welf. Com'n Wage Order, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/iwc/wageorderindustriesprior.htm (last visited Mar. 12, 2019).

[42] Indus. Welfare Comm'n, WAGE ORDER No. 9-2001 § (3)(A)(1) (2001).

[43] § (11)(A).

[44] *See generally*, CAL. LAB. CODE.

The California Labor Code offers a variety of protections and remedies to employees.[45] Some commonly asserted employee remedies under the Labor Code include waiting time penalties and liquidated damages.[46] While the Wage Orders mandate proper payment of the minimum wage and overtime pay,[47] Labor Code section 203 provides that where an employer willfully fails to pay any wages when an employee is discharged or quits, waiting time penalties are assessed against the employer for an amount equivalent to the employee's daily rate, until the owed wages are paid, for up to 30 days.[48] Similarly, Labor Code section 1194.2 provides that, when an employer fails to pay the minimum wage, the employee is entitled to liquidated damages in the amount equal to the unpaid minimum wages with interest.[49] These two provisions help illustrate that the Wage Orders and the Labor Code operate in conjunction when practically applied. Typically, when an employee brings a claim for Wage Order violations, the employee may assert remedies under the Labor Code simultaneously.[50]

When an employee suffers an injury arising out of the course of employment and the injury is caused by the employment, the employee will receive workers' compensation benefits.[51] Under Labor Code section 3700, all California employers must provide workers' compensation insurance benefits to their employees.[52] Workers' compensation insurance provides five basic benefits for injured employees or their survivors: (1) medical costs to recover from a work-related injury; (2) temporary disability benefits to cover lost wages while the employee recovers; (3) permanent disability benefits to compensate an employee who does not fully recover; (4) supplemental job displacement benefits to help pay for retraining or skill enhancement in the event the employee does not fully recover; and (5) death benefits paid to survivors if an employee dies from a work-related injury.[53] Workers' compensation benefits protect the employee as well as the employer, as employers are

[45] *See e.g.,* CAL. LAB. CODE §§ 203, 1194.2 (2019).

[46] *Id*.

[47] Indus. Welfare Comm'n, WAGE ORDER No. 9-2001.

[48] Cal. Lab. Code § 203 (2019); GEORGE ABELE & KIRBY WILCOX, 1 MATTHEW BENDER PRACTICE GUIDE: CALIFORNIA WAGES AND HOURS § 5.16(b)(1) (Matthew Bender & Company, Inc. 2018).

[49] § 1194.2.

[50] Labor Comm'n, *Policies and Procedures for Wage Claim Processing*, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/dlse/policies.htm (last visited Nov. 15, 2018).

[51] Edward Baskauskas, 2 CALIFORNIA EMPLOYMENT LAW § 20.20 (Kirby Wilcox et al. eds., Matthew Bender & Company, Inc. 2019).

[52] § 3700.

[53] Division of Workers' Comp., *Answers to Frequently Asked Questions About Workers' Compensation for Employees*, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/dwc/WCFaqIW.html#5 (last visited Mar. 10, 2019).

shielded from tort liability for an injured worker under the exclusive-remedy doctrine.[54] Workers' compensation benefits do not extend to independent contractors, despite the fact that they may extend to minors, prison inmates, and undocumented workers.[55]

Finally, collective bargaining is an important right only afforded to employees and not independent contractors. Collective bargaining is the process by which employees negotiate collectively with their employers over working conditions.[56] In the private sector, collective bargaining is governed by federal law under the National Labor Relations Act ("NLRA").[57] The NLRA aims to protect the rights of employees and employers while encouraging collective bargaining.[58] The NLRA explicitly excludes independent contractors from its definition of "employee."[59]

B. THE CALIFORNIA SUPREME COURT ATTEMPTS TO ADDRESS THE INDEPENDENT CONTRACTOR PROBLEM IN ITS LANDMARK *DYNAMEX* DECISION

1. Preceding Decisions

For almost three decades, prior to *Dynamex*, California used a multi-factor test to determine employee versus independent contractor status: the *Borello* test.[60] The *Borello* test consists of the following factors: (1) whether the employer has a "right to control" the manner and means of the work completed; (2) the employer's right to discharge the workers; (3) whether the workers are engaged in a distinct occupation or business; (4) the nature of the work performed; (5) the skill required in the particular occupation; (6) whether the employer supplies the instrumentalities, tools, and the place of work; (7) the length of time for which the services will be performed; (8) the method of payment; (9) whether the work is part of the regular business of the employer; and (10) whether the parties believed they were creating an employer-employee relationship.[61] Under *Borello,* the burden of proving employee status is on the worker.[62]

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[54] Baskauskas, *supra* note 50.

[55] *Id.*

[56] Ralph M. Goldstein, *The Obligations of Collective Bargaining*, 18 B.U. L. REV. 750, 751 (1938).

[57] 29 U.S.C. §§ 151-169 (2019).

[58] § 151.

[59] *Id.*

[60] S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel., 48 Cal. 3d 341, 351 (1989).

[61] *Id.*

[62] *Id.* at 349.

After *Borello* and prior to *Dynamex*, two decisions clarified the definition of the term "to employ" under the California Wage Orders. In *Martinez v. Combs*, agricultural workers sued their employer, a farming company, and two produce merchants that did business with the farming company.[63] The workers claimed they were jointly employed by the produce merchants, such that the produce merchants were therefore liable for unpaid minimum wages and penalties.[64] The California Supreme Court found that, under the Wage Orders, the term "to employ" had three alternative definitions.[65] First, it meant to exercise control over the wages, hours or working conditions.[66] Second, it also meant to "suffer or permit to work,"[67] meaning that the employer "knows or has to reason" to know the worker works for them.[68] Finally, "to employ" also means to engage, thereby creating a common law employment relationship.[69] The court in *Martinez* found that the produce merchants had not employed the agricultural workers under any of these three definitions.[70]

Four years later, *Ayala v. Antelope Valley Newspapers, Inc.* added to the discussion about the proper test to determine employee versus independent contractor status.[71] In *Ayala,* a group of newspaper carriers sued the newspaper company they worked for, alleging Wage Order violations and that the company misclassified them as independent contractors.[72] First, the court needed to discern whether the workers were employees to determine whether the class could properly be certified for a class-action suit.[73] Here, the court had the opportunity to decide whether it would apply *Martinez* to find an employment relationship under any of the three definitions of "employ" in the Wage Orders, or whether it would apply the traditional multi-factor test.[74] The court deliberately decided not to rule on which test should govern and stated that it was a "question for another day."[75] Accordingly, the court used the *Borello* test because the plaintiff's theory was that they were employees under the *Borello* test.[76] The court ultimately remanded the case for further proceedings to

[63] *Martinez*, 49 Cal. 4th at 42-43.
[64] *Id.*
[65] *Id.* at 64.
[66] *Id.*
[67] *Id.*
[68] Morillion v. Royal Packing Co., 22 Cal. 4th 575, 585 (2000).
[69] *Martinez*, 49 Cal. 4th at 64.
[70] *Id.* at 77.
[71] Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 531 (2014).
[72] *Id.* at 528-29.
[73] *Id.* at 529.
[74] *Id.* at 530-31.
[75] *Id.* at 531.
[76] *Id.*

give the trial court an opportunity to reach a decision applying the proper legal inquiry.[77]

2. The Dynamex *Decision*

The plaintiffs in *Dynamex* were parcel delivery drivers for a courier and delivery-service company that operated a number of business centers in California.[78] Prior to 2004, Dynamex classified its California drivers as employees, but in 2004 it converted all its drivers to independent contractors upon concluding that the conversion would generate economic savings for the company.[79] The drivers brought suit claiming they were incorrectly classified as independent contractors as opposed to employees.[80] They also claimed that Dynamex violated provisions in the California Wage Orders as well as the Labor Code.[81]

Though the trial court initially denied class certification, the California Court of Appeal reversed, and the trial court eventually certified the class in 2011.[82] While the plaintiffs asserted that the new legal standard from *Martinez* was the correct standard to determine employee versus independent contractor status, Dynamex contended that *Martinez* did not apply.[83] Dynamex argued that *Martinez* strictly applied to questions of joint-employer status and not to determine independent contractor status.[84] Instead, Dynamex argued that *Borello* was the correct standard to determine whether the plaintiffs were employees or independent contractors.[85] Under the *Borello* standard, it is more difficult to prove that a worker is an employee.[86] The trial court agreed with the plaintiffs' position, stating that *Martinez* was not limited to joint-employment questions and that the *Martinez* decision represents a "redefinition of the employment relationship."[87]

In 2012, Dynamex renewed its previous motion to decertify the class.[88] The trial court denied the motion and Dynamex appealed.[89] The

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[77] *Id.* at 540.

[78] *Dynamex Operations W.*, 4 Cal. 5th at 917.

[79] *Id.*

[80] *Id.* at 919.

[81] *Id.*

[82] *Id.* at 919-20.

[83] *Id.* at 920-21.

[84] *Id.*

[85] *Id.* at 921.

[86] *C.f. S.G. Borello & Sons, Inc.*, 48 Cal. 3d at 355-59, *with Martinez*, 49 Cal. 4th at 42-43 (The *Borello* test consists of a multi-factor assessment, whereas the *Martinez* test provides for three alternative definitions of employment.)

[87] *Dynamex Operations W.*, 4 Cal. 5th at 92.

[88] *Id.* at 924.

[89] *Id.*

California Court of Appeal approved Dynamex's motion regarding to the claims arising from Labor Code violations.[90] However, it denied the motion for claims arising from Wage Order violations, holding that the *Martinez* test was proper for Wage Order claims, but not for Labor Code claims.[91] Then Dynamex petitioned for review of the appellate court's conclusion that the Wage Order definitions of "to employ" and "employer," as construed by *Martinez*, may be relied on to determine whether a worker is an employee or an independent contractor under the California Wage Orders.[92]

The California Supreme Court affirmed the Court of Appeal's decision and concluded that the second alternative definition of "to employ" and "employer" in the Wage Orders, "to suffer or permit to work," properly applies to the question of whether a worker should be classified as an employee or independent contractor.[93] The court noted that the legislature intended expansive reach of the "suffer or permit to work" standard as a means of providing maximum protections to workers and law-abiding businesses.[94] It further asserted that the standard must be interpreted and applied broadly to include all workers who can "reasonably be viewed as working in the hiring entity's business."[95] The court also expressed concern that multi-factor tests that consider "all the circumstances," like *Borello*, afford businesses greater opportunity to evade wage and hour laws.[96] As a consequence, the court presented a new three-prong test to determine whether a worker has been "suffer[ed] or permit[ted] to work" and is thus an employee or an independent contractor under the California Wage Orders.[97]

Under the new standard, there is a presumption that the worker is an employee.[98] The employer may overcome the presumption by establishing each of the three factors in the following "ABC" Test:

> (A) that the worker 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; *and*
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*

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[90] *Id.* at 924-25.
[91] *Id.*
[92] *Id.* at 925.
[93] *Id.* at 943.
[94] *Id.* at 952-53.
[95] *Id.* at 953 (2018) (alteration omitted) (quoting *Martinez*, 49 Cal. 4th at 49).
[96] *Id.* at 954.
[97] *Id.* at 956-57.
[98] *Id.* at 957.

> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[99]

To satisfy the "A" prong, workers must be free from the hiring party's control as well as from the actual control of the hiring party regarding the manner and detail of the work performed.[100] The "B" prong seeks to distinguish work that is traditionally performed by employees versus work that is traditionally performed by independent contractors.[101] The court offers two opposing examples: a plumber repairing a leak at a retail store and a seamstress making dresses in her home for a clothes manufacturing business.[102] The first is an example of an independent contractor relationship, while the second is an example of an employment relationship.[103] Finally, prong "C" seeks to differentiate situations where the worker has "independently chosen the burdens and benefits of self-employment" from those where workers have been subjected to the independent contractor label through unilateral action by the hiring entity.[104]

3. Subsequent Decisions

Though the *Dynamex* decision was issued less than two years ago,[105] California courts have interpreted the limitations of *Dynamex.*[106] In *Curry v. Equilon Enterprises*, a service station manager brought suit against the owner of the gas station where she worked, Equilon Enterprises.[107] The plaintiff alleged several Wage Order violations, including failure to pay overtime and missed break periods.[108] The plaintiff signed an employment contract with American Retail Services, a limited liability company that had a multi-site operations contract with Shell.[109] The plaintiff argued that Shell was a joint-employer and suggested that the "ABC" Test should be used to define "suffer or permit to work" in the joint-employer analysis.[110] The California Court of Appeal reasoned that the California Supreme Court's analysis in formulating the "ABC" Test

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[99] *Id.* at 957 (emphasis in original).
[100] *Id.* at 958.
[101] *Id.* at 959.
[102] *Id.*
[103] *Id.* at 960.
[104] *Id.* at 962 (quoting *S.G. Borello & Sons, Inc*., 48 Cal. 3d at 354).
[105] *Id.* at 903.
[106] *See e.g.,* Curry v. Equilon Enters., 23 Cal. App. 5th 289 (2018); Garcia v. Border Transp. Grp., 28 Cal. App. 5th 558 (2018).
[107] *Curry*, 23 Cal. App. 5th at 292.
[108] *Id.* at 292-93.
[109] *Id.*at 294-95.
[110] *Id.* at 312.

was rooted in policy reasons uniquely related to the issue of misclassification.[111] Therefore, the court found that placing the burden on the employer to prove the "ABC" Test factors in order to absolve itself of joint-employer liability does not serve the policy goals the court intended in *Dynamex.*[112] In sum, this decision established that the "ABC" Test may not be used to establish joint employment.

Another recent case that highlighted the limitations of *Dynamex* is *Garcia v. Border Transportation Group*.[113] In *Garcia*, a taxi driver sued Border Transportation, the company he worked for as a driver, alleging several claims under the Wage Orders as well as claims not under the Wage Orders.[114] The trial court granted summary judgment for the Border Transportation, finding that Garcia was an independent contractor under *Borello.*[115] By the time the case reached the California Court of Appeal, *Dynamex* was decided by the California Supreme Court.[116] Hence, the Court of Appeal applied the "ABC" Test to Garcia's Wage Order claims and reversed summary judgement, finding that he was an employee.[117] However, the court noted that *Borello* remained the proper test to determine employee versus independent contractor status for non-Wage Order claims.[118] The court further noted that *Borello* remained the standard for workers' compensation.[119] Though *Dynamex* was explicit in that it did not apply to non-Wage Order claims, *Garcia* clarified this point further.[120] *Garcia* exemplifies situations where California workers may be found to be employees under the Wage Orders but not under the Labor Code.

II. THE NARROW SCOPE OF *DYNAMEX* CREATES AN UNWORKABLE DICHOTOMY

Overall, the "ABC" Test provides increased protections against misclassification by creating a presumption of employee status, setting a high threshold for overcoming the presumption by requiring that all three prongs must be satisfied, and by setting forth a clear test that is accessible for employers and workers alike. Nevertheless, because the court's decision was narrowly tailored to the Wage Orders exclusively, the

[111] *Id.* at 314.
[112] *Id.*
[113] *Garcia*, 28 Cal. App. 5th at 558.
[114] *Id.* at 563-64.
[115] *Id.* at 564.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 571.
[119] *Id.*
[120] *Id.*

"ABC" Test was only useful to determine a worker's status as it related to Wage Orders because it did not apply to determining employee status for claims arising out of the Labor Code or workers' compensation.[121] The California Supreme Court explicitly acknowledged that the absence of an easily and consistently applied standard "leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly."[122] The narrow applicability of its "ABC" Test to Wage Order claims exacerbated the very problem the court acknowledged.

While the "ABC" Test brought many misclassified workers into the purview of the IWC's Wage Orders, ensuring proper payment of the minimum wage and overtime pay, the same workers remained excluded from other protections and benefits that employees are entitled to. This dichotomy offered employers seeking to violate the law new opportunities to evade responsibility. It also created potential for confusion for law-abiding employers and workers seeking to assert their rights.

The penalties set forth in the Labor Code serve to deter employers from violating the law.[123] This deterrent effect serves the "critically important objectives" of the Wage Orders as stated by the *Dynamex* court: to benefit both workers and law-abiding businesses by eliminating the competitive advantage enjoyed by employers who offer substandard wages.[124] When workers are classified as employees under the Wage Orders, but not under the Labor Code, these workers are denied some of the remedies designed to make employees whole and deter misconduct by employees. By creating a two-tiered system where workers found to be employees under *Borello* have access to these remedies, and workers found to be employees under *Dynamex* do not, California effectively undermined its wage and hour laws.

Workers' compensation protections further illustrate the dichotomy between protections for employees under *Dynamex* as opposed to employees under *Borello*.[125] A worker who met the standard to be an employee under the *Dynamex* "ABC" Test was not entitled to workers' compensation benefits unless they also met the *Borello* standard.[126] This dichotomy allowed employers to lawfully exclude employees from workers' compensation benefits if the worker was not considered an employee under *Borello*. This had the potential to create situations where employ-

[121] *Dynamex Operations W.*, 4 Cal. 5th at 943.
[122] *Id.* at 954.
[123] CAL. LAB. CODE §§ 203, 1194.2 (2019).
[124] *Dynamex Operations W.*, 4 Cal. 5th at 952.
[125] *See* CAL. LAB. CODE, Div. 4, Pt. 1, Ch. 4 (2019).
[126] *See Garcia*, 28 Cal. App. 5th at 571.

ees who were injured in the course of employment did not have any access to workers' compensation benefits.

While *Dynamex* attempted to curb misclassification by providing a more straightforward test to determine employee versus independent contractor status, the narrow scope of the decision fell short of this objective. By limiting application of the "ABC" Test exclusively to the Wage Orders, the decision failed to effectively limit opportunities for misclassification. Furthermore, the exclusion of *Dynamex* employees from workers' compensation benefits made them even more vulnerable to misclassification. After this decision, workers considered employees under *Dynamex* could justifiably rely on their employee status to bring them into the purview of workers' compensation, only to find out, once they were injured, that they are not protected unless they were also employees under *Borello.*

III. ASSEMBLY BILL 5 AS A PROMISING SOLUTION

After much debate, Assembly Bill 5 ("AB 5") emerged as a promising solution to the uncertainty that *Dynamex* caused. In response to the *Dynamex* decision, leading gig-economy companies and business groups initially sought to undo the decision, while labor groups sought to clarify and expand its application through executive and legislative action. Major technology companies including Uber, Lyft, InstaCart, DoorDash, PostMates, and TaskRabbit, argued that their business model would not be viable if they were to implement traditional employee-employer structures.[127] The California Chamber of Commerce also mobilized to garner support from restaurant associations, retailers, trucking companies, and individual workers to call for legislation to overturn *Dynamex.*[128] In their marketing materials on the "I'm Independent Coalition" website, the Chamber of Commerce describes *Dynamex* as "overturn[ing] . . . employment law that allowed individuals to work as independent contractors."[129]

Worker advocate groups, such as the California Labor Federation, voiced opposition against business groups' efforts to overturn *Dynamex.*[130] In a letter to then-Governor Brown, they voiced their oppo-

[127] Josh Eidelson, *Gig Firms ask California to Rescue Them from Court Ruling*, BLOOMBERG (Aug. 6, 2018, 12:15 PM), https://www.bloomberg.com/news/articles/2018-08-05/gig-firms-ask-california-dems-to-rescue-them-from-court-ruling.

[128] *Id.*

[129] *About Us*, I'M INDEPENDENT COALITION, IMINDEPENENT.CO, https://imindependent.co/about/ (last visited Nov. 15, 2018).

[130] Eidelson, *supra* note 122.

sition to any attempt to "delay or alter" the *Dynamex* ruling.[131] Labor groups immediately voiced support for a new bill to codify *Dynamex*.[132] Furthermore, labor groups expressed their openness to incorporating changes to the bill to "clear up the intent" of the test to prevent liability for small businesses that, for example, bring a one-time contractor to perform a service.[133]

In December 2018, Assembly Member Lorena Gonzalez introduced Assembly Bill 5 to codify the *Dynamex* decision and clarify its application.[134] Assembly Member Gonzalez commented that maintaining the new *Dynamex* standard was "essential for maintaining solid employment for workers in a changing economy."[135] She added that AB 5 offered a quicker resolution than litigation to addressing *Dynamex's* implications for issues like workers' compensation and unemployment insurance.[136] In a contentious process with many competing interests, the bill was rewritten a half-dozen times.[137]

Governor Gavin Newsom signed AB 5 in its final form on September 18, 2019.[138] Under AB 5, effective January 1, 2020, California workers are classified as employees by default, unless their employer can show they can satisfy all three prongs under *Dynamex's* "ABC" Test: (A) the worker is free form control by the hiring entity; and (B) the worker performs work outside the usual course of business as the hiring entity; and (C) the worker is customarily engaged in an established trade, occupation, or business of the same nature as the work performed.[139] While several occupations are exempted from AB 5, app-based companies are not exempt from the law.[140]

After failed efforts to secure an exception under AB 5, Uber, Lyft, and DoorDash pledged $90 million for a ballot initiative seeking to ex-

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[131] *Id.*

[132] Alexei Koseff, *Labor Pushes to Protect California Ruling that Redefines Who is an Employee*, SACRAMENTO BEE (Dec. 3, 2018, 6:10 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article222466405.html.

[133] *Id.*

[134] Assemb. B. 5, 2019-2020 Reg. Sess. (Cal. 2018).

[135] Koseff, *supra* note 127.

[136] *Id.*

[137] John Myers, Johana Bhuiyan, Margot Roosevelt, *Newsom Signs Bill Rewriting California Employment Law, Limiting Use of Independent Contractors,* L.A. TIMES (Sept. 18, 2019, 3:55 PM), https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california.

[138] *Id.*

[139] CAL. LAB. CODE, § 2750.3 (2020).

[140] *Id.*

empt its drivers from AB 5.[141] Though the initiative claims that drivers will receive guaranteed pay equal to 120% the minimum wage, economists estimate that the pay guarantee for drivers under the ballot initiative is the equivalent of $5.64 per hour.[142] Most recently, Uber and Lyft filed a lawsuit in federal court attempting to block AB 5 and arguing that it violates equal protection and due process under state and federal law.[143]

Despite AB 5's numerous exceptions, 64% of workers who are independent contractors at their main job are now subject to the "ABC" Test.[144] If the law survives the challenges mounted against it, it stands to significantly curb misclassification. Importantly, AB 5 empowers the Attorney General and certain city attorneys to bring action for injunctive relief against companies suspected of misclassification.[145] This provides for increased enforcement of the law, thereby reducing the incidence of misclassification by deterring it or suing employers who violate the law. Altogether, AB 5 offers a promising solution for independent contractor misclassification because it provides a uniform standard that is easier for employers to comply with, while providing important enforcement mechanisms. Nevertheless, AB 5 does not address collective bargaining for on-demand platform workers. Without collective bargaining, a dysfunctional dichotomy persists by depriving certain workers of the right to organize for better wages, benefits, and working conditions, effectively maintaining an underclass of workers.

IV. A PATH FORWARD: COLLECTIVE BARGAINING FOR INDEPENDENT CONTRACTORS

Collective bargaining encourages labor and management to negotiate employment relationships that work in the context of the industry, market, company, and community.[146] On average, unionized workers

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[141] Kate Conger, *Uber, Lyft, and DoorDash Pledge $90 Million Fight Driver Legislation in California,* NY TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/technology/uber-lyft-ballot-initiative.html.

[142] Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees only $5.64 per Hour*, UC BERKELEY LAB. CTR. (Oct. 31, 2019), http://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour/.

[143] *Uber and Postmates File Lawsuit Challenging California's New Independent Contractor Law,* NAT'L LAW REV. (Dec. 31, 2019), https://www.natlawreview.com/article/uber-and-postmates-file-lawsuit-challenging-california-s-new-independent-contractor.

[144] Sarah Thomason, Ken Jacobs, Sharon Jan, *Estimating the Coverage of California's New AB 5 Law,* UC BERKELEY LAB. CTR. (Nov. 2019), http://laborcenter.berkeley.edu/wp-content/uploads/2019/11/Estimating-the-Coverage-of-Californias-New-AB-5-Law.pdf.

[145] CAL. LAB. CODE, § 2750.3 (2020).

[146] Michelle Chen, *Union Benefits Go Far Beyond the Workplace,* THE NATION (Jan. 22, 2019), https://www.thenation.com/article/unions-labor-welfare/.

earn 16% more than nonunionized workers.[147] Union members also pay more taxes by virtue of earning more income.[148] Furthermore, employer expenditures on fringe benefits are two and a half times higher per hour for unionized workers.[149] Employees may maximize the benefit they derive from an employment relationship through collective bargaining, and it follows that employees without collective bargaining rights are in a substandard position of employment than those with collective bargaining rights.

In the private sector, collective bargaining is governed by federal law under the National Labor Relations Act ("NLRA").[150] The NLRA aims to protect the rights of employees and employers while encouraging collective bargaining.[151] The NLRA explicitly excludes independent contractors from its definition of "employee."[152] The National Labor Relations Board ("NLRB"), the board that enforces the NLRA, uses a common-law test to determine whether a worker may be deemed an employee and subject to protection under the NLRA.[153] The NLRB considers the following factors in its inquiry: (a) the extent of control which the master may exercise over the details of the work; (b) whether the one employed is engaged in a distinct occupation or business; (c) whether the work is done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work; (f) the length of time the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating a master-servant relationship; and (j) whether the principal is or is not in business.[154] Under this test, many workers considered employees under the "ABC" Test may not be employees under the NLRB's test.

The NLRB issued an advice memo concluding that Uber drivers are independent contractors under its common-law test.[155] Therefore, the NLRB foreclosed the possibility of granting ride- share workers access to

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[147] *Id.*

[148] *Id.*; *see also* Aaron Sojourner & José Pacas, *The Relationship Between Union Membership and Net Fiscal Impact*, IZA INST. OF LAB. ECON. 2, (Jan. 2018), http://ftp.iza.org/dp11310.pdf.

[149] Aaron Sojourner & José Pacas, *The Relationship Between Union Membership and Net Fiscal Impact*, IZA INST. OF LAB. ECON. 2, (Jan. 2018), http://ftp.iza.org/dp11310.pdf.

[150] 29 U.S.C. §§ 151-169 (2019).

[151] § 151.

[152] *Id.*

[153] SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).

[154] SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).

[155] NLRB Advice Memo, *Uber Technologies, Inc.* Case Nos. 13-CA-163062 and 14-CA-158833 & 29-CA-177 483 (Apr. 16, 2019).

collective bargaining protections for the foreseeable future. Nevertheless, workers, labor organizations, and governments may consider novel frameworks by which gig-economy workers may access collective bargaining because without access to collective bargaining, many gig-economy workers will remain in a subpar employment position.

A. Creating a State Labor Relations Scheme for Independent Contractors

California lawmakers ought to consider creating a state regulatory scheme granting collective bargaining rights to workers who are viewed as independent contractors by the NLRB. California would thereby create its own version of the NLRA for this class of workers. Workers who are employees under the "ABC" Test and independent contractors under the NLRB's common-law test are in a unique position because of their hybrid status for the purpose of collective bargaining. Since the NLRA does not provide protection to this hybrid class of employee-independent contractors, a state law specifically tailored to empower hybrid employee-independent contractors to collectively bargain would offer a new opportunity for them to engage in collective bargaining to improve their working conditions.

Some may argue that such a labor relations scheme would be preempted because the NLRA already governs labor relations and collective bargaining. However, it would likely avoid preemption, as the NLRA has left open the field for regulation of independent-contractor labor relations and collective bargaining.[156] The NLRA excludes independent contractors from its purview, and this allows state law to fill in to regulate in the area of hybrid employee-independent contractor labor relations.

The Agricultural Labor Relations Act ("ALRA") provides a model for a labor relations scheme for independent contractors. The ALRA emerged to fill a gap federal law left open.[157] The NLRA's exclusion of agricultural workers allowed California to create the ALRA to protect workers otherwise left without collective bargaining protection and therefore subject to exploitation.[158] The ALRA was created pursuant to California's policy:

> to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions

[156] 29 U.S.C. § 151 (2019).
[157] Cal. Lab. Code §§ 1140-1166.3 (2019).
[158] 29 U.S.C. § 151 (2019).

> of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.[159]

A state regulatory scheme for independent-contractor collective bargaining may be subject to an antitrust challenge under the Sherman Act because collective bargaining may inhibit competition between independent contractors.[160] However, it would likely survive such a challenge. Under *Parker v. Brown*, state and municipal authorities are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects.[161] California lawmakers may frame the stated policy purpose of the independent contractor collective bargaining law as a mechanism to facilitate commerce and protect its residents from substandard working conditions, thereby countering antitrust challenges. Furthermore, the hybrid employee-independent contractor workers subject to the regulatory scheme would bear little resemblance to business owners in any significant way, thus further undermining any serious antitrust challenge. Though erecting a regulatory scheme and corresponding agency requires a vast amount of resources, California may find it a worthwhile option to consider to protect its workforce and economy.

B. THE GUILD MODEL

Another option that workers and labor groups should consider is organizing a guild for independent contractors. A guild is an association of people in shared occupations who work collectively to pursue mutual goals.[162] Guilds existed for thousands of years, dating back to the medieval ages.[163] Historically, guilds worked together to set prices for goods, facilitate contract enforcement, and solve information asymmetries.[164] A guild is distinct from a labor union because labor unions represent employees that work for a common employer, while guilds provide an organizational mechanism by which independent contractors or business

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[159] CAL. LAB. CODE § 1140.2 (2019).

[160] *See* 15 U.S.C. § 1 (2019) (The Sherman Act prohibits activities that inhibit interstate commerce and market competition).

[161] Parker v. Brown, 317 U.S. 341 (1943).

[162] Sheila Ogilvie, *The Economics of Guilds*, 28 J. OF ECON. PERSPECTIVES 169, 169-70 (2014).

[163] *Id.* at 170-71.

[164] *Id.* at 174.

owners can negotiate collectively with decision-makers to advocate for their shared interests.[165] Unlike labor unions, guilds are not subject to the rights and responsibilities granted to unions under the NLRA.[166] Thus, employers are not obligated to bargain with guilds over wages, benefits, or working conditions.[167]

Recently, a group of independent contractor ride-share drivers in New York organized a guild to negotiate with Uber over improvements to their working conditions.[168] The guild formed a compensation fund that provides substitute income for injured drivers when they are hurt and unable to work.[169] Furthermore, the guild has successfully advocated for higher pay, access to restrooms for drivers while on the road, and healthcare.[170]

California gig-economy workers could benefit from following suit and organizing a guild to negotiate with technology companies for better wages and increased protections. Absent legislation to form a state regulatory scheme allowing independent contractors to unionize, the guild model would afford independent contractors with the greatest leverage to demand better wages and more protections through collective action. For example, workers may bargain collectively to demand that technology companies contribute to a welfare fund to provide healthcare coverage and protections for injured workers, as well as to increase the rates paid to workers.

However, given that guilds do not have the right to compel a company to negotiate like unions do, gig-economy companies may refuse to recognize the guild and refuse to negotiate with it. If gig-economy companies agree to negotiate with the guild, technology companies may demand that the guild concede that its workers are, in fact, not employees. By collectively resigning to and accepting the independent-contractor status, gig-economy workers would be perpetually cast as second-class workers and would be worse off in the long term. Nevertheless, absent a more viable option, the guild model would be an effective vehicle to bring about improvements to the wages, benefits, and working conditions of gig-economy workers.

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[165] GUILD ASS'N, https://guildassociation.org (last visited Mar. 10, 2019).

[166] *My Employer Says I am an Independent Contractor. What Does That Mean?,* COMM. WORKERS OF AM., https://cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean (last visited Mar. 15, 2019).

[167] *Id.*

[168] *About the IDG*, INDEP. DRIVERS GUILD, https://drivingguild.org/about/ (last visited Mar. 10, 2019).

[169] *Id.*

[170] *Campaigns*, INDEP. DRIVERS GUILD, https://drivingguild.org/about/ (last visited Mar. 10, 2019).

CONCLUSION

Independent-contractor misclassification is a serious problem that has received large-scale attention from lawmakers and the public over the past two years as a result of the landmark *Dynamex* decision. Though *Dynamex* fell short of providing a standard that would effectively curb misclassification, it provided a clear "ABC" Test to replace the traditional multi-factor test.[171] Nevertheless, *Dynamex* created an unworkable dichotomy by applying the new "ABC" Test to Wage Order claims, while maintaining the traditional multi-factor test for Labor Code claims. This created the potential for situations where some employees would fall under the purview of some California employment protections, but not others.

AB 5 cured *Dynamex's* most substantial defect by codifying the "ABC" Test as the standard test for determining employee versus independent contractor status under the Labor Code.[172] AB 5 provides uniformity and predictability regarding who is an employee and who is an independent contractor. However, it does not ensure that all workers classified as employees under its "ABC" Test have access to collective bargaining.

The ills of misclassification will persist so long as collective bargaining is denied to some employees. Without access to collective bargaining employees do not have the right to negotiate with their employer to address grievances and improve working conditions. Employee status alone is insufficient to allow workers to gain access to livable wages and fair working conditions. California must take its work one step further than AB 5 by enacting a statewide regulatory scheme modeled after the ALRA to allow workers who are employees under AB 5 and whom the NLRB does not recognize as employees to engage in collective bargaining. Alternatively, gig-economy workers should consider organizing a guild for industry-wide bargaining with the gig-economy companies that employ them.

California's bold action to combat misclassification is a model for other jurisdictions to follow. AB 5 brings workers into the purview of California employment protections. However, it does not provide them a vehicle to seek wages, benefits, and working conditions above the minimum protections the Labor Code provides. Collective bargaining is the remaining component necessary to allow California gig-economy workers the greatest opportunity to fair wages, benefits, and working conditions.

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[171] *Dynamex Operations W.*, 4 Cal. 5th at 964.

[172] CAL. LAB. CODE, § 2750.3 (2020).