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DISPATCH NO. 31 – UNITED STATES

PROPOSITION 22: A VOTE ON GIG WORKER STATUS IN CALIFORNIA

Miriam A. Cherry†

INTRODUCTION

In the shadow of the 2020 United States Presidential election, an important vote was also taking place about the employment status of gig workers. In 2019, the California Legislature had enacted AB5, a bill that expanded the definition of “employees” to include workers in the on-demand economy.¹ In response, gig platforms like Uber, Lyft, and Postmates backed a direct ballot initiative, California’s Proposition 22, which asked voters to undo the work of the Legislature.² Gig workers would be reclassified as independent contractors, but they would also receive certain benefits, including, among others, the ability to sue for discrimination under California law, a contribution toward health insurance, and a guaranteed minimum wage for time worked. The vote was important for several reasons: California’s Bay Area and Silicon Valley were the starting place for the on-demand economy, the proving ground for Uber and other on-demand apps. California is viewed as a progressive jurisdiction and would rank as the world’s seventh largest economy on its own. As such, when California voters approved Proposition 22 on November 3, 2020, stripping gig workers of employee status and curtailing some of their newly-found rights, it left some

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1. A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

2. Sasha Lekach, *Future of Uber, Lyft on the Line in Fight to Keep Drivers from Becoming Employees*, MASHABLE (Oct. 24, 2020), <https://mashable.com/article/uber-lyft-california-prop-22-gig-workers/>.

commentators surprised and many labor advocates disappointed and concerned.³

During the past decade, platform economy companies have not only disrupted established business and labor models, but also have challenged the legal tests and structures traditionally used for employee classification.⁴ In the United States, as in many countries, employee status is an important gateway to determine which workers will receive the protection of the labor and employment laws, including the right to organize and bargain collectively, eligibility for minimum wage, unemployment insurance, and worker's compensation.⁵ As such, classification as an employee is crucial in ensuring decent standards and working conditions. The on-demand model of work does not fit neatly into binary categories; it has been characterized before in litigation as handing the jury "a square peg and asked to choose between two round holes."⁶ With its flexible "open call" that allows workers the flexibility about when and how to work, combined with algorithms and customer ratings that track and surveil every move that the worker makes, the gig-work model combines some aspects of the employment relationship and some aspects of the independent contractor relationship. With the confusion of a type of work that did not seem to fit with previous classification, jurisdictions around the world have reached radically different answers about whether the workers for rideshare or on-demand food delivery companies were in fact independent contractors or whether they were employees.⁷ Recently, the tide seemed to be turning in favor of employee status, with both French and Italian Courts of Cassation ruling that gig workers were employees.⁸

And California also seemed headed in the direction of employee status as well – at least, until the vote on Proposition 22. The result took many by

3. Greg Bensinger, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), <https://nyti.ms/316p721> ("[Prop. 22] will encourage other companies to reclassify their work force as independent contractors, and once they do, over a century of labor protections vanishes overnight," says Robert Reich, former U.S. Secretary of Labor).

4. Ulysse Lojkine, *Cartographier la géopolitique des plateformes*, LE GRAND CONTINENT (Feb. 19, 2020), <https://legrandcontinent.eu/fr/2020/02/19/geopolitique-des-plateformes/> (providing summaries of various jurisdictions and their differing approaches to worker classification in the gig economy). For additional background to the problem of worker classification in the on-demand economy, see Valerio De Stefano, *The Rise of the "Just-in-Time Workforce" On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, 37 COMP. LAB. L. & POL'Y J. 471 (2016).

5. Miriam A. Cherry, *Beyond Misclassification The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 578 (2016).

6. *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

7. Miriam A. Cherry, *A Global System of Work, A Global System of Regulation? Crowdwork and Conflicts of Law*, 94 TULANE L. REV. 183, 187 (2020) (recounting ongoing litigation over employee status in the gig economy, including cases then-pending in Spain, Belgium, Colombia, and Australia, and noting they seemed to be reaching different conclusions).

8. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 4, 2020, Bull. civ. V, No. 374 (Fr.); *Italy Court Rules Uber Food Delivery Riders Were Exploited*, ASSOCIATED PRESS (May 30, 2020), <https://apnews.com/article/62609b97fbc25575cb1fcc2573db48f1>.

surprise, as most ballot initiatives in California fail.⁹ Further, the California legislature had just passed AB5 the year before, signifying the political will to expand the category of “employee” to include the vulnerable group of gig workers. Further, during the 2020 pandemic, the treatment of gig workers was coming closer to parity with traditional employees, through programs like extended unemployment assistance, which was extended to platform workers in the CARES Act.¹⁰ The other anomaly has to do with Proposition 22’s creation of a new class of independent contractor, which is really unprecedented in the United States. As such, we need to keep a close eye on further developments in California and what Proposition 22 will mean for the fortunes of workers in the platform economy.

For context, this Dispatch will first discuss legal developments in California including the ruling by the California Supreme Court, the passage of AB5, and the series of events that led to Proposition 22 gaining support. Then, the next part of the Dispatch will examine the new sub-category of independent contractors created by Proposition 22, which is quite different from how the category of independent contractor has been constructed previously. Finally, the Dispatch will end by discussion what these recent developments could mean for gig worker rights moving forward.

THE CALIFORNIA SUPREME COURT’S *DYNAMEX* DECISION

In 2018, the California Supreme Court announced its decision in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (“*Dynamex*”).¹¹ The court announced a new standard for determining employment status in the state of California, known as the “ABC” test due to its three factors. While the ABC test for employee status was new to California, it actually was an older test for employee status used in many jurisdictions.¹² The first part of the test, Part A, embodied the traditional control test, asking whether the worker was free from the “control and direction of the hiring entity in the performance of the work[.]”¹³ Part B of the test declared that to be an independent contractor, the worker would have to perform work outside the “usual course of the hiring entity’s business.”¹⁴ In other words, Part B required that there truly be some division between the hiring company’s business and the type of work that the hiring company

9. CAL. SEC’Y OF STATE, HISTORY OF CALIFORNIA INITIATIVES: SUMMARY OF DATA (2020), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/summary-data.pdf> (of the 376 initiatives that qualified for the California ballot between 1912 and 2017, 64% were rejected by the voters).

10. Miriam A. Cherry & Ana Santos Rutschman, *Gig Workers as Essential Workers*, 35 ABA LAB. & EMP. L. J. 11, 12-13.

11. *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 416 P.3d 1 (2018).

12. Keith Cunningham-Parmeter, *Gig-Dependence Finding the Real Independent Contractors of Platform Work*, 29 N. ILL. L. REV. 379, 408 (2019).

13. *Id.* at 418.

14. *Id.* at 413.

required the putative independent contractor to perform. Finally, Part C asked whether the worker was customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

The *Dynamex* decision was a catalyst for many of the political events that would ensue in California, even though the hiring entity in *Dynamex* was not a digital platform. Further, the court's ruling was limited in the sense that it only applied to California wage orders. Nonetheless, the *Dynamex* decision touched off a heated debate about the nature of the employment relationship, which groups of workers should be covered by labor and employment laws, and what the *Dynamex* decision might mean for businesses around the state, including platform economy businesses.

The reason for the attention was that the new ABC test that the *Dynamex* court adopted was quite expansive, and its practical effect would be to make many more workers employees. Of the three parts of the test, it was noted that Part B would likely cause problems for the gig economy.¹⁵ If the business of a platform company was to provide passengers with rides from one part of the city to another, and the rideshare drivers were providing it, it would be very difficult to argue that the drivers were somehow not involved in a fundamental part of the platform's business. In fact, the European Court of Justice had previously heard similar types of arguments, and soundly rejected Uber's attempt to argue that it was a software provider removed from the business of transportation.¹⁶

In the wake of the *Dynamex* decision, gig economy companies began to lobby the California legislature to change the coverage of the employment law statutes, and so did labor unions. Gig economy companies wanted a legislative overhaul to the *Dynamex* decision, one that would either change the test to a more relaxed standard for finding independent contractor status, or one that would present a clear "carve out" to the law for on-demand platform companies. At the same time, labor unions pressed the legislature to codify the *Dynamex* ruling and the expanded ABC test for employee status.¹⁷

CALIFORNIA LEGISLATURE PASSES AB-5

It was in this charged political context in 2019 that the California legislature passed, and California Governor Gavin Newsom signed, the AB5 Bill, which adopted *Dynamex*'s expanded ABC test for employee status. The text of AB5 cited the "harm to misclassified workers who lose significant

15. *Id.* at 412-14.

16. 2017 E.C.R. C-434/15 ("Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence").

17. Steve Smith, *Labor Joins Gonzalez Fletcher to Introduce New Bill to Protect Workers from Misclassification*, CAL. LABOR FED'N (Dec. 3, 2018), <https://calaborfed.org/labor-joins-gonzalez-fletcher-to-introduce-new-bill-to-protect-workers-from-misclassification/>.

workplace protections,” the loss of revenue to the state, and the unfairness to companies that compete with companies that misclassify workers as the reasons behind the decision to expand coverage.¹⁸ AB5 also expanded the *Dynamex* ABC test holding beyond its original purview of wage orders. Under the provisions of AB5, the ABC test would apply to all aspects of the California Labor Code, including unemployment, collective bargaining, and anti-discrimination law.¹⁹

Many businesses lobbied for, and received, exemptions from AB5’s coverage, meaning that whether those businesses had hired employees would be based on the prior control test that had been in force before the decision in *Dynamex*. Some of these exempted occupational categories included the professions, typically highly skilled labor. Those exempted included lawyers, accountants, engineers, architects, investment advisors, physicians, surgeons, dentists, psychologists, and veterinarians.²⁰ But some of the exempted occupations included occupations that were outside the highly paid professions: direct salespeople, private detectives, fishermen, real estate agents, and hair stylists. These carveouts from the ABC test were difficult to harmonize, as many of these careers had little in common with each other. These exemptions from AB5 and the ABC test were the direct result of lobbying by various groups.

Despite the lobbying and exemptions from the law, worker rights advocates largely hailed the California legislature’s passage of AB5 as a progressive and forward-thinking change. Under Part B of the ABC test, it appeared that gig workers would finally be included in AB5’s expanded definition of employee. Many worker advocates followed the situation closely to see what an employee-centered gig work model might look like.

Uber and Lyft, however, categorically refused to comply with AB5. In fact, the major platforms did not take any action to comply with the change in the law or reclassify their workers as employees. Rather, when the AB5 bill came into effect on January 1, 2020 Uber and Postmates filed a lawsuit in federal court challenging its constitutionality.²¹ On-demand companies then began negotiating with California lawmakers to create a third hybrid category, which would offer some employment rights to gig workers, even if those were not “full” employment rights. Meanwhile, the companies stalled about changing their business models and, pointing to the ongoing lawsuits, refused to implement the new employee status.

Later in that year, during the 2020 pandemic, rideshare company Lyft threatened to cease operations in California if it were required to comply with

18. A.B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

19. *Id.*

20. *Id.*

21. *See Olson v. California*, No. 19-CV-10956, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

AB5.²² In the meantime, California municipal attorneys general began filing lawsuits seeking injunctions against Uber and Lyft to get them to comply with the law.²³ These lawsuits requested that the gig companies take action to reclassify their workers and begin providing employment protections and benefits, or else be ordered to do so by the courts. The attorneys general were successful at both the trial and appeals court level, but Uber and Lyft's attorneys kept drawing out the process to request more time.

THE PROPOSITION 22 CAMPAIGN

The reason that Uber and Lyft sought delay was that they had their eyes on the ballot initiative, scheduled as part of the November election. Along with a coalition of other gig companies, Uber and Lyft declared their intention to fight AB5 through a ballot initiative, eventually known as Proposition 22. Gig economy companies contributed over \$200 million to exempt on-demand companies from AB5 and to keep gig workers as independent contractors.²⁴

While unions and loosely organized groups of gig workers opposed Proposition 22, they were outspent by more than 20 to 1 during the November election season.²⁵ Uber and Lyft portrayed the issue as one of flexibility, arguing that their drivers did not want to become 9 to 5 employees. As part of the campaign, Uber and Lyft amplified the voices of some of their drivers who wanted to work on flexible schedules, and featured these drivers in their campaigns. These advertisements had a large impact on voters, who may have assumed that these drivers were speaking on behalf of all gig workers. The same can be said for restaurant and food delivery services, who were told to leave political leaflets asking for a vote of "yes" on Proposition 22 along with the meals and food that they dropped off.²⁶

The fact that employees could also work flexible hours and have part-time schedules was a message that got completely lost in the campaign rhetoric. The platforms' message caught on with the California electorate, who were bombarded with advertisements in favor of Proposition 22's passage. Other voters were concerned because they depended on services like Lyft to get them to and from work, doctor's appointments, and other situations where transportation was needed, and Lyft's threats to leave the

22. Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), <https://nyti.ms/2QarROv>.

23. *See* *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266 (Cal. Ct. App. 2020).

24. Jeremy B. White, *Gig Companies Break \$200M Barrier in California Ballot Fight*, POLITICO (Oct. 29, 2020), <https://www.politico.com/states/california/story/2020/10/29/gig-companies-break-200m-barrier-in-california-ballot-fight-9424580>.

25. Brian Merchant (@bcmmerchant), TWITTER (Nov. 4, 2020, 3:37 P.M.), <https://twitter.com/bcmmerchant/status/1324103506739916801>; Kari Paul & Julia Carrie Wong, *California Passes Prop 22 in a Major Victory for Uber and Lyft*, THE GUARDIAN (Nov. 4, 2020), <https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft>.

26. Lekach, *supra* note 2.

state may have struck a chord. Others were worried about the potential cost and simply did not want to pay more. And because Proposition 22 also included some protections for gig workers, many voters who were not the most aware may have thought paradoxically that by voting to approve the measure, they were actually helping rideshare drivers. California voters approved Proposition 22 on November 3, 2020.

THE IMPACT OF PROPOSITION 22

As Proposition 22 was a compromise, and promised more rights for gig workers than those that an independent contractor would typically ever receive, it de facto created a new hybrid type of category, even though workers falling within it would technically still carry the label of independent contractor.

Proposition 22 does give California rideshare and delivery drivers some benefits that independent contractors do not typically receive. For example, under Proposition 22, these benefits and protections include a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA), a minimum earnings guarantee for time worked while actively providing rides, compensation for certain vehicle expenses, and occupational accident insurance to cover on-the-job injuries. Proposition 22 also prohibits employment discrimination by rideshare companies and allows gig workers the right to bring an action under California's anti-discrimination laws.

These protections and benefits are actually fairly substantial. Even though Proposition 22 explicitly notes that the on-demand workers are now independent contractors for purposes of California law, they will now receive many more benefits and protections than independent contractors have ever received. It has even led some to call Proposition 22 a "third way" for gig workers.²⁷ But without employee status, there is no right for the drivers to organize or bargain collectively, and other rights offered in this compromise are less than what a California employee would receive. Further, gig companies have already started tacking on fees to its services as a "California Driver Benefits Fee,"²⁸ which was nowhere described in the voting materials.

Moving forward, unions have already declared their opposition to Proposition 22 and their willingness to challenge Proposition 22 in court.²⁹

27. The idea has been theoretically discussed in the United States, but this is the first attempt to carry it out. For more discussion on this point, see Harris & Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* THE HAMILTON PROJECT (2015) and Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors' in the Gig Economy: A Comparative Approach*, 66 AM. UNIV. L. REV. 635 (2017).

28. Levi Sumagaysay, *California Post-Prop. 22: Gig Workers to See Pay Changes, Customers to See Higher Prices*, MARKETWATCH (Dec. 14, 2020), <https://www.marketwatch.com/story/california-post-prop-22-gig-workers-to-see-pay-changes-customers-to-see-higher-prices-11607991899>.

29. Sasha Lekach, *Uber Tacks on New Fee for Prop. 22 Gig Worker Benefits*, MASHABLE (Dec. 15, 2020), <https://mashable.com/article/uber-lyft-prop-22-benefits/>.

The year that the gig economy companies spent in non-compliance is also still being litigated, with California government officials seeking to hold the companies accountable for past violations when AB5 was the law.³⁰ Given the California Legislature's previous vote in favor of employee status for gig workers, it would not be surprising if there is additional political maneuvering in the coming months and years including further ballot initiatives. And gig workers themselves have filed lawsuits alleging that they were ordered to vote in favor of Proposition 22 and to engage in compelled speech supporting it. It would seem that further lawsuits and additional votes may come to pass.

In addition, the *Dynamex* decision itself remains the law for all traditional businesses, other than those that deal with exempted occupational categories, as set out above. As such, many traditional businesses have started to complain that gig workers should not be allowed a carve out from the law, when the law was specifically crafted to try to cover them.

As a final note, Proposition 22 was the most expensive ballot initiative in California's history. The enormous lobbying effort behind it has led some to question the wisdom of the initiative process itself. Ballot initiatives were designed as a type of "direct democracy" to allow the average voter, the common person, to have their voice be heard. If the initiative process is dominated by large corporate interests, the very purpose of the ballot initiative process is subverted.

Others have expressed concern that this vote undermines minimum labor standards. While this particular vote only involved gig workers, the concern is of a slippery slope, as other industries may try to seek similar exemptions from various parts of labor regulation that they do not like or do not agree with.

Finally, there is some concern that this vote is creating a retrenchment during a period of time when gig workers were finally starting to be recognized as meriting parity with other workers. Instead of being pushed aside as workers that were merely there for convenience or for luxury items, a view that some gig platforms cultivated, during 2020 gig workers were recognized for the valuable efforts of their work. When the pandemic struck, grocery delivery shoppers, meal delivery services, and on-demand rideshare drivers were all seen as "essential" workers. And at the same time, many traditional workers started working from home, using online platforms on a regular basis. The old categories that may have justified differential treatment in the past were collapsing. The CARES Act provided for pandemic unemployment relief even for gig workers who lost their jobs. And gig workers were eligible for sick leave as well, a benefit that not all

30. Max Kutner, *Uber Tells 9th Circuit Prop. 22 Doesn't Moot AB 5 Challenge*, LAW360, (Dec. 9, 2020), <https://www.law360.com/articles/1336032/uber-tells-9th-circ-prop-22-doesn-t-moot-ab-5-challenge>.

employees in the United States enjoy. In some ways California's recent vote looks like the proverbial one step forward, two steps back.³¹

The story will continue to evolve in the coming year. Without a doubt, Uber and other gig economy companies will likely introduce copycat legislation in other states or utilize the ballot initiative processes in those states.³² Meanwhile, some are looking for support from the new administration coming to power. President Biden had been a vocal proponent of the ABC test and even proposed extending it nationally.³³ The NLRB will likely reverse the Trump administration's ruling that gig workers were not employees, and could not organize.

CONCLUSION

This Dispatch has focused on the law and policy around the gig worker misclassification issue in California. The back-and-forth, the advances and the retrenchment, highlight the complexity of the issues involved and the interplay of different sources of political power and the ballot initiative process within California. For now, the process will play out and the hybrid independent contractor category will be watched closely.

31. Mike LaSusa, *3 Ideas Shaking Up the Worker Classification Debate*, LAW360 (Dec. 14, 2020), <https://www.law360.com/employment-authority/articles/1329552/3-ideas-shaking-up-the-worker-classification-debate>.

32. Braden Campbell, *3 Takeaways as Gig Cos. Prevail at Polls on Worker Status*, LAW360 (Nov. 4, 2020), <https://www.law360.com/articles/1325919/3-takeaways-as-gig-cos-prevail-at-polls-on-worker-status>.

33. Ronald Zambrano, *How Biden May Save Gig Workers From California's Prop 22*, LAW360 (Dec. 16, 2020), <https://www.law360.com/articles/1335406/how-biden-may-save-gig-workers-from-california-s-prop-22>.