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The Gig Is Up: California's Crackdown on the Gig Economy

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ABSTRACT

The typical nine-to-five job, exemplified by traditional office spaces, steady incomes, and comfortable retirements, is fundamentally shifting. Technological innovation, necessity, and the human yearning for autonomy has forged a new economic reality: the gig economy. Theoretically, the gig economy facilitates individuals' abilities to make money and preserve personal freedom while permitting companies to categorize workers as independent contractors, not employees. The ride-hailing companies Uber and Lyft notably utilize this model in treating their drivers as independent contractors. But this choice has sparked outrage, legislation, and lawsuits by advocates arguing that such drivers are not independent contractors but employees under the law. The controversy unearths the tension between preserving traditional employee classifications versus adapting to the economic reality of work in the modern era.

This Comment explores the gig economy's rise in California, focusing on the spate of litigation disputing whether app-based Uber and Lyft drivers are employees or independent contractors. The ongoing conflict demonstrates how the gig economy upsets traditional notions undergirding employer–employee relationships and seemingly settled agency law paradigms. Using California as a bellwether, this Comment assesses the gig economy's impact not only on workers and companies, but also on deeply-seated presumptions of what earning a living looks like in America.

INTRODUCTION

Gone are the days in which an American worker heads to his or her nine-to-five job, year after year, at the same workplace until blissful retirement.[1] Instead, a new way of working has emerged: the so-called "gig economy."[2] Sophisticated technological platforms, the growing desire for autonomy and flexibility, and efforts to weather the ebb and flow of a global economy have forged a category of workers that eludes tidy classification. Specifically, this burgeoning gig economy eschews rigid labels of either "independent contractor" or "employee."[3] Any attempt to shoehorn gig workers into one or the other category will result in short- and long-term harm to workers, business, and the economy.[4]

In recent years, litigation over gig-worker classifications in ride-hailing apps has proliferated, particularly in California, where both Uber

1. Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1 (2018) (observing that although a "traditional model of work" involving "long-term employees depend[ing] on a single employer" was the norm for many years, "[f]ew people work this way today").

2. *Id.*

3. *Id.* at 4.

4. Henry H. Perritt Jr., *Don't Burn the Looms—Regulation of Uber and Other Gig Markets*, 22 SMU SCI. & TECH. L. REV. 51, 55 (2019).

and Lyft have their headquarters.[5] This Comment focuses on California legislation and litigation that has intensified this debate. This Comment also proposes a solution—a malleable framework that combines elements of both employee and independent contractor classifications, facilitates flexibility and economic freedom envisioned by workers and businesses alike, and resists the urge to stifle entrepreneurial growth.

Part I of this Comment discusses the historic delineation between independent contractors and traditional employees, the role of agency law in driving this distinction, and the category-dependent impact on worker protections and benefits. Part II analyzes the rise of the gig economy, assesses how technology and ideology upset the traditional worker-category distinctions, and discusses how workers for ride-hailing apps like Uber and Lyft complicate classification efforts. Part III concentrates on California case law and legislation, particularly the spat of litigation surrounding Uber and Lyft worker classifications, the much-discussed AB5 bill, and Uber's and Lyft's swift response in the form of Proposition 22. Part IV evaluates the economic impact of categorizing gig workers as independent contractors and surveys the likelihood of harm resulting from forcing gig workers into the employee categories. Finally, this Comment acknowledges that Proposition 22's enactment appears to be a step in the right direction. However, time will tell whether Proposition 22 will accomplish its purported goals of promoting drivers' autonomy and flexibility as independent contractors while providing new benefits and earnings guarantees.[6]

I. INDEPENDENT CONTRACTORS VERSUS EMPLOYEES: LEGAL BACKGROUND, AGENCY THEORY, AND AVAILABILITY OF BENEFITS

Traditionally, the common law has shaped the distinctions between independent contractors and employees.[7] It is important to assess such historic delineations because these delimitations form the foundation of

5. *Uber Headquarters and Office Locations*, CRAFT, https://craft.co/uber/locations [https://perma.cc/QC75-XWYJ].

6. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) [https://perma.cc/RD86-B3F2] (scroll to "Full text"; then hover mouse near bottom of "Full text" PDF; then click download icon to download full text of ballot initiative).

7. Mark J. Loewenstein, *Agency Law and the New Economy*, 72 BUS. LAW. 1009, 1012 (2017) (explaining that at the "heart" of worker "arrangements is the legal question of what it means to be an employee, a question often resolved by reference to a common-law definition of the term").

classification-dependent worker benefits, or lack thereof. This Part analyzes the legal background that shaped worker classifications, focusing primarily on the time-honored agency theory. It then discusses the impact of respective classifications on worker benefits, highlighting the import of worker classification upon the receipt of government benefits. Ultimately, this Part lays the groundwork for understanding the hotly contested issues surrounding worker classifications in the gig economy.

A. Legal Background, Agency Theory, and Employer Liability

The distinction between independent contractor and employee stems from the common law of agency.[8] The differences center on how much control the hiring entity exercises over the individual performing the work.[9] If the boss has only the right to control the result of the work, the law deems the worker an independent contractor.[10] But when the boss controls both the result and the method and means used to produce that result, the law regards the worker as an agent of the hiring entity.[11]

Focusing first on independent contractors, worker autonomy typifies the independent-contractor relationship.[12] The Restatement (Second) of Agency defines "independent contractor" as "a person who contracts with another to do something for him but who is *not controlled* by the other nor subject to the other's right to *control* with respect to the physical conduct in the performance of the undertaking."[13] Put another way, an independent contractor is someone who contracts to do work for an employer according to the independent contractor's chosen method, as opposed to submitting to the employer's required or preferred method of achieving a certain end result.[14] The employer retains control over only the end product for which the employer hired the independent contractor.[15]

By contrast, the historic hallmark of an employee, under agency theory, is the employer's exertion of control over most or all aspects of the employee's work.[16] Agency theory comprises vast and varied types of circumstances and relationships.[17] An important relationship historically

8. 2A C.J.S. *Independent Contractor Relationship* § 18 (2020).
9. *Id.*
10. *Id.*
11. *Id.*
12. RESTATEMENT (SECOND) OF AGENCY § 2 (AM. L. INST. 1957).
13. *Id.*
14. 41 AM. JUR. 2D *Independent Contractors* § 1 (2020).
15. *Id.*
16. RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006).
17. *Id.* § 1.01.

governed by agency theory is the employer–employee relationship.[18] The Restatement defines "employee" as an "agent whose principal controls or has the right to control the manner and means of the agent's performance of work."[19] In turn, Restatement (Third) of Agency defines "agency" as a "fiduciary relationship" where the principal "manifests assent" to the agent that "the agent shall act on the principal's behalf and subject to the principal's control."[20] Evidently the Restatement emphasizes the element of "control" in delineating between independent contractor and employee–employee relationships.

The distinction between independent contractor and employee becomes especially important in determining an employer's liability for the malfeasance of its workers. The fact that an employer might be liable in a court of law for the acts of its workers—depending on how the law categorizes workers—highlights one of the main reasons that worker categorization is often contested.[21] A court may very well find a principal vicariously liable for an agent's negligence.[22] Conversely, courts do not usually deem principals liable for the negligent acts of independent contractors.[23]

Courts developed the definition of "employee" to add clarity to the decision of whether an employer would be vicariously liable for a worker's tort.[24] Specifically, if an employee commits a tort "while acting within the scope of their employment," the law generally subjects the employer to liability for that tort.[25] However, the fact that an employer may be vicariously liable for its employees is not the only reason that employers, and workers, might contest the applicable worker categorization. The classification of "independent contractor" versus "employee" also impacts available benefits.

18. RESTATEMENT (SECOND) OF AGENCY § 2.

19. RESTATEMENT (THIRD) OF AGENCY § 7.07.

20. *Id.* § 1.01.

21. 41 AM. JUR. 2D *Limited Rule of Nonliability; Generally* § 27 (2020) ("One who employs an independent contractor is not generally liable for the contractor's negligent acts. . . . Under the 'independent contractor rule,' the doctrine of 'respondeat superior' does not apply to the acts of an independent contractor because the owner/operator has no control over the work performed and, thus, the risk of loss is more sensibly placed on the contractor.").

22. 2A C.J.S. *Agency* § 18, n.1 (2020).

23. *Id.*

24. Loewenstein, *supra* note 7, at 1012.

25. RESTATEMENT (THIRD) OF AGENCY § 2.04.

B. Impact on benefits

In addition to the potential for employer liability, worker classifications are also vehemently contested because the availability of state and federal benefits hinges largely on the respective classification. And while the number of individuals classified as independent contractors was once relatively slim, the dilemma has deepened now that independent contractors comprise more than twenty percent of the working population.[26] As the millennium marches onward, people have dramatically altered the ways that they make money.[27] The law has failed to keep up.[28]

The dispute over whether a worker is an employee or independent contractor is significant.[29] Currently, federal labor laws mandate that employers provide a rigidly defined minimum set of benefits for every employee.[30] Independent contractors, on the other hand, are absolutely ineligible for those same benefits.[31] The inflexible categorization of workers as "'employees' (who get the entire bundle of benefits) or 'independent contractors' (who get none)" has sparked a plethora of lawsuits striving to describe who actually qualifies as an employee.[32]

The employer–employee relationship entails "manifold assurances and protections," including health insurance, minimum wage protections, disability insurance, overtime pay, ability to collectively bargain, paid sick leave, worker's compensation insurance, parental leave upon the birth or adoption of a child, and employer-provided retirement plans.[33] By contrast, independent contractors are excluded from the protections of the National Labor Relations Act.[34] They are also excluded from state wage-and-hour protections.[35] They are not covered under the Employee Retirement Income Security Act of 1974.[36] And they are not safeguarded under various state

26. Oranburg, *supra* note 1.

27. *See id.* at 15–17.

28. *Id.* at 20.

29. *See* Recent Adjudication, *Employment Law — National Labor Relations Act — NLRB Classifies Canvassers as Employees, Not Independent Contractors. —* Sisters' Camelot*, 363 N.L.R.B. No. 13 (Sept. 25, 2015)*, 129 HARV. L. REV. 2039, 2039 n.2 (2016) [hereinafter *NLRB Classifies Canvassers as Employees*].

30. *See* Oranburg, *supra* note 1, at 24.

31. *Id.*

32. *Id.* at 1.

33. JANE DOKKO ET AL., HAMILTON PROJECT, WORKERS AND THE ONLINE GIG ECONOMY 2 (2015) https://www.hamiltonproject.org/assets/files/workers_and_the_online_gig_economy.pdf [https://perma.cc/KLT8-WFYQ].

34. J. Huizinga Cartage Co. v. NLRB, 941 F.2d 616, 619 (7th Cir. 1991).

35. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015).

36. Holt v. Winpisinger, 811 F.2d 1532, 1538 (D.C. Cir. 1987).

workers' compensation acts.[37] Independent contractors' ineligibility for these, and numerous other, employee protections exacerbate the tensions surrounding worker classifications.

Understandably, most workers would like to receive the employee benefits and protections accompanying employee categorization. But why else does the independent contractor–employee distinction matter? One reason is that, paradoxically, "the requirement to provide a rigid bundle of benefits to employees has resulted in fewer workers receiving any benefits at all."[38] Put another way, employers are increasingly dissuaded from hiring workers in the first place, for fear they must provide a plethora of benefits that would financially cripple their businesses, or out of trepidation that they will be penalized for miscategorizing workers as independent contractors from the start.

This fear is compounded by the rapid development of an entirely new way of working: the gig economy.[39] This Comment now turns to the meaning of the gig economy; the impact of technology, especially within ride-hailing apps like Uber and Lyft; and the growth of this new way of working.

II. MEANING OF THE GIG ECONOMY IN THE APP AGE

The gig economy is the product of workers' desire for flexibility and independence, combined with the explosion of technological innovations through phone applications known as "apps."[40] The term "gig," stretching back over a hundred years, began as a slang term that musicians adopted to refer to a working engagement or date.[41] Also called the "on-demand economy, the 1099 economy, the peer-to-peer economy, and freelance nation," the gig economy has been described as the "industrial revolution"

37. *See* Munoz v. Indus. Comm'n of Ariz., 318 P.3d 439, 443 (Ariz. Ct. App. 2014).

38. Oranburg, *supra* note 1.

39. Matthew L. Timko, *The Gig Economy: An Annotated Bibliography*, 39 N. ILL. U. L. REV. 361, 362 (2019) (pointing out that the "rise of this so-called gig economy . . . has meant that current labor and employment laws have not kept pace with the new reality" and that efforts "to define the contours of the gig economy" in cases and regulations have been stymied by their reliance "on existing (and outdated) norms").

40. Jimmy Frost, *Uber and the Gig Economy: Can the Legal World Keep Up?*, SCITECH LAW., Winter 2017, at 4, 5.

41. Geoff Nunberg, Opinion, *Goodbye Jobs, Hello 'Gigs': How One Word Sums up a New Economic Reality*, NPR (Jan. 11, 2016, 1:23 PM), https://www.npr.org/2016/01/11/460698077/goodbye-jobs-hello-gigs-nunbergs-word-of-the-year-sums-up-a-new-economic-reality [https://perma.cc/AXV5-P52H].

of the twenty-first century.[42] This revolution manifests through the reality that the way much of today's workforce earns a living bears scant resemblance to the workforce of years past, when most workers maintained steady nine-to-five jobs at the same employer for the majority of their adult lives.[43] Today, millions of individuals prefer engaging in independent work that yields several income streams to remaining in a single, systematized payroll position.[44]

Technological advances facilitated by sophisticated smartphone technology have driven this paradigmatic shift in how Americans work.[45] In fact, the explosion of the gig economy has grown to be defined by its relationship to the App Age.[46] The twenty-first-century gig economy allows both workers and consumers to utilize "online technology and apps to contract for specific, on-demand services."[47] The platforms compensate workers for performing short-term projects for paying app users.[48] The "cyber 'gig' workers" typically work job by job, and they control how they perform the job and how many hours they work.[49] The on-demand services these apps offer fulfill a wide variety of consumer needs. Such services include landscaping, cooking, driving, shopping, cleaning, and even

42. *Id.*; *see also* Sydney Brownstone, *Gig Economy Explosion: 53 Million American Freelancers Are Their Own Bosses*, FAST CO. (Sept. 5, 2014), https://www.fastcompany.com/3035325/gig-economy-explosion-53-million-american-freelancers-are-their-own-bosses [https://perma.cc/3XK3-UBTS] (explaining that more than half of Americans are dissatisfied with their jobs and have found ways to "adapt[] to this weird economy" through freelancing). Sara Horowitz, executive director of the Freelancers Union, calls the rising gig economy "an economic shift on par with the Industrial Revolution," and notes that "[m]any freelancers see this way of working as the best way to take back control of their lives." *Id.*

43. JAMES MANYIKA ET AL., MCKINSEY GLOB. INST., FULL REPORT, INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 1 (2016), https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Independent%20work%20Choice%20necessity%20and%20the%20gig%20economy/Independent-Work-Choice-necessity-and-the-gig-economy-Full-report.pdf [https://perma.cc/8C84-Y9UD] [hereinafter FULL REPORT].

44. *Id.*

45. Frost, *supra* note 40, at 5.

46. *Id.* at 6 (explaining that "on-demand, gig companies" have resulted from technological advances in smartphone use). "Overnight, our phones have become sources of whole worlds of information, communication, transportation, and employment opportunities." *Id.* at 5.

47. DOKKO ET AL., *supra* note 33, at 1.

48. Frost, *supra* note 40, at 5.

49. *Id.*

handiwork.[50] Importantly, these services also include ride-hailing applications, most notably Uber and Lyft.[51]

These seemingly ubiquitous platform companies have catalyzed heavily litigated issues around worker classifications, availability of worker benefits, and whether the gig economy in the App Age necessitates a new category of worker classification.[52] The meaning of "work" is swiftly changing, and this progression increasingly provokes questions about the efficacy of existing worker classifications.[53] This evolution necessitates retooling the trenchant, all-or-nothing classification of either independent contractor or employee in favor of more flexible, workable, and useful options.[54]

This Comment now turns to California specifically, a state that has become a hotbed of litigation surrounding gig worker classification. First, this Comment will discuss the various tests that have been used to determine worker classifications. Second, this Comment will assess the contentious AB5 bill that Governor Gavin Newsome signed into law and that codified the infamous "ABC" test. Finally, this Comment will examine the Uber and Lyft litigation in particular, leading to the enactment of Proposition 22.

III. CALIFORNIA CASE LAW IMPACTING GIG WORKER CLASSIFICATIONS

In classifying workers, courts often find they are "handed a square peg and asked to choose between two round holes."[55] The court in *Cotter v. Lyft* astutely observed that "the test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem."[56] Before moving to the various tests that California utilizes in an effort to find workable classifications for gig workers, it is important to understand how Uber and Lyft operate in the current millennium.

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50. Dokko et al., *supra* note 33, at 1.

51. Frost, *supra* note 40, at 5.

52. *NLRB Classifies Canvassers as Employees*, *supra* note 29, at 2039 n.2 (recognizing that "[t]he challenge in the gig economy—where everyone gets to 'be their own boss'—is to determine who, if anyone, still counts as an employee").

53. *Id.* at 2039.

54. *See id.* The cited article observes that "[m]any have eschewed the traditional nine-to-five job for more flexible, often one-time 'gigs' . . . . Supported by online intermediaries such as Uber . . . , this growing gig economy offers greater freedom for workers and businesses alike." *Id.* However, this burgeoning economy has "ignited [disputes] over whether gig workers are employees or merely independent contractors under the law." *Id.*

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

56. *Id.*

The way these ride-hailing apps work is relatively simple. For example, individuals who wish to drive for Uber simply download the app, tap a button, and press GO to be matched with riders requesting a lift.[57] Drivers set their own schedules, choosing when and where they want to drive.[58] They may also use their own vehicles to drive people requesting a ride through the app.[59] When they want to drive, they simply open the app and connect to customers.[60] Finally, Uber drivers are paid after each trip, and earnings are automatically transferred to drivers' bank accounts every week.[61] Based on the common law agency definitions of employee, one would think that these drivers are indisputably independent contractors.[62] After all, drivers use their own equipment; choose when, if at all, they want to work; pick where they work; and get paid per drive. With a general understanding of how ride-hailing apps operate, this Comment now addresses the various tests California has used to classify workers, including drivers for Uber and Lyft.

A. Worker Classification Tests and the Ascendency of AB5 in California

In *Nationwide Mutual v. Darden*, the United States Supreme Court addressed whether a hired party was an "employee" as the term is used in ERISA.[63] Justice Souter explained that where the statute does not define "employee," the Court should utilize the principles of common law agency doctrine.[64] This doctrine required consideration of the hirer's right to control the method by which the worker accomplished the end result, the tools and instruments the worker used in achieving the end result, and how long and when the worker should work.[65] No factor is decisive, and all the factors must be examined and considered in context.[66] But this case did not settle the issue for California.

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57. *Driver Requirements*, UBER, https://www.uber.com/us/en/drive/driver-app/ [https://perma.cc/NX6Z-LUMQ].

58. *See id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. 2A C.J.S. *Independent Contractor Relationship* § 18 (2020). According to the common law, where the "person requesting the work has reserved the right to control the means and method by which the work will be performed," the worker is not an independent contractor. *Id.* The opposite is true where the person requesting the work controls only the result but not the precise method in which the worker is to achieve that result. *Id.*

63. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 319 (1992).

64. *Id.* at 322–23.

65. *Id.* at 323–24.

66. *Id.* at 324.

Over a decade after *Nationwide*, two California delivery drivers filed a class action against a national delivery company called Dynamex, alleging that Dynamex misclassified its drivers as independent contractors.[67] While California wage laws protected employees by setting minimum and maximum hours and regulating working conditions, independent contractors did not enjoy equivalent protections.[68] The California Supreme Court held that the proper means to distinguish between independent contractors and employees was to utilize the ABC test.[69] The test places the burden of proof on the hiring entity, mandating that a worker is *presumed* to be an employee *unless* the hiring entity establishes:

> (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[70]

Subsequently, on September 18, 2019, California Governor Gavin Newsome signed Assembly Bill No. 5 (AB5) into law.[71] AB5 codified the ABC test promulgated by the *Dynamex* court. The law provides that a person is automatically *presumed* to be an employee rather than an independent contractor unless the hiring organization proves: "(A) [t]he person is free from the control and direction of the hiring entity in connection with the performance of the work," "(B) [t]he person performs work that is outside the usual course of the hiring entity's business," and finally "(C) [t]he person is customarily engaged in an independently established trade, occupation, or business."[72] In other words, any person a hiring entity hires is deemed an employee; hiring entities must surmount the hurdle of the ABC test if they wish to rebut the presumption that their workers are employees entitled to the full panoply of state and federal benefits.

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67. Dynamex Operations W., Inc. v. Super. Ct. of L.A. Cnty., 416 P.3d 1, 5 (Cal. 2018).

68. *See id.* at 7.

69. *Id.*

70. *Id.*

71. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 & CAL. UNEMP. INS. CODE §§ 606.5, 621).

72. *Id.*

Unsurprisingly, this law ignited a firestorm of ballot initiatives and litigation in California, particularly pertaining to Uber and Lyft driver classifications. Moreover, AB5 paved the way for lawsuits against Uber and Lyft that achieved shocking traction.

B. Uber and Lyft Litigation in California

On May 5, 2020, the California Attorney General filed an action against Uber and Lyft seeking penalties, injunctions, and restitution.[73] The complaint alleged that these ride-hailing companies failed to classify their drivers as employees as required by AB5, instead misclassifying them as independent contractors.[74] In an opinion authored by California Superior Court Judge Ethan P. Schulman, the court granted California's motion and forced Uber and Lyft to reclassify their drivers and provide employee benefits.[75]

In granting the motion, the court applied the ABC test set forth in *Dynamex* and codified in AB5.[76] The court pointed to the "B" prong of the test—"The person performs work that is outside the usual course of the hiring entity's business"—and summarily declared that because the defendants could not possibly fulfill the "B" prong of the ABC test, the probability that the People's claim would succeed was "overwhelming."[77] Because Uber and Lyft drivers performed work that was *inside* the course of Uber's and Lyft's business, the court handed the state a complete victory. The court was so secure in its decision that part-time gig drivers were actually employees that it declared that it need not bother to even address the "A" and "C" prongs of the ABC test.[78]

The court opined in a conclusory fashion, "It's this simple: Defendants' drivers do not perform work that is 'outside the usual course' of their businesses. . . . [It] flies in the face of economic reality and common sense."[79] The court bolstered its assertion by claiming that the State demonstrated that if the court declined to issue an injunction, severe public harm would result.[80] Why? Because the Legislature said so; the court

73. Order on People's Motion for Preliminary Injunction and Related Motions at 2, People v. Uber Techs., Inc., CGC-20-584402 (Cal. Super. Ct. Aug. 10, 2020).

74. *Id.*

75. *See id.* at 32–33.

76. *See id.* at 4.

77. *Id.* at 5.

78. *Id.*

79. *Id.*

80. *Id.*

declared that under the governing standard, harm is presumed.[81] The harm results from drivers' allegedly wrongful deprivation of the "panoply of basic rights and protections to which employees are entitled under California law."[82] Finally, the court lamented that if Uber and Lyft drivers were not afforded the entire buffet of employee protections, including workers' compensation, unemployment insurance, paid sick leave, and paid family leave, such a travesty would inflict devastating "ripple effects on law-abiding competing businesses, and on the public generally."[83]

To justify its order, the court opined that Uber and Lyft had not demonstrated that they would experience permanent and destructive harm resulting from the issuance of the injunction.[84] One might point out it may be audacious for a court to presume that a company will not be harmed after that court has ordered the dismantling of the company's entire business model. After all, Uber's and Lyft's models allow anyone who wants to make a little extra cash to simply download the app, choose when, where, whom, and how they want to drive, and earn money per drive.[85] Uber and Lyft do not require drivers to work a minimum or maximum number of hours, do not dictate who drivers must drive, and do not even mandate the route drivers take.[86] So to compel Uber and Lyft to eradicate their business models and treat part-time, gig workers as employees entitled to the full array of employee benefits—all because the drivers "perform work that is [inside] the usual course" of Uber and Lyft's business—arguably defies common sense.[87]

Uber and Lyft apparently thought so too. Following Judge Schulman's order, Uber and Lyft prepared to exit California.[88] However, a California appeals court temporarily stayed the injunction on August 20, 2020, prompting Uber and Lyft to halt their planned exodus.[89] The stay mandated that Uber and Lyft must comply with Judge Schulman's injunction if a

81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.* at 6.

85. *Driver Requirements*, *supra* note 57.

86. *Id.*

87. *See* Order on People's Motion for Preliminary Injunction and Related Motions, *supra* note 73, at 5.

88. Levi Sumagaysay, *The Different Routes Uber and Lyft Could Take as They Fight California Law*, MARKETWATCH (Aug. 28, 2020, 4:42 PM), https://www.marketwatch.com/story/the-different-routes-uber-and-lyft-could-take-as-they-fight-california-law-11598645583 [https://perma.cc/6DE4-BBAP].

89. *See* Order Granting Petitions to Stay Preliminary Injunction, People v. Uber Techs., Inc., CGC-20-584402 (Cal. Ct. App. Aug. 20, 2020).

ballot measure titled "Proposition 22" failed to pass on the November 2020 ballot.[90]

Fortunately for Uber and Lyft, Californians voted to pass Proposition 22 on November 3, 2020, with about sixty percent of ballots cast in favor of passage.[91] In the weeks leading up to the passage of Proposition 22, there was much discussion about the ballot initiative's impact and what it purported to accomplish. Known as the "Protect App-Based Drivers and Services Act," the initiative countermands AB5 by deeming app-based drivers to be independent contractors, not employees or agents.[92] Three companies, DoorDash, Lyft, and Uber, began funding this ballot initiative on August 30, 2019, correctly anticipating that the California legislature would refuse to compromise with the companies in passing AB5.[93] The text of the Proposition points out that a multitude of Californian consumers and businesses, not to mention California's economy at large, reap the benefits that independent contractors provide by working with app-based delivery and ride-hailing platforms.[94] Explaining that "the ability of Californians to work as independent contractors . . . is necessary so people can continue to choose which jobs they take, to work as often or as little as they like, and to work with multiple platforms and companies," the Proposition points out that implementing AB5 would inflict harm to individual drivers themselves.[95] Accordingly, the Proposition declares that its purpose is to safeguard Californians' opportunities to work as independent contractors for ride-hailing and delivery companies if they so choose.[96] The Proposition further defends the right of every app-based driver to maintain the freedom to decide when, where, how, and how long he or she wishes to work.[97]

The ballot initiative does not advocate against providing app-based drivers with protections, however. In fact, it proposes affirmatively requiring ride-hailing companies to provide certain benefits and protections.[98] As passed, Proposition 22 allows drivers to remain categorized as independent contractors while simultaneously requiring ride-

90. *Id.* at 2.

91. Kari Paul & Julia C. Wong, *California Passes Prop 22 in a Major Victory for Uber and Lyft*, GUARDIAN (Nov. 4, 2020, 4:14 PM), https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft [https://perma.cc/U5QM-VALU].

92. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, *supra* note 6.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

hailing companies to pay drivers twenty percent more than the local minimum wage.[99] The companies also must assist in subsidizing health insurance costs for drivers working more than fifteen hours a week.[100] The Proposition also mandates that the ride-hailing companies purchase medical insurance to pay for drivers injured while behind the wheel; directs that drivers not exceed certain work hours; prohibits workplace discrimination; and obliges companies to implement sexual harassment policies, provide comprehensive safety training to drivers, and perform criminal background checks on potential contractors.[101]

As these changes suggest, the proponents of Proposition 22 not only recognize the incongruity in labeling part-time gig workers as employees but also acknowledge that app-based workers should enjoy protections and benefits tailored specifically to the kind of work these gig drivers perform. The supporters of Proposition 22 understood that AB5 threatened to eradicate "the flexible work opportunities of hundreds of thousands of Californians, potentially forcing them into set shifts and mandatory hours."[102] Moreover, AB5 would have crushed drivers' autonomy in deciding what jobs they want to take and how long they want to work.[103] The challenge for gig-economy proponents was, and still is, finding a solution that accounts for the unique nature of independent contractor work as it exists in the app-based gig economy, provides protections and benefits best suited to this new type of work, and does not risk destroying the gig economy entirely. California has historically been a bellwether for the rest of the nation, but time will tell whether the passage of Proposition 22 accomplishes its supporters' purported goals to the fullest extent and whether other states will follow suit.[104]

This Comment now turns to its final Part, which delves into the economic impact of the gig economy, how the independent workforce has

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Anna Wiener, *Gig Work on the Ballot in California*, NEW YORKER (Oct. 22, 2020), https://www.newyorker.com/news/letter-from-silicon-valley/gig-work-on-the-ballot-in-california [https://perma.cc/R3ZS-ZRQE]. Wiener notes California's "rich history of leading on labor rights" and predicts that the "passage of Prop. 22 could resonate across the country for years to come, inhibiting regulation elsewhere." Faiz Siddiqui, *Uber Says It Wants to Bring Laws Like Prop 22 to Other States*, WASH. POST (Nov. 5, 2020, 6:10 PM), https://www.washingtonpost.com/technology/2020/11/05/uber-prop22/ [https://perma.cc/5HCJ-XPHH]. Siddiqui writes that "[t]he ride-hailing giant's CEO said Thursday that Uber is looking to expand the model to other states, joining an executive from rival Lyft." *Id.*

shaped individuals' ability to create income, and how forcing independent contractor workers into employee categories would cause more socioeconomic harm than good. Finally, this Comment explores possible alternative categorizations besides the all-or-nothing binary of no benefits and protections for independent contractors, while employees enjoy an abundance of benefits and protections. Instead, this Comment advocates for a flexible approach, one that safeguards the autonomy and self-governance that independent contractors in the gig economy desire while providing benefits and protections that actually correlate with the type of work gig workers perform. Hopefully, Proposition 22 will spearhead national efforts to implement policies unique to app-based drivers.[105]

IV. IMPACT OF CATEGORIZING GIG WORKERS AS INDEPENDENT CONTRACTORS OR EMPLOYEES

The independent contractor designation provides many advantages, and freedom is foremost among them. Despite AB5 advocates' protestations to the contrary, it turns out that many Americans prefer being their own boss.[106] In fact, a 2015 study found that four-fifths of independent contractors favored this type of work arrangement over working for another person.[107] Many workers became independent contractors in the first place precisely because they wanted to be their own master.[108]

Uber and Lyft drivers in particular value choice, flexibility, and independence. Most drivers do not choose to drive for these companies for their whole lives or even for a prolonged time period.[109] This is because one of the attractive features of working for a ride-hailing, app-based platform is that drivers need not make long-term commitments.[110] These ride-hailing companies are designed so that drivers can exert control over how, when, and where they want to work.[111] In the United States, "92% of drivers drive less than 40 hours per week, and 45% of drivers drive less than

105. *See California Proposition 22*, *App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, *supra* note 6.

106. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016).

107. *Id.*

108. *Id.*

109. *Uber and the American Worker: Remarks from David Plouffe*, UBER NEWSROOM (Nov. 3, 2015), https://www.uber.com/newsroom/1776/ [https://perma.cc/XZ6F-BLCV].

110. *Id.*

111. Tony West, Update on AB5, UBER NEWSROOM (Sept. 11, 2019), https://www.uber.com/newsroom/ab5-update/ [https://perma.cc/5J9L-R7TT].

10 hours per week."[112] The companies do not wish to preclude drivers' ability to work for respective drive sharing competitors, as many drivers do.[113] But if California drivers had been labeled as employees, this label would have foreclosed the freedom to work for other drive sharing companies. The passage of Proposition 22 has allayed that fear for now, although there is likely a "long, turbulent road ahead" as Uber and Lyft grapple nationally with these issues.[114]

Along with increased autonomy, the independent contractor designation also affords a safety net to unemployed individuals. Gig work benefits the economy by "cushioning unemployment."[115] These ride-hailing platforms provide a way to supplement income, assist people who are transitioning between jobs, and furnish extra spending money.[116] The present era of digital transformation affords down-and-out individuals a previously unavailable opportunity to make money with relative ease.[117] The fact is that without the option to perform independent work, some face a catch-22; they must choose between no employment and traditional work in a potentially insufferable working environment.[118] Importantly, for many individuals, independent contract work supplies a "critical bridge" that allows people to keep income streams flowing during the job hunt.[119] For Californians, AB5 would have eliminated the availability of this safety net, which is especially vital for unemployed persons.[120]

Additionally, if Proposition 22 had not passed, AB5 would have damaged the ability of both retirees and millennials to earn supplemental

112. *Id.*

113. *Id.*

114. Sara Ashley O'Brien, *Prop. 22: After $200 Million California Brawl, Uber and Lyft's Gig Worker Fight Is Far from Over*, MERCURY NEWS (Nov. 16, 2020, 4:25 AM), https://www.mercurynews.com/2020/11/16/prop-22-after-200-million-california-brawl-uber-and-lyfts-gig-worker-fight-is-far-from-over/ [https://perma.cc/EJX2-49NZ].

115. JAMES MANYIKA ET AL., MCKINSEY GLOB. INST., EXECUTIVE SUMMARY, INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY, at iv (2016), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/employment%20and%20growth/independent%20work%20choice%20necessity%20and%20the%20gig%20economy/independent-work-choice-necessity-and-the-gig-economy-executive-summary.ashx [https://perma.cc/BPB6-M4DP] [hereinafter EXECUTIVE SUMMARY].

116. *See Uber and the American Worker: Remarks from David Plouffe*, *supra* note 109.

117. EXECUTIVE. SUMMARY, *supra* note 115, at 1.

118. FULL REPORT, *supra* note 43, at 7.

119. *Id.* at 14.

120. *Id.* at 50.

income by presumptively reclassifying drivers as company employees.[121] Many retirees rely on gig jobs for supplemental income.[122] In 2016, Uber reported that it had more drivers over the age of fifty than under the age of thirty.[123] In fact, about one-fourth of its drivers were older than fifty.[124] The ability for baby boomers to pad their retirement income would be drastically circumscribed if gig jobs were to disappear in California and out-of-state companies cut ties with California companies.[125] Assuredly, this inability to create or supplement post-retirement income would have happened directly after the passage of AB5 if the California appellate court had not stayed the lower court's injunction, consequently pausing Uber and Lyft's flight from California.[126]

Early in 2021, the U.S. Department of Labor promulgated rules meant to clarify the standards for categorizing a worker as an independent contractor versus an employee under the Fair Labor Standards Act.[127] The final rule "[r]eaffirms an 'economic reality' test" to decide whether a worker depends economically on his or her employer (making the worker an employee), or whether the worker is essentially in business for himself or herself (making the worker an independent contractor).[128] The rule also focuses on "(i) [t]he nature and degree of control over the work" and (ii) the worker's "opportunity for profit or loss" to determine whether an individual is an independent contractor and employee.[129] The rule purports to "sharpen[] the test to determine who is an independent contractor under the Fair Labor Standards Act . . . while recognizing and respecting the entrepreneurial spirit of workers who choose to pursue the freedom associated with being an independent contractor."[130] Scheduled to go into

121. Chris Carosa, *Will California's AB5 Law Gag Your Gig Retirement?*, FORBES (Feb. 27, 2020, 10:50 AM), https://www.forbes.com/sites/chriscarosa/2020/02/27/will-californias-ab5-law-gag-your-gig-retirement/?sh=1e308bbe6518 [https://perma.cc/63B8-29E9].

122. *Id.*

123. Chris Farrell, Gig Economy: Better for Boomers than Millennials, FORBES (Jan. 24, 2016, 8:00 AM), https://www.forbes.com/sites/nextavenue/2016/01/24/gig-economy-better-for-boomers-than-millennials/?sh=789d1700fc3c [https://perma.cc/7AW5-J6L5].

124. *Id.*

125. *Id.*; Carosa, *supra* note 121.

126. Sumagaysay, *supra* note 88.

127. 29 C.F.R. § 795 (2021).

128. *U.S. Department of Labor Announces Final Rule to Clarify Independent Contractor Status Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB. (Jan. 6, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210106 [https://perma.cc/9EQS-ZVUB].

129. 29 C.F.R. § 795(d)(1)(i)–(ii) (2021).

130. Eric Miller, *Department of Labor Issues Final Rule on Independent Contractor Status*, TRANSP. TOPICS (Jan. 6, 2021, 2:00 PM), https://www.ttnews.com/articles/department-labor-issues-final-rule-independent-contractor-status [https://perma.cc/8MTK-ADFM].

effect March 8, 2021, the new federal rule is thought to better correlate with the "economic realities" of particular jobs than California's repudiated ABC test.[131] However, four days before the rule's scheduled enactment the Department of Labor (under a new administration) formally delayed the implementation of the final rule until May 7, 2021, citing the need for more time to consider the rule's implications.[132] The final rule implementation demonstrates how this area of law is in an even greater state of fluidity than ever due in large part to the new Democrat-controlled Congress and recent presidential election.[133]

Ultimately, however, the fight over whether to categorize gig workers as independent contractors or employees detracts from the real issue: how best to protect "tens of millions who put together their own income streams and shape their own work lives," without destroying their ability to do so in the process.[134] In fact, fighting over whether to force workers into the binary classification of employee or independent contractor focuses on the wrong issue.[135] Instead, legal and political reformers should focus on whether gig workers require extra legal protections or whether they have welcomed and adapted to this emerging marketplace.[136] Traditional labor laws, developed in the era of factory work and life-time employment with a single employer, do not supply an adequate framework to govern the developing legal relationships between users, buyers, sellers, and workers within the gig economy.[137] Since the gig economy is so new, especially in the context of ride-hailing apps, this issue is ripe for discussion.

It is almost certain that forcing gig work into the employment category will promote a dearth of productivity and thwart fair and effectual resource distribution.[138] Put simply, it is unworkable.[139] What is more, cramming

131. *Id.*

132. Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 41 (Mar. 4, 2021) (to be codified at 29 C.F.R. §§ 780, 788, 795).

133. Richard Reibstein, Opinion, *Biden Independent Contractor Plan Sends Confusing Message*, LAW360 (Nov. 10, 2020, 3:12 PM), https://www.law360.com/articles/1327616?scroll=1&related=1 [https://perma.cc/NY73-TKUP]; Michelle Cheng, *How Far Will Uber Take Its New Legal Framework for Gig Labor?*, QUARTZ (Nov. 12, 2020), https://qz.com/1930610/what-passing-prop-22-in-california-means-for-gig-firms-like-uber/ [https://perma.cc/4676-DVA9].

134. FULL REPORT, *supra* note 43, at viii.

135. Perritt, Jr., *supra* note 4, at 54–55.

136. *Id.* at 54.

137. *Id.* at 55.

138. *Id.*

139. *Id.* at 54. Perritt's thesis is that "protecting gig workers as employees under traditional labor and employment law . . . is an intellectually lazy way of adapting law to

gig workers into employee classifications stymies the goals and ambitions of the very workers this course of action purports to protect.[140] If the California courts and legislature had gotten their way, ride-hailing apps would have been forced to fundamentally alter their foundational business models, even though traditional employee protections fail to correspond to drivers' actual concerns, including passenger dispute resolution and compensation levels.[141] The question we should ask is "not whether gig workers should be classified as employees or independent contractors; the relevant inquiry is whether they . . . need the government's help to strike a better deal with those that hire them."[142]

The historic distinction between independent contractor and employee grows increasingly outdated and ineffective when applied to the technology-driven gig economy. The gig economy did not exist when worker classifications arose.[143] Instead, labor laws that shaped employer classifications formed around a traditional work model where long-time, or even lifetime, employees produced goods or provided services for a single employer.[144] But this way of life has changed, and not many people work that way anymore.[145] California's effort to finagle gig workers into employee categorizations is like an attempt to shove a size nine foot into a size six shoe; it just will not fit. The way people work is changing, and the current laws surrounding gig work must adapt accordingly.

A viable solution is to increase protections for gig workers while preserving the worker autonomy that the independent contractor classification provides. Instead of frustrating individuals' efforts to obtain gig work by making it onerous for Uber and Lyft to even function, California lawmakers would do well to embrace this historic moment and promote the security and quality of independent work while safeguarding the innovation for which California was once renowned.[146] The passage of Proposition 22, providing increased wages, injury and automobile accident insurance, healthcare subsidies, and anti-discrimination and harassment protections, is a step in the right direction, although some criticize ride-hailing companies for failing to clearly explicate exactly what

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new technologies." *Id.* at 54–55. This is because "the nature of the legal relationships between buyers and sellers of work services in the gig economy is quite different from the structure of the relationship in a factory environment." *Id.* at 55.

140. *Id.* at 54.

141. *Id.* at 55–56.

142. *Id.* at 57.

143. Oranburg, supra note 1, at 8.

144. *Id.* at 15.

145. *Id.*

146. West, *supra* note 111.

Proposition 22 entails for drivers at the ground level.[147] Uber and Lyft desire to provide these protections all while safeguarding the autonomy, flexibility, and freedom that drivers desire. But only time will tell whether the California legislature will continue to permit this to happen.

CONCLUSION

The distinction between independent contractors and employees is centuries old, shaped by the law of agency, labor laws, factory work, and the traditional ideals of what it means to work a steady, nine-to-five job until retirement. However, the technological boom of the twenty-first century has rocked foundational worker classifications and increased the difficulty of categorizing workers. In particular, Uber and Lyft's ride-hailing technology has thrown a wrench into settled notions shaping what it means to be an employee entitled to many benefits, as opposed to an independent contractor entitled to few or no benefits.

In opposition to preserving the personal and financial freedom drivers desire most, California attempted to impose trenchant legislation making drivers presumptive employees. This would have thwarted Uber and Lyft's ability to offer transportation to the public and work to individuals. Instead of clinging to outdated notions of strict employee and independent contractor delineations, California, and the rest of the nation, would do well to embrace alternate solutions for classifying gig workers. The passing of Proposition 22 reveals a glimmer of hope that California is willing to adapt to change. As technological advances continue and society evolves, so must the law.

*Savannah M. Singletary**

147. Suhauna Hussain & Johana Bhuiyan, *Prop. 22 Passed, a Major Win for Uber, Lyft, Doordash. What Happens Next?*, L.A. TIMES (Nov. 4, 2020, 7:06 PM), https://www.latimes.com/business/technology/story/2020-11-04/prop-22-passed-what-happens-next [https://perma.cc/X3C4-QD6N].

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