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THE GIG-ECONOMY WAR: THE DRIVE TOWARDS REGULATING RIDESHARE EMPLOYMENT MISCLASSIFICATION

Inae Cavalcante¹

I. INTRODUCTION

For such an omnipresent activity in the life of most Americans,² little attention is given to employment classification. The terms *employee* or *independent contractor* are seen as mere legal technicalities that for the layperson might only signify their tax withholding strategy. However, making a distinction between the two requires more than just monetary consideration. Rather, it signifies protection under the law.

By default, the absence of a federal employment classification entrusts the responsibility to address this issue to each state. In California, the definition of *employer* is the person who “employs or exercises control over the wages, hours, or working conditions

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2 See U.S. DEPT. OF LAB., BUREAU LAB. STATS., THE EMPLOYMENT SITUATION--DEC. (2022). This report details the United States national labor statistics. They report that the United States unemployment rate was 3% at the time of report publication.

of any person.”³ Following this definition, an employee is a person employed to perform services in the affairs of another and who—with respect to the physical conduct in the performance of the services—is subject to the other’s control or right to control.⁴ As a consequence of the employer and employee relationship, the employer is liable to “wage order protection to *all* workers”⁵ who are engaged in the business.⁶ In contrast, an independent contractor is a person engaged in their business without the supervision of an employer. When an independent contractor provides their service, the contractee is not legally liable for any costs or responsibilities towards the workers.⁷ The gig-economy model is characterized by a system of free markets where businesses hire independent workers for short-term commitments.⁸ Within the gig-economy, rideshare apps such as Uber Technologies, DoorDash, GrubHub, and others are woven into the fabric of the American economy as many households depend on their services regularly. The gig-economy is remarkable because it has revolutionized the traditional employment model. Workers have a new capacity to work at any time and from any place.

To determine employment classifications of gig-economy workers, the California Courts established the Borello Test. It carries different factors that are used to properly define if a person who provides service to a business should be classified as an employee or an independent contractor. The ideation and implementation of this employment framework was born out of compensation and law

3 Martinez v. Combs, 231 P.3d 259, 263–66 (Cal. 2010).

4 Richard Buxbaum, *Agency, Partnerships & Limited Liability Co.*, U.C. BERKELEY SCH. OF L. (Spring 2018) <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fid=12067>.

5 Wage orders refer to minimum wages, required meal & rest breaks.

6 Dynamex Operations W., Inc. v. Superior Ct., 4 Cal.5th 903, 913, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018).

7 *Id.* at 913

8 Ben Lutkevich, *What is the Gig Economy*, TECH TARGET (Nov. 2022), <https://www.techtarget.com/whatis/definition/gig-economy>. The usage of *gig* in the nomenclature is a colloquial term for a position with a set duration.

protection claims in the California courts.⁹ However, the Borello Test hasn't succeeded at wrestling with the ascension of the new gig-economy labor model.

Due to these innovative employment conditions stemming from the popularity of the gig-economy, the California Courts were faced with reassessing the increasingly obsolete Borello Test for this new workforce. The biggest case against a rideshare app company was brought to the California Courts in 2013 in *O'Connor v. Uber Technologies*. *O'Connor* challenged the drivers' classification claiming that the drivers were being misclassified as independent contractors based on their relationship with Uber. When using the Borello Test to classify drivers who offer their services to rideshare apps, the test became ambiguous and did not address the factors that make this new market so unique, such as schedule and location flexibility.

In turn, the California Assembly passed new legislation known as Assembly Bill 5 in 2019. It contained the guidelines for the ABC Test and is known as The Gig-Economy Law because it addressed, in a clearer manner, the rideshare app drivers' employment classification. According to the ABC Test, the drivers are classified as employees.¹⁰ However, this movement towards enforcing employment classification in the gig-economy incited a significant legal response from rideshare app companies as the decision to legally classify as independent contractors was at stake. Uber, the world's most valuable ride-share company¹¹ and primary focus of this article, defended itself in this way:

9 See also *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 59 Cal. 4th 522, 173 Cal. Rptr. 3d 332 (2014); *Lara v. WORKERS' COMP. APPEALS BD.*, 182 Cal. App. 4th 393, 105 Cal. Rptr. 3d 769 (Ct. App. 2010); *Duffey v. Tender Heart Home Care Agency, LLC*, 31 Cal. App. 5th 232, 242 Cal. Rptr. 3d 460 (Ct. App. 2019).

10 Complaint for Injunctive Relief, Restitution, & Penalties at 266, *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266 Cal Rptr. 3d 290 (2020) (No. CGC-20-584402)

11 Uber Newsroom, *The Hist. of Uber*, UBER (Nov. 2022), <https://www.uber.com/newsroom/history/>. Uber Technologies was founded in 2009 and quickly grew to become the world's most valuable startup.

In this litigation, Uber bills itself as a “technology company,” not a “transportation company,” and describes the software it provides as a “lead generation platform” that can be used to connect “businesses that provide transportation” with passengers who desire rides. Docket No. 213 (Colman Decl.) at ¶ 6. Uber notes that it owns no vehicles, and contends that it employs no drivers. *Id.* Rather, Uber partners with alleged independent contractors that it frequently refers to as “transportation providers.”¹²

In opposition to the allegation that Uber was a transportation company, Uber argued that their main product was their software that connected drivers to passengers rather than the service itself. Uber’s focus on software eliminated any possibility of misclassifying its workers since it technically did not have its own employees. In a general perspective, Uber disagreed with the idea that their drivers were employees considering all the flexibility they received as independent contractors. Throughout the present article, the issues associated with Uber’s viewpoint will be addressed and juxtaposed with the voice of the plaintiffs, or drivers.¹³

In light of this debate, rideshare app companies funded the historical ballot measure Proposition 22, passed in California in December 2020. This proposition had the goal of ending the dispute by unequivocally labeling rideshare app drivers as independent contractors. The California Courts have pending litigation regarding the constitutionality of Proposition 22.¹⁴ The customarily lengthy legal procedures associated with the pending litigation are delaying drivers’ right to proper classification. While the ruling is imperative for the future of the employees of the gig-economy, a more permanent solution lies in new company policies and reforming the ABC Test. This article suggests a successful resolution to the gig-economy war

12 O’Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133 (N.D. Cal. 2015).

13 *Id.* at 1137

14 *Castellanos v. State of California*, No. RG21088725 (Alameda Co. Sup. Ct. Aug. 20, 2021) (ord. granting petition for writ of mandate)

that would consist of mutual benefits for rideshare apps and drivers alike through a more precise test for employment classification.

II. BACKGROUND

With the emergence of the gig-economy, the doctrine distinguishing independent contractors from employees is extremely relevant to the state of California and to the nation due to the growing number of workers who engage in this market. The gig-economy draws its labor force from independent contractors and freelancers with the express purpose of assigning these workers to temporary and part-time positions. The gig-economy gained popularity in 2008 largely due to the employment opportunities it offered amid the financial crisis. While remaining strong in the following decade, it gained further momentum during the COVID-19 pandemic by growing 33% in 2020 in the U.S. alone. This jump contributed to the 1.1 billion gig workers that currently exist worldwide. Future projections estimate that about half of the U.S. population will have participated in the gig-economy by 2024.¹⁵ Because participation in the gig-economy is so widespread, a complete understanding and application of employment classification proves imperative.

Regarding employees, the California Supreme Court stated that the pertinent question was “not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise.”¹⁶ Even with such a binary relationship, courts may review other pertinent facts and circumstances of the relationship, such as (a) whether or not the one employed is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employers or the workman supplies the

15 Marcin Zgola, *Will the Gig Economy Become the New Working-Class Norm?*, FORBES BUS. COUNCIL (Oct. 2022), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/?sh=4b7b94ffae66>.

16 *O'Connor v. Uber Techs., Inc.*, 82 F. Supp.3d 1133, 1139 (N.D. Cal. 2015).

tools, instrumentalities, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) whether or not the work is a part of the regular business of the employer; and (h) whether or not the parties believe they are creating the relation of employer and employee.¹⁷

According to California's wage and hour laws, minimum wage, overtime, meal periods, and rest breaks are rights granted to employees.¹⁸ In the same manner, workplace safety laws and retaliation laws protect employees but not independent contractors. Additionally, employees can go to state agencies such as the Labor Commissioner's Office to seek enforcement of these laws; independent contractors must resolve their disputes and enforce their rights through other means. Thus, the law offers far more space under its protective umbrella for employees than independent contractors.

The gig-economy, namely Uber Technologies, has neatly nestled itself into the interstitial space between both classifications. While Uber portrays their partners—or those who engage in work with Uber—as independent contractors, the onboarding process would indicate otherwise. One is required to upload their driver's license information as well as vehicle's registration and insurance during the initial application. Passing a background check, a city knowledge test, and bringing the car to an interview with an Uber employee¹⁹ are also required pre-employment activities. Upon completion of the application stage, the driver must sign a contract with Uber to which they have no bargaining power. Uber retains the ability to terminate the relationship with the drivers at any time through their rating system. If a driver has less than 4.6 stars, Uber reserves the right to end the relationship with the driver. The contract also dictates the relationship of independent contractors and the fee or payment that drivers will receive upon completion of each ride. The employment contract explains that Uber sets fares based on the miles traveled by

17 Richard Buxbaum, *Agency, Partnerships & Limited Liability Co.*, U.C. BERKELEY SCH. OF L. (Spring 2018) <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=12067>.

18 California Lab. Code §1197 (2011).

19 *O'Connor*, 82 F. Supp.3d at 1136.

the rider and the duration of the ride.²⁰ Because Uber receives the rider's entire fare, the employment contract stipulates that Uber will automatically deduct its own fee per ride before it remits the remainder of the fare to the driver.

The nature of the non-negotiable employment contract generates plenty of discussion points. Drivers remain responsible for obtaining their own mode of transport or work tools, but they report to Uber and follow company guidelines. Uber does not supervise scheduling of drivers. However, Uber's rating system supervises the quality and occurrences during the time that the drivers are working. Contracts are unilateral, but drivers benefit from the service they perform through offering rideshares with no limit to the number of rides.

The following cases will illustrate the injustices of employment classification as presented above:

A. S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989)

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, an employer failed to comply with worker's compensation for cucumber harvesters through the assumption that the harvesters were independent contractors.²¹ The California Courts argued that a work details test should be applied. They considered the nature of the work and the agreement between parties. An eight-factor test was established to determine classification, and the suit ultimately classified the harvesters as employees.²² The eight factors that determine employment classification according to the Borello Test are:

- (a) whether the one performing services is engaged in a distinct occupation or business;

20 *Id.* at 1136 (Taken from Coleman Depo. at 187:20-188:16).

21 *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 256 Cal. Rptr. 543, 769 P.2d 399, 410 (Cal. 1989).

22 *Id.* at 410.

- (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (c) the skill required in the particular occupation;
- (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) the length of time for which the services are to be performed;
- (f) the method of payment, whether by the time or by the job;
- (g) whether or not the work is a part of the regular business of the principal; and
- (h) whether or not the parties believe they are creating the relationship of employer-employee.²³

While a start in the right direction, the Borello Test did not address crucial factors such as the contract bargaining power and proportion of revenues generated and shared (in the context of rideshare apps, the cost of a ride and a driver's profit).²⁴ The Borello Test has shown efficiency and positive results in general employment classification. However, it struggled to adapt to the gig-economy due to the difference in market models.

B. Martinez v. Combs (2010)

The Supreme Court of California established the meaning of *employ* and *employer* in *Martinez v. Combs* in 2010. In this case, seasonal agricultural workers were not receiving minimum or overtime wages from their employer, Munoz & Sons. The workers sought to recover wages according to the California Labor Code.²⁵ The Court deemed the language in the California Labor Code imprecise and adopted a definition of *employer* as the person who “employs or exercises control over the wages, hours, or working conditions of

23 *S.G. Borello* at 48 Cal.3d 341, 367-368.

24 *O'Connor v. Uber Techs., Inc.*, 82 F. Supp.3d 1153 (N.D. Cal. 2015).

25 California Lab. Code §1194.

any person.²⁶ This case further established how employment classification should be determined, but it failed to address the emerging gig-economy.

C. Dynamex Operations W. v. Superior Court (2018)

Dynamex is a carrier company based in CA. They work with delivery, same day delivery, and on-demand delivery to the public and to their business customers, such as Office Depot and Home Depot. Its drivers had always been classified as employees, but in 2004, Dynamex decided to change their employment classification. The reason was solely associated with the costs saved with this classification. In turn, drivers had to provide their own vehicle, pay for gas, insurance, taxes, and so forth. A class action lawsuit ensued, prompting the court to rule in favor of drivers, stipulating that they were being wrongly misclassified. This case catalyzed the rise of the ABC Test. On April 30, 2018, the California Supreme Court enacted a new standard for determining employment status. The ABC Test targets independent contractors. According to the ABC Test, an independent contractor must meet the following criteria:

- (A) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) the person performs work outside the usual course of the hiring entity's business; and
- (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.²⁷

According to this test, the employer has the burden to prove that a worker, or a driver in this article's scenario, is an independent contractor. While all three factors challenge Uber's current situation,

26 Martinez v. Combs, 231 P.3d 259, 263–66 (Cal. 2010).

27 Dynamex Operations W., Inc. v. Superior Ct., 4 Cal.5th 903, 913, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018).

item “B” directly conflicts with the rideshare apps’ business model. Contrary to their legal argument, Uber’s primary service is transportation, not software.²⁸ It is clear that drivers engage in the central service of the business. Without the drivers, the software would have little application in the economic world. Although the ABC Test seems very beneficial to drivers, it currently only applies to California wage orders which limits the scope of the test.²⁹

Because of the *Dynamex* ruling, labor unions and gig companies lobbied the California legislature to alter the scope of the employment law statutes. While rideshare companies were interested in a revision to *Dynamex* that would either ease the criteria for determining whether a worker qualifies as an independent contractor or clearly spell out exceptions for on-demand platform providers, labor unions pushed for the legislature to cement the *Dynamex* decision into law.³⁰

D. California Assembly Bill 5 (2019)

Pursuant to the lobbying of labor unions, Governor Gavin Newsom signed Assembly Bill 5 in September 2019 which, conforming with *Dynamex*, turned the ABC Test into an official employment status test. Some of the arguments in favor of this bill were “the harm to misclassified workers who [would] lose significant workplace protections,”³¹ the loss of revenue to the state, and the unfairness to companies that compete with companies that misclassify workers.³² Additionally, the bill covers all the aspects of the California

28 O’Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1138 (N.D. Cal. 2015).

29 Miriam A. Cherry, *Proposition 22: A Vote on Gig Worker Status in California*, ST. LOUIS U. COMPAR. LAB. L. & POL’Y J. (2021).

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

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

32 *Id.*

Labor Code. Exempt to this test and classified by the Borello Test are: lawyers, accountants, engineers, architects, investment advisors, physicians, surgeons, dentists, psychologists, and veterinarians.³³ The existent exceptions to AB-5 are due to different organizations' lobbying efforts.³⁴ This legislation was targeted at the gig-economy employers. Even while AB-5 puts forth the right intention to avoid misclassification, the legislation still needs to be improved to prevent enforcement gaps such as health insurance, overtime, mealtime, and so forth.

Rideshare companies such as Uber and Lyft did not comply with the changes. Uber and Postmates, another rideshare app, filed a lawsuit in federal court challenging the constitutionality of AB-5.³⁵

E. O'Connor v. Uber Technologies (2013)

In attempting to address the enforcement gaps of Uber Technologies, *O'Connor v. Uber Technologies*³⁶ was brought to the California courts in 2013 and made history as the first judicial attempt to challenge Uber's preying upon employment misclassification. In *O'Connor*, plaintiffs claimed that Uber exercised considerable control and supervision over the drivers' work through their termination policy that entailed conduct with customers, the cleanliness of their vehicle, compliance with waiting time to pick up customers, and their general conduct.³⁷ Uber countered plaintiffs by stating that drivers had the freedom to set their own hours and work schedule. This case sought to establish drivers' rights and reimbursement processes for the misclassification of employment in addition to minimum wage

33 *Id.*

34 Miriam A. Cherry, *Proposition 22: A Vote on Gig Worker Status in California*, ST. LOUIS U. COMPAR. LAB. L. & POL'Y J. (2021).

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

36 *O'Conner v. Uber Tech., Inc.*, No. CV 13-3826-EMC (N.D. Cal. Oct. 7, 2013).

37 *Id.*

violations, overtime, mealtime, and premiums claims.³⁸ The lawsuit also incorporated violations to the Federal Fair Labor Standard Act (FLSA), 29 U.S.C §§201 *et seq.* that required reimbursement for the minimum wage claims for the hours that drivers had worked, as well as overtime for all the hours that exceed forty per week.³⁹

If drivers were classified as employees and not independent contractors, they would be entitled to all the protections of the California Labor Code including gas and vehicle use reimbursement.⁴⁰ *O'Connor* primarily based its argument in the *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*⁴¹ case where the California Supreme Court established the Borello Test to include whether the potential employer has all necessary control over the manner and means of accomplishing the result desired, although such control need not be direct, actually exercised, or detailed. After the ABC Test became effective, *O'Connor* switched and used the ABC Test as its central argument. Through the rise of *Dynamex* and its ABC Test, “Uber bears a hefty burden to establish that its drivers are not employees, since they are presumptively considered employees and Uber can only overcome that liberally construed in a manner that serves its remedial purposes.”⁴² The ABC Test contains additional criteria of discernment between employees and independent contractors that the Borello Test failed to include. The Court determined that Uber’s claim of being a technology company rather than a transportation company was not creditable since the argument focused on the intricacies of the platform more than on the service that the company aims to provide.⁴³ *O'Connor* resulted in a settlement between the parties.

38 California Lab. Code §226.8 & §2753.

39 *Id.*

40 California Lab. Code §2802.

41 *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989).

42 *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1147 (N.D. Cal. 2015)

43 *Id.* at 1141.

F. Proposition 22

The positive legacy of the *O'Connor*⁴⁴ verdict failed to endure with the introduction of Proposition 22 on November 03, 2020.⁴⁵ This regulatory measure was proposed during the COVID-19 pandemic due to a number of factors. First, there was a sudden increase in the number of drivers given the unemployment conditions brought by the pandemic. Second, the high demand for food and grocery deliveries created demand for more delivery drivers. Third, it was meant as a definitive response to the misclassification matter after AB-5 seemed to permanently change the gig-economy. Proposition 22 largely benefited the corporations at fault in misclassifications. The same duality expressed in the factors that Uber used for the employment classification can be found in this legislation, demonstrating that Proposition 22 was written by app companies for app companies. While this legislation offers minimum earnings of 120% during engaged time – the time between when a driver accepts a ride or delivery until the time the driver completes it – there is no guaranteed protection or enforcement by the California Labor Code. Drivers spend about 33% of their time waiting and only get paid for 67% of their time.⁴⁶ Similarly, issues are found within the related commitments such as mileage compensation, health care subsidies, medical and disability coverage, and protection against discrimination and sexual harassment. Proposition 22, in the attempt to improve work conditions for drivers that still favor companies, has created a new employment classification whereby drivers are still independent contractors, but they receive more protections than a typical independent contractor outside the gig-economy.

44 See generally *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015)

45 Prop. 22, Amends Bus. & Prof. and Rev. & Tax. Code (2020).

46 Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees only \$5.64 an Hour*, U.C. BERKELEY LAB. CEN. (October 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>.

Proposition 22 was recently ruled unconstitutional by Superior Court Judge Frank Roesch as part of a lawsuit filed by the Service Employees International Union against the state of California. The argument's premise relied on the logic that Proposition 22 regulations have infringed on the power explicitly granted to the California Legislature to regulate worker's compensation.⁴⁷ While the merits of Proposition 22 and the associated constitutionality will not be addressed in this article, it is important to understand that no employment classification test or proposed legislation has yet resolved the misclassification issues in the gig-economy world, and Proposition 22 makes this reality explicit. With Proposition 22, the ABC Test could not be applied to rideshare app drivers. Thus, this article seeks to bring a reformed classification test that will be tailored to the needs of the gig-economy and will abide by the California Labor Code and legislative regulations.

III. PROOF OF CLAIM

The current scenario in California illustrates that no employment test has been successful in adequately classifying gig-economy drivers. Even with the rise of Dynamex, the ABC Test⁴⁸ has been an important, albeit incomplete tool in determining employment classification. Misclassification incurs a direct relationship between employer liability and workers' protection. Additionally, misclassification of workers as independent contractors has been a crucial reason "in the erosion of the middle class and the rise in income inequality."⁴⁹ A UC Berkeley study showed that Uber and Lyft have accumulated over \$413,000,000 by not paying into California's unemployment fund from 2015-2020.⁵⁰ As employer liability

47 *People v. Castellanos*, No. H032865 (Cal. Ct. App. Aug. 11, 2009).

48 *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). The Borello test has shown similar efficiency and results, however, it is not the focus of this article.

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

50 Rebekah Didlake, *The Gig Economy's Battleground – California Proposition 22*, GOLDEN GATE U. SCH. OF L. REV. BLOG., Sep. 2020

diminishes, so does employee protection. The present article focuses on the consequences of this relationship by promoting the claim that California's employment classification test, known as the ABC Test, should be reformed and tailored to address the specific demands of gig-economy workers and companies alike.

The purpose of this proposed alteration to the ABC Test is not to prescribe or incentivize Uber or any rideshare app to change its business models in an operational way. The flexibility and extra income that these technological platforms provide persist as fundamental innovations and offer efficiencies for drivers and consumers alike. In fact, when Uber drivers were asked whether they preferred to be classified as independent contractors or employees, many still opted for an independent contractor classification, since it would not bring change to the flexibility that many search for when working for Uber.⁵¹ In a scenario where the population fully understood their rights, the outcome of a reformer test would not be necessary. Perhaps, AB-5 would have been celebrated by all rideshare app drivers. After one of the rideshare companies, Lyft, threatened to discontinue operations in California upon hearing that they were required to comply with the AB-5,⁵² it was clear that the drivers would face harsher consequences than their multi-billion-dollar employers. In order to survive, both sides must be appeased.

Gig-economy classification issues will only be settled if both sides have a symbiotic relationship. This article puts forth a fairer test for employment classification that suggests a mutually beneficial relationship between companies and drivers. However, this test may require some procedural changes according to the companies' discretion if they would like to resume the independent contractor classification to fit a reformed ABC Test.

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- 51 Harry Campbell, *Lyft & Uber Driver Surv. 2020: Uber Driver Satisfaction Takes a Big Hit*, THE RIDE SHARE GUY (Oct. 2022), <https://therideshareguy.com/uber-driver-survey/>.
- 52 Kate Conger, *Relieve for Uber and Lyft After Threat to Shut Down*, N.Y. TIMES, Aug. 21, 2020, at B-5.

A. Opposition to AB-5

According to the California Labor Code, the rise of AB-5 meant that employers would be responsible for ensuring that their employees were compensated per minimum wage and overtime requirements. When speaking about AB-5, Uber's Chief Legal Officer Tony West stated that Uber would still pass the test and prove that their drivers were in fact independent contractors.⁵³ In the same declaration, West made it clear that Uber would not file for an exemption from AB-5, but that it would target their efforts to overturn the bill and fight for more driver-based policies. Uber indeed followed through on West's statement and pushed for Proposition 22, an app driver based legislation that created a third employment classification which guaranteed that drivers would receive benefits as independent contractors.⁵⁴

With AB-5 in effect, Uber has incorporated a new function in its app that supports its argument that it is a technology-based company. Through this new feature, drivers may connect with open gigs such as bartending, cleaning, and warehouse work.⁵⁵ This promotes the idea that Uber's central business is the software rather than the ride service. It could also be used as a strong counterargument to whether their drivers are truly employees.

The main reason AB-5 might not be beneficial takes root in that Uber and Lyft have made threats to cease operations in California if they were legally obligated to comply with AB-5. Even though this is a calculated strategy to gain public endorsement against AB-5,⁵⁶ the

53 Tony West, *Update on AB5*, UBER NEWSROOM, Sep. 12, 2019.

54 Brian A. Brown II, *Your Uber Driver is Here, but Their Benefits are Not: The ABC Test, Assembly Bill 5, and Regul. Gig Economy Emps.*, 15 BROOKLYN J. OF CORP., FIN. & COM. L. 183 (2021).

55 Peter Talbot, *Uber Launches An App to Connect Job Seekers with Gig Work*, NPR, Oct. 3, 2019.

56 Brian A. Brown II, *Your Uber Driver is Here, but Their Benefits are Not: The ABC Test, Assembly Bill 5, and Regul. Gig Economy Emps.*, 15 BROOKLYN J. OF CORP., FIN. & COM. L. 183 (2021).

economic loss would be more financially crippling to drivers than to Uber.

Many critics of AB-5 argue that a bill of this nature should not be celebrated but feared, since the government is interfering with how businesses are conducted.⁵⁷ While this puts forth a valid argument, the intention of AB-5 has always been to protect independent contractors that are misclassified as employees. Unfortunately, AB-5 has been used as a double-edged sword that protects drivers' rights but threatens their employment.

In addition to arguments for and against AB-5, the Courts should consider adding the following factors that are not found in the ABC Test:

- 1) Potential remedies for employment misclassification through the reformer six factor test provided by this article;
- 2) A clear provision for enforcement of the test; and
- 3) Application of the California Code Sections 226.8 which addresses drivers' rights and reimbursement processes for the misclassification of employment in addition to minimum wage violations, overtime, mealtime, and premiums claims as a measure for penalties.⁵⁸

B. Proposition 22

The ballot initiative known as Proposition 22 was put forth in 2019 by app-based businesses including Uber, Lyft, and DoorDash as a response to the passage of AB-5. In order to receive support from the local population, those rideshare companies used advertisements on TV, social media, and their drivers as a way to convince people that Proposition 22 would improve rather than restrict drivers' benefits. This is exemplified by a poll of California voters that revealed that 40% of "yes" voters believed that they were improving the work

57 Jennifer Wright, *Why California's AB-5 is a Threat to the American Way of Life*, N.Y. POST, Oct. 26, 2019.

58 Brian A. Brown II, *Your Uber Driver is Here, but Their Benefits are Not: The ABC Test, Assembly Bill 5, and Regul. Gig Economy Emps.*, 15 BROOKLYN J. OF CORP., FIN. & COM. L. 183 (2021).

conditions of the gig-economy workers.⁵⁹ Others claimed that they were unaware that they were choosing between “an arbitrary set of supplemental benefits... designed by the gig companies.”⁶⁰ Proposition 22 officially classifies drivers as independent contractors and gives space for loopholes that deny nearly all employee rights under state law to workers who use ride-hailing and food-delivery apps, including the right to a minimum wage, time-and-a-half for overtime, expense reimbursement, unemployment insurance, and state workers’ compensation. As previously stated, this article does not seek to address the constitutionality of Proposition 22. However, the enforcement of this legislation validates the relevance of a proper employment classification. According to Alameda County Superior Court Judge Frank Roesch:

A prohibition on legislation authorizing collective bargaining by app-based drivers does not promote the right to work as an independent contractor, nor does it protect work flexibility, nor does it provide minimum workplace safety and pay standards for those workers. It appears only to protect the economic interests of the network companies in having a divided, un-unionized workforce, which is not a stated goal of the legislation.⁶¹

C. Necessary Measures: Full-time employees, part-time independent contractors

In addition to a new employment test, another approach to settle the misclassification issues would be having full-time employees and part-time independent contractors within the rideshare app companies.

59 Faiz Siddiqui & Nitasha Tiku, *Uber and Lyft Uses Sneaky Tactics to Avoid Making Drivers Emps. in California, Voters Say. Now They’re Going Nat’l*, WASHINGTON POST, Nov. 17, 2020.

60 *Id.*

61 *People v. Castellanos*, No. H032865 (Cal. Ct. App. Aug. 11, 2009).

California full-time employee status implies that the company exercises control over a person's business hours. Rideshare apps should include in their contract the option to work full-time or part-time as a driver. When opening up this possibility to the gig-economy, Uber drivers who would become employees would receive all the protections under the California Labor Code or become a part-time independent contractor.

Employees would be entitled to protections under the California Labor Code. If Uber does not comply with the benefits entitled to this classification, they will be held responsible for paying all future claims for unpaid wages, minimum wage, overtime, meal period, rest period premiums, expense reimbursements, according to the California Labor Code section 203.⁶²

Independent contractors should have the similar rights and obligations required by a part-time employee. They should work less than 40 hours a week but be entitled to receive minimum wage. To prevent drivers from using the platform as a full-time driver when they have indicated their preference for the part-time option, rideshare apps should adjust their software to limit the number of hours for part-time drivers. Another functional modification that Uber would enact includes lifting the limitations that are put forth by its algorithms such as indirect penalties for not accepting three rides in a row, discriminatory bonuses, and so forth.⁶³ In the current scenario, the flexibility that is advertised is not solely adopted.⁶⁴ The algorithm discriminatorily gives bonuses to drivers that can work

62 California Lab. Code §203

63 "Uber drivers are data is managed by semi-automated systems that track their acceptance rates, time on trips, speed, ratings from customers and makes determinations, such as whether a driver's account should be deactivated, based on this information." Lawrence Mishel, *Uber Drivers are Not Entrepreneurs*, ECON. POL'Y INST., Sept. 20, 2019, at 1, <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1345&context=bjcfcl>

64 See generally Harry Campbell, *Lyft & Uber Driver Surv. 2020: Uber Driver Satisfaction Takes a Big Hit*, THE RIDE SHARE GUY (Oct. 2022), <https://therideshareguy.com/uber-driver-survey/>.

“when and where”⁶⁵ the company needs them, since Uber has features that allow passengers to schedule rides on-demand.

The attempt to settle this issue by having full-time employees and part-time independent contractors would benefit drivers and Uber alike: drivers who committed to Uber due to its full-time promises would have the chance of becoming employees and receiving all the benefits and protections previously discussed. For Uber, the constantly advertised opportunities for full-time employment on their website would be fulfilled, and the arguments that they are misclassifying their drivers would be undermined. Additionally, it is advantageous for Uber from a tax perspective. For the IRS, it is not about the number of part-time employees that a company has that determines tax payout—it is the number of hours that they work that is taken into consideration. If Uber has “part-time independent contractors,” they omit this obligation. Summarizing the reasons for full-time drivers to become employees is as follows:

- 1) Uber would have the control, or the possibility of control, of most of a driver’s business hours
- 2) The full-time driver’s work would consist of Uber’s principal source of revenue, which is consistent with an employer and employee relationship.
- 3) Full-time drivers would ensure that the company’s duties would be fulfilled as there would be a guarantee that a certain number of drivers would be available for 40 hours a week.
- 4) The driver would be accepting the implied offer of full-time work, and Uber would be their main source of income.

D. The Reformed Six Factor ABC Test

In undertaking employment classification *tailored to* the gig-economy’s rideshare apps, the following six factors can serve as a

basis for courts to determine whether a driver is an independent contractor or an employee:⁶⁶

- 1) whether the driver is providing service to the business entity for less than 40 hours per week
- 2) whether the driver needs to make significant alterations and/or purchases for the tools of work to satisfy the job demands
- 3) whether the platform is scrupulously exercising control over the work
- 4) whether the driver's primary source of income comes from their gig-economy employment
- 5) whether the company is only composed of independent contractors solely to perform the company's duties
- 6) whether the parties believe they are creating the relation of employer and employee.⁶⁷

Each of these factors will be addressed below in sequential order.

- 1) Whether the driver is providing service to the business entity for less than 40 hours per week

If a driver is providing services for the business entity, in this case the rideshare app, for less than 40 hours per week, the driver is working part-time according to California labor law.⁶⁸ For drivers who work 40 hours per week, once it is established that they are working full-time for a consecutive period of time, customarily 90

66 Some of the factors below were inspired by the Borello test but adjusted to the needs of the gig-economy. For more information, see *Borello* under background.

67 *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989).

68 California Lab. Code Section 515(c)

days⁶⁹, this driver must be considered a full-time worker and receive all the benefits entitled to this classification.⁷⁰

2) Whether the driver needs to make significant purchases and/or alterations for the tools of work to satisfy the job demands

Conventionally, Uber requires precise specifications in the vehicles that are their service. For instance, in Orange County, CA, Uber requires a 15-year-old or newer 4-door vehicle with no cosmetic damage, commercial branding, taxi-style paint, or permanent stains. Additionally, they require the same color for hoods and doors. While this consists of a target specific to the classification of employees, not placing any guidelines for vehicle specifications would be unacceptable since Uber provides service to the public. Therefore, Uber should provide a stipend to its full-time employees to guarantee standardized vehicle practices. Part-time independent contractors should only be hired if they already possess a compliant vehicle, and they should not be provided a stipend.

3) Whether the platform is scrupulously exercising control over the work

As determined in the ABC Test, employers are entitled to supervise and direct employees' work. The control over one's work is a pivotal factor in defining employment relationships and perhaps the main factor that courts take into consideration when making an employment classification decision.⁷¹ In Uber's case, the extent to which the company can exercise control over drivers is fairly ambiguous. Uber alleges that their main product is the *technology* that connects drivers to passengers, not the rides per se.⁷² Additionally, they

69 Most companies have a 90-day probationary period before hiring their employees. The same policy could be used by Uber in determining if a driver should become an employee.

70 For more information regarding part time v. full time employees, please refer to Proof of Claim: *B) Proposition 22*.

71 O'Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1138 (N.D. Cal. 2015).

72 *Id.*

do not control or own drivers' schedules and cannot define the routes or require drivers to wear a uniform.⁷³ While this is an accurate description of Uber's practices according to the original ABC Test,⁷⁴ to claim that Uber lacks control over the drivers is a misconception.⁷⁵ Becoming an independent contractor for Uber Technologies requires that a driver completes an onboarding process, interview, and a test.⁷⁶ Once this process is complete, Uber drivers can access the software where they agree to Uber's terms of service, connect with passengers, check for ride fare, and receive evaluation through Uber's rating system. The execution of these procedural actions, according to the traditional ABC Test, reclassifies Uber independent contractors as employees since Uber is exercising an amount of control specific to an employer-employee relationship.

When considering the control that the platform exercises over its drivers, this reformed test focuses not on the control that a rideshare app has over its drivers but in the manner that this control affects its drivers. In the case of Uber and several other rideshare apps, it seems imprudent that the platform would exercise no control. To an extent, drivers need supervision due to the nature of their work. They are connected to the people with whom they have no association other than through Uber.

To avoid exercising unfair control over drivers' works, for independent contractors, rideshare platforms should not prevent drivers from working due to the onboarding process. Rather, they should focus on a driver's ability to perform the task. Another way that Uber controls drivers' work is through their platform. Adjusting the platform

73 Although Uber has features such as a shared driver profile, sharing live route, or schedule a ride as extra features, those are intended only for passenger protection.

74 *Dynamex Operations W., Inc. v. Superior Ct.*, 4 Cal.5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (Cal. 2018).

75 Ben Z. Steinberger, *Note, Redefining 'Employee' in the Gig Economy: Shielding Workers from the Uber Model*, 23 *FORDHAM J. CORP. & FIN. L.* 577 (2018).

76 *O'Connor v. Uber Techs., Inc.*, 82 F. Supp.3d 1133, 1136 (N.D. Cal. 2015).

algorithm to not penalize drivers for not accepting three rides in a row if the fare is not desired, would prevent the unintended control. Finally, Uber should not terminate drivers through their respective rating system without additional investigation. By following these three propositions, Uber would have the right to classify their drivers as independent contractors, even though they are exercising some control in the employment process. Any opposed action would be an expression on employer-employee relationship which entitles drivers to be employees instead.

4) Whether the driver's primary source of income comes from their gig-economy employment

In the point above, the discussed conditions were solely in the control of the rideshare apps. It is acknowledged that whether or not the driver's primary source of income originates from their gig-economy job is not in the control of the companies, but it is a driver's personal decision. However, Uber directly advertises that those "looking for a full-time driver job" should "give Uber a try."⁷⁷ That claim may cause drivers to rely on the promises of a main income through the platform, since conventionally a full-time job is linked to a full-time income. The advertisement proves that Uber recognizes that many of its drivers' derive their primary source of income from the rideshare company. Therefore, the solution to the income factor must be linked to the part-time and full-time condition.⁷⁸

Those who would choose a full-time option should be classified as employees and abide by Uber's non-solicitation clause⁷⁹ that prohibits a driver from contacting any passenger and making arrangements to provide services outside of the platform. Those who would choose a part-time option should be freed from the non-solicitation clause as

77 Uber Newsroom, *Flexible Driving Opportunities with Uber*, UBER (Oct. 27, 2022), <https://www.uber.com/us/en/drive/>.

78 Please refer to Proof of Claim, *B) Proposition 22*

79 O'Connor v. Uber Techs., Inc., 82 F. Supp.3d 1133, 1142 (N.D. Cal. 2015).

a sign that drivers are able to have a source of income through the solicitation⁸⁰ that is beyond software usage.⁸¹

By allowing drivers to make a statement of their decision of employment status, their income dependence would be delineated. It would be clear to courts that a driver whose primary income comes from their gig-economy occupation is an *employee* and is entitled to all the rights pertaining to this classification.

5) Whether the company's source of revenue is only composed of independent contractors to perform the company's duties

Major rideshare apps claim that their product is the *technology* that they use to connect drivers to passengers. However, these companies' source of revenue comes directly from the work that the drivers perform and not through the sale of the technology. This creates an employer-employee relationship. This alone should be considered by the courts as a factor to classify all the drivers as employees. Making this assumption in the context of the gig-economy model, however, would drastically change companies' business models. This article is not calling for a complete overhaul of Uber's business model but rather the incorporation of minor, feasible and procedural changes. Therefore, Uber's main source of revenue could come from a proposed fee that drivers pay to use Uber's *technology*, such as a subscription, rather than deriving revenue based on ride fares. A subscription service format is conditioned to the independent contractor classification.

80 Uber Legal, *Uber Community Guidelines*, UBER (Oct 20, 2021). <https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=general-community-guidelines>. This should not overrule Uber's "post-trip" contact guidelines. As Uber asserts, "Unwanted contact can be seen as harassment and includes, for example, texting, calling, social media contact, visiting, or trying to visit someone in person after a trip or delivery has been completed." What it refers to is the capacity that drivers must conduct a similar type of business after completing a ride as an Uber passenger. Uber Community Guidelines,

81 *Id.*

6) Whether the parties believe they are creating the relation of employer and employee⁸²

As the Borello test exemplified, a person's understanding of the employment relationship can be a significant factor in determining the correct classification. However, there is little evidence suggesting that gig-economy workers fully understand what is required for their classification. They see the flexibility of work, the supplemental income, and the limited autonomy as a pretext for the lack of benefits, support, and rights. It is only when they feel "wronged" by Uber from having their account deactivated that they realize the disadvantages associated with their independent classification. Uber's terms of service asserts that the individual driver is "an independent company in the business or providing transportation" and an "independent contractor." In regards to the relationship of the parties, Uber says that is "solely that of independent contracting parties."⁸³ Uber makes the expectation that drivers should have regarding the employment relationship clear, but they do not make it clear what their classification entails. Drivers should have a better understanding and a listing of independent contractor duties that both parties are subjected to. The following must be made clear to drivers: tax obligations (they must understand that a 1099 form will be generated, and the burden of filing taxes is theirs), freedom of schedule, algorithm explanation, and Uber support's limitations. Currently drivers and passengers alike understand that as soon as they are utilizing the Uber app, the driver is an Uber representative and not an independent driver.⁸⁴

82 *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989).

83 *Uber Terms of Serv. 13.1*, RAISER, LLC (November 10, 2014), https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%2010%202014.pdf

84 Sarah Burns & Mike Whelan, *What's in the Uber Driver's Terms of Serv.?*, L. INSIDER (May 26, 2022), <https://www.lawinsider.com/resources/contract-teardown/whats-in-the-uber-drivers-terms-of-service>.

E. The Need for Federal Enactment of the Reformed ABC

The misclassification issue in the gig economy world is popular in many states in addition to California. A similar scenario was seen in Massachusetts, New Jersey, and Florida. For instance, the New Jersey's Department of Labor taxed Uber 650 million dollars for misclassification charges.⁸⁵ The fact that many states are initiating new systems, legislations, and lawsuits warrants the federal government's action. A beneficial course of action would involve bringing the independent contractor and employee definitions to a federal level. This would disable checking the local economy in regard to the definition.⁸⁶ In the past, the IRS had the task to classify workers as employees or independent contractors through their twenty-factor test. This test is no longer in use and was replaced by common law.⁸⁷ It would instead standardize the definitions, protections, rights, and obligations of companies around the U.S., thus eliminating possible threats of discontinuous operations from the gig companies in specific states.

IV. CONCLUSION

The purpose of the law is to maintain order and protect liberties and rights. This is an unachievable goal if, in the gig-economy context, drivers do not receive an accurate employment classification. Conventional employment classification tests, like *Borello*, are obsolete and cannot properly be used in terms of the gig-economy world. While AB-5 seemed to settle the misclassification issue, it resulted in the unintended approval of Proposition 22. Proposition 22 is simply not favorable for drivers. Solving the misclassification

85 *Uber Hit With \$650 Million Employment Tax Bill in New Jersey*, BLOOMBERG, (Nov. 14, 2019), <https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey>.

86 Brian A. Brown II, *Your Uber Driver is Here, but Their Benefits are Not: The ABC Test, Assembly Bill 5, and Regul. Gig Economy Emps.*, 15 BROOKLYN J. OF CORP., FIN. & COM. L. 183 (2021).

87 INTERNAL REVENUE SERV., 20 FACTOR TEST—INDEPENDENT CONTRACTOR OR EMP. (1977).

issue requires a symbiotic relationship between rideshare companies and drivers alike. This article has presented a reformed test that is better equipped to handle the innovative work model that rideshare apps are bringing to gig-economy markets. This test consists of six new propositions that address the ambiguity in the misclassification definitions. It includes classifying full-time drivers as employees, analyzing whether drivers' primary income comes from the platform, addressing the requirements for the tools of work, directs the limitations to the extent of control of work, recognizing the role drivers play in Uber's income stream, and the relationship that drivers believe exist with the rideshare company.

The misclassification issue is a countrywide controversy. Courts around the country do not seem to draw the same conclusions towards employee and independent contractor definitions. For this reason, this issue should be brought to a federal level to have a standardized system around the country. California Courts should consider the proposed reform and pioneering employment classification as a means to encourage nationwide reform. After all, Uber Technologies originated in California, and nothing would be more suitable than applying the reformed classification test where the gig-economy commenced.