

Proposition 22:
Protect App-Based Drivers and Services Act

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 22, the *Protect App-Based Drivers and Services Act*, would classify app-based drivers as independent contractors. The initiative would exempt app-based transportation and delivery companies from providing drivers with benefits guaranteed to employees but requires benefits not otherwise guaranteed to independent contractors.¹ Proposition 22 would set minimum compensation and increases overtime pay for app-based drivers.² App-based transportation and delivery companies (“network companies”) would be required to provide healthcare subsidies and carry liability insurance for drivers who average over 15 hours per week during a calendar quarter.³ Under Proposition 22, network companies would have to perform background checks on their drivers and implement sexual harassment policies.⁴ Proposition 22 would also create criminal penalties for impersonating an app-based driver.⁵

A **YES** vote supports classifying app-based drivers as independent contractors, not employees, and will override recent judicial decisions.⁶

A **NO** vote supports existing law classifying app-based drivers as employees and not independent contractors.⁷

II. THE LAW

A. Background

The California Labor Code governs the relationship between employers and employees in the state, but common law additionally recognizes that relationship for the purposes of vicarious civil liability and anti-kickback laws.⁸ The Labor Code defines an “employer” as one who engages a person—the “employee”—to “do something for the employer or a third person.”⁹ California law presumes that workers are employees if they are performing services that require a license.¹⁰ However, status as an “independent contractor” can be established by proving the worker controls the manner in which they

¹ LEGISLATIVE ANALYST’S OFFICE, PROPOSITION 22 EXEMPTS APP-BASED TRANSPORTATION AND DELIVERY COMPANIES FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS. INITIATIVE STATUTE. (2020), available at <https://lao.ca.gov/ballot/2020/Prop22-110320.pdf> [LAO Analysis of Measure].

² Cal. Proposition 22 § 1, art. 2 (2020).

³ *Id.* at art. 4.

⁴ *Id.* at art. 5.

⁵ *Id.*

⁶ Assembly Bill No. 5, ch. 296, 2019 Cal. Leg. 2017–2018 Sess.

⁷ *Id.*

⁸ 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, ch. IV § 3 *Employee* (11th ed. 2020).

⁹ CAL. LAB. CODE § 2750 (West 2020).

¹⁰ *Id.* § 2750.5.

work, performs services normally done by independently established businesses, and is a bona fide vendor not merely trying to avoid employee status.¹¹

B. Existing Law

The court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* established a three-factor test to decide a worker's status as an independent contractor,¹² which California Assembly Bill 5 ("AB 5") codified into law the following year.¹³ This three-prong "ABC" test presumes workers are employees, and permits hiring companies to classify workers as independent contractors if: (1) the worker is free from the hiring company's control and while working; (2) the worker is doing work outside of the company's usual course of business; and (3) the worker is engaged in an established trade, occupation, or business that is the same as the work being done.¹⁴ Based on this test, a hiring business must prove that the worker in question satisfies all three conditions to successfully classify that worker as an independent contractor rather than as an employee. This distinction becomes significant with respect to compensation and benefits.

California's wage and hour laws—which include minimum wage, overtime, and breaks—workplace safety laws, and retaliation laws only protect employees—not independent contractors.¹⁵ Employees can go to a state agency—such as the Labor Commissioner's Office—to seek enforcement of these laws, but independent contractors must resolve their disputes and enforce their contractual rights through the courts.¹⁶

The California Legislature passed AB 5 on September 11, 2019, and Governor Gavin Newsom signed it into law on September 18, 2019.¹⁷ Many app-based network companies—like Uber, Lyft, Doordash, and Postmates—considered leaving California because they thought they would not be able to continue to effectively operate in California under the requirements established by AB 5.¹⁸ After the law took effect in January 2020, Uber and Postmates requested a preliminary injunction preventing the enforcement of AB 5 against

¹¹ *Id.*

¹² *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903, 916 (2018).

¹³ Assembly Bill No. 5, ch. 296, 2019 Cal. Leg. 2017–2018 Sess.

¹⁴ *Dynamex Operations West, Inc.*, 4 Cal. 5th, at 955.

¹⁵ Labor Commissioner's Office, *Independent Contractor Versus Employee*, STATE OF CAL DEP'T. OF INDUS. REL., https://www.dir.ca.gov/dlse/faq_independentcontractor.htm#:~:text=What%20difference%20does%20it%20make,employees%2C%20but%20not%20independent%20contractors (last visited Oct. 4, 2020).

¹⁶ *Id.*

¹⁷ Complete Bill History of AB 5, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB5, (last visited Oct. 4, 2020).

¹⁸ Nathan W. Austin, Erika Barbara Pickles, Emilia A. Arutunian & Cecilie E. Read, *California AB 5 and the Status of Independent Contractors*, NAT'L L. REV. (Aug. 28, 2020), <https://www.natlawreview.com/article/california-ab-5-and-status-independent-contractors>.

companies.¹⁹ Plaintiffs offered several constitutional challenges to the law, but the district court rejected their request for an injunction, so AB 5 still applies to network companies.²⁰

C. Path to the Ballot

1. External Factors

Laws regulating the relationship between network companies and app-based drivers vary nationally:

- In 2016, Uber and Lyft briefly left Texas when lawmakers increased background check requirements for app-based drivers but returned when state courts overruled the law.²¹ In 2019, the Texas Workforce Commission adopted a rule that gig-economy workers—including app-based drivers—are independent contractors.²²
- In New York City, the Taxi and Limousine Commission issued rules in 2018 that set minimum pay for app-based drivers based on how much time app-based drivers spend transporting passengers.²³
- Massachusetts filed a lawsuit in July 2020 to declare that Uber and Lyft drivers are employees under state employment law.²⁴

The United States Department of Labor also announced a proposal in late September 2020 to treat gig workers as independent contractors, but—beyond federal minimum wage and overtime laws—the interpretive rule would not supersede state employment laws.²⁵

¹⁹ *Olson v. California*, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

²⁰ *See id.* (finding the plaintiffs failed to show “either a likelihood of success on the merits or that serious questions exist as to any of their claims”). *See also infra* Subsection III.A.1 (discussing federal constitutional issues as applied to app-based transportation and delivery companies).

²¹ Harriet Taylor, *What Happened in Austin After Uber and Lyft Got Up and Left*, CNBC (Aug. 18, 2016), <https://www.cnbc.com/2016/08/18/what-happened-in-austin-after-uber-and-lyft-got-up-and-left.html>.

²² Lynne Anne Anderson & Alex Harrel, *New Texas Rule Classifies Gig Economy Workers as Independent Contractor*, NAT’L LAW REVIEW (May 7, 2019), <https://www.natlawreview.com/article/new-texas-rule-classifies-gig-economy-workers-independent-contractors>.

²³ Tina Bellon, *Uber to Limit Drivers’ App Access to Comply with NYC Regulation*, REUTERS (Sept. 16, 2019), <https://www.reuters.com/article/us-uber-new-york/uber-to-limit-drivers-app-access-to-comply-with-nyc-regulation-idUSKBN1W12OV>.

²⁴ Kate Conger and Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N. Y. TIMES (July 14, 2020), <https://nyti.ms/32iKtTU>.

²⁵ Noam Scheiber, *Uber and Lyft Could Gain from U.S. Rule Defining Employment*, N. Y. TIMES (Sept. 22, 2020), <https://nyti.ms/2RLVrdY>.

2. California v. Uber & Lyft

The State of California brought this case May 5, 2020.²⁶ The complaint alleges that Uber and Lyft avoided complying with workplace standards and requirements by misclassifying their drivers as independent contractors rather than employees.²⁷ On August 10, 2020, the San Francisco County Superior Court issued an injunction restraining Uber and Lyft from classifying their drivers as independent contractors.²⁸ Uber argued the work drivers perform is outside of Uber's normal course of business.²⁹ Judge Ethan P. Schulman wrote, "to state the obvious, drivers are central, not tangential, to Uber and Lyft's entire ride-hailing business."³⁰

The case is currently on appeal before the California First District Court of Appeal to determine whether Uber and Lyft have misclassified their employees against the current standard set up by the "ABC" test in AB 5.³¹ On August 20, 2020, the appellate court stayed Judge Schulman's injunction from taking effect.³² Instead, the court allowed Uber and Lyft to file written consents to expedited procedures until August 25, 2020. Additionally, the court required Uber and Lyft to file sworn statements confirming that their companies have developed implementation plans should the court uphold the injunctions and should voters reject Proposition 22.³³ In September and October, several parties filed amicus curiae briefs in support of each side, and both parties presented their arguments on October 13, 2020.³⁴

3. Filing of Proposition 22

Three network companies—Uber, Lyft, and Doordash—filed Proposition 22 in October 2019.³⁵ After proponents spent nearly \$6.5 million gathering signatures, the initiative

²⁶ Complaint for Injunctive Relief, Restitution, and Penalties at 27, *California v. Uber & Lyft*, San Francisco Superior Court No. CGC20584402 (2020).

²⁷ *Id.* at 3.

²⁸ Order on People's Motion for Preliminary Injunction and Related Motions at 32–33, *California v. Uber & Lyft*, San Francisco Superior Court No. CGC20584402 (2020).

²⁹ Tony West, Chief Legal Officer, Uber, Press Call (Sept. 11, 2019), available at <https://drive.google.com/file/d/1O9EDg-wmgZBOWeUmGNUvZ2JOVFZch54z/view>.

³⁰ See Dara Kerr, *Judge Issues Injunction Against Uber and Lyft, Says Drivers are Employees*, CBS5 SF BAYAREA, (Aug. 10, 2020), <https://sanfrancisco.cbslocal.com/2020/08/10/judge-issues-injunction-uber-lyft-ride-hailing-employees/> (quoting Judge Schulman's decision).

³¹ *People of the State of California vs. Uber Technologies, et al.*, California First District Court of Appeal No. A16076 (2020).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Qualified Statewide Ballot Measures*, CAL. SEC. OF STATE, <https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/> (last visited Sept. 23, 2020).

qualified for the ballot the following May.³⁶ In California, Office of the Attorney General writes the title, summary, and label for initiatives that appear on the ballot and ballot pamphlet.³⁷ Backers of Proposition 22 sued Attorney General Xavier Becerra this summer, charging his label, title, and summary for the ballot were “infected with the contagion of bias and hostility” left over from *California v. Uber & Lyft*.³⁸ However, Sacramento Superior Court Judge Laurie Earl held that the descriptions were not false, misleading, or inaccurate and that the previous lawsuit was irrelevant.³⁹ Judge Earl noted that Proposition 22 would exempt network companies from complying with various state laws pertaining to employers.⁴⁰

D. Proposed Law

Proposition 22, the *Protect App-Based Drivers and Services Act*, declares that app-based drivers are independent contractors in California if the network company meets certain conditions.⁴¹ To maintain their workers’ status as independent contractors, network companies may not require app-based drivers to work specific or minimum hours or accept any service request as a condition of maintaining access to the network.⁴² Network companies also may not restrict app-based drivers from working for other network companies or restrict app-based drivers from working in another lawful occupation.⁴³ The initiative also requires network companies and app-based drivers to enter work agreements that include provisions requiring cause to terminate employment and a process to appeal termination.⁴⁴ Proposition 22 prevents the California State Legislature from amending this measure unless seven-eighths of Assembly members and Senators vote in support of the amendment.⁴⁵

The proposition establishes a minimum level of compensation for app-based drivers.⁴⁶ This calculation is based on an app-based driver’s “engaged time,” which begins

³⁶ *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://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) (last visited Oct. 16, 2020).

³⁷ Carolyn Said, *Prop. 22 Backers Sue California AG over Gig-Worker Initiative Description*, S.F. CHRON. (July 29, 2020, updated Aug. 7, 2020), <https://www.sfchronicle.com/business/article/Prop-22-backers-sue-California-AG-over-15444429.php>.

³⁸ *Id.*

³⁹ See Carolyn Said, *Judge Rejects Prop. 22 Backers’ Attempt to Change Gig-Work Ballot Language*, S.F. CHRON. (Aug. 4, 2020), <https://www.sfchronicle.com/business/article/Judge-rejects-Prop-22-backers-attempt-to-15459333.php> (reporting that the judge noted that state officials are entitled to take positions on important public matters).

⁴⁰ *Id.*

⁴¹ Cal. Proposition 22 § 1, art. 2 (2020).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at art. 9.

⁴⁶ *Id.* at art. 3 (defining “net earnings floor” as 120% of the applicable minimum wage for engaged time plus \$0.30 per engaged mile to compensate for vehicle expenses).

when the driver accepts a network request and ends when the driver completes that request.⁴⁷ Under Proposition 22, if a driver earns less than the minimum for the driver's engaged time during a pay period, the network service must remit the difference to the driver before the end of the next pay period.⁴⁸ If a driver averages 15 hours per week engaged in a network's service requests over a calendar quarter, the driver earns a healthcare subsidy from the network company. The healthcare subsidy is a payment equal to 50% of the average Affordable Care Act contribution for Covered California premiums for that quarter.⁴⁹ App-based drivers averaging at least 25 hours per week over a calendar quarter are entitled to a payment equaling 100% of the average Covered California premiums for that quarter.⁵⁰ Network companies would also have to carry loss and liability insurance covering medical expenses and death/disability payments for events that occur during a driver's engaged time.⁵¹

Proposition 22 prohibits discrimination against app-based drivers, requires network companies to implement and maintain sexual harassment policies, and contains additional measures intended to protect the public.⁵² A network company must conduct a criminal background check for every app-based driver that uses its network, provide safety training to its app-based drivers, and give law enforcement an exclusive channel to submit requests for information.⁵³ The proposition requires network companies to immediately suspend drivers reasonably suspected of intoxication during engaged time and to limit app-based drivers to 12 hours of network access within a 24-hour period.⁵⁴ Furthermore, Proposition 22 criminalizes the impersonation of app-based drivers as a misdemeanor.⁵⁵ Offenders face up to six months in jail and a \$10,000 fine.⁵⁶

III. DRAFTING ISSUES: AMENDMENT CLAUSE

Proposition 22 contains an amendment clause that explains how the California State Legislature could amend the initiative.⁵⁷ According to the California Constitution, "the Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."⁵⁸ Initiative statutes may contain language that requires a supermajority vote by the Legislature in order for the amendment

⁴⁷ *Id.* at arts. 3–4 (omitting coverage requirements while drivers are waiting to accept a request).

⁴⁸ *Id.*

⁴⁹ *Id.* at art. 4 (defining the average contribution as 82% of the monthly premium).

⁵⁰ *Id.* (requiring network companies to provide app-based drivers statements every pay period documenting their hours accrued for that period and calendar quarter).

⁵¹ *Id.* at arts. 3–4.

⁵² *Id.* at art. 5.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at art. 9.

⁵⁸ CAL. CONST., art. II § 10(c).

to pass.⁵⁹ Proposition 22 contains an amendment clause that allows the Legislature to “amend this chapter by a statute passed in each house of the Legislature by rollcall vote entered into the journal, seven-eighths of the membership concurring”⁶⁰ In effect, 87.5% of the Legislature must vote to enact an amendment of Proposition 22’s initiative statute in order for that amendment to succeed. In simpler terms, 35/40 Senate members and 70/80 Assembly members must agree for an amendment to pass. Proposition 22 also expressly prevents the Legislature from reclassifying app-based drivers.⁶¹ While the initiative’s thresholds for amendment by the Legislature exceeds the highest thresholds in current California statutory law, several enacted initiatives do not authorize amendments by the Legislature at all.⁶² If Californians pass Proposition 22, they would likely need to enact a new ballot initiative to amend Proposition 22’s initiative statute.

IV. CONSTITUTIONAL AND STATUTORY ISSUES

A. Federal Constitutional Issues

The Fourteenth Amendment prohibits states from passing laws that deny equal protection under the law, but Proposition 22 treats app-based drivers differently than other drivers who are entitled to employee benefits and protections under existing law.⁶³ Courts will uphold laws regulating app-based driver employment if the laws are rationally related to a legitimate state interest and do not target app-based driver with animus.⁶⁴ Provisions providing protections and benefits and public support from some app-based drivers likely preclude a court from finding that Proposition 22 targets app-based drivers with animus.⁶⁵ A court would likely determine that Proposition 22 is rationally related to preserving the state’s legitimate interest in regulating employment and uphold the law against an Equal Protection Clause challenge.

The Fourteenth Amendment also prohibits states from depriving a person of liberty or property without due process, but Proposition 22 arguably deprives app-based drivers of employee status and benefits.⁶⁶ However, courts do not consider vocational liberty

⁵⁹ See CAL. REV. & TAX. CODE § 3700 (West 2020) (requiring four-fifth of both houses of the Legislature to amend under the initiative statute passed as Proposition 99 in 1988).

⁶⁰ Cal. Proposition 22 § 1, art. 9 (2020).

⁶¹ *Id.* (precluding amendments to CAL. BUS. & PROF. CODE § 7451).

⁶² Email from Kathryn Londenber, Deputy Legislative Counsel, State of California Office of Legislative Counsel, to Matt Urban, Student, McGeorge School of Law, University of the Pacific (Oct. 5, 2020, 2:26 PM PT) (on file with the *California Initiative Review*).

⁶³ See LAO Analysis of Measure, *supra* note 1.

⁶⁴ *Olson v. California*, 2020 WL 905572 (C.D. Cal. Feb. 10, 2020).

⁶⁵ See *Frequently Asked Questions*, PROTECT APP-BASED DRIVERS & SERVICES, <https://yeson22.com/questions-and-answers/> (last visited Oct. 6, 2020) (arguing AB 5 “attempts to prohibit app-based drivers from working as independent contractors with control over their schedules, instead forcing Californians who want to keep driving to become employees with rigid schedules and set shifts”).

⁶⁶ See U.S. CONST., amend. XIV (“No State . . . shall deprive any person of life, liberty, or property, without due process of law”).

interests—such as worker classification and the benefits that come with employee status—to be fundamental rights.⁶⁷ Therefore, when elected leaders lawfully pass worker-classification legislation, courts will uphold that legislation if they can find a “conceivable basis on which it might survive constitutional scrutiny.”⁶⁸

Federal regulations preempt state law, but courts will only strike down state laws that conflict with federal regulation if the impact is more than tangential.⁶⁹ The United States Department of Labor enforces federal minimum wage and overtime pay rules, but states have authority to determine worker classifications.⁷⁰ Proposition 22 does not treat out-of-state app-based drivers differently than California app-based drivers and therefore does not likely violate the Dormant Commerce Clause.⁷¹

B. State Constitutional Issues: Workers’ Compensation

The California Constitution gives the Legislature full authority to create and enforce workers’ compensation.⁷² Nothing prohibits the inclusion of workers’ compensation in an initiative statute.⁷³ Proposition 22 does not explicitly provide workers’ compensation benefits within its compensation section; however, it does provide comparable benefits to workers classified as independent contractors.

Proposition 22 requires network companies to provide occupational accident insurance to cover injuries in addition to disability payments that would cover 66% of a worker’s income up to 104 weeks.⁷⁴ The proposition also extends accidental death coverage to families of drivers who die during network company engaged time.⁷⁵ Automobile insurance coverage is not included for driver injuries or car damage but is included for third-party injuries.⁷⁶ A network company can deny the coverage offered in Proposition 22 if the worker was online on the app but not on “engaged time.”⁷⁷ This gap in coverage raises an issue of app-based workers being potentially liable for accidents that could occur while they are simply sitting in their car waiting to accept a request from the

⁶⁷ See *Olson*, 2020 WL 905572 at *10 (discussing why AB 5 does not deprive gig economy workers the right to pursue their chosen occupation).

⁶⁸ See *id.* (quoting *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999)).

⁶⁹ *W. States Trucking Ass’n v. School*, 377 F. Supp. 3d 1056, 1073 (E.D. Cal. 2019), *appeal dismissed*, 2019 WL 5212963 (9th Cir. Sept. 5, 2019).

⁷⁰ Noam Scheiber, *Uber and Lyft Could Gain from U.S. Rule Defining Employment*, N. Y. TIMES (Sept. 22, 2020), <https://nyti.ms/2RLVrdY>.

⁷¹ *Cf. W. States Trucking Ass’n v. School*, 377 F. Supp. 3d, at 1073.

⁷² CAL. CONST., art. XIV § 4.

⁷³ CAL. SEC. OF STATE, STATEWIDE INITIATIVE GUIDE (2020), available at <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/statewide-initiative-guide.pdf> (on file with the *California Initiative Review*).

⁷⁴ Cal. Proposition 22 § 1, art. 4 (2020).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

network company app. California law, on the other hand, currently requires an employer to supply workers' compensation coverage that covers workers for on-the-job injuries.⁷⁸ Additionally, California law states that insurance coverage still extends to workers who take minor detours at work,⁷⁹ which contrasts with the lack of coverage for non-engaged time indicated by the language in Proposition 22.⁸⁰

While Proposition 22 would offer new benefits to independent contractors creating a new class of workers, it carves out an exemption that allows network companies to deny their drivers employee benefits.⁸¹ These network companies would not have to provide standard employee benefits because their workers would be independent contractors rather than employees.⁸² If Proposition 22 passes, drivers could file lawsuits against the hiring network company for incidents that could foreseeably occur on the job. For example, a driver who is actively on the app could potentially be involved in an accident while waiting to accept a ride or delivery. Because that driver would not have accepted a ride or delivery, that driver would not be covered under Proposition 22's provisions because the incident occurred while the driver was between a ride or delivery. It is unclear how successful these lawsuits would be but, considering drivers spend significant time in their vehicles waiting for a ride or delivery request, drivers are vulnerable to incidents that Proposition 22 does not expressly cover.⁸³

V. PUBLIC POLICY ISSUES

A. Proponent's Arguments

Proponents of Proposition 22 have support from a broad spectrum of interest groups including business and taxpayer associations, as well as the prominent network companies that would be subject to the initiative statute. Public safety organizations, senior advocates, several local chapters of the NAACP, the National Action Network, and other community advocacy groups also support Proposition 22.⁸⁴

⁷⁸ CAL. LAB. CODE § 3700 (West 2020).

⁷⁹ See *Mason v. Lake Delores Group, LLC*, 117 Cal. App. 4th 822, 830, 834, 838 (2004) (acknowledging that an injury must arise out of employment to be covered by workers' compensation, disputes are a question of fact, workers' compensation law be liberally interpreted in favor of coverage, and that coverage is not broken even if the worker is engaged in "certain acts necessary to the life, comfort, and convenience of the employee while at work").

⁸⁰ See Cal. Proposition 22 § 1, art. 4 (2020) (omitting coverage guarantees for non-engaged time).

⁸¹ *No on Prop 22 Fact Sheet*, CAL. LABOR FED'N (last visited Oct. 16, 2020), available at <https://calaborfed.org/no-on-prop-22-faq/> (on file with the *California Initiative Review*).

⁸² See LAO Analysis of Measure, *supra* note 1.

⁸³ See *id.* (estimating that app-based drivers spend one-third of their time waiting for a request).

⁸⁴ *Proposition 22 Coalition*, PROTECT APP-BASED DRIVERS & SERVICES, <https://yeson22.com/coalition/> (last visited Oct. 7, 2020).

1. Labor Issues

Independent contractor status provides worker flexibility not guaranteed to employees because they may determine their own hours, choose which requests they accept, and work for multiple companies in any industry.⁸⁵ This flexibility allows workers to earn extra money through app-based driving without sacrificing their autonomy or making undesirable long-term commitments. Proposition 22 would enable app-based driver to maintain their independence, but it also entitles them to benefits not otherwise guaranteed to independent contractors.

2. Business & Consumer Concerns

The majority of large network companies are based in California,⁸⁶ and they argue AB 5 is problematic legislation that places a burden on a vital industry in the state.⁸⁷ Standard employee benefits account for 20% of employee costs.⁸⁸ Forcing network companies to comply with existing law risks thousands of jobs if companies choose to reduce wages or jobs in order to mitigate any potential reductions in profits.

If worker classification under existing law applies to rideshare and delivery workers, the costs could be so burdensome to network companies that it would significantly limit the availability and affordability of these services. These network companies have publicly threatened to cease operations and relocate headquarters if forced to comply with existing law.⁸⁹ Losing these services could increase costs and reduce choices for consumers unless other companies can find a way to make the employee model profitable for network companies.

3. Public Safety

Proposition 22 would provide increased protections for both app-based drivers and riders alike. The initiative would introduce requirements for app-based drivers to pass criminal background checks and be subject to antidiscrimination and sexual harassment training.⁹⁰ Proposition 22 would also protect consumers by introducing misdemeanor criminal penalties for impersonating app-based drivers.⁹¹

⁸⁵ Cal. Proposition 22 § 1, art. 2 (2020).

⁸⁶ See LAO Analysis of Measure, *supra* note 1.

⁸⁷ *Frequently Asked Questions*, PROTECT APP-BASED DRIVERS & SERVICES, <https://yeson22.com/questions-and-answers/> (last visited Oct. 7, 2020).

⁸⁸ See LAO Analysis of Measure, *supra* note 1.

⁸⁹ Complaint for Injunctive Relief, Restitution, and Penalties at 3, *California v. Uber & Lyft*, San Francisco Superior Court No. CGC20584402 (2020).

⁹⁰ Cal. Proposition 22 § 1, art. 5 (2020).

⁹¹ *Id.*

California cities have seen significant reductions in DUI rates after network companies started offering rideshare and delivery services.⁹² Furthermore, app-based drivers deliver food and medicine to people forced to stay indoors—essential services during the COVID-19 crisis.⁹³

B. Opponent’s Arguments

Opponents of Proposition 22 include prominent Democrats like former Vice President Joe Biden, California Senator Kamala Harris, Massachusetts Senator Elizabeth Warren, Speaker of the California Assembly Anthony Rendon, and several labor organizations.⁹⁴ California Labor Commissioner Lilia García-Brower recently sued both Uber and Lyft for committing wage theft by misclassifying their workers as independent contractors instead of employees and is seeking reimbursement for lost drivers’ wages.⁹⁵ Commissioner García-Brower stated this misclassification “leaves workers without protections such as paid sick leave and reimbursement of drivers’ expenses, as well as overtime and minimum wages.”⁹⁶ The main arguments against Proposition 22 are labor issues, public safety, fair elections, and potential ripple effects.

1. Labor Issues

Proposition 22 establishes a base level of compensation for app-based transportation or delivery workers that consists of two components: (a) 120% of the “applicable minimum wage” and (b) 30 cents per mile.⁹⁷ However, the minimum wage and mileage reimbursements are both determined based on a driver’s engaged time or engaged miles, as defined in the definitions section of Proposition 22.⁹⁸ So, a network company will only pay its workers for the time between accepting and completing a ride or delivery but not for waiting time or minor detours while logged into the app.⁹⁹ To make up for this loss in revenue, drivers might be forced to work longer shifts or more days in the week than originally planned. Also, there is no express provision in Proposition 22 for overtime pay. In California, employers are required to pay employees 150% of the state or local minimum wage after that worker has worked eight hours in one day or after the worker has completed 40 hours in one week.¹⁰⁰

⁹² *Prop 22 Protects Public Safety & Keeps Our Roads Safe*, PROTECT APP-BASED DRIVERS & SERVICES, <https://yeson22.com/safety-protections/> (last visited Oct. 6, 2020).

⁹³ *Id.*

⁹⁴ *California Propositions: A Voter’s Guide to the 2020 Ballot Measures*, ABC7 NEWS, (Sept. 15, 2020) <https://abc7.com/california-ballot-measures-november-2020-ca-props-propositions-guide-to/6419431/>

⁹⁵ Press Release, Dep’t of Indus. Relations, Labor Commissioner’s Office Files Lawsuits against Uber and Lyft for Engaging in Systemic Wage Theft (Aug. 5, 2020), available at <https://www.dir.ca.gov/DIRNews/2020/2020-65.html>.

⁹⁶ *Id.*

⁹⁷ Cal. Proposition 22 § 1, art. 3.

⁹⁸ *Id.* at art. 3.

⁹⁹ *Id.* at art. 6.

¹⁰⁰ CAL. LAB. CODE § 510 (West 2020).

Proposition 22 does include mileage reimbursements for drivers, at a rate of 30 cents per mile,¹⁰¹ but that is lower than what employee drivers receive under current California law. California law calculates the standard IRS mileage reimbursement rate for driving time at 57.5 cents per mile.¹⁰² Unlike Proposition 22, current California law does not take into account “engaged time.”¹⁰³ Proposition 22’s compensation provision indicates that drivers will receive 120% of the applicable wage for that engaged time.¹⁰⁴ However, after taking into account several loopholes—unpaid waiting time, unreimbursed waiting time expenses, underpayment for driving expenses, unpaid payroll taxes and employee benefits, and an added health care stipend—drivers will likely receive much less than Proposition 22 implies.¹⁰⁵ For example, in 2021, minimum wage in California will be \$13 per hour, meaning that drivers would theoretically receive \$15.60 per hour.¹⁰⁶ After subtracting hidden costs for these variables, a driver could be left with a mere \$5.64 per hour of engaged time.¹⁰⁷ Under Proposition 22, drivers could be paid less than what they are currently earning—and potentially even less than minimum wage.

Additionally, California law requires employers to compensate their workers for all other work-related expenses, including the worker’s phone plan costs or cleaning equipment for their vehicle, but there is no comparable language for independent contractors in Proposition 22.¹⁰⁸ Exempting network companies from providing these resources raises concerns for workers and consumers alike because drivers need to continuously sanitize their vehicles during the COVID-19 crisis to ensure adequate decontamination.¹⁰⁹ Finally, because Proposition 22 classifies app-based drivers as independent contractors, the proposition would preclude them from receiving unemployment insurance in the event of job loss within California.¹¹⁰

¹⁰¹ Cal. Proposition 22 § 1, art. 3.

¹⁰² *Standard Mileage Rates*, INTERNAL REV. SERV., <https://www.irs.gov/tax-professionals/standard-mileage-rates> (last visited Oct. 16, 2020).

¹⁰³ REY FUENTES, ET AL., PEOPLE FOR WORKING FAMILIES, RIGGING THE GIG 11 (July 2020), available at https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf (on file with the *California Initiative Review*).

¹⁰⁴ Cal. Proposition 22 § 1, art. 3.

¹⁰⁵ Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only \$5.64 an Hour*, UC BERKELEY LABOR CENTER (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ CAL. LAB. CODE § 2802 (West 2020).

¹⁰⁹ Telephone Interview with Rey Fuentes, Skaden Fellow, People for Working Families (Oct. 7, 2020) (notes on file with the *California Initiative Review*).

¹¹⁰ FUENTES, ET AL., *supra* note 103, at 16.

2. Public Safety

The California Division of Occupational Safety and Health is the state agency that enforces workplace safety and health standards. Current California law requires all employers to ensure a safe and healthy workplace.¹¹¹ All employers must create and implement an Injury and Illness Prevention Program for their employees, including a reoccurring assessment of potential new hazards.¹¹² However, Proposition 22 eliminates this requirement for network companies.¹¹³ California law requires that employers keep a record of any work-related injuries.¹¹⁴ While the California Public Utilities Commission requires employers to report accidents, there is no requirement within Proposition 22 that mandates network companies to keep a record of these work-related injuries.¹¹⁵ Proposition 22 also does not include any language indicating that the network companies will handle workplace violence even though drivers commonly encounter or experience workplace violence.¹¹⁶ While Proposition 22 does include a requirement that drivers have to complete a safety training course,¹¹⁷ California law already contains this requirement for employees.¹¹⁸ Proposition 22 would require app-based drivers to “review and confirm” the network company’s sexual harassment policy, but the initiative’s provisions do not specify details for compliance.¹¹⁹

3. Fair Elections

From the beginning of January until the middle of September 2020, proponents raised over \$184 million in support of Proposition 22, which is the most money raised in support of an initiative in California history.¹²⁰ These funds are primarily coming from the network companies who will likely benefit from the adoption of Proposition 22.¹²¹ Some of these network companies have already lost in court with respect to worker classifications, and now they are resorting to California’s initiative process to financially push their

¹¹¹ CAL. LAB. CODE § 2802 (West 2020).

¹¹² CAL. CODE REGS. tit. 8, §§ 3203, 14300, 14300.29(a)–(b) (West 2020).

¹¹³ FUENTES, ET AL., *supra* note 103, at 11.

¹¹⁴ CAL. CODE REGS. tit. 8, §§ 14300, 14300.29 (West 2020).

¹¹⁵ *Compare Require Reports TNCs Must Provide the CPUC*, CAL. PUBLIC UTILITIES COMMISSION, <https://www.cpuc.ca.gov/General.aspx?id=3989> with Cal. Proposition 22 § 1 (2020).

¹¹⁶ Seth Rosenfeld, *Safety Report from Uber Leaves out Most Accidents*, S. F. PUBLIC PRESS (Jan. 7, 2020), <https://sfpublicpress.org/safety-report-from-uber-leaves-out-most-accidents/>.

¹¹⁷ Cal. Proposition 22 § 1, art. 5.

¹¹⁸ CAL. PUBLIC UTILITIES COMMISSION, DECISION ADOPTING RULES AND REGULATION TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS TO THE TRANSPORTATION INDUSTRY (Sept. 23, 2013).

¹¹⁹ Cal. Proposition 22 § 1, art. 5.

¹²⁰ See CAL. SECRETARY OF STATE, *Campaign Finance, Yes on 22*, available at <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422181&view=general> (last visited on Sept. 23, 2020); see also *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) (last visited Oct. 16, 2020).

¹²¹ See CAL. SECRETARY OF STATE, *supra* note 120.

preferences into law.¹²² Furthermore, Proposition 22's unprecedented seven-eighths amendment provision will likely lock-out any future legislative consideration regarding driver classification.¹²³

4. Potential Ripple Effects & Adoption by Other Industries

Opponents to Proposition 22 argue that it establishes a dangerous precedent for misclassification of organized labor, which could potentially be adopted by other industries and ultimately limit worker benefits for workers beyond those working as app-based drivers. Currently, Proposition 22 only applies to network companies. However, if other business organizations were to adopt this policy, it could cause rippling effects. So, if Proposition 22 passes, other industries could adopt this new independent contractor business model, which potentially threatens middle-class jobs.¹²⁴

VI. CONCLUSION

Proposition 22 would classify app-based drivers as independent contractors, exempting network companies from giving app-based drivers standard employee benefits.¹²⁵ The initiative classifies app-based drivers as independent contractors rather than employees or agents of the network company.¹²⁶ Therefore, Proposition 22 would override the Legislative statute passed in September 2019 that codified the common law test to determine worker status.¹²⁷ The ballot measure would require network companies to provide app-based drivers with benefits not otherwise guaranteed to independent contractors but falls short of protections that state law requires for employees.¹²⁸ Proposition 22 would also introduce criminal penalties intended to protect vulnerable riders.¹²⁹ This initiative codifies a new worker classification for app-based driving, and other industries could follow and adopt this model.

¹²² Sarah Holder, *California's Gig Economy Ballot Measure Fails Workers, Labor Group Says*, BLOOMBERG CITYLAB (July 7, 2020), <https://www.bloomberg.com/news/articles/2020-07-07/uber-lyft-ballot-measure-opposed-by-labor-groups>.

¹²³ See FUENTES, ET AL., *supra* note 103, at 21; see also *supra* Part III (discussing Proposition 22's amendment clause).

¹²⁴ *No on Prop 22 Fact Sheet*, CAL. LABOR FED'N (last visited Oct. 16, 2020), available at <https://calaborfed.org/no-on-prop-22-faq/> (on file with the *California Initiative Review*).

¹²⁵ See LAO Analysis of Measure, *supra* note 1.

¹²⁶ Cal. Proposition 22 § 1, art. 2 (2020).

¹²⁷ Complete Bill History of AB 5, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB5, (last visited Sept. 23, 2020).

¹²⁸ See LAO Analysis of Measure, *supra* note 1.

¹²⁹ Cal. Proposition 22 § 1, art. 5 (2020).