

## **Assembly Bill No. 5 Worker Status: Employees and Independent Contractors**

### **I. INTRODUCTION**

Assembly Bill No. 5 (“AB 5”), signed into law by California governor Gavin Newsom on September 18, 2019, adds Section 2750.3 to the CA Labor Code.<sup>1</sup> AB5 clarifies the legal designation of an employee or independent contractor,<sup>2</sup> codifying the California Supreme Court Decision *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*.<sup>3</sup> *Dynamex* implemented a three-pronged test, also known as the “ABC” test, which presumes that workers are employees unless they are exempt, or the employer can demonstrate that:

- (1) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (2) the worker performs work that is outside the usual course of the hiring entity’s business; and
- (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.<sup>4</sup>

### **II. 2020 POPULAR INITIATIVE**

A number of private companies, including Uber, Lyft, Doordash, Postmates, and Instacart, have responded to AB5 by placing Proposition 22 on the ballot for the November 2020 election.<sup>5</sup> Popular initiatives allow California voters to overturn a law passed by the California government, or to circumvent a Supreme Court ruling.<sup>6</sup> The companies argue that AB5 threatens earning opportunities for thousands of Californians, and the availability of app-based delivery and rideshare services for millions of consumers.<sup>7</sup>

Proposition 22, known as the “Protect App-Based Drivers and Services Act,” aims to exempt app-based drivers from AB5.<sup>8</sup> The ballot initiative would allow app-based drivers to maintain independent contractor worker status, while providing additional worker protections.<sup>9</sup> These worker protections include an earnings guarantee of at least 120% of the minimum wage, expense reimbursement, health care subsidy, and insurance to cover injuries that occur while working.<sup>10</sup> Proposition 22 also requires criminal background checks, driver safety training, and other safety provisions “to help ensure app-based rideshare and delivery drivers do not pose a threat to customers or the public.”<sup>11</sup>

### **III. LEGAL CHALLENGES**

#### ***Olson et al. v. California et al.***

In addition to Proposition 22, Uber and Postmates have sued the State of California in *Olson et al. v. California et al.*<sup>12</sup> Plaintiffs in *Olson* allege that AB5 is unconstitutional under the federal Equal Protection clause “because it draws classifications between network companies and non-network companies without a rational basis for distinguishing between the groups.”<sup>13</sup> The complaint argues that “the California’s legislators’ focus on subjecting network companies to AB5, and their willingness to grant a laundry list of non-network company exemptions in order to spare those types of companies the cost and burdens of complying with AB5, demonstrates irrational animus against network companies in violation of their equal protection rights.”<sup>14</sup> Moreover, Plaintiffs argue that if the goal of the legislature is to protect workers “from perceived harms caused by perceived misclassification . . . the statute would not contain the dozens of exemptions that leave so many workers outside the purported umbrella.”<sup>15</sup>

Plaintiffs complaint sought injunctive relief, claiming Defendant’s “should be preliminarily and permanently enjoined from enforcing AB5 against the Company Plaintiffs.”<sup>16</sup> They argue that drivers would suffer “severely and irreparably” because they rely heavily on the “independence and flexibility for their income” associated with being an independent contractor.<sup>17</sup> Plaintiffs also argue injunctive relief favors the public interest, since AB5 would “increase prices, increase wait times, and reduce access to important services, particularly in low-income and rural areas.”<sup>18</sup>

The federal court denied Uber and Postmates’s request for a preliminary injunction, finding that Plaintiffs did not demonstrate a likelihood that California had violated the Equal Protection Clause because Plaintiffs failed to show a “likelihood of success on the merits or that sufficiently serious questions have been raised as to the merits of these claims.”<sup>19</sup> Judge Dolly Gee further reasoned that targeting the gig economy on-demand drivers does not establish an equal protection violation where the statute addresses legitimate concerns of the misclassification of workers in many industries, thereby finding that AB5 is “rationally related to a legitimate state interest.”<sup>20</sup>

***People of the State of California v. Uber Technologies, Inc. et al.***

In enforcing AB5, California Attorney General Xavier Becerra sued ride-hailing companies Uber and Lyft for misclassifying their drivers as independent contractors under AB5. In *People of the State of California v. Uber Technologies, Inc. et al.*,<sup>21</sup> the State claims that “by misclassifying their drivers, Uber and Lyft evade the workplace standards and requirements that implement California’s strong public policy in favor of protecting workers and promoting fundamental fairness for all Californians.”<sup>22</sup> The State alleges “Defendants’ unlawful misclassification deprives drivers of their rights as

employees,”<sup>23</sup> because they have violated California’s requirements relating to minimum wages, overtime wages, and meal and rest periods.<sup>24</sup>

The State’s complaint seeks injunctive relief for violations of AB5, stating AB5 permits an action for injunctive relief “to prevent the continued misclassification of employees as independent contractors,”<sup>25</sup> and each Defendant “continues to misclassify its drivers as independent contractors.”<sup>26</sup> The State argues “Defendants’ unlawful misclassification harms law-abiding competitors and would-be competitors,”<sup>27</sup> claiming the misclassification of drivers allows Defendants “to unlawfully reduce a substantial portion of the labor and vehicle fleet costs they would otherwise incur if they lawfully classified and compensated their drivers as employees,”<sup>28</sup> demonstrating irreparable harm to the law-abiding competitors in the industry.<sup>29</sup> The case is set for a hearing on August 6, 2020.<sup>30</sup>

#### **IV. PROSPECTS OF LEGAL CHALLENGES**

The result of the Proposition 22 ballot initiative may resolve the pending *Olson* and *Uber Technologies* cases. If Proposition 22 prevails this November, both the *Olson* and *Uber Technologies* cases may be dismissed as moot, since companies would no longer need to challenge the legality of AB5, and the State of California would no longer be able to enforce AB5 in court. Furthermore, companies will be able to presume that app-based drivers are independent contractors if certain conditions are met.<sup>31</sup>

In the event that Proposition 22 fails, the *Olson* and *Uber Technologies* cases will continue to be litigated. The outcome of the *Olson* case is uncertain, since federal courts have not previously held whether AB5 violates the Equal Protection Clause of the U.S. Constitution. However, Uber may have difficulty in succeeding on this claim, since the district court in *Olson* has ruled in the preliminary injunction motion that

Uber is unlikely to succeed on the merits.<sup>32</sup> In *Uber Technologies*, the State of California will likely prevail on the claim for injunctive relief under § 2750.3 (j) of the Labor Code,<sup>33</sup> unless Defendants can demonstrate that their drivers qualify as independent contractors under all parts of the “ABC” test, or that they should be exempt under the statute.

Since the *Dynamex* decision, the California Courts of Appeal have held that the “ABC” test should be properly applied to wage and hour claims. In *Shepherd v. Honarchian*,<sup>34</sup> Plaintiff filed an action alleging that Defendant was in violation of wage and hour laws.<sup>35</sup> The issue in *Shepherd* was whether Plaintiff was an employee or an independent contractor, thereby determining the outcome of the allegations,<sup>36</sup> because only employees are covered under California’s wage and hour laws.<sup>37</sup> The court held that because the claim involved wage and hour claims, the court should apply the legal standard set forth in *Dynamex*.<sup>38</sup> The court reasoned the legal standard applied by the trial court was “inadequate to resolve the question of whether Plaintiff was an independent contractor *for purposes of relevant wage and hour laws*.”<sup>39</sup> The case was reversed and remanded for a new trial under the correct legal standard set forth in *Dynamex*.<sup>40</sup>

In *Gonzales v. San Gabriel Transit, Inc.*,<sup>41</sup> 500 drivers working as independent contractors allege that their misclassification as independent contractors violated the Industrial Welfare Commission’s wage orders.<sup>42</sup> The trial court initially evaluated the class as a whole, premised on the terms contained in several lease agreements, and found that Plaintiffs failed to “demonstrate the requisite community of interest of typicality among SGT drivers,”<sup>43</sup> under the “then-prevailing legal test”<sup>44</sup> and denied the motion.<sup>45</sup> However, *Dynamex* was decided when this appeal was still pending and

on appeal, the court held that the “ABC” test in *Dynamex* applies retroactively to pending litigation on wage and hour claims.<sup>46</sup>

## V. CONCLUSION

The outcome of the legal matters discussed rely heavily on the outcome of Proposition 22 this November. In the event that Proposition 22 prevails, the current cases being litigated will likely be dismissed. However, if Proposition 22 fails, litigation surrounding AB5 is likely to continue. If litigation continues in this area, it is possible that additional exemptions to the bill will be established through judicial interpretation at some point in the future.

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<sup>1</sup> CAL. LAB. § 2750.3 (2020).

<sup>2</sup> Id.

<sup>3</sup> *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal.App.5th 903 (Cal. Ct. App. April 30, 2018).

<sup>4</sup> CAL. LAB. § 2750.3(a)(1); see generally *Dynamex*, 4 Cal.5th at p. 957 (2019).

<sup>5</sup> See Proposition 22, p. 1, available at [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)).

<sup>6</sup> CAL. CONST. art. 2 § 8.

<sup>7</sup> See Proposition 22 App-Based Drivers and Services, p.1, available at [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)).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. at 2.

<sup>11</sup> Id. at 3.

<sup>12</sup> *Olson et al. v. California et al.*, No. 2:19-cv-10956.

<sup>13</sup> Id. at 35.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id. at 46

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> *Olson et al. v. California et al.*, No. 2:19-cv-10956-DMG-RAO, p. 7.

<sup>20</sup> Id.

<sup>21</sup> *People of the State of California v. Uber Technologies, Inc., et al.*, No. 20-55267.

<sup>22</sup> Id.

<sup>23</sup> Id. at 20.

<sup>24</sup> Id.

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<sup>25</sup> See CAL. LAB. § 2750.3(j).

<sup>26</sup> *People of the State of California v. Uber Technologies, Inc., et al.*, No. 20-55267 *supra* p. 25.

<sup>27</sup> *Id.* at 21.

<sup>28</sup> *Id.* at 22.

<sup>29</sup> *Id.*

<sup>30</sup> See <https://www.reuters.com/article/us-uber-california/california-wants-judge-to-classify-uber-lyft-drivers-as-employees-idUSKBN23V315>

<sup>31</sup> Under Proposition 22, drivers will be considered independent contractors so long as the following conditions are met: (1) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform; (2) The network company does not require the app-based driver to accept any specific rideshare service or delivery service requested as a condition of maintaining access to the network company's online-enabled application or platform; (3) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time; and (4) The network company does not restrict the app-based driver from working in any other lawful occupation or business. See Proposition 22, p. 3, *available at* [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)).

<sup>32</sup> *Olson et al. v. California et al.*, No. 2:19-cv-10956-DMG-RAO, p. 7.

<sup>33</sup> See CAL. LAB. § 2750.3(j).

<sup>34</sup> *Shepherd v. Honarchian*, No. F073576, 2019 WL 4729440 (Cal. Ct. App. Sept. 27, 2019).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See #12 *available at* [https://www.dir.ca.gov/dlse/faq\\_independentcontractor.htm](https://www.dir.ca.gov/dlse/faq_independentcontractor.htm).

<sup>38</sup> *Shepherd v. Honarchian*, No. F073576, 2019 WL 4729440 (Cal. Ct. App. Sept. 27, 2019).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal.App.5th 1311 (Cal. Ct. App. October 8, 2019).

<sup>42</sup> *Id.* at 1139.

<sup>43</sup> *Id.* at 1140.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1156.