UBER'S WAY OR THE HIGHWAY: HOW PROP 22 CREATED A NEW WORKER CLASSIFICATION STATUS FOR APP-BASED DRIVERS AND THE FIGHT FOR GREATER WORKER PROTECTIONS

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I. INTRODUCTION

In 1944, Supreme Court Justice John Rutledge noted that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[1] Almost eighty years later, that sentiment continues to ring true. However, Justice Rutledge could not have anticipated the growing complexity of labor law in the twenty-first century, spurred by advancements in technology that make it possible for workers to perform their duties without ever stepping foot in an office or meeting their supervisors. Technology platforms such as Uber and DoorDash have started to dominate delivery and transportation markets previously occupied by more traditional companies such as taxicab services and restaurants. According to Uber, about seven million people in the United States did gig work for either Uber, Lyft, or DoorDash in 2019.[2] Unfortunately, both state and federal labor laws have struggled to keep up with the changing landscape of

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1 NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944).

2 Uber, *A First Step Toward a New Model for Independent Platform Work*, UBER NEWSROOM (Aug. 10, 2020), https://www.uber.com/newsroom/working-together-priorities/.

employment law that has accompanied this shift.

Rideshare services have based their business model on hiring drivers as independent contractors to avoid state- and federally mandated worker protections for employees.[3] Worker classification is important because the vast majority of federal and state employment law protections only cover employees.[4] While recognizing that their drivers lack necessary benefits and protections under independent contractor status, these companies have consistently resisted attempts to re-classify their drivers as employees.[5]

California attempted to address the needs of the fast-growing group of gig workers, including rideshare drivers, when it passed AB 5 in 2019, which would have broadened the definition of "employee" to include many independent contractors.[6] However, Uber and other large tech companies fought back, launching a successful ballot initiative campaign to exempt themselves from the law.

This Comment surveys the landscape of employment law as it relates to worker classification. Focusing on California's failed attempt to re-classify rideshare drivers as employees, this Comment argues for a uniform federal approach that expands worker protections and benefits to a greater share of workers. Specifically, this Comment advocates for the adoption of the ABC worker classification test at the federal level through the passage of the Protecting the Right to Organize Act (the "PRO Act") and similar legislation expanding the ABC Test to all federal employment statutes. At the same time, gig workers seeking employee status should continue to litigate the issue, arguing that they are employees, even under the restrictive common law "right to control" test.

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[3] The Editorial Board, *Uber Rides Cost More? OK*, N.Y. TIMES (June 27, 2020), https://www.nytimes.com/2020/06/27/opinion/uber-covid-gig-economy.html.

[4] TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 5–6 (4th ed.) (2019) [hereinafter EMPLOYMENT LAW].

[5] The Editorial Board, *supra* note 3.

[6] Carolyn Said, *AB5, California's Landmark Gig-Work Law, Takes Effect Jan. 1 Amid Controversy*, S.F. CHRON. (Dec. 31, 2019), https://www.sfchronicle.com/business/article/AB5-California-s-landmark-gig-work-law-takes-14942512.php.

Part II of this note examines federal labor law and explains the various tests employed to determine whether a worker is an employee or an independent contractor. It then focuses on California's attempt to re-classify workers following its supreme court's ruling in *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 10 (Cal. 2018).

Part III analyzes the protections afforded to rideshare workers under Prop 22 as compared to those under AB 5. Considering this analysis, Part III argues that congressional action is needed to provide adequate protection for rideshare drivers and other similarly situated workers. Specifically, Part III advocates for the passage of the PRO Act. Lastly, Part III argues that, even under the common law right to control test, rideshare drivers could be classified as employees.

II. AN OVERVIEW OF EMPLOYMENT CLASSIFICATION IN THE UNITED STATES

A. *Common Law Right To Control Test*

Classifying workers for the purposes of federal statutory interpretation is difficult because Congress failed to meaningfully define "employee" or "employer" in many employment law statutes.[7] In the absence of a meaningful "employee" definition, the Supreme Court has held that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[8] Today, in the majority of circumstances, both federal and state courts apply some version of the common law right to control test.[9]

[7] EMPLOYMENT LAW, *supra* note 4, at 6 ("An 'employee' is 'an individual employed by an employer.'").

[8] EMPLOYMENT LAW, *supra* note 4, at 6; Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989).

[9] EMPLOYMENT LAW, *supra* note 4, at 30.

1. Origins of Common Law Test

The distinction between employees and independent contractors initially arose in the tort liability context to determine whether "masters" were liable for the acts of their "servants."[10] In the early 1700s, English courts "impos[ed] liability on masters for their servants' acts regardless of whether the master had given explicit authority to perform the tort-causing act."[11] This became impractical, however, at the start of the nineteenth century, as an increase in industrial activity led to enormous growth in the number of individuals hired for a particular skill "with the expectation that the hiring party would not be responsible for their conduct."[12] As a result, English and American courts began to distinguish between employees and independent contractors based on the right to control, holding that employers were only liable for the torts of their employees.[13] The courts reasoned that this limitation on vicarious liability protected hiring parties who utilized someone's services but had no realistic means to supervise the work.[14] Courts continued to classify workers for vicarious liability using the right to control test into the mid-twentieth century.[15] Under the right to control test, a court was likely to find an employee-employer relationship when the hiring party exercised a high degree of control over the worker.[16]

In 1933, the Restatement of Agency adopted the right to control test for purposes of tort liability to third parties.[17] Section 220 defined the term "servant" as "a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."[18] Although this right to control test was initially used to impose negligence liability on employers, courts began to use it during the New Deal Era in the

10 Ryan Vacca, *Uncertainty in Employee Status Across Federal Law*, 92 TEMP. L. REV. 121, 125 (2019).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 Vacca, *supra* note 10, at 125.

17 Restatement (First) of Agency § 220 (Am. L. Inst. 1933).

18 *Id.*

areas of collective bargaining and worker protection.[19]

The right to control test continued to be relied upon in the Restatement (Second) of Agency.[20] Section 220 listed ten factors to be considered in determining whether a worker is an employee or independent contractor, including:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, 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 employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.[21]

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19 Vacca, *supra* note 10, at 127.

20 Restatement (Second) of Agency § 220 (Am. L. Inst. 1958) ("A servant 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.").

21 *Id.*

2. Benefits and Criticisms of the Common Law Test

The chief criticism of the common law test is that its original purpose was to determine whether the principal was liable for the worker's torts "under the doctrine of respondeat superior[.]"[22] The common law test focuses on control because "[t]ort and agency law seek to link legal accountability with control."[23] But federal and state employment statutes "serve different ends."[24] Many federal labor laws were passed during the New Deal Era with the goal of compensating for the social inequality resulting from economic dependency in labor relations.[25] The common law test fails to recognize this goal. With a focus on the right to control, "the test denies the benefits of protective social legislation to many workers who labor under subordinate economic circumstances."[26]

The common law "test and its variations are highly fact-intensive[.]"[27] The ten-factor test creates uncertainty regarding the employer-worker relationship, resulting in "real costs" on workers and employers, including "ex ante planning and risk management costs and ex post costs," such as litigation.[28] While a more bright-line rule provides "greater predictability,"[29] the highly fact-sensitive inquiry insulates the common law test from being either over or underinclusive.

22 EMPLOYMENT LAW, *supra* note 4, at 31.

23 EMPLOYMENT LAW, *supra* note 4, at 31.

24 EMPLOYMENT LAW, *supra* note 4, at 31.

25 Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 1 BERKELEY J. EMP. & LAB. L. 153, 168 n.121 (2003) (citing Taco van Peijpe, *Independent Contractors and Protected Workers in Dutch Law*, 21 COMP. LAB. L. & POL'Y J. 127, 155 (1999).

26 *Id.* at 168.

27 EMPLOYMENT LAW, *supra* note 4, at 31.

28 EMPLOYMENT LAW, *supra* note 4, at 31.

29 EMPLOYMENT LAW, *supra* note 4, at 31.

3. The Common Law Test in Practice

i. The National Labor Relations Act ("NLRA")

Congress enacted the NLRA in 1935.[30] The NLRA protects the rights of employees to organize themselves into unions and "encourage[s] collective bargaining by protecting workers' full freedom of association."[31] The Act, however, only protects "employees" which shall not "include . . . any individual having the status of an independent contractor[.]"[32] Unfortunately, the NLRA did not include a helpful definition of "employee," and instead provides a circular definition stating that, "the term 'employee' shall include any employee[.]"[33] In *NLRB v. United Insurance Co.*,[34] the Supreme Court stated that the common law agency test should determine whether a worker is an employee or independent contractor,[35] emphasizing that "[w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principles."[36] In 1998, the National Labor Relations Board ("NLRB") "high-lighted the importance of the multifactor analysis of the Restatement (Second) of Agency, Section 220[.]"[37] There has been much debate, however, about the proper application of the common law factors to the independent contractor analysis.[38]

30 National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169.

31 *Id.*

32 *Id.* § 152(3).

33 *Id.*

34 NLRB v. United Ins. Co., 390 U.S. 254 (1968).

35 NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (explaining "the obvious purpose of [the Taft Hartley Amendments] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.").

36 *Id.* at 258.

37 Roadway Package Sys., Inc., 326 N.L.R.B. 842, 849 (1998).

38 *Compare* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) [hereinafter *FedEx I*] (explaining that "while all the considerations at common law remain in play … an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism"), *with* FedEx Home Delivery, 361 N.L.R.B. 610, 626 (2014) (rejecting *FedEx I*'s emphasis on entrepreneurial opportunity because such approach "would create a broader exclusion under Section 2(3) of the NLRA").

In *FedEx Home Delivery v. NLRB*, FedEx sought review of the NLRB determination that the company "committed an unfair labor practice by refusing to bargain with the union"[39] and argued that the drivers were not employees under § 2(3) of the NLRA.[40] The D.C. Circuit first noted that whether the workers were independent contractors or employees had jurisdictional consequences because the NLRB does not have "authority" over matters concerning independent contractors.[41] The court then explained, "[t]o determine whether a worker should be classified as an employee or an independent contractor, the Board and this court apply the common-law agency test, a *requirement* that reflects clear congressional will."[42] The court, relying on *Corporate Express Delivery Systems*,[43] explained that the common law agency test was qualitative rather than quantitative and that the evaluation "focus[es] not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors 'have a significant entrepreneurial opportunity for gain or loss.'"[44] Shifting the focus away from the right to control factors to the entrepreneurial opportunity factors of the Restatement (Second) of Agency § 220, the court held that the drivers were independent contractors.[45] Importantly, the court focused on the theoretical entrepreneurial opportunity rather than the actual entrepreneurial opportunity. The court was not concerned that many FedEx drivers chose not to organize their work in the form of independent business, nor did it take into account that both the opportunity for profit was minuscule and the company dictated the routes that the drivers were required to follow.[46] The

39 *FedEx I*, 563 F.3d at 495.

40 *Id.*

41 *Id.* at 496.

42 *Id.* at 495–96 (emphasis added).

43 *Id.* at 497 n. 3 (citing Corporate Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002) (quoting *Corp. Express*, 332 N.L.R.B. at 6)).

44 *Id.* (stating "[w]e do not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins.") (cleaned up).

45 *Id.* at 504 (finding that the drivers had "[t]he ability to operate multiple routes, hire additional drivers . . . and helpers, and to sell routes without permission").

46 *Id.* at 498 ("even one instance of a driver using such an opportunity can be

common law test outlined in *FedEx* makes it especially difficult for a worker to be considered an employee, as mere "entrepreneurial potential" will support the conclusion that the worker is an independent contractor.[47]

In 2014, the Labor Board again addressed the issue of whether FedEx drivers are employees.[48] The NLRB discussed the relevance of "entrepreneurial opportunity" and made clear that "entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[49] The NLRB gave "little weight to the drivers' right to sell their routes," because drivers seldom took advantage of this opportunity.[50] By looking to actual entrepreneurial opportunity, rather than theoretical opportunity, the Board concluded that the FedEx drivers were employees rather than independent contractors.[51] On appeal, the D.C. Circuit reiterated its previous holding in *FedEx I* and overturned the decision of the Board.[52]

In 2019, in *Supershuttle DFW, Inc.*, the NLRB expressed agreement with the *FedEx* common law agency test.[53] The Board confirmed that the ten common law factors enumerated in the Restatement (Second) of Agency § 220 determine whether a worker is an employee.[54] The Board criticized and overruled its previous ruling in *FedEx II*, explaining that it "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities," which "greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency."[55] The

sufficient to show there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right").

47 *See generally* FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).

48 FedEx Home Delivery, 361 N.L.R.B. No. 55 (2014).

49 *Id.* at 11.

50 *Id.* at 20.

51 *Id.* at 15.

52 FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 2017).

53 SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75 (2019).

54 *Id.* at 4–5.

55 *Id.* at 33–34.

Board explained that *FedEx I* did not make entrepreneurial opportunity the "overriding consideration," but rather "an important animating principle by which to evaluate those factors."[56] "Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general the more control, the less scope for entrepreneurial initiative."[57]

In April 2019, the NLRB explicitly addressed the issue of whether Uber drivers are employees or independent contractors.[58] In an advisory opinion, the NLRB General Counsel applied the common law agency test to determine whether the Uber drivers are independent contractors or employees.[59] The opinion highlighted the "animating principle" by which to evaluate the common law factors: whether the position presents the opportunities and risks inherent in entrepreneurialism.[60] The opinion stated that "where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, the Board will likely find independent-contractor status."[61] Considering all of the relevant factors, the NLRB General Counsel concluded that Uber drivers are independent contractors and therefore not covered by the NLRA.[62]

ii. Internal Revenue Code ("IRC") and the Internal Revenue Service ("IRS")

The IRS employs the common law right to control test for worker classification.[63] Worker classification is important to the IRS because the agency is charged with enforcement of wage withholding. The IRC mostly failed to provide a helpful definition of "employee," although some sections explicitly adopt the common law definition. For example, 26 U.S.C.

56 *Id.* at 35.

57 *Id.* at 42.

58 2019 NLRB Gen. Counsel Advice Memorandum, Uber Technologies Inc., 13-CA-163062 (April 16, 2019) [hereinafter *Uber Advice Memo*].

59 *Id.* at 5–7.

60 *Id.* at 6–7.

61 *Id.* at 7 (Quoting SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019) at 11).

62 *Id.* at 22.

63 Andrew G. Malik, *Worker Classification and the Gig-Economy*, 69 RUTGERS U. L. REV. 1729, 1737 (2017).

§ 3121(d)(2), which defines terms for purposes of social security taxes that apply to wages paid to an employee, states that an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee."[64] But some sections of the IRC, such as 26 U.S.C. § 3401, which defines terms for the purposes of an employer's federal income tax withholding obligation, do not adequately define the term "employee."[65] In the absence of a clear statutory definition, regulations issued under § 3401 incorporate the common law test.[66]

In 1987, the IRS provided guidance concerning the factors to be used in determining whether an employment relationship exists for federal employment tax purposes.[67] The IRS identified twenty factors to aid the analysis.[68] The agency developed these factors "based on an examination of cases and rulings" that considered whether an individual is an employee.[69]

Because of the difficulty in applying a twenty-factor test, the IRS adopted a new approach that groups the factors into categories.[70] The IRS looks at three relevant categories: behavioral control, financial control, and the relationship of the parties.[71] The behavioral control category considers whether the business retains the right to direct and control how the worker performs the specific tasks it hired the worker to perform.[72] The financial control category considers whether a business retains the right to direct and control how the business aspects of the worker's activities are conducted.[73] The relationship of the

64 26 U.S.C. § 3121(d)(2).

65 26 U.S.C. § 3401(c)("the term 'employee' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof").

66 Rev. Rul. 87-41, 1987-1 C.B. 296.

67 *Id.*

68 *Id.*

69 *Id.*

70 INTERNAL REVENUE SERVICE, INDEPENDENT CONTRACTOR OR EMPLOYEE, Publication 1779 (Rev. 3-2012), http://www.irs.gov/pub/irs-pdf/p1779.pdf.

71 INTERNAL REVENUE SERVICE, EMPLOYER'S SUPPLEMENTAL TAX GUIDE, Publication 15-A Cat. No. 21453T, http://www.irs.gov/pub/irs-pdf/p15a.pdf.

72 *Id.* (showing behavioral control include the training and the type and degree of instructions the business gives to the worker).

73 *Id.* (showing financial control include the method of paying the worker; the worker's opportunity for profit or loss; and whether the worker has a significant

parties category includes facts that illustrate how the parties perceive their relationship, such as facts that show the intent of the parties in establishing their relationship and whether the parties are free to terminate their relationship at will.[74] In addition to the aforementioned factors, "all information that provides evidence of the degree of control and independence" is relevant to the worker classification determination.[75]

iii. Social Security Act of 1935 ("SSA")

The SSA "protect[s] workers from poverty by requiring employers to pay taxes earmarked for future compensation to workers during periods of unemployment," including retirement.[76] Initially, the SSA provided a very general definition of "employment" and "employee."[77] In 1947, the Supreme Court, in *United States v. Silk*, concluded that "the very specificity of the exemptions" in the Act, coupled with "the generality of the employment definitions" indicated that the terms "employee" and "employment" were to be construed broadly to accomplish the purposes of the legislation.[78]

In response to the apparent broadening of the "employee" definition in *Silk*, Congress quickly amended the SSA to exclude independent contractors.[79] This amendment remains in place today, and the SSA defines an employee as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee."[80]

investment . . . or provides his services to the relevant market).

74 *Id.*

75 Malik, *supra* note 63, at 1739.

76 Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255, 291 (2013); *see also* U.S. v. Silk, 331 U.S. 704, 710 (1947).

77 *Silk*, 331 U.S. at 711–12.

78 *Id.* (adopting the economic realities test under the SSA).

79 Vacca, *supra* note 10, at 132.

80 42 U.S.C. § 410(j).

iv. Antidiscrimination Statutes (Title VII, Americans with Disabilities Act, and the Age Discrimination in Employment Act)

Federal antidiscrimination statutes, including Title VII, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"), prohibit discrimination against *employees* on the basis of race, color, religion, sex, national origin, disability, and age.[81] Under Title VII, it is unlawful for an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[82] Under the ADEA, it is illegal for an employer "to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[83] The ADA makes it unlawful for an employer to limit, segregate, or classify an "employee in a way that adversely affects the opportunities or status of such . . . employee because of the disability of such . . . employee."[84]

Title VII, the ADA, and the ADEA all define the term "employee" in the same way: "An individual employed by an employer."[85] Because all three statutes define "employee" in the same manner, courts generally analyze worker classification the same way under each statute.[86] Due to the vague "employee" definition, however, courts initially "used a variety of approaches for determining who counted as an employee under the

81 29 U.S.C. § 623(a)(2)–(3) (ADEA); 42 U.S.C. § 2000e-2(a)(2) (Title VII); 42 U.S.C. § 12112(a)–(b) (ADA).

82 42 U.S.C. § 2000e-2(a)(2).

83 29 U.S.C. § 623(a)(2).

84 42 U.S.C. § 12112(b)(1).

85 29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f); 42 U.S.C. § 12111(4).

86 U.S. EEOC v. Glob. Horizons, Inc., 915 F.3d 631 (9th Cir. 2019) (utilizing common law agency test to define "employee" under Title VII); *see* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440 (2003) (utilizing common law agency test to define "employee" under the ADA); *see also* Frankel v. Bally, Inc., 987 F.2d 86 (2d Cir. 1993) (utilizing common law agency test to define "employee" under the ADEA).

antidiscrimination statutes."[87]

The Supreme Court finally provided guidance in 2003, in *Clackamas Gastroenterology Associates v. Wells*. The Court first discussed its prior holding in *Nationwide Mut. Ins. Co. v. Darden*, that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[88] Noting that the ADA used the term "employee" without a true definition, the Court concluded that "the common law element of control is the principal guidepost" that should be followed in ADA cases.[89] Although *Clackamas* was an ADA case, the Court "clearly intended" it to apply to all three antidiscrimination acts, given the similar definition of "employee" in these acts.[90] In accordance with *Clackamas*, the Equal Employment Opportunity Commission, which is charged with enforcing Title VII, the ADEA, and the ADA, relies on the common law test for determining who qualifies as an employee.[91]

B. *The Economic Realities Test*

1. Origins of the Economic Realities Test

The economic realities test initially arose in the context of interpreting several federal labor statutes, including the NLRA and the Fair Labor Standards Act ("FLSA").[92] In *NLRB v. Hearst Publications*,[93] the Supreme Court rejected the common law test and applied the economic realities test to determine whether newsboys were employees of a newspaper publisher.[94] In finding that the newsboys were employees, the Court explained that the newsboys worked continuously and regularly, relied upon their

87 Vacca, *supra* note 10, at 141.

88 *Clackamas*, 538 U.S. at 445 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992)).

89 *Id.* at 448.

90 Vacca, *supra* note 10, at 141.

91 2 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL §§ 605:0008-00010 (2000).

92 Jiyoung Bang, *supra* note 76, at 284.

93 NLRB v. Hearst Publ'ns, 332 U.S. 111 (1944).

94 NLRB v. Hearst Publ'ns, 322 U.S. 111, 128–29 (1944).

earnings to support themselves, and had their wages largely influenced by the publishers.[95] Moreover, the publishers supervised their work hours and provided a substantial portion of the newsboys' sales equipment and advertising materials.[96] The Supreme Court's adoption of the economic realities test provided "a greater safety net for workers because the definition of 'employee' was expanded to embrace those who were not subject to direct physical domination," while "the definition of 'employer' was broadened to include those who had no direct contractual employment relationship with a group of workers."[97]

In response to *Hearst*, however, Congress amended the NLRA to "specifically exclud[e] 'any individual having the status of an independent contractor' from the definition of 'employee.'"[98] This had both the purpose and effect of overturning *Hearst*, and it required courts to apply the common law agency test in determining worker classification under the NLRA.[99] Although no longer used to determine worker classification under the NLRA, the economic realities test is still used today to determine worker classification under the FLSA.[100]

Following *Hearst*, the Supreme Court expanded the economic realities test to other labor-related statutes.[101] In *United States v. Silk*,[102] the Supreme Court sought to determine whether men who unloaded railway cars were employees of a railway company under the SSA for the purposes of unemployment taxes.[103] The Court, under the economic realities test, concluded that the workers were employees by considering

95 *Id.* at 131.

96 *Id.*

97 Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 327 (2003).

98 NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968).

99 *Id.*

100 Jiyoung Bang, *supra* note 76, at 284–85.

101 *See* Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (defining "employee" under provisions of the Fair Labor Standards Act); U.S. v. Silk, 331 U.S. 704 (1947) (defining "employee" under the Social Security Act).

102 U.S. v. Silk, 331 U.S. 704 (1947).

103 *Silk*, 331 U.S. at 705, *superseded by statute*, 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. § 3121(d) (amending SSA to exclude "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor")).

the following five factors: the "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required in the claimed independent operation."[104] Although the first factor, the degree of control, reflects the common law agency analysis, the remaining four factors seek to analyze the "broader aspects of a worker's economic subordination."[105]

2. Criticisms of the Economic Realities Test

Courts do not consistently apply the economic realities test outlined in *Silk*.[106] Some courts abandoned the five factors in favor of a "totality of the circumstances" test.[107] Other courts created their own economic realities tests,[108] adding additional factors.[109] While these additional factors continue to reflect the spirit of the original five-factor test of *Silk*, and many courts have adopted the *Silk* test, "the uncertainty of which test to use, or the ability to invent a new test, adds to an already unpredictable playing field."[110] Instead, "[c]ourts decide rather arbitrarily which factors to employ and, without articulated interpretative frameworks to guide their decisions, courts oscillate between

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104 *Id.* at 716.

105 Lung, *supra* note 97, at 327.

106 *Rutherford*, 331 U.S. at 730 (expanding economic realities test to a totality of the circumstances); Velez v. Sanchez, 754 F. Supp. 2d 488, 499 (E.D.N.Y. 2010) (using a different test to determine economic reality).

107 *Rutherford*, 331 U.S. at 730.

108 *Velez*, 574 F. Supp. 2d at 499 (citing Herman v. RSR Sec. Servs., 172 F.3d 132, 139 (2d Cir. 1999) (relevant factors include "whether the allege employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records").

109 Jiyoung Bang, *supra* note 76, at 295 (The following factors have been considered under the economic realities test:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) and whether the service rendered is an integral part of the alleged employer's business.

110 Jiyoung Bang, *supra* note 76, at 295.

different versions of the factors, resulting in inconsistencies within circuits."[111]

At the end of the day, "the economic realities test is similar to the common-law test both in structure (a multifactored inquiry) and substance (a focus on control)."[112] Although the economic realities test should expand the definition of "employee," courts have found that the two tests ultimately lead to the same results.[113]

3. Economic Realities Test in Practice

The Department of Labor ("DOL") oversees the enforcement of the FLSA.[114] Congress enacted the FLSA in 1938 to ensure safe working conditions and to promote the general well-being of workers.[115] The FLSA prohibits employers from failing to pay an employee the federal minimum wage; discriminating against an employee on the basis of sex by paying different wages for equal work; and using oppressive child labor.[116] Similar to other New Deal legislation, the FLSA provides an unhelpful, circular definition of employee: "the term 'employee' means any individual employed by an employer."[117] The FLSA, however, also states that "employ includes to suffer or permit to work."[118]

The same day that the Supreme Court decided *Silk*, it also handed down its decision in *Rutherford Food Corp v. McComb*.[119] In *Rutherford Food Corp.*, the Court considered

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111 Lung, *supra* note 97, at 325.

112 EMPLOYMENT LAW, *supra* note 4, at 62.

113 Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945 (9th Cir. 2010) ("there is no functional difference" between the common law and economic realities test).

114 Malik, *supra* note 63, at 1740.

115 *See* Fair Labor Standards Act, 29 U.S.C. § 202; U.S. v. Darby, 312 U.S. 100, 109–10 (1941) (explaining that purpose of Fair Labor Standards Act is to "exclude from interstate commerce goods produced … under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being").

116 29 U.S.C. §§ 206 (minimum wage, (d) (prohibition of sex discrimination)), 212 (child labor provisions).

117 29 U.S.C. § 203(e)(1).

118 29 U.S.C. § 203(g).

119 Rutherford Food Corp. v. McComb, 331 U.S. 722, 723 (1947).

whether meat boners were employees of a slaughterhouse company under the FLSA.[120] The Court noted that while the FLSA's definition of "employee" is unhelpful, its definition of "employ" is broad and "comprehensive enough to require its application to many persons . . . which, prior to this Act, were not deemed to fall within an employer-employee category."[121] The Court reasoned that the determination of the relationship should not depend on "such isolated factors" under the common law approach, "but rather upon the circumstances of the whole activity."[122] Under this definition of "employ," the Court concluded that the meat boners were employees under the FLSA.[123]

Although Congress quickly amended the NLRA and SSA after *Hearst* and *Silk* to define "employee" under the common law test, they failed to introduce any similar amendment to change the FLSA after *Rutherford*.[124] In the absence of an amendment, the Supreme Court, in *Goldberg v. Whitaker House Cooperative*, concluded that the "economic reality" test is the appropriate standard to determine worker classification under the FLSA.[125]

Today, the DOL continues to rely on the economic realities test and understands that economic dependence is the "ultimate inquiry," and "an employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work."[126] The DOL provides two "core factors" that are most probative as to whether an individual is an economically dependent employee.[127] The first core factor is "the nature and degree of control over the work."[128] This factor mimics the common law test and weighs toward the individual being an independent contractor if the individual "exercises substantial

120 *Id.* at 727.
121 *Id.* at 728–29.
122 *Id.* at 730.
123 *Id.*
124 Vacca, *supra* note 10, at 132.
125 Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961).
126 29 C.F.R. § 795.105(b) (2019).
127 29 C.F.R. § 795.105(c-d) (2019).
128 29 C.F.R. § 795.105(d) (2019).

control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors."[129]

The second core factor is "the individual's opportunity for profit or loss."[130] Where an individual has the "opportunity to earn profits or incur losses based on his or her exercise of initiative . . . or management of his or her investment in or capital expenditure on, for example, helpers or equipment," this factor weighs in favor of finding the individual to be an independent contractor.[131] On the other hand, this factor weighs in favor of finding that an employment relationship exists when "the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster."[132]

If the core factors support different conclusions, the four remaining factors can provide guidance. Aside from the core factors, the DOL looks to (1) the amount of skill required; (2) the degree of permanence of the working relationship between the individual and the hiring party; (3) "whether the work is part of an integrated unit of production" and; (4) any additional factors "relevant in determining whether an individual is an employee or independent contractor."[133]

C. *The ABC Test*

1. Origins of the ABC Test

The ABC Test originated in Maine in 1935 but gained popularity as the dominant reform for state independent contractor definitions after Massachusetts adopted it in 2004.[134] Although the federal government has not adopted the ABC Test, it has become increasingly popular among state legislatures and

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129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L. J. 1, 27 (2018).

courts.[135]

While the exact language varies from state to state, the ABC Test is a simplified version of the common law test that "creates a rebuttable presumption in favor of employment."[136] The ABC Test, as codified in California for the purposes of the Unemployment Insurance Code and wage orders of the Industrial Welfare Commission, states that:

> a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that *all of the following conditions* are satisfied:
> (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 that is outside the usual course of the hiring entity's business.
> (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.[137]

The first prong, whether the person is free from control, determines whether the worker is subject "to the type and degree of control a business typically exercises over employees."[138] A business does not need to control the exact manner or details of the work in order to maintain the requisite control that an employer ordinarily possesses over its employees (but not independent contractors) to find an employer-employee relationship.[139]

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135 *Id.* ("in total, [thirty-eight] states have adopted some form of the ABC Test").

136 *Id.*

137 CAL. LAB. CODE § 2775(b) (West 2021) (emphasis added).

138 Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 958 (2018).

139 *Id.*

The second prong, whether the worker performs work that is outside the usual course of the business, "bring[s] within the 'employee' category *all* individuals who can reasonably be viewed as working 'in the hiring entity's business,' . . . [including] all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee."[140] Whether the business labels the worker as an independent contractor is not controlling. Instead, the focus is on "whether the work done, in its essence, follows the usual path of an employee."[141] A worker is most likely classified as an employee when their services align with "the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business."[142]

The third prong, whether the worker is engaged in an independently established business, ensures that a business is not attempting to evade its obligations under relevant employment laws.[143] Evidence that would satisfy this prong includes proof that the worker has taken steps to incorporate his business, obtain licenses, or advertise the business.[144] To satisfy the C prong, the "hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business."[145]

Several factors contribute to the ABC Test's increasing popularity. First, the ABC Test "creates a presumption of employment, making it more difficult for unscrupulous employers to misclassify employees as independent contractors to avoid legal obligations."[146] The presumption of employment places the burden on the employers, who have "the most control over the facets of the relationship, to prove that" the workers are

140 *Id.* at 959.

141 *Id.*

142 *Id.*

143 *Id.* at 962–63.

144 *Dynamex*, 4 Cal. 5th at 963.

145 *Id.*

146 Karen R. Harned, Georgine M. Kryda, & Elizabeth A. Milito., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 102 (2010).

not employees under the test.[147]

A second benefit of the ABC Test is that the three-prong test eliminates easily manipulated common law factors, such as intent and location.[148] Instead, the ABC "prongs act as a simple checklist of objective factors."[149] Moreover, because failure to satisfy any single prong results in classifying the worker as an employee, the ABC Test is "more user-friendly to judges, workers, and businesses compared to the complexity of current common law tests."[150]

2. Criticisms of the ABC Test

The ABC Test is not perfect. Despite the seemingly simple three-prong approach, "the B and C prongs . . . have been subject to great variation in different jurisdictions' interpretations of the test."[151] Critics have argued that the three prongs "only hide the other right-to-control factors."[152] In *Carpet Remnant Warehouse v. New Jersey Dept. of Labor*, for example, the New Jersey Supreme Court looked to several common law right to control factors to evaluate prong A.[153] Lastly, the ABC Test is inflexible: there may be situations where the "overwhelming evidence suggests that a person should" be classified as an independent contractor, but the failure to satisfy a single prong requires a finding that the worker is an employee.[154]

D. *The Adoption of the ABC Test in California*

While the federal government determines worker classification for the purpose of enforcing various federal employment and labor law statutes, states similarly determine worker classification to carry out their own laws. In California,

147 Pearce & Silva, *supra* note 134, at 27.

148 *Id.* at 28.

149 *Id.*

150 *Id.*

151 Alaina Billingham, *Driving the Industry Crazy: Classifying Ride-Share Drivers Following Dynamex*, 72 RUTGERS U. L. REV. 189, 198 (2019).

152 Pearce & Silva, *supra* note 134, at 29.

153 Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab., 125 N.J. 567, 582 (1991).

154 Pearce & Silva, *supra* note 134, at 29.

the worker classification determination has far-reaching consequences. Employees, but not independent contractors, are entitled to state protections including "[state] minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave."[155] Given that "California employment law is generally more worker-friendly than the law of other jurisdictions," employers have good reason to prefer independent contractors over traditional employees.[156]

1. *Dynamex* and its Predecessors

Although worker classification determinations initially arose in the tort context, "California decisions generally invoked this common law 'control of details' standard beyond the [vicarious liability] context."[157] For example, in an unemployment insurance case, the Supreme Court of California stated that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has *the right to control* the manner and means of accomplishing the result desired."[158] Many decisions also pointed to the Restatement Second of Agency § 220 factors to help determine worker classification.[159]

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, the California Supreme Court addressed "whether agricultural laborers engaged to harvest cucumbers under a written 'sharefarmer' agreement are 'independent contractors' [under California] workers' compensation [statutes]."[160] The

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155 *See* Olson v. California, No. 19-10956-DMG, 2020 U.S. Dist. LEXIS 34710, at *14–15 (C.D. Cal. Feb. 20, 2020).

156 Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 82 (2016) (California has a high minimum wage, guaranteed paid family leave and paid sick days, and prevents employers from asking applicants about their salary history); *see* Alexia F. Campbell, *Here are the States That Treat Workers the Best—and the Worst*, VOX (Aug. 30, 2019) https://www.vox.com/2019/8/30/20838389/best-and-worst-states-to-work; *see also* CAL. LAB. CODE § 432.3 (West 2020).

157 *Dynamex*, 4 Cal. 5th at 927.

158 Tieberg v. Unemployment Ins. App. Bd., 2 Cal. 3d 943, 944 (1970) (emphasis added).

159 *Dynamex*, 4 Cal. 5th at 928.

160 S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d 341, 345 (1989).

court concluded that "[i]n no practical sense are the 'sharefarmers' entrepreneurs operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply."[161] The court explained that "the concept of 'employment' embodied in the [Workers' Compensation] Act is not inherently limited by common law principles," and "the Act's definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute."[162] *S.G. Borello* essentially altered the common law test to give "deference to the purposes of the . . . legislation."[163]

In *Martinez v. Combs*, the California Supreme Court addressed the meaning of "employ" and "employer" under the California wage orders.[164] In *Martinez*, the strawberry grower, Munoz & Sons, employed seasonal agricultural workers but failed to pay them appropriate minimum or overtime wages as required by the Industrial Welfare Commission ("IWC") Wage Order No. 14.[165] The court observed that the IWC's "suffer or permit to work" language had been historically used "to impose liability upon an entity 'even when no common law employment relationship existed.'"[166] The *Martinez* court emphasized the importance of not limiting the meaning and scope of "employment" to only the common law definition for the purposes of wage orders.[167]

In *Dynamex*, delivery drivers filed a complaint against Dynamex Operations, a nationwide package and document delivery company, alleging that Dynamex misclassified them as independent contractors.[168] This misclassification, the drivers argued, led to Dynamex's violation of provisions of the state wage

161 *Id.*

162 *Id.* at 351.

163 *Id.* at 353.

164 Martinez v. Combs, 49 Cal. 4th 35, 42 (2010).

165 *Id.*

166 *Id.* at 58; Dynamex Operations W. v. Superior Ct., 4 Cal. 5th 903, 937 (2018).

167 *Martinez*, 49 Cal. 4th at 65.

168 *Dynamex*, 4 Cal. 5th at 914.

order governing the transportation industry.[169] The wage order at issue applied to "all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis."[170] The wage order defined "employ" as to "engage, suffer, or permit to work," and "employee" as "any person employed by an employer."[171] Accordingly, the *Dynamex* court "confine[d] the discussion . . . to an analysis of the scope and meaning of the suffer or permit to work standard in California wage orders."[172]

The court explained that the suffer or permit to work standard was first adopted in the FLSA and was "'the broadest definition' that has been devised for extending the coverage of a statute or regulation to the widest class of workers."[173] The suffer or permit to work standard in California wage orders, the court explained, "finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation."[174] Given the historically broad suffer or permit to work standard, coupled with the remedial goals of the wage orders, the court concluded that "the suffer or permit to work standard must be interpreted and applied broadly to include within the covered 'employee' category all individual workers who can reasonably be viewed as 'working in the hiring entity's business.'"[175]

Acknowledging that federal courts use the economic realities test to determine whether workers are employees under the "suffer or permit to work" standard of the FLSA, the court weighed the relative advantages and disadvantages of the test.[176] The court ultimately rejected the economic realities approach for two reasons. First, the multifactor economic realities test is unpredictable and "makes it difficult for both hiring businesses

169 *Id.*

170 CAL. CODE REGS. tit. 8, § 11090(1) (2021).

171 CAL. CODE REGS. tit. 8, § 11090(2) (2021).

172 *Dynamex*, 4 Cal. 5th at 944.

173 *Id.* at 951.

174 *Id.* at 952 ("The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare.").

175 *Id.* at 953.

176 *Id.* at 953–54.

and workers to determine in advance how a particular category of workers will be classified."[177] Second, the court was concerned that a multifactor test encourages businesses to manipulate their workforce into "disparate categories and varying working [ ] conditions . . . with an eye to the many circumstances that may be relevant under the" economic realities test.[178]

Given the court's reluctance to adopt the economic realities test, the court looked to "a simpler, more structured test for distinguishing between employees and independent contractors:" the ABC Test, adopted by a number of other jurisdictions.[179] The court reasoned that the ABC Test minimizes the disadvantages of the economic realities test because it "presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates" each of the three prongs:

> (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[180]

The court explained that because the IWC was enacted before the FLSA and, therefore, was not intended to embrace the federal economic realities test of the FLSA, the court was not required to follow it.[181] The court, in adopting the ABC Test, concluded that its interpretation of the suffer or permit to work standard "is faithful to its history and to the fundamental purpose of the wage

177 *Id.* at 954.

178 *Dynamex*, 4 Cal. 5th at 955.

179 *Id.*

180 *Id.* at 955–56.

181 *Id.* at 956 ("California wage orders are intended to provide broader protection than that accorded workers under the federal standard").

orders and will provide greater clarity and consistency, and less opportunity for manipulation" than the economic reality or common law test.[182]

2. Codifying *Dynamex*: AB 5 and Subsequent Amendments

After the *Dynamex* decision, California Assemblywoman Lorena Gonzalez drafted Assembly Bill No. 5 ("AB 5") to codify the ABC Test and offer workers "more stability and security and the opportunity to organize."[183] In response to this proposed legislation, representatives from Uber, Lyft, Teamsters Service Employees International Union, and the governor's office met to discuss a deal that "could leave drivers for ride-hailing services with many of the employment protections under [AB 5] while allowing them to join a labor organization," but still exempting the rideshare drivers from employee classification under AB 5.[184] After negotiations failed, the ridesharing apps attempted to lobby for the enactment of a separate bill that would have left the drivers "short of full employee status, but give them a union that would bargain industrywide with the companies over wages and benefits."[185] This attempt also failed.[186]

While *Dynamex* concerned claims asserted by delivery drivers against a package and document delivery company,[187] AB 5 focused its attention on the gig economy, including rideshare services.[188] Moreover, although *Dynamex* only applied to wage-hour claims, AB 5 expanded the ABC Test to all California wage

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182 *Id.* at 964.

183 ECT, *Governor Signs AB 5 to Stop Misclassification and Protect Millions of Workers*, E. CNTY. TODAY (Sept. 18, 2019), https://eastcountytoday.net/governor-signs-ab-5-to-stop-misclassification-and-protect-millions-of-workers/.

184 Kate Conger & Noam Scheiber, *California Labor Bill, Near Passage, Is Blow to Uber and Lyft*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/2019/09/09/business/economy/uber-lyft-california.html.

185 *Id.* It is unclear, however, if this structure would survive judicial scrutiny under federal antitrust laws.

186 *Id.*

187 Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 903 (2018).

188 Carolyn Said & Dustin Gardiner, *Gig-work Bill Passes Senate Committee as Crowded Rally For and Against it*, S.F. CHRON. (July 10, 2019), https://www.sfchronicle.com/business/article/Gig-work-bill-passes-Senate-committee-as-crowds-14085950.php.

orders, the Labor Code, and the Unemployment Insurance Code.[189] AB 5 was signed into law in late 2019 and took effect January 1, 2020.[190]

AB 5, as codified, states "for purposes of [the Labor Code] and the Unemployment Insurance Code, and for the purposes of wage orders in the [IWC]," a worker "providing labor or services shall be considered an employee" unless the employer demonstrates each of these conditions is satisfied:

> (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 that is outside the usual course of the hiring entity's business.
> (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.[191]

This language closely mirrors the *Dynamex* ABC Test, with no material difference.[192] The significance of the new statute, therefore, is that it extends the ABC Test to serve as the worker classification test for the purposes of the Labor Code, Unemployment Insurance Code, and wage orders in the IWC.[193] Given the broad scope of the "employee" definition under the ABC Test, AB 5 has the effect of providing more workers with access to state labor protections such as paid sick leave, unemployment insurance, and paid family leave.[194]

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189 Janet Grumer, *New California AB 5 Law Expands Independent Contractor ABC Test*, DAVIS WRIGHT TREMAINE LLP (Sept. 19, 2019), https://www.dwt.com/blogs/employment-labor-and-benefits/2019/09/california-ab5-employment-law.

190 Dustin Gardiner, *Gov. Newsom Signs AB5, Making Gig-Work Reform Bill Law*, S.F. CHRON. (Sept. 18, 2019), https://www.sfchronicle.com/business/article/Gov-Newsom-signs-AB5-making-gig-work-reform-14449952.php.

191 CAL. LAB. CODE. § 2775(b)(1) (West 2021).

192 *See Dynamex*, 4 Cal. 5th at 957 (enumerating the three ABC factors).

193 CAL. LAB. CODE. § 2775(b)(1) (West 2021).

194 CAL. LAB. CODE. § 246 (West 2021) (paid sick leave); CAL. UNEMP. INS. CODE § 621 (West 2021) (unemployment insurance); CAL. UNEMP. INS. CODE § 3302 (West

Implementation of the new statute, however, did not go off without a hitch. A number of amendments have since been added to carve out exceptions for workers in various industries.[195] According to the amendments, workers that are subject to the economic realities test rather than the ABC Test include business-to-business contracting relationships, contracts between a referral agency and a service provider, contracts for professional services, occupations in connection with the creation, marketing, promotion, or distribution of sound recordings or musical compositions, some medical professionals, and commercial fishermen.[196] Rideshare services, however, did not receive an exemption from the state legislature.[197]

3. Proposition 22

After the California Legislature enacted AB 5, Uber and Lyft successfully launched a 2020 state ballot initiative to exempt their drivers from the new law.[198] The ballot initiative, Proposition 22 ("Prop 22"), exempts "app-based transportation and delivery companies from providing employee benefits to certain drivers."[199] It assumes that the drivers are independent contractors *unless*:

> (a) the network company does not unilaterally prescribe specific dates, times of day, or minimum hours during which the app-based driver must be logged into the network company's [app]. (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of

2021) (paid family leave).

195 Dorothy Atkins, *California Legislation and Regulation to Watch in 2021*, LAW360 (January 3, 2021).

196 Cal. Lab. Code § 2783 (West 2021).

197 *Id.*

198 Kate Conger & Noam Scheiber, *California Labor Bill, Near Passage, Is Blow to Uber and Lyft*, N.Y. TIMES, (Sept. 9, 2019), https://www.nytimes.com/2019/09/09/business/economy/uber-lyft-california.html.

199 OFFICIAL VOTER INFORMATION GUIDE, https://web.archive.org/web/20210429214531/https://voterguide.sos.ca.gov/propositions/22/title-summary.htm (last visited Jan. 29, 2021) [hereinafter OFFICIAL VOTER INFORMATION GUIDE].

> maintaining access to the network company's [app]. (c) 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] (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.[200]

Although effectively precluding drivers from being considered as "employees" under California law, Prop 22 provides some benefits to the drivers, including minimum wage guarantees, healthcare subsidies, and occupational accident insurance.[201] Prop 22 guarantees drivers earn at least one hundred and twenty percent of local minimum wage plus thirty cents per mile, calculated by "engaged time," or time spent en route to, or during, a ride.[202] Drivers earning more than the guaranteed minimum can also keep all of their earnings, as well as one hundred percent of their tips.[203]

In addition to a guaranteed minimum wage, drivers receive a healthcare contribution "equal to [one hundred] percent of the average employer payment under the Affordable Care Act if they work [twenty-five] hours per week,"[204] and equal to fifty percent if they work at least fifteen hours per week.[205] But both the healthcare subsidy and the guaranteed minimum wage are only based on "engaged time."[206] The time between trips does not count, which means that it is likely that most drivers make less than local minimum wages for their total time using the app, and

200 CAL. BUS. & PROF. CODE § 7451 (West 2021).

201 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 199.

202 Faiz Siddiqui, *Uber, Other Gig Companies Spend Nearly $200 Million to Knock Down an Employment Law They Don't Like—and It Might Work*, WASH. POST, (Oct. 26, 2020), https://www.washingtonpost.com/technology/2020/10/09/prop22-uber-doordash/.

203 Kim Lyons, *Uber and Lyft Roll Out New Benefits For California Drivers Under Prop 22*, THE VERGE (Dec. 14, 2020), https://www.theverge.com/2020/12/14/22174600/uber-lyft-new-benefits-california-drivers-prop-22-gig-economy.

204 Siddiqui, *supra* note 202.

205 Lyons, *supra* note 203.

206 Siddiqui, *supra* note 202.

they do not receive a guaranteed rate of pay.[207] Drivers spend an estimated thirty to forty percent of their time clocked into the app waiting for passengers,[208] which means that it takes approximately thirty-eight hours to reach twenty-five hours of "active" time for full healthcare benefits.[209] Similarly, even if the driver works thirty-eight hours, he or she is only guaranteed the minimum wage for the roughly twenty-five hours of active time, receiving nothing for the other thirteen hours of inactive time.[210]

Rideshare services invested over $224 million into the Prop 22 campaign.[211] In comparison, opponents only raised about $20 million.[212] Uber and Lyft paid for advertisements on cable, "social media[,] and their own apps with messaging promising a minimum wage, health care[,] and protections typically consistent with" full-time employees.[213] For example, one click-through prompt on Uber explained that "Prop 22 will provide guaranteed earnings and a health care stipend," and gave drivers the option to tap "Yes on Prop 22" or "okay."[214] The advertisements showed drivers embracing the independence and earnings opportunities gig work provided, and asked California

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[207] Eve Batey, *California Voters Approve Tech-Bankrolled Campaign to Deny Benefits to Food Delivery Drivers*, EATER S.F. (Nov. 4, 2020), https://sf.eater.com/2020/11/4/21549219/prop-22-food-delivery-uber-postmates-lyft-DoorDash-2020-election.

[208] Emily Brill, *3 Open Benefits Questions Under CA's Prop 22*, LAW360 (November 13, 2020), https://www.law360.com/articles/1328718/3-open-benefits-questions-under-california-s-prop-22.

[209] If one-third (thirty-three percent) of the total time is spent waiting for passengers, forty minutes of each hour is "active." Forty minutes (of active time) multiplied by thirty-eight (total hours) is 1,520 minutes, or twenty-five hours and twenty minutes (of active time).

[210] *See* Batey, *supra* note 207 (explaining that requirement to pay drivers 120 percent of local or statewide minimum wage only applies to active time); Emily Brill, *3 Open Benefits Questions Under CA's Prop 22*, LAW360 (November 13, 2020), https://www.law360.com/articles/1328718/3-open-benefits-questions-under-california-s-prop-22 (explaining that drivers spend 30 to 40 percent of their time clocked into the app waiting for passengers).

[211] Batey, *supra* note 207.

[212] Batey, *supra* note 207.

[213] Faiz Siddiqui & Nitasha Tiku, *Uber and Lyft Used Sneaky Tactics To Avoid Making Drivers Employees in California, Voters Say. Now, They're Going National.*, WASH. POST (Nov. 17, 2020), https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/.

[214] *Id.*

voters to not take away driver flexibility.[215]

As part of the Yes Campaign, Uber and Lyft warned that they would either hike up prices or leave California if they were forced to re-classify their drivers as employees instead of independent contractors.[216] "Voters were told that they could grant drivers guaranteed earnings and health-care benefits by voting 'yes,' but if they voted 'no,' up to [ninety] percent of gig[]work driving jobs could disappear."[217]

Since its passage, some voters have expressed remorse over their Prop 22 vote, explaining that they were deceived by the Yes Campaign.[218] The rideshare services cautioned that a "no" vote would subject drivers to greater control by the company, including set hours and schedules.[219] Some voters believed that "Prop 22 was going to help the drivers, and Uber and Lyft were going to be paying them more."[220] A survey of California voters revealed that at least "[forty] percent of 'yes' voters thought they were supporting gig workers' ability to earn a living wage."[221] Some voters did not make the connection between AB 5 and Prop 22 and thought that they were simply granting minimum wage to the drivers.[222] Moreover, some voters did not realize that "they were making a choice between benefits guaranteed through employment and an arbitrary set of supplemental benefits—including a health-care stipend—designed by the gig companies."[223] Although some advertisements cited a survey that "claimed that at least 70 percent of drivers supported Prop 22[,]

215 *Id.*

216 Eve Batey, *That Price Hike Delivery Apps Threatened If Prop 22 Failed? It's Happening Anyway*, EATER S.F. (Dec. 15, 2020, 10:47 AM PST), https://sf.eater.com/2020/12/15/22176413/uber-eats-DoorDash-price-hike-fee-december-prop-22.

217 Siddiqui & Tiku, *supra* note 213.

218 Siddiqui & Tiku, *supra* note 213.

219 *Uber, Lyft-Backed State Ballot Measure Passes; Gig Economy Business Model Remains Intact; Drivers Independent Contractors*, CBS NEWS BAY AREA (Nov. 4, 2020, 5:01 PM), https://sanfrancisco.cbslocal.com/2020/11/04/cuber-lyft-backed-state-ballot-measure-passes-gig-economy-business-model-remains-intact-drivers-remain-independent-contractors/.

220 Siddiqui & Tiku, *supra* note 213.

221 Siddiqui & Tiku, *supra* note 213.

222 Siddiqui & Tiku, *supra* note 213.

223 Siddiqui & Tiku, *supra* note 213.

[t]he data cited included unscientific surveys and a poll ordered by Uber."[224]

III. PROP 22 AND THE WAY FORWARD FOR RIDESHARE DRIVERS

A. *Prop 22 Provides Drivers with Fewer Protections than Traditional Employees Despite Rideshare Services Exercising Typical Employer Control Over Them*

1. Prop 22 Fails to Provide Drivers With Sufficient Worker Protections

Prop 22 is a potential "third way" to classify workers that fall somewhere between independent contractor and employee.[225] "Prop 22 offers workers more benefits" and protections than independent contractors typically receive but falls short of "offering the benefits typically provided to employees."[226] Although Prop 22 provides drivers with a guaranteed minimum wage, a healthcare subsidy, and occupational accident insurance,[227] it does not provide full, traditional employee protections and benefits. For example, under AB 5, employees are protected by the IWC, which sets "meal and rest break requirements, minimum wage, and overtime pay for employees."[228] Moreover, California employees are protected by the Labor Code, which provides remedies to workers for injuries suffered in connection with their employment, including access to workers' compensation insurance.[229]

At first glance, the guaranteed minimum wage equal to 120 percent of the local minimum wage seems to provide drivers with a comfortable hourly rate. Lyft CEO John Zimmer explained

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224 Siddiqui & Tiku, *supra* note 213.

225 Axios Re:Cap, *Lyft co-founder John Zimmer on what comes next for the gig economy*, AXIOS, 05:50 (Nov. 10, 2020), https://www.axios.com/lyft-john-zimmer-prop-22-worker-0db82847-b7e2-4963-938c-60e47927d7f5.html.

226 Brill, *supra* note 208.

227 *Text of Proposed Laws*, CAL. SEC'Y OF STATE, at 30, https://vig.cdn.sos.ca.gov/2020/general/pdf/topl.pdf (California General Election, Tuesday, November 3, 2020).

228 Leticia Chavez, *The Dynamex Dichotomy and the Path Forward*, 50 GOLDEN GATE U. L. REV. 147, 152 (2020).

229 *Id.* at 153.

that the rate is set above the local minimum wage to account for the unengaged time spent on the app.[230] In 2021, the guaranteed minimum wage for Uber was $15.60, "when the California minimum wage [was] $13.00."[231]

While a $15.60 minimum wage sounds promising, a University of California, Berkeley Labor Center study found that "[a]fter considering multiple loopholes in the initiative . . . the pay guarantee for Uber and Lyft drivers is actually the equivalent of a wage of $5.64 per hour."[232] The study found that engaged time amounted to only sixty-seven percent of the drivers' working time, and companies did not pay for approximately thirty-three percent of the time that drivers were waiting, although such time was a necessary part of the drivers' work.[233] For comparison, not paying for unengaged time is like paying a grocery cashier only when a customer is at the counter.[234]

Drivers are also not reimbursed for the costs of driving while waiting for a ride.[235] While waiting for a ride, drivers will spend time driving, heading back from a drop-off area to an area where they are more likely to have a pick-up, or circling in downtown areas where there is no place to park.[236] None of the costs associated with driving while waiting, including gas and wear and tear on the vehicle, can be covered as reimbursed employee expenses.[237]

Prop 22 guarantees drivers a health care stipend if they average at least fifteen active weekly hours per quarter.[238] Drivers averaging between fifteen and twenty-five hours during a quarterly period "receive a stipend equivalent to [forty-one]

230 Axios Re:Cap, *supra* note 225.

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

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 Jacobs & Reich, *supra* note 231.

238 Carolyn Said, *Instacart Is Raising Prices To Help Pay For Prop. 22*, S.F. CHRON. (February 19, 2021), https://www.sfchronicle.com/business/article/Instacart-is-raising-prices-for-its-California-15961886.php.

percent of the average premium for a covered California Bronze plan."[239] Drivers who average at least twenty-five engaged hours receive a stipend "equal to [eighty-two] percent of the average premium for a covered California Bronze plan."[240] App-based companies calculate the stipend by looking at "the statewide average monthly premium of bronze-level plans sold on the Covered California exchange."[241] Although the healthcare stipend is a new benefit for rideshare drivers, it bears very little resemblance to a typical employer-based healthcare benefit,[242] and the vast majority of drivers do not qualify because drivers must work fifteen hours of engaged time for a single company to receive any stipend.[243] For example, a driver that worked an average of twenty-two hours per week for Uber and fourteen hours per week for Lyft would only qualify for a forty-one percent stipend from Uber, despite averaging thirty-four engaged hours per week for the rideshare services. Importantly, the healthcare stipend would require drivers to "periodically reassess what kind of coverage they would qualify for and could afford" because the stipends are calculated and distributed quarterly.[244]

Although Prop 22 requires companies to provide some occupational accident insurance, the requirement is at levels "well below the protections required by California's laws for employees."[245] The insurance payment is based on "the driver's earnings from all app-based companies the driver works for."[246] The occupational accident insurance, however, is not available to

239 Jacobs & Reich, *supra* note 231.

240 Jacobs & Reich, *supra* note 231.

241 Rachel Bluth, *App-based Companies Pushing Prop. 22 Say Divers Will Get Health Benefits. Will They?*, POLITIFACT (Oct. 28, 2020), https://www.politifact.com/factchecks/2020/oct/28/lyft-lyft/app-based-companies-pushing-prop-22-say-drivers-wi/.

242 California Healthline, *Fact Check: App-Based Companies Pushing Prop. 22 Say Drivers Will Get Health Benefits. Will They?* LAIST (Oct. 29, 2020), https://laist.com/2020/10/29/app-based_companies_pushing_prop_22_say_drivers_will_get_health_benefits_will_they.php.

243 Jacobs & Reich, *supra* note 231.

244 California Healthline, *supra* note 242.

245 Jacobs & Reich, *supra* note 231.

246 Rebekah Didlake, *The Gig Economy's Battleground—California Proposition 22*, GOLDEN GATE U. L. REV. BLOG (Sept. 22, 2020), https://ggulawreview.com/2020/09/22/the-gig-economys-battleground-california-proposition-22/.

drivers who are injured while logged onto multiple apps.[247] Given that drivers are often signed into multiple apps simultaneously (to minimize "waiting time"), there is a strong likelihood that a driver who is injured while waiting for a ride would not be eligible for the accident insurance.[248]

One of the biggest consequences of classifying rideshare drivers as independent contractors is that it shifts the burden of payroll taxes onto the drivers.[249] Although California cannot alter how workers are classified for federal payroll tax purposes, it is important to recognize this tax burden considering the driver's purported increased minimum wage guarantee. Additionally, independent contractor status prevents drivers from enjoying paid rest breaks, paid sick leave, and unemployment insurance.[250] Therefore, the increased minimum wage is deceiving given the lost employee benefits and protections and lack of compensation for waiting times.

Perhaps the most unsettling component of Prop 22 is its permanency in California. In addition to rolling back the standards in AB 5, it precludes local governments "from enacting their own higher labor standards" and prevents localities from setting standards to "govern compensation, scheduling, leave, healthcare, and termination of an app-based driver's contract."[251] Additionally, the legislature must secure a seven-eighths supermajority to amend the law.[252] A supermajority is rare, as California propositions typically include language requiring a two-thirds majority for the legislature to amend, but the Prop 22 seven-eighths supermajority requirement ensures that the law is essentially unchangeable.[253] This unusually high requirement has

247 *Id.*

248 *Proposition 22: Analyzing the Impact on App-Based Drivers' Earnings*, U.C. RIVERSIDE SCH. OF BUS. CTR. FOR ECON. FORECASTING & DEV. (2020), https://ucreconomicforecast.org/wp-content/uploads/2020/08/Prop22_Driver_Earnings_Analysis_August2020.pdf ("Lyft found that 55% of its drivers worked on at least one other app-based driving platform. The Cornell study of Seattle found that a third of driver time is spent signed into Lyft and Uber apps simultaneously.").

249 Jacobs & Reich, *supra* note 231.

250 Jacobs & Reich, *supra* note 231.

251 Jacobs & Reich, *supra* note 231.

252 Jacobs & Reich, *supra* note 231.

253 Lizette Chapman, *California's Prop 22 Would be Virtually Permanent if It*

the practical effect of requiring any future changes to be enacted by another ballot initiative.[254] A group of app-based drivers, along with the Service Employees International Union, filed an emergency petition for writ of mandate with the California Supreme Court.[255] The petition asked the Court to find Prop 22 invalid and unenforceable because the seven-eighths supermajority requirement is a usurpation of the constitutional "authority of the Legislature."[256] The Court denied the petition and stated that the suit could be refiled in a lower court.[257] The plaintiffs refiled a near-identical petition for writ of mandate in the Superior Court in February 2021.[258] The Superior Court, by order dated August 20, 2021, found that Prop 22 is unconstitutional because (1) it limits the power of a future legislature to define app-based drivers as workers subject to worker compensation law and (2) it defines unrelated legislation as an "amendment" and is not germane to Prop 22's stated "theme, purpose, or subject."[259] The court further held that the entirety of Prop 22 is unenforceable because the unconstitutional provisions are not severable.[260] The Superior Court's ruling is currently on appeal at the time of this Comment's publication.[261]

Uber and Lyft's threats that employee classification would require the companies to create driver schedules and layoff workers misled both drivers and voters.[262] Nothing in the law

Passes, BLOOMBERG NEWS (Oct. 20, 2020) https://www.bloomberg.com/news/newsletters/2020-10-20/california-s-prop-22-would-be-virtually-permanent-if-it-passes.

254 Jacobs & Reich, *supra* note 231.

255 Emergency Pet. for Writ of Mandate and Request for Expedited Review, *Castellanos v. State of California*, No. S266551 (Cal. 2021).

256 *Id.* at 10.

257 Carolyn Said, *Union-Backed Prop. 22 Challenge Rejected by California Supreme Court*, S.F. CHRON. (Feb. 3, 2021), https://www.sfchronicle.com/business/article/Union-backed-Prop-22-challenge-rejected-by-15922771.php.

258 Tim Ryan, *Union, Drivers Say Calif. Prop 22 is Unconstitutional*, LAW360 (Feb. 12, 2021); See also Verified Pet. for Writ of Mandate, *Castellanos v. State of California*, No. S266551 (Cal. Super. 2021).

259 Castellanos v. State, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *17–18 (Cal. Super. Aug. 20, 2021).

260 *Id.*

261 Maeve Allsup, *Prop. 22 Backers Appeal Ruling Striking California Gig Work Law*, BLOOMBERG LAW (Sept. 23, 2021).

262 Faiz Siddiqui & Nitasha Tiku, *California Voters Sided with Uber, Denying*

prevented companies from allowing employees to work flexible schedules,[263] and the companies already comply with New York City's higher labor standards.[264]

2. Rideshare Services Exercise Employer Control Over Drivers While Denying the Existence of an Employer-Employee Relationship

Despite rideshare services' claims that their drivers enjoy flexibility and autonomy, research shows that Uber's drivers are "in fact tightly surveilled and controlled."[265] Rather than reporting directly to a supervisor, Uber's drivers are at the mercy of an algorithm.[266] The algorithm tracks personalized statistics, including "ride acceptance rates, cancellation rates, hours spent logged into the app and trips completed."[267] Uber provides safe driving reports by using data from the drivers' accelerometer, GPS, and gyroscope.[268] Further, in-app notifications, heat maps[,] and emails with real-time and predictive information encourage drivers to relocate to surge pricing areas.[269] When a driver attempts to log out, they are prompted with an automatic message stating "your next rider is going to be awesome! Stay online to meet him."[270]

Drivers Benefits by Classifying Them as Contractors, WASH. POST (Nov. 4, 2020), https://www.washingtonpost.com/technology/2020/11/03/uber-prop22-results-california/.

263 The Editorial Board, *California, Reject Prop 22*, N.Y. TIMES (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/opinion/california-prop-22-uber-lyft.html.

264 Siddiqui & Tiku, *supra* note 262.

265 Edward Ongweso Jr., *Uber Will 'Shut Down' in California if it Must Classify Drivers as Employees*, VICE (Aug. 12, 2020), https://www.vice.com/en/article/n7wkdm/uber-will-shut-down-in-california-if-it-must-classify-drivers-as-employees. For a more in-depth discussion of how Uber uses psychological tricks to influence drivers, *see* Noam Scheiber, *How Uber Uses Psychological Tricks to Push its Drivers' Buttons*, N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html.

266 Alex Rosenblat, *When Your Boss is an Algorithm*, N.Y. TIMES (Oct. 12, 2018), https://www.nytimes.com/2018/10/12/opinion/sunday/uber-driver-life.html.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.*

Uber has a long history of controlling many aspects of its drivers' experiences.[271] Drivers are unable to expand revenues because they cannot control prices, alter Uber's commission, or expand their customer base; they can only drive more hours.[272] They also have little control over their customer base because they are penalized for rejecting trips.[273] Furthermore, drivers are even penalized for picking inefficient routes.[274] Given that rideshare drivers have very little flexibility beyond choosing when to log on to work (both before and after the passage of Prop 22), it is unclear how Prop 22 preserved any real flexibility for drivers.

3. Prop 22 Will Have Far-Reaching Consequences Outside California and Beyond the Rideshare Service Industry

California is one of the most worker-friendly states in the country.[275] Despite this, California rideshare drivers still lost the fight over worker classification against rideshare companies. The rideshare companies prevailed by using "a deluge of money to convince voters that the proposition served workers' interests by preserving their flexibility, ensuring a guaranteed level of pay, and providing them with 'portable' benefits."[276] Given its success in California, Uber and other rideshare platforms are planning to replicate the Prop 22 campaign across the United States, including in Massachusetts, New Jersey, New York, and Pennsylvania.[277] Uber has already created a campaign, "IC+," which stands for "independent contractor plus," a nod to the tech company's goal of creating a third classification of workers.[278]

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271 Lawrence Mishel & Celine McNicholas, *Uber Drivers Are Not Entrepreneurs*, 9 ECON. POL'Y INST. (Sept. 20, 2019).

272 *Id.* at 1.

273 *Id.*

274 *Id.*

275 Alexia Fernandez Campbell, *Here are the States That Treat Workers the Best—and the Worst*, VOX (Aug. 30, 2019), https://www.vox.com/2019/8/30/20838389/best-and-worst-states-to-work.

276 Terri Gerstein, *What Happened in California is a Cautionary Tale for Us All*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/opinion/prop-22-california-gig-workers.html.

277 *Id.*

278 Edward Ongweso Jr., *What Is 'IC+', Uber's New Plan to Warp Labor Laws Nationwide*, VICE (Nov. 19, 2020), https://www.vice.com/en/article/akdvpa/what-is-ic-

Tech executives like Uber chief executive Dara Khosrowshahi are confident that the "IC+" model will win.[279]

Less than a month after Prop 22 went into effect, a California grocery chain, Albertsons, laid off delivery driver employees and replaced them with gig workers.[280] Other industries could face a similar consequence because "if you create a subcategory that has fewer rights and wages, [you are] going to shift from traditional employment to this new category of work."[281] Albertsons was unable to fire a number of union delivery drivers whose jobs were insulated by a contract.[282]

The labor protection disparity between the Albertsons union drivers and gig workers is stark. The union drivers earn between "$17 to $22 an hour, have access to employer-paid health insurance, vacation time, sick time and 401(k) benefits, and do not have to use and maintain their own vehicles for their work."[283] Meanwhile, the gig workers earn wages only for engaged time and are "eligible for some health insurance subsidies" when they work fifteen hours or more per week.[284] These gig workers are also "not entitled to . . . overtime rules, workers' compensation . . . and unemployment insurance."[285] It is unsurprising that businesses such as Albertsons are drawn to the Prop 22 business model, as it allows them to "'lower labor costs'" and avoid compliance with "'basic workplace standards and responsibilities.'"[286]

ubers-new-plan-to-warp-labor-laws-nationwide.

279 *Id.*

280 Eli Rosenberg, *Albertsons is Laying Off Employees and Replacing Them with Gig Workers, as App Platforms Rise*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/business/2021/01/06/vons-albertsons-doordash-prop-22-layoffs/.

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.* (quoting David Weil, current professor at Brandeis University and former Labor Department official).

Other industries are also eyeing the Prop 22 staffing structure.[287] Shawn Carolan, a venture capitalist and early Uber investor, has explained that "the existence of flexible work arrangements in fields like nursing, executive assistance, tutoring, programming, restaurant work and design suggests that a Prop 22 inspired approach could make sense there as well."[288] Carolan would expand the Prop 22 model to "basically any industry where an ongoing relationship with a single employer [is not] essential to do the job well."[289] The traditional employer-employee model is preferable where "the continuity of relationship" and "specific training" are important to "the core value" of the position.[290] On the other hand, a Prop 22 model is preferable where workers can "move frictionlessly between platforms."[291] Carolan sees Prop 22 benefits such as the healthcare stipend to be an essential part (rather than a bug) of the system because it allows the subsidy to "move[]" with the worker between employers, while traditional employer-sponsored healthcare often ends upon termination of the employment relationship.[292]

B. *The Path Forward for Rideshare Drivers: The PRO Act*

Both President Joe Biden and Vice President Kamala Harris opposed Prop 22. In fact, President Biden's official campaign site include[d] "a promise to create a federal version of California's [AB 5]."[293] Importantly, President Biden wants to

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287 Edward Ongweso Jr, *What is 'IC+', Uber's New Plan to Warp Labor Laws Nationwide?*, VICE (Nov. 19, 2020), https://www.vice.com/en/article/akdvpa/what-is-ic-ubers-new-plan-to-warp-labor-laws-nationwide.

288 Shawn Carolan, *What Proposition 22 Now Makes Possible*, THE INFO. (Nov. 10, 2020), https://www.theinformation.com/articles/what-proposition-22-now-makes-possible.

289 *Id.*

290 *Id.*

291 *Id.* (Carolan imagines applying the Prop 22 model to the following industries: agriculture, zookeeping, nursing, executive assistance, tutoring, programming, restaurant work and design).

292 *Id.* (Carolan does acknowledge that the subsidy is only calculated based on time spent on a single app rather than the cumulative time spent on all apps combined: "A remaining improvement would be if the threshold to receive these benefits were [*sic*] calculated across app companies").

293 Kari Paul, *Prop 22: Why Uber's Victory in California Could Harm Gig*

establish "a federal standard modeled on the ABC Test for *all* labor, employment, and tax laws."[294] President Biden has vowed to adopt the ABC Test because the current tests give "too much discretion to employers . . . and too little discretion to government agencies and courts."[295] To that end, President Biden has committed to supporting the PRO Act, which amends the NLRA by adopting the "ABC" Test to classify workers as employees or independent contractors.[296] Specifically, the PRO Act amends Section 2(3) of the NLRA by adding that:

> [A]n individual performing any service shall be considered an employee . . . and not an independent contractor, unless–
> (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
> (B) the service is performed outside the usual course of the business of the employer; and
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.[297]

The ability to unionize and engage in collective bargaining under the NLRA would have immediate, tangible benefits for rideshare drivers. For example, unions have a strong track

Workers Nationwide, THE GUARDIAN (Nov. 11, 2020), https://www.theguardian.com/us-news/2020/nov/11/california-proposition-22-uber-lyft-DoorDash-labor-laws.

294 *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, https://joebiden.com/empowerworkers/ (last visited Feb. 6, 2022) (emphasis added).

295 *Biden Plan*, *supra* note 294.

296 Jay Cohen et al., *Transition to a Biden Administration: Recent Developments and the Continuing Debate Concerning Worker Classification*, PAUL WEISS (Jan. 4, 2021), https://www.paulweiss.com/practices/litigation/employment/publications/transition-to-a-biden-administration-recent-developments-and-the-continuing-debate-concerning-worker-classification?id=38991; *see also* H.R. 842, 117th Congress (2021).

297 H.R. 842 § 101(b), 117th Congress (2021).

record of raising wages for their members.[298] Unionized workers' earnings "exceed those of comparable nonunion workers by about fifteen percent, a phenomenon known as the 'union wage premium.'"[299] Rideshare workers, in particular, could benefit from strong union representation in wage negotiations. Prop 22 guaranteed rideshare drivers a minimum wage equal to 120 percent of the local minimum wage;[300] however, the drivers are not paid for unengaged time, which equates to roughly thirty percent of the drivers' time spent logged on to the app.[301] Given the historic success of union wage negotiations, it is not unreasonable to believe that union representatives could have negotiated a better wage schedule than what Prop 22 affords.

In addition to wage negotiations, unions can negotiate benefits on behalf of their members. Given that rideshare drivers are currently recognized as independent contractors under federal law and most state laws, they have few, if any, benefits or protections, such as health insurance or paid leave. A strong union would create the opportunity to negotiate with the employer to obtain traditional employee benefits for their members. When compared to nonunion workers, unionized employees "are given employer-provided health and pension benefits far more frequently" and "are provided better paid leave and better health and pension plans."[302] Prop 22 provides a healthcare subsidy and accidental insurance; however, as previously discussed, these benefits are substandard compared to typical employer-provided benefits.[303] It is entirely plausible that a strong union would negotiate better benefits for drivers.

The PRO Act's passage would be a strong first step toward providing better protections for rideshare drivers and other similarly situated independent contractors. The PRO Act is limited, however, because it merely adopts the ABC Test to define "employee" under the NLRA and leaves in place the common law and economic realities tests to define "employee"

298 Lawrence Mishel & Matthew Walters, *How Unions Help All Workers*, ECON. POL'Y INST. (Aug. 2003), https://www.epi.org/publication/briefingpapers_bp143/.

299 *Id.* (quoting research findings).

300 OFFICIAL VOTER INFORMATION GUIDE, *supra* note 199.

301 Siddiqui, *supra* note 202.

302 Mishel & Walters, *supra* note 298.

303 *See supra* text accompanying notes 220–43.

under every other federal labor and employment law statute.[304] While an effective union could theoretically advocate for parallel labor protections through contract negotiations, rideshare drivers would still not be able to bring a cause of action under federal labor laws such as the FLSA or ADA. Moreover, both workers and companies will face confusion from analyzing worker classification under different tests for different statutes. For example, a rideshare driver could enjoy the benefits of belonging to a union as an employee but could still be required to pay payroll taxes as an independent contractor under the IRS common law test.[305] Because the law seeks to promote predictability, and employment and labor laws generally seek to provide protection to the greatest number of workers, Congress should take the PRO Act a step further and redefine "employee" under all federal labor and employment statutes to accord with the ABC Test.[306]

C. *Litigating Employee Status*

Although the PRO Act was recently approved in the House of Representatives, it may be dead on arrival in the Senate.[307] With only a narrow Democratic majority, Republicans have vowed to filibuster the bill, which could only be overcome by sixty votes.[308] Even in the absence of a filibuster threat, it is unclear if the bill would even have enough support from Democratic senators to overcome Republican opposition to the bill.[309] Given that the PRO Act is far from a sure thing, rideshare drivers seeking greater labor protections may be forced to continue litigating the issue in the courts. There is a strong case, however, that rideshare drivers could be considered employees under the stricter, more traditional tests.

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304 H.R. 842 § 101(b), 117th Congress (2021) (amending the NLRA only).

305 26 U.S.C. § 3121(d)(2).

306 Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015).

307 Nicholas Fandos, *House Passes Labor Rights Expansion, but Senate Chances Are Slim*, N.Y. TIMES (Mar. 9, 2021), https://www.nytimes.com/2021/03/09/us/politics/house-labor-rights-bill.html.

308 *Id.*

309 Ryan Grim, *Sen. Mark Kelly is Emerging as an Obstacle to the PRO Act*, THE INTERCEPT (Apr. 12, 2021).

The NLRB previously argued, perhaps erroneously, that under the common law test, rideshare drivers are independent contractors, not employees.[310] There is a strong argument to be made, however, that rideshare drivers are indeed employees under the common law definition.

The Restatement (Second) of Agency lists ten factors that should be considered to determine worker classification, including:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, 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 employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.[311]

Analyzing these ten factors, it is not implausible for a court to conclude that a rideshare driver is in fact an employee.

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310 *Uber Advice Memo*, *supra* note 58.

311 Restatement (Second) of Agency § 220 (Am. L. Inst. 1958).

Uber, through its algorithm, exercises a high degree of control over its drivers.[312] Uber does not allow its drivers to view the destination or fare information before accepting a trip, and Uber punishes drivers (by suspension or removal) for cancelling unprofitable fares.[313] Uber's blind acceptance policy is made riskier for drivers because Uber, not the drivers, set a low minimum fare rate.[314] For example, if a driver accepts a five-dollar minimum fare ride, they will receive $3.20 after Uber collects a one-dollar safe ride fee and twenty percent commission of the remaining four dollars.[315] The blind acceptance and fare-setting policies suggest that the rideshare company exercises a high degree of control over their drivers, and quashes the notion that drivers are entrepreneurs.

Uber has argued that under the common law right to control test, their drivers are not employees because drivers can choose to work as much or as little as they like and are never required to accept any "leads" generated by Uber.[316] However, the Uber Driver Handbook states that the company expects drivers to accept all ride requests, and too many rejected trips is a "performance issue" that could result in termination.[317] There is also evidence that Uber has attempted to control the "manner and means" of the drivers' services.[318] Drivers are instructed to dress professionally, play soft jazz on the radio, and open the door for riders.[319] Although Uber suggests that it merely provides "suggestions" to its drivers, drivers are admonished for failing to follow the suggestions.[320]

One factor, whether the worker or employer supplies the tools and instrumentalities, weighs in favor of a finding that the drivers are independent contractors because the drivers pay for

312 *See supra* text accompanying notes 220–43.

313 Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. OF COMMC'N 3758, 3762 (2016).

314 *Id.*

315 *Id.*

316 O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015).

317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.* at 1150.

their gas, cars, and insurance. This factor, however, may become of little relevance in a post-COVID society. The pandemic forced a large share of the workforce to switch to remote, at-home work.[321] As a result, many employees began to supply their own work supplies, such as laptops, cell phones, and internet connection.[322] Factors that initially weighed heavily in favor of independent contractor status in a pre-Internet world, where it was impossible to conduct work outside the office, simply do not have the same level of probative value in 2022.

Uber further contends that its drivers are not employees because they conduct work outside the company's usual course of business.[323] Uber argues that it is a technology platform, not a transportation company.[324] Though a clever argument, it is one that defies logic. Unsurprisingly, an English court rejected this argument, explaining "the lady doth protest too much," as it is "unreal to deny that Uber is in business as a supplier of transportation services."[325]

IV. CONCLUSION

Federal adoption of the ABC Test, either through statutory amendments or judicial interpretation, would not put rideshare drivers on equal footing with current employees. Even if the federal government adopted the ABC Test, rideshare drivers would not qualify for state unemployment insurance or state laws

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321 Kathryn Vasel, *The Pandemic Forced A Massive Remote-work Experiment. Now Comes the Hard Part*, CNN BUS. (Mar. 11, 2021), https://www.cnn.com/2021/03/09/success/remote-work-covid-pandemic-one-year-later/index.html.

322 Kathleen McLeod Caminiti & Maxim Doroshenko, *Covert Costs of the COVID-19 Pandemic: Expense Reimbursement For Remote Workers*, FISHER PHILLIPS (May 30, 2020), https://www.fisherphillips.com/news-insights/covert-costs-of-the-covid-19-pandemic-expense-reimbursement-for-remote-workers.html.

323 Joel Rosenblat, *Uber's Future May Depend On Convincing the World Drivers Aren't Part of its 'Core Business*,*'* TIME (Sept. 12, 2019), https://time.com/5675637/uber-business-future/#:~:text=its%20'Core%20Business'-,Uber's%20Future%20May%20Depend%20On%20Convincing%20the%20World%20Drivers%20Aren,Part%20of%20its%20'Core%20Business'&text=Facing%20the%20most%20serious,platform%2C%20not%20a%20transportation%20company.

324 *Id.*

325 Arjun Kharpal, *Uber in Landmark UK Employment Tribunal: All You Need To Know*, CNBC (Sept. 27, 2017), https://www.cnbc.com/2017/09/27/uber-uk-employment-tribunal-drivers-rights-all-you-need-to-know.html.

regarding sick time or workers' compensation.[326] However, it is certainly a step in the right direction toward expanding protections and benefits to rideshare drivers. If the ABC Test applied to all federal labor, employment, and tax laws, rideshare drivers would, for the first time ever, be guaranteed a federal minimum wage, have the ability to form and join unions, and would be relieved of the heavy independent contractor tax burden.

Uber, Lyft, DoorDash, and other rideshare companies have successfully evaded new labor regulations at the state level. When it seemed that California would finally require them to pay their drivers a fair wage and expand basic employee benefits to the drivers, the large companies managed to buy their way out of classifying their drivers as employees.

Over the next couple of years, the Biden Administration will be tasked with taking on these companies and ensuring workers are paid a just wage. The gig economy will continue to grow over the next several decades. The federal government must respond to the changing employment landscape.

[326] Sean Burke, *Conflicting Interpretations of Worker Classification*, THE REGUL. REV. (Apr. 11, 2019), https://www.theregreview.org/2019/04/11/burke-interpretations-worker-classification/.