Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 15
Issue 1 *SYMPOSIUM Consumer Structure, Market Structure, and Political Power*

Article 8

12-30-2020

YOUR UBER DRIVER IS HERE, BUT THEIR BENEFITS ARE NOT: THE ABC TEST, ASSEMBLY BILL 5, AND REGULATING GIG ECONOMY EMPLOYERS

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ABSTRACT

In September 2019, California passed Assembly Bill 5 (AB 5) which adopts the ABC test as the standard for determining whether an individual worker is an employee or an independent contractor. This legislation is aimed at gig economy employers, such as Uber, whose workers are arguably misclassified as independent contractors, ultimately denying them access to benefits and the ability to unionize. This Note will discuss AB 5 by identifying the successes and pitfalls of the legislation. While AB 5 is a step in the right direction, the bill still needs to be refined to avoid gaps in enforcement. Further, this Note will advocate for the ABC test to be adopted on the federal level to avoid further misclassification of individual workers and to increase regulations for the gig economy.

INTRODUCTION

The American workforce is rapidly changing.[1] As technology continues to advance, temporary and freelance workers are able to find work within the service sector with ease. This portion of the American workforce is known as the gig economy.[2] Its expansion can be accredited to the emergence of mobile applications which make it possible for those seeking work to easily connect with "gigs."[3]

The laws governing the gig economy, however, have not advanced as fast as the system has which has resulted in inadequate protection for workers.[4] For one, misclassification of individual workers is widespread throughout this employment system. Several gig economy employers, such as Uber, Lyft, and DoorDash, classify their workers as independent

1. Nearly 60 million workers make up the gig economy. Prior to the COVID-19 pandemic, this figure was projected to rise to a majority of the American workforce by 2020. *See* Susan Caminiti, *4 gig economy trends that are radically transforming the US job market*, CNBC (Oct. 29, 2018), ht tps://www.cnbc.com/2018/10/29/4-gig-economy-trends-that-are-radically-transforming-the-us-job-market.html.

2. *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gig%20economy (last visited Sept. 19, 2019).

3. "Gigs" are defined as assignments, contracts or part-time jobs. MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gig%20economy (last visited Dec. 24, 2019).

4. *See* Gillian B. White, *When Will Labor Laws Catch Up With the Gig Economy?*, ATLANTIC (Dec. 9, 2015), https://www.theatlantic.com/business/archive/2015/12/new-laws-for-the-gig-economy/419745/.

contractors[5] rather than employees to avoid providing certain benefits such as a minimum wage, unemployment insurance, and medical insurance.[6] Additionally, by classifying a worker as an independent contractor, gig economy employers effectively deny these workers the ability to unionize and the ability to seek protections under federal statutes such as the Civil Rights Act and the Fair Labor Standards Act.[7]

Specifically, the debate surrounding whether Uber drivers should be classified as employees or independent contractors is a contentious one.[8] Jurisprudence on this debate has left the issue unresolved as some courts ruled that Uber drivers are employees,[9] while other courts ruled in favor of the company and held that their drivers are independent contractors.[10] Aside from this jurisprudence, current legislation is insufficient to address this situation as it does not clearly define which workers should be considered independent contractors and which are employees.[11]

On September 18, 2019, California Governor Gavin Newsom signed Assembly Bill 5 (AB 5) into law, which attempts to solve this problem by essentially changing the test to determine the classification for most individual workers who were previously classified as independent contractors to employees.[12] AB 5 targets gig economy employers who typically misclassify their workers and deny them critical benefits. Ride-sharing companies, like Uber, are the primary targets of this legislation but this bill affects other employers of low wage workers in California.[13] While

5. An independent contractor is defined as "[o]ne who, exercising independence in respect of his choice of work to be performed by him, contracts to do or perform certain work for another person according to his own means and methods, without being subject to the control of such other person except as to the product or result of the work." *Independent Contractor*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

6. Workers that are classified as employees generally cost 30-40% more than those classified as independent contractors because companies must provide employees with federal income, Social Security, Medicare taxes, and unemployment insurance. *See* Diane Mulcahy, *How Can We Stop Companies From Misclassifying Employees As Independent Contractors?*, FORBES (June 25, 2019), https://www.forbes.com/sites/dianemulcahy/2019/06/25/how-can-we-stop-companies-from-misclassifying-employees-as-independent-contractors/#57781b9f544c.

7. *See* Gabrielle Canon, *California's controversial labor bill has passed the Senate. Experts forecast more worker rights, higher prices for services*, USA TODAY (Sept. 13, 2019), https://www.usatoday.com/story/news/politics/2019/09/10/what-californias-ab-5-means-apps-like-uber-lyft/2278936001/.

8. *Id.*

9. *See* O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1145 (N.D. Cal. 2015).

10. *See* Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *19 (E.D. Pa. Apr. 11, 2018).

11. *See* Ann K. Wooster, J.D., *Validity, Construction, and Application of Fair Labor Standards Act – Supreme Court Cases*, 196 A.L.R. Fed. 507; *see also* 29 U.S.C.A § 203 (2018).

12. *See* Alexandria Sage, *California Governor signs Gig Economy Labor Bill into Law*, BUS. INSIDER (Sept. 18, 2019), https://www.businessinsider.com/california-governor-signs-gig-economy-labor-bill-into-law-2019-9.

13. *See* Allana Akhtar, *California's gig economy bill won't just impact Uber drivers. Here's how the landmark decision is a major win for janitors, truck drivers, and other low wage workers*,

the bill has earned high praises from labor unions, workers, and even a 2020 Democratic presidential candidate,[14] the bill has faced opposition from some gig economy employers, including Uber.[15]

This Note argues that AB 5 is a step in the right direction in regulating the gig economy and ensuring that individual workers of various companies, especially ride-sharing companies such as Uber, are afforded the protections that they would receive if they were considered employees. As the gig economy continues to expand and state governments take action to regulate this sector, the federal government needs to enact legislation that adopts the ABC test [16] and enforces the proper classification of individual "gig economy" workers so that they are effectively able to receive the benefits that they would have a right to as an employee.

Part I of this Note details the history of laws and regulations concerning the classification of individual workers, both nationally and specifically in California. Part II discusses the history of Uber, previous legal disputes between Uber and its drivers regarding the drivers' classifications, and Uber's continued stance on drivers as employees. Part III will discuss the current state of laws and recent court decisions addressing classifications of individual workers who participate in the gig economy. Part IV details AB 5 and specifically the benefits and drawbacks of this legislation. Finally, Part V will address the arguments opposing AB 5 and why these arguments should not hinder other states and the federal government from adopting similar legislation.

I. HISTORY OF LAWS AND REGULATIONS CONCERNING CLASSIFICATION OF INDIVIDUAL WORKERS

In recent years, companies such as Uber, Lyft, and DoorDash have found success with business models centered around the gig economy.[17] Workers typically choose to work for gig economy employers for several reasons including increased flexibility, better work-life balance, and less intensive

BUS. INSIDER (Sept. 19, 2019), https://www.businessinsider.com/how-californias-bill-will-impact-fissured-workforce-2019-9.

14. "Because every worker deserves safe working conditions, benefits, and a union, I support AB5, a bill that would bring workplace protections to a million Californians. As the gig economy grows, it's critical to insure that companies can't skirt labor protections." *See* Julián Castro (@JulianCastro), TWITTER (Sept. 2, 2019, 10:33AM), https://twitter.com/juliancastro/status/1168532354777985024?lang=en.

15. *See* Tony West, *Update on AB5*, UBER (Sept. 11, 2019), https://www.uber.com/newsroom/ab5-update/.

16. Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 35 (Cal. 2018); *see* description *infra* note 105.

17. *See* Annie Lowrey, *The Truth About the Gig Economy*, ATLANTIC (Jan. 14, 2019), https://www.theatlantic.com/ideas/archive/2019/01/gig-economy-isnt-really-taking-over/580180/.

work environments.[18] These benefits have attracted people to join the gig economy workforce and is projected to continue to surge as technology continues to advance.[19] As the gig economy workforce expands, more workers are using gig work as their sole source of income as opposed to a supplemental career.[20] The specific number of employees currently involved in the gig economy is difficult to determine because the United States Bureau of Labor Statistics has had difficulty measuring the number of workers and, more specifically, which workers should be included in this figure.[21] The last survey that the United States Bureau of Labor and Statistics published was in 2005 and showed that over 5 million people were "contingent workers."[22] A recent survey conducted in 2017 by the Freelancers Union estimates that this number has increased to over 57 million workers.[23]

The federal government has struggled in part to determine the precise number because there is debate over what workers should be included in the gig economy.[24] Determining which worker should be counted has proven difficult for the federal government because many gig economy employers label their workers as independent contractors rather than employees.[25] Classifying these workers as independent contractors allows these employers to withhold certain benefits from workers such as access to a minimum wage, overtime, and medical benefits that are typically protected for those considered employees.[26] Additionally, gig economy employers would be forced to pay their independent contractors for costs associated with their daily tasks, such as paying for gas, insurance, and any normal damage to their

18. *See* Nicole Fallon, *The Growth of the Gig Economy: A Look at American Freelancers*, BUS. NEWS DAILY (Nov. 10, 2017), https://www.businessnewsdaily.com/10359-gig-economy-trends.html.

19. *Id.*; The gig economy has increased substantially since the Great Recession of 2008. *Id*.

20. Jack Kelly, *We're Starting To See A 'Hunger Games' Gig-Economy Job Market*, FORBES (July 27, 2020), https://www.forbes.com/sites/jackkelly/2020/07/27/were-starting-to-see-a-hunger-games-gig-economy-job-market/#7323df3f2a9d.

21. *See* Elisabeth Buchwald, *The government has no idea how many gig workers there are, and that's a problem*, MARKETWATCH (Jan. 7, 2019), https://www.marketwatch.com/story/the-government-has-no-idea-how-many-gig-workers-there-areheres-why-thats-a-problem-2018-07-18.

22. *Id*.; The United States Bureau of Labor and Statistics defines contingent workers as people who do not expect their jobs to last or who report that their jobs are temporary. Karen Kosanovich, *A Look at Contingent Workers*, U.S. BUREAU OF LABOR STATISTICS (Sept. 2018), https://www.bls.gov/spotlight/2018/contingent-workers/home.htm#:~:text=Contingent%20workers%20are%20people%20who,that%20their%20jobs%20are%20temporary.&text=0%20Contingent%20workers%20as%20a,U.S.%20Bureau%20of%20Labor%20Statistics.

23. Buchwald, *supra* note 21.

24. *Id.*

25. *Id.*

26. *See* Olivares v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 109348, at *2 (N.D. Ill. July 14, 2017); *see also* Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 4–5 (Cal. 2018) (finding that if a worker is properly classified as an employee, the employer bears the responsibility to comply with numerous federal and state statutes that govern wages, hours, and working conditions of employees).

vehicles.[27] Taxing schemes are also different for employees as opposed to independent contractors.[28] Workers classified as employees are taxed at lower rates than independent contractors who are taxed separately and are subject to additional Self-Employment taxes.[29] This ultimately results in economic irregularities amongst those who are independent contractors and employees.[30]

The debate surrounding whether to classify workers as independent contractors "arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him."[31] Courts have struggled with developing tests to determine whether an individual worker should be classified as a full-time employee or an independent contractor as the gig economy continues to increase in size. The main piece of legislation passed by Congress that comes close to addressing the issue leaves courts with broad interpretations that have not aided in addressing the situation.[32]

The Fair Labor Standards Act (FLSA) was passed in 1938 by Congress as a way to protect the economy and labor force as a result of the Great Depression.[33] FLSA enabled Congress to enact provisions to establish a minimum wage and criminal penalties for those who fail to provide this minimum wage to their workers.[34] Congress intended this scheme to be for workers who were "engaged in" or "in the production of goods for" interstate commerce.[35] These provisions have been updated regularly over time to account for increasing demand for higher minimum wages.[36]

However, FLSA's definitions have largely remained unchanged since they were adopted. FLSA simply defines an "employee" as "any individual employed by an employer" and defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[37] FLSA initially did not define an "independent contractor" which further complicates when courts attempt to determine coverage under FLSA.[38] Courts, however, have identified a number of factors that are used to determine whether an individual is an employee or independent contractor

27. Michael Hiltzik, *Column: Uber and Lyft try to blunt a court ruling that their drivers are employees*, L.A. TIMES (July 11, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-uber-lyft-dynamex-20190711-story.html.

28. Mulcahy, *supra* note 6.

29. *Id.*

30. *Id.*

31. *See* S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989).

32. Wooster, *supra* note 11.

33. *Id.*

34. *Id.*; *see also* United States v. Darby, 312 U.S. 100, 125 (1941) (holding that Congress sufficiently has power to pass this legislation under the commerce clause and that employers who fail to conform to the minimum wage and hour conditions are correctly subject to the criminal penalties of FLSA).

35. Wooster, supra note 11.

36. *Id.*; *see also* 29 U.S.C.A § 203 (2018).

37. *See* 29 U.S.C.A. § 203 (2018).

38. *See* Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 754 (9th Cir. 1979).

under FLSA.[39] This test is known as the economic realities test and uses the following factors:

> (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) 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; and (6) whether the service rendered is an integral part of the alleged employer's business.[40]

All of these factors must be addressed, and none should have a higher weight than another.[41] FLSA, however, still maintains a broad definition of the word "employee" and does not explicitly define who should be considered an "independent contractor."[42]

A. S.G. BORELLO & SONS, INC. V. DEPARTMENT OF INDUSTRIAL RELATIONS

In the absence of a clear federal directive on when to classify workers as employees or independent contractors, states have grappled with addressing the issue.[43] For example, Courts in California took on the issue directly in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*. This is a case involving an employer who received a penalty for failure to obtain adequate workers' compensation coverage for harvesters of a cucumber crop.[44] The employer conceded that it failed to secure coverage but contended that it was unnecessary to secure coverage for the harvesters because they should be considered independent contractors that do not require workers' compensation coverage.[45] The Court surveyed various tests used to determine whether an individual should be considered an employee or an independent contractor and determined that the "control-of-work details" test should be applied.[46] Specifically, the Court took into account the nature of the work performed and the overall arrangement between the parties.[47] Additional factors that are not separately tested but weighed amongst different considerations include:

> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the

39. *Id.*
40. *Id.*
41. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992).
42. *See* Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *8 (E.D. Pa. Apr. 11, 2018) (citing Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985)).
43. *Borello*, 769 P.2d at 410.
44. *Id.* at 401.
45. *Id.*
46. *Id.* at 405–06.
47. *Id.*

> locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.[48]

These factors were compared with the statutory purpose of the legislation and used to determine whether workers should be considered employees rather than independent contractors.[49] The emphasis on the statutory purpose of the legislation distinguishes this test from those used for FLSA purposes.[50] The Court used this standard to hold that the harvesters were employees for the purposes of California state law and not independent contractors who were excluded from coverage under the law.[51]

B. MARTINEZ V. COMBS

Additionally, the Supreme Court of California recently determined the meaning of "employ" and "employer" in *Martinez v. Combs*. *Martinez* is a case involving a strawberry grower, Munoz & Sons, that employed seasonal agricultural workers but failed to provide these workers with minimum or overtime wages.[52] The agricultural workers brought suit under California Labor Code section 1194, seeking to recover for unpaid minimum wages and unpaid contract wages among other claims.[53] Section 1194 states in relevant part, "[a]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation."[54]

The Court found the specific language of the California Labor Code vague and sought to define specifically what party can be held liable under this statute.[55] "Employer" as defined in FLSA was insufficient to be applied here following an examination of the language and history of California wage law.[56] California's Industrial Welfare Commission (IWC) adopted the "suffer or permit" language prior to Congress adopting the language in

48. *Borello*, 769 P.2d at 404.
49. *Id.*
50. *See* Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 20 (Cal. 2018).
51. *Borello*, 769 P.2d at 410.
52. Martinez v. Combs, 231 P.3d 259, 263–66 (Cal. 2010).
53. *Id.* at 266.
54. CAL. LAB. CODE § 1194(a) (West 2018).
55. *Martinez*, 231 P.3d at 267.
56. *Id.* at 269.

FLSA.[57] Applying this legislative history, it was clear to the Court that the IWC's definition was not meant to incorporate federal law, but rather, the employment relationship as defined by federal law.[58] Instead, the definition used by the IWC, which defined "employer" as one that "employs or exercises control over the wages, hours, or working conditions of any person," was applied to determine whether the Plaintiffs were entitled to unpaid wages.[59]

II. BACKGROUND OF UBER AND ITS STANCE ON DRIVERS AS EMPLOYEES

Uber began as UberCab in March 2009 when Garrett Camp, Oscar Salazar, Conrad Whelan, and Travis Kalanick built the first version of their black-cab service.[60] The service launched in San Francisco and allowed consumers to get easier access to taxis, though at a higher rate than a normal taxi would demand.[61] UberCab later rebranded as Uber and expanded into larger markets, such as New York City and Paris, France.[62] The Uber model became a huge success and pioneered the way for other rivals, mainly Lyft, to join the market and compete directly with Uber.[63] Uber's growth, however, remained undeterred and stretched internationally as its expansion hit markets in Asia and Africa.[64] Uber began to add services such as UberPool which allows multiple customers to share rides at a cheaper rate than a normal Uber.[65] As Uber continued to grow exponentially, however, the company faced backlash from the traditional taxi industry as well as consumers for price surging during high usage times.[66] Uber later expanded its service to include UberEats, a delivery service that allows consumers to order food and have it delivered directly to their location.[67] Uber would go on to test self-driving cars as a potential expansion to the company's service, however, the California DMV ordered the testing to cease as at the time it was declared to be illegal.[68]

57. *Id.* at 279.
58. *Id.*
59. *Id.* at 274.
60. Avery Hartmans & Paige Leskin, *The history of how Uber went from the most feared startup in the world to its massive IPO*, BUS. INSIDER (May 18, 2019), https://www.businessinsider.com/ubers-history.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id*.
67. *Id.*
68. *Id.*

A. *O'CONNOR* AND A LEGAL VICTORY FOR DRIVERS

In 2013, *O'Connor v. Uber Technologies, Inc.* served as the first legal challenge that Uber faced from drivers who alleged that they should be treated as employees of the company instead of independent contractors, which would make them entitled to a minimum wage and benefits from Uber.[69] The plaintiffs in this litigation brought evidence to show that Uber collects around 20% of the total fare billed to a rider prior to payment to the driver.[70] This evidence was used in tandem with the fact that drivers must agree to contracts with Uber or its subsidiaries in order to drive for the company.[71]

Uber's defense to this litigation was that the company should be considered a "technology company" as opposed to a "transportation company."[72] The company claimed that driving is not within the usual course of their business and instead argued that developing technology is the primary focus of their business practices.[73] Uber further contended that the company merely provides software that acts as a conduit between "businesses that provide transportation and passengers who are seeking rides."[74] As a result of this classification, Uber argued that Uber drivers are independent contractors as opposed to employees and were not entitled to certain protections granted to individual workers considered employees under California state law.[75]

The Northern District of California found Uber's argument meritless and held that the company was "most certainly a transportation company, albeit a technologically sophisticated one."[76] When examining Uber's argument on a motion for summary judgment, the Court viewed the company's argument as focused more on the mechanics of the platform rather than the large scale service that the company seeks to provide.[77] Uber's marketing as "Everyone's Private Driver" and as the "best transportation service in San Francisco" further bolstered the contention that Uber should be considered as a transportation company.[78] The Court found that without their drivers, Uber would not be able to continue to succeed as a viable business.[79] Even so, *O'Connor* later resulted in a settlement between the parties.[80]

69. *See* Hartmans, *supra* note 60; *see also* O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).
70. *O'Connor*, 82 F. Supp. 3d at 1137.
71. *Id.* at 1136.
72. *Id.* at 1137.
73. *Id*. at 1141.
74. *Id.* at 1137.
75. O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1137-38.
76. *Id.* at 1141.
77. *Id.*
78. *Id.* at 1141–42.
79. *Id.* at 1142.
80. Hartmans, *supra* note 60.

B. THE *RAZAK* DECISION

Uber initially received a legal victory in *Razak v. Uber Technologies, Inc.* where the Eastern District of Pennsylvania used FLSA to determine whether drivers of the service from Pennsylvania should be considered independent contractors or employees.[81] Uber drivers, initially brought this suit to recover unpaid wages from the service pursuant to federal minimum wage and overtime requirements as well as under Pennsylvania's Minimum Wage Act and the Pennsylvania Wage Payment and Collection Law.[82]

There, the Court applied the Third Circuit's decision in *Donovan v. DialAmerica Marketing, Inc.*,[83] which recognized that FLSA maintains a broad definition of "employee" and recognized the need for factors to determine whether a worker should be considered an employee.[84] After analyzing the factors set forth by *Donovan*,[85] the Court found that the plaintiffs did not meet their burden to show that they should be considered employees of Uber.[86] Uber's contractual relationship with Plaintiff drivers did not weigh heavily in favor of determining their status with the company.[87]

The Court considered the fact that UberBLACK[88] drivers can control the amount they are able to work and weighed that heavily in favor of determining that the Plaintiffs' status as independent contractors.[89] The Court

81. *See* Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *54 (E.D. Pa. Apr. 11, 2018).

82. *Id.* at 2; *see also* 43 P.S. § 333.104 (stating in relevant part, "If the minimum wage set forth in the Fair Labor Standards Act of 1938 is increased above the minimum wage required under this section, the minimum wage required under this section shall be increased by the same amounts and effective the same date as the increases under the Fair Labor Standards Act, and the provisions of subsection (a) are suspended to the extent that they differ from those set forth under the Fair Labor Standards Act").

83. *See* Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985).

84. Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *54 (E.D. Pa. Apr. 11, 2018) (citing Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985)).

85. *See Donovan*, 757 F.2d at 1382 (3d Cir. 1985) (applying these six factors for determining whether a worker is an employee: "(1) the degree of the alleged employer's right to control the manner in which 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; and (6) whether the service rendered is an integral part of the alleged employer's business.").

86. *See* Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *54 (E.D. Pa. Apr. 11, 2018) (holding that given the "totality of circumstances" there was not a sufficient showing to consider the plaintiffs employees).

87. *Id.* at 42. (holding that Uber's decision to terminate Plaintiff Razak for his Driving While Intoxicated arrest did not exhibit Uber's "control" over him but instead was a decision for the safety of passengers who use Uber).

88. UberBLACK was the original luxury black car version of Uber's service. Later rebranded to simply "Black," this version of Uber's car service is twice as expensive as Uber's traditional service, UberX. Brett Helling, *UberX vs. UberBlack: What's the Difference?*, RIDESTER (Sept. 25, 2020), https://www.ridester.com/uberx-vs-uberblack/.

89. Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *53 (E.D. Pa. Apr. 11, 2018).

also considered the fact that UberBLACK drivers, specifically, have to buy and own their own cars in order to participate in the service.[90] Despite noting that drivers are essential to Uber's business, the Court found that the factors that supported UberBLACK drivers being considered independent contractors weighed heavier than the factors that supported drivers being classified as employees.[91]

On appeal, the Third Circuit found general disputes of material facts exist especially when reviewing the "right to control" factor.[92] The Third Circuit found that the lower court dismissed the drivers'claims while there was a dispute as to whether Uber retained the right to control the Plaintiffs' work.[93] The Court found credibility in the Plaintiffs' argument that Uber exercises control over the driver by placing a ratings threshold and limiting a driver's ability to work based on that threshold.[94] The Court ultimately held that more fact-finding was necessary and remanded the case back to the Eastern District of Pennsylvania for reconsideration of the remaining *Donovan* factors.[95]

III. CURRENT STATE OF LAWS

A. CALIFORNIA AND THE *DYNAMEX* DECISION

Since *Borello*, the California Legislature has not opposed the standard that the *Borello* Court adopted which places emphasis on statutory purpose.[96] However, the legislature has continued to impose civil penalties on those who "willfully misclassify, or willfully aid in misclassifying, workers as independent contractors."[97] In *Dynamex Operations West v. Superior Court of California*, the California Supreme Court reviewed which standard should apply under California law for classifying workers as employees or independent contractors for the purpose of minimum wage orders.[98]

Dynamex, a nationwide courier and delivery service, changed the classification of all of its drivers to independent contractors in order to generate economic benefits.[99] The company implemented a new policy that considered all drivers as independent contractors and as a result required the drivers to "provide their own vehicles and pay tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes workers' compensation

90. *Id.* at 48.
91. *Id.*
92. Razak v. Uber Techs., Inc., 951 F.3d 137, 145 (3d Cir. 2020).
93. *Id.* at 146.
94. *Id.* (noting that Uber deactivates drivers who have a rating below the 4.7 stars required for UberBLACK drivers and limits the amount of consecutive hours that drivers may work).
95. *Id.* at 147–48.
96. *See* Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 20 (Cal. 2018).
97. *Id.*
98. *Id.* at 5.
99. *Id.* at 8.

insurance."[100] Two individual drivers brought suit alleging that Dynamex misclassified their drivers as independent contractors and as a result, violated several provisions of California's Labor law.[101]

Relevant provisions of a California wage order passed specifically for the transportation sector defines "employ" as "to engage, suffer, or permit to work."[102] The Court reviewed both the *Borello* decision and the *Martinez* decision and recognized the importance of a standard that emphasizes statutory purpose but also noted the need to establish a standard that is simplified and more effective.[103] As a result, the Court adopted the ABC test as the new standard for determining whether a worker should be considered an independent contractor or an employee for the purposes of California law. The Court emphasized that the burden is on the employer to show that the worker is an independent contractor and that there must be a showing of all three factors of the ABC test.[104] The ABC test factors are:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for 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 the work performed.[105]

If an employer fails to prove any of these three components, that failure alone is sufficient for the worker in question is considered an included employee and eligible for benefits.[106]

In order to establish factor A, the employer must present evidence that the employer does not exercise sufficient control over the individual.[107] In order to establish factor B, the employer must sufficiently show that the worker performs work that is outside of the employer's normal course of business.[108] The Court recognized that workers who are most likely to be considered employees typically have roles within the employer's normal course of business and would not be considered an independent contractor if their work is consistent with the employer's normal course of business.[109] Finally, in order to establish factor C, the employer must show that the worker is engaged in what is known as an independently established trade, occupation, or business of the same nature as the employer.[110] The Court took

100. *Id.*
101. Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 5 (Cal. 2018).
102. *Id.* at 13; *see also* CAL. CODE REGS. § 11090 (West 2018).
103. *Dynamex*, 416 P.3d at 34.
104. *Id.* at 35.
105. *Id.*
106. *Id.* at 40.
107. *Id.* at 36.
108. Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 34 (Cal. 2018).
109. *Id.* at 37.
110. *Id.* at 39.

the helpful step of specifically defining "independent contractor." According to the Court, an independent contractor is an individual who independently made a decision to go into business for themselves.[111] Since the class of drivers who sought to be certified by the Court consisted of drivers who solely performed services for Dynamex, there was no showing that these drivers were in business for themselves or involved in an independent business separate from the nature of the employer.[112]

While Uber was not directly a party to this suit, the company and the gig economy as a whole were affected by this seminal decision.[113] The effects of *Dynamex* will force most gig economy employers to classify their workers as employees, unless employers can truly provide evidence that their employees should not be considered employees and are, in fact, independent contractors. Since Uber and other companies operate businesses that are largely similar to Dynamex, this will undoubtedly force the same result upon them.

B. MASSACHUSETTS

The ABC test, while new to California, is not new to other states and has been enacted in other jurisdictions, such as in Massachusetts. [114] Massachusetts codified the ABC test several years before California though the specific statute has not yet been used against ride-sharing employers or other gig economy employers.[115] When the codified Massachusetts ABC test has been applied, courts have struggled with defining certain terms such as the "B" prong, and specifically, what constitutes as the employer's "usual course of business."[116] Massachusetts' courts have typically looked at this prong in conjunction with the other two prongs of the ABC test to make a determination on what activity should fall within the "usual course" of business.[117] In *Athol Daily News v. Board of Review of the Division of Employment and Training*, the Court relied on the employer's definition of its "usual course of business" in determining whether newspaper carriers were independent contractors or employees under the ABC test.[118] The

111. *Id.* at 38.
112. *Id.* at 42.
113. Hiltzik, *supra* note 27.
114. *Dynamex*, 416 P.3d at 35.
115. *See* MASS. GEN. L. ch. 149, § 148B (LexisNexis 2004) (stating in relevant part: "An individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless: (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and (3) 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.").
116. *See* MASS. OFF. ATT'Y GEN., An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B (2008).
117. *Id.*
118. *See* Athol Daily News v. Bd. of Review of the Div. of Emp't & Training, 439 Mass. 171, 179 (Mass. 2003).

Massachusetts Supreme Court differed with the Massachusetts Board of Review of the Division of Employment and Training on how to interpret this prong of the ABC test.[119] The Court determined that the Board failed to consider the second portion of the "B" prong and the facts easily showed that this portion of the test was met.[120]

C. NEW YORK

New York is another state that also uses the ABC test to determine whether individual workers in the construction industry should be considered independent contractors or employees.[121] Unlike California, New York's version of the ABC test generally only applies to individual workers in the construction industry. The statute automatically presumes that workers in the construction industry are employees unless they are determined to be a business entity as defined by the statute[122] or they meet the criteria of New York's version of the ABC test.[123]

This test was applied in *In re Barrier Window Systems, Inc.* to determine whether window installers for Barrier Window Systems, Inc. were classified correctly as independent contractors.[124] The Court held that the New York Unemployment Insurance Appeal Board correctly determined that the window installers were misclassified and entitled benefits under New York state law.[125] While New York's ABC test, is only limited to the construction industry and thus has not been used to challenge Uber, the New York Unemployment Insurance Appeal Board found that Uber drivers are considered employees for the purposes of unemployment insurance.[126]

IV. ASSEMBLY BILL 5

The California Legislature responded to the *Dynamex* decision by bringing forth measures to codify the decision and ensure that the ABC

119. *Id.*

120. *Id.*

121. N.Y. LAB. L. § 861-c (2) (McKinney 2010).

122. Any person performing services for a contractor is classified as an employee unless…all of the following criteria are met, in which case the person shall be an independent contractor:

> (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

N.Y. LAB. L. § 861-c (1) (McKinney 2010).

123. N.Y. LAB. L. § 861-c (McKinney 2010).

124. *In re Barrier Window Systems, Inc.*, 149 A.D. 3d 1373, 1377 (2017).

125. *Id.*

126. *See* David Z. Morris, *Uber Drivers Are Employees, New York Unemployment Insurance Board Rules*, FORTUNE (July 21, 2018), https://fortune.com/2018/07/21/uber-drivers-employees-new-york-unemployment/.

standard remains a staple in the California Labor Code.[127] AB 5, when initially introduced, lacked substantive details but had the intent to codify *Dynamex*.[128] The bill later began to take shape and following multiple amendments, the legislation went up for a vote in the California Legislature.[129] Similar to *Dynamex*, AB 5 does not overrule or invalidate *Borello*.[130] *Borello* is still considered applicable; if the standard set forth in *Borello* appears to fulfill the inquiry in question rather than the ABC test, then *Borello* should be applied.[131] AB 5 also stays in line with *Dynamex* by keeping the exact wording of the ABC test and by requiring that all three conditions are met in order to successfully fight the presumption that the worker is an employee.[132] For certain provisions of the bill, AB 5 sets forth a refined definition of "employee." Under the bill, an employee is "any individual providing labor or services for renumeration…rather than an independent contractor."[133] If an employer is unable to demonstrate all factors of the ABC test, then the individual worker is considered an "employee" under this definition of the term.[134]

As a result of individual workers failing the ABC test, employers will be forced to comply with other sections of the California Labor Code that requires minimum wage pay, overtime pay, meal and rest breaks, and reimbursement of certain business expenses for employees.[135] AB 5 differs from *Dynamex* in that it applies to the entire California Labor Code, whereas, *Dynamex* was only limited to wage and hour claims.[136] Liability also may,

127. *See* Josh Eidelson, *Uber, Lyft, DoorDash Put $90 Million To Possible Ballot War*, BLOOMBERG (Aug. 29, 2019), https://www.bloomberg.com/news/articles/2019-08-29/uber-lyft-pledge-60-million-to-possible-labor-law-ballot-fight.

128. *Id.*

129. Canon, *supra* note 7.

130. *See* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5; *see also* Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 33 (Cal. 2018).

131. *See* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

132. *Id.*:

> (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.

133. *Id.*

134. *Id.*

135. *See* Janet Sparks, *Franchising Braces for 2020 California AB-5 Law Regarding Misclassification of Workers*, FORBES (Oct. 9, 2019), https://www.forbes.com/sites/janetsparks/2019/10/09/franchising-braces-for-2020-california-ab-5-law-regarding-misclassification-of-workers/#2ad357bb7f60.

136. *See* Tony Marks, *How Do You Spell Trouble? California AB5*, FORBES (Sept. 11, 2019), https://www.forbes.com/sites/tonymarks/2019/09/11/how-do-you-spell-trouble-california-ab-5/#7c9e1f617e29; *see also* AB-5 Worker status: employees and independent contractors, A.B. 5,

though not confirmed, extend to cases involving tort claims and other vicarious liability claims.[137]

AB 5 also carves out exemptions for individual workers in certain industries. Most healthcare providers, commercial fisherman, and certain individuals in the securities industry are exempt from employee status under AB 5.[138] Newspaper publishers and newspaper carriers who are under contract with a newspaper distributor are also considered exempt for an additional year under the ABC test adopted in Assembly Bill 170 (AB 170), which was passed following AB 5.[139] Since these specific professions are exempt from the changes in AB 5, their status as independent contractor or employee is determined by the standard set forth in *Borello*.[140] AB 5 also notably does not apply retroactively to convert current employees into independent contractors.[141] In other words, an individual worker who is considered an employee prior to the enactment of the legislation cannot now be considered an independent contractor once the legislation goes into effect.[142]

California labor unions praised AB 5 as a victory that allows workers to receive the basic protections to which they are entitled to under law.[143] Some drivers have also championed AB 5 as a victory that allows them to not only receive benefits that they believe they are entitled to under law, but AB 5 also allows them to have a voice at the company they work for.[144] The ability to unionize and advocate for benefits is a main reason that some drivers support this new initiative.[145]

2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5; *see also* Dynamex, 416 P.3d at 34.

137. *See* Sparks, *supra* note 135.

138. *See* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

139. *See* AB-170 Worker status: employees and independent contractors, A.B. 170, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB170; AB 170 only applies to those involved in the newspaper industry. *Id.*

140. *See* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

141. *Id.*

142. *Id.*

143. *See* Art Pulaski, *In Monumental Victory for Workers, Gov. Newsom Signs AB 5 into Law*, CAL. LAB. FED'N (Sept. 18, 2019), https://calaborfed.org/in-monumental-victory-for-workers-gov-newsom-signs-ab-5-into-law/.

144. *See* Gabrielle Canon, *Why some on-demand drivers are fighting for – or against – California's gig economy bill*, USA TODAY (Sept. 9, 2019), https://www.usatoday.com/story/news/politics/2019/09/09/drivers-share-their-stories-on-why-ab-5-is-so-controversial/2268244001/.

145. Canon, *supra* note 7.

V. SOLUTION

A. OPPOSITION TO AB 5

The initial reaction to AB 5 by opponents is the impending demise of the gig economy, at least for those workers who do not fall within any of the listed exemptions. Employers involved in the gig economy will now incur costs that they previously were not responsible for.[146] With the classification of their workers changing to employees, gig economy employers will now have to meet minimum wage and overtime requirements that are already incorporated into existing laws.[147]

Uber's current Chief Legal Officer, Tony West, has addressed AB 5 and asserts that AB 5 simply implements a new legal test into the California Labor Code that is already currently law.[148] West argues that while the test may make it harder for companies to prove that individual workers are independent contractors, it does not make it impossible for Uber to pass the test and show that its drivers are independent contractors.[149] West also claims that Uber will not seek to have their employees considered exempt under AB 5, but will instead sponsor a referendum aimed at overturning AB 5 and push for more driver based policies, which are similar to those that Uber would provide if the company complied with AB 5.[150] Proposition 22, which is sponsored by gig economy companies such as Uber, Lyft and DoorDash, would allow workers to keep their independent contractor status while also providing them with new benefits such as, a minimum earnings floor, access to certain health care plans, and better representation within the companies to address their concerns.[151]

Proposition 22 notably does not classify workers as employees but instead proposes to create a third category of worker known as a network driver.[152] This third category will encompass both ride-hailing drivers and delivery service drivers.[153] The bill also proposes that drivers would not be paid for time that they spend waiting for passengers, even though that accounts for a significant portion of a driver's time.[154] However, drivers would be provided with a set minimum wage and mileage reimbursement but

146. *See* Graham Rapier, *Uber and Lyft just took a major blow in California, and now they're gearing up for war*, BUS. INSIDER (Sept. 18, 2019), https://www.businessinsider.com/california-bill-to-treat-contract-workers-as-employees-2019-9.

147. Canon, *supra* note 7.

148. West, *supra* note 15.

149. *Id.*

150. *Id.*

151. *See* Eidelson, *supra* note 127; *see also* Canon, *supra* note 7.

152. Carolyn Said, *Uber circulates new gig-work bill alternative to AB5*, S.F. CHRON. (Sept. 10, 2019), https://www.sfchronicle.com/business/article/Uber-circulates-new-gig-work-bill-as-alternative-14426247.php.

153. *Id.*

154. *Id.*

only once they have accepted a request.[155] While this proposed bill may seem to address all of the issues that drivers face, it still has major pitfalls.[156] For example, creating a third category of worker complicates regulation and which laws would apply to this third class of worker.[157] Nonetheless, all three companies have pledged to contribute $30 million each to gain support for the referendum in the hopes that voters will choose the demise of AB 5.[158]

Further, Proposition 22 would not force ride-share employers to pay unemployment benefits or contribute to California's unemployment fund.[159] Drivers, undoubtedly would feel the brunt of this as it is estimated that Uber and Lyft would have contributed roughly $413 million to the state's unemployment fund, if their drivers were considered employees.[160] This has increasingly posed problems during the Coronavirus Disease 2019 (COVID-19) pandemic, which saw unemployment levels rise exponentially.[161] As a result of various stay-at-home orders, many drivers were forced to file for unemployment benefits.[162] These drivers, however, were met with increased wait times for these benefits as ride-sharing employers did not contribute to these funds.[163] Other drivers continued to work during the COVID-19 pandemic and unfortunately lost their lives because they could not afford to cease working during the pandemic.[164]

Since the passage of AB 5, Uber has also launched a new Uber Works app, which is designed to connect workers with temporary shifts with certain employers.[165] Under the new program, consumers are able to sign up and get connected to open job postings for temporary work that includes bartending, warehouse work, and commercial cleaning.[166] Uber's expansion into this area

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* Eidelson, *supra* note 127; *see also* Canon, *supra* note 7; *see also* West, *supra* note 15.

159. Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/technology/uber-lyft-california-shutdown.html.

160. Ken Jacobs & Michael Reich, *What would Uber and Lyft owe to the State Unemployment Insurance Fund*, U.C. BERKELEY LAB. CTR. (May 7, 2020), https://laborcenter.berkeley.edu/pdf/2020/What-would-Uber-and-Lyft-owe-to-the-State-Unemployment-Insurance-Fund.pdf (finding that Uber and Lyft would have paid approximately $413 million to the state's Unemployment Insurance Fund from 2014 to 2019, if their workers were classified as employees).

161. Patricia Cohen & Tiffany Hsu, *'Sudden Black Hole' for the Economy With Millions More Unemployed*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/04/09/business/economy/unemployment-claim-numbers-coronavirus.html.

162. Joshua Smith, *A COVID-19 death renews questions of responsibility of Uber and Lyft to drivers*, L.A. TIMES (July 25, 2020, 8:42AM), https://www.latimes.com/california/story/2020-07-25/covid-19-death-uber-lyft-drivers.

163. *Id.*

164. *Id.*

165. *See* Peter Talbot, *Uber Launches An App To Connect Job Seekers With Gig Work*, NPR (Oct. 3, 2019, 4:04PM), https://www.npr.org/2019/10/03/766861700/uber-launches-an-app-to-connect-job-seekers-with-gig-work.

166. *Id.*

seemingly intends to solve problems that many agencies that place temporary employees face, while also bolstering the argument that Uber is a technology company.[167] While this app does support the argument that Uber is a technology company, this app will not be the main course of Uber's business as traditional Uber operations remains its primary focus.[168]

Despite arguments that AB 5 would force Uber out of business due to insurmountable rising costs associated with classifying their drivers as employees[169], the bill would only force Uber to advance its business model while also adding protections for drivers.[170] Uber can continue to do business by contracting with new or existing companies that would hire their drivers as employees and be responsible for providing them with the benefits that they would be entitled to as employees under state law.[171] Under AB 5, ride-sharing companies would be responsible for providing the benefits to their newly classified employees.[172] While Uber's costs would increase, the risk of liability and responsibility of insuring that each of their individual drivers shifts to the contracting companies.[173] Uber would undoubtedly lose its ability to incentivize drivers while also maximizing profits, but the company would still make a profit and continue to exist as a business.[174] Nevertheless, Uber along with Lyft have threatened to cease operations in California at least temporarily as a result of AB 5, which is a tactical move to gain increased public support for Proposition 22.[175]

Some critics have argued that removal of independent contractor status will result in a lack of choice as to where an individual worker can work and when they can work.[176] This is a fair criticism, but Uber has already limited some of the flexibility that incentivized drivers.[177] The company has employed software and algorithms[178] that selectively give drivers incentives

167. *Id.*

168. Uber's website states that "on-demand transportation technology is our core service." *See* UBER, https://www.uber.com/us/en/about/how-does-uber-work/ (last visited Dec. 24, 2019).

169. *See* Canon, *supra* note 7.

170. *See* Edward Niedermeyer, *California's New Gig Economy Law Forces Uber To Grow Up*, DRIVE (Sept. 25, 2019), https://www.thedrive.com/tech/30028/californias-new-gig-economy-law-forces-uber-to-grow-up.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Conger, *supra* note 159.

176. *See generally* Harry Campbell, *Uber Drivers Just Want to Be Free*, N.Y. TIMES (Sept. 16, 2019), https://www.nytimes.com/2019/09/16/opinion/uber-ab5-california.html.

177. *See id.*

178. Uber drivers are tracked by semi-automated systems that reviews their acceptance rates, time on trips, speed, ratings from customers and makes determinations, such as whether a driver's account should be deactivated, based on this information. Lawrence Mishel, *Uber drivers are not entrepreneurs*, ECON. POL'Y INST. (Sept. 20, 2019), https://www.epi.org/publication/uber-drivers-are-not-entrepreneurs-nlrb-general-counsel-ignores-the-realities-of-driving-for-uber/.

to work when and where the company wants them to.[179] In essence, this practice allows Uber to exert more control over drivers while maximizing the revenue and profits the company brings in.[180] However, the wages that the driver brings in remains unchanged.[181] Uber exerts significant control over the pricing of rides and drivers are unaware of the rate that a passenger will pay prior to the trip.[182] Drivers can also be penalized for picking inefficient routes or for rejecting certain passenger requests.[183] Drivers cannot take measures to expand their revenues by either providing additional services to riders or expanding their customer base.[184] Therefore, Uber drivers are essentially subject to employee restrictions but receiving independent contractor-like benefits.[185]

AB 5 helps to cure defects resulting from the often murky distinction between an independent contractor and an employee.[186] AB 5 provides a three step process that, when adequately defined, protects individual workers and allows them to receive their correct status and the benefits related to that status under state law.[187]AB 5, however, will allow drivers to have access to improved wages and benefits, such as full reimbursement for driving expenses while not disturbing their flexibility to choose different work hours.[188] Federal and state law both currently pose no restriction on the ability of employees to select different blocks of work hours week to week.[189] Similarly, AB 5 imposes no restriction on the flexibility that gig economy employees enjoy.[190] The driver is still able to choose when they wish to work and how often. The only change brought on by AB 5 and the adoption of the ABC test is that the worker will be classified correctly and will receive the benefits that are accorded to them under the respective laws.[191]

179. Campbell, *supra* note 176; *see also* Mishel, *supra* note 178.

180. Campbell, *supra* note 176.

181. *Id.*

182. Mishel, *supra* note 178.

183. *Id.*

184. Uber initially imposed constraints on tipping which limited a driver's ability to enhance their revenue by providing in ride additional services, including but not limited to phone chargers or bottled water. *Id.*

185. Campbell, *supra* note 176.

186. *See generally* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200 AB5.

187. *Id.*

188. Andrew J. Hawkins, *Uber and Lyft Face An Existential Threat In California – And They're Losing*, VERGE (Sept. 2, 2019), https://www.theverge.com/2019/9/2/20841070/uber-lyft-ab5-california-bill-drivers-labor.

189. "Nothing in federal or state law precludes allowing employees to choose different or similar blocks of work hours each week." *Id.*

190. *See generally* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200 AB5.

191. Hawkins, *supra* note 188.

Some critics have also argued to the extreme and cautioned that Americans nationwide should be fearful of AB 5.[192] These critics exclaim that this bill essentially is an example of state governments telling adults how to conduct business and especially, how to manage their livelihood.[193] Without this legislation, however, companies like Uber will be able to take advantage of their individual workers disguising their status as independent contractors.[194] Further, AB 5 allows employees of gig economy employers to unionize and bargain for benefits that correspond with their needs.[195] For example, drivers who use Uber less frequently or as a second job may bargain for less benefits than those who drive for Uber as their sole career.

B. CLEARLY DEFINING AB 5

AB 5, which went into effect on January 1, 2020, did not initially dictate what would happen or how individual workers—currently misclassified as independent contractors rather than as employees—would be affected as a result of the new legislation.[196] Prior to enactment, Uber noted that the company would not automatically change the classification of drivers to employees as a result of the bill going into effect.[197] This resulted in the Attorney General of California bringing suit against Uber and Lyft to enforce the new law.[198] The complaint, which alleged that the ride-sharing companies cannot defeat the presumption that their drivers are employees through the ABC test, sought injunctive relief and payment of violations.[199] The Attorney General of California won the suit initially, however, Uber and Lyft are currently appealing the decision and drivers are still left waiting for their benefits.[200]

AB 5 is not perfect. Passing AB 5 is a big step in regulating the gig economy, however, enforcing these changes proves to be another large hurdle. AB 5, for one, does not explicitly spell out ways that the provisions can be enforced or even potential remedies that potential misclassified employees can pursue.[201] The bill essentially defers to the judicial system to

192. *See generally* Jennifer Wright, *Why California's AB-5 is a threat to the American way of life*, N.Y. POST (Oct. 26, 2019), https://nypost.com/2019/10/26/why-californias-ab-5-is-a-threat-to-the-american-way-of-life/.

193. *Id.*

194. *See* Campbell, *supra* note 176.

195. Hawkins, *supra* note 188.

196. Diane Mulcahy, *California's New Gig Economy Law Is All Bark, No Bite*, FORBES (Sept. 20, 2019), https://www.forbes.com/sites/dianemulcahy/2019/09/20/californias-new-gig-economy-law-is-all-bark-no-bite/#5a6f26b4baef.

197. Canon, *supra* note 7; *see also* West, *supra* note 15.

198. Complaint at 3, California v. Uber Techs., Inc., (Sup. Ct. Cal. 2018) (No. CGC-18-570124).

199. *Id.*

200. Conger, *supra* note 159.

201. *See* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5 (enforcement provisions are missing from AB 5 and therefore is not stated).

determine what remedies are available, which is not different from what would be available to misclassified employees under *Dynamex*.[202] Other than injunctive relief, AB 5 should provide a more structured remedy that is clear in the text of the legislation.[203]

The text of AB 5 should be amended to clearly state that if an employer has misclassified a worker, then California Labor Code section 226.8 will take into effect and will be the baseline for penalties.[204] Section 226.8 states, in relevant part, "It is unlawful for any person or employer to engage in any of the following activities: (1) willful misclassification[205] of an individual as an independent contractor."[206] The statute also permits for the employer to be subject to civil penalties not exceeding $15,000 for each violation and no less than $5,000 for each violation.[207] The fines can increase to $25,000 for each violation if the employer is found to have engaged in a pattern of these violations.[208] Directing violators of AB 5 to this statute would ensure that there is adequate notice of the punishment and would prevent violations, especially repeated violations from large gig economy companies, such as Uber.[209]

AB 5 also contains terms that are potentially ambiguous and can be interpreted differently by courts in California.[210] One such term is the "usual course of business." The definition of this term is crucial to the process of determining whether an individual worker passes or fails the ABC test and is ultimately considered an independent contractor.[211]

The California Legislature should clearly define this term and others throughout the bill so that application mirrors the intent of the Legislature. Specifically, the Legislature should clearly define each prong of the ABC test so that when the judicial branch applies the test, there is no confusion as to the meaning of a specific term. Massachusetts serves as an example where

202. Mulcahy, *supra* note 196.

203. *See* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

204. *See generally* Anthony Zaller, *Five key issues to understand about AB 5 and its impact on independent contractors*, CAL. EMP. L. REP. (Sept. 27, 2019), https://www.californiaemploymentlawreport.com/2019/09/five-key-issues-to-understand-about-ab-5-and-its-impact-on-independent-contractors/.

205. Willful misclassification is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor" CAL. LAB. CODE § 226.8 (i)(4) (Deering 2013).

206. CAL. LAB. CODE § 226.8 (a)(1) (Deering 2013).

207. CAL. LAB. CODE § 226.8 (b) (Deering 2013).

208. CAL. LAB. CODE § 226.8 (c) (Deering 2013).

209. Zaller, *supra* note 204.

210. *See generally* AB-5 Worker status: employees and independent contractors, A.B. 5, 2019 Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

211. *Id.*

there can be varying interpretations of the ABC test.[212] The Massachusetts Attorney General's Fair Labor Division issued an Advisory to provide guidance on how to interpret Massachusetts' independent contractor and worker misclassification laws.[213] The Attorney General anticipated that there would be some confusion when attempting to apply these laws and specifically, the ABC test, which led to the release of this Advisory.[214] If California wishes to avoid the same issue, the Legislature needs to clearly define all of the potentially ambiguous terms in AB 5 and how to effectively calculate these terms. Leaving this task up to the judicial branch will potentially take years to get a clear determination of how the test is to be applied and also may not follow exactly the legislative intent.[215] The Legislature also cannot be certain that it will achieve the same result each time as the Court determined in *Dynamex*.

C. FEDERAL ADOPTION OF THE ABC TEST

Since the passage of AB 5, other states have taken concrete actions to regulate the gig economy. For example, New Jersey's Department of Labor has recently billed Uber for taxes and penalties resulting from the misclassification of their drivers as independent contractors.[216] Since the company and its subsidiary failed to provide disability and unemployment insurance as mandated under New Jersey state law, the New Jersey Department of Labor & Workforce Development valued their misclassification at $523 million with an addition $119 million in penalties.[217] Notably, the penalty is only limited to unemployment and disability insurance purposes.[218] An Uber spokeswoman vowed that the company will challenge these penalties and the classification of their drivers as employees.[219] This will likely not be the last penalty that Uber will continue to receive from a state government.[220]

212. *See* Athol Daily News v. Bd. of Review of the Div. of Emp't & Training, 439 Mass. 171, 179 (Mass. 2003) (finding that the Board of Review of the Division of Employment and Training incorrectly interpreted the factor B of the ABC test).

213. *See* MASS. OFF. ATT'Y GEN., *supra* note 116.

214. *Id.*

215. Mulcahy, *supra* note 196.

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

217. Janet Burns, *New Jersey Says Uber Owes Nearly $650 Million In Taxes And Interest, That Its Drivers Are Employees*, FORBES (Nov. 14, 2019), https://www.forbes.com/sites/janetwburns/2019/11/14/new-jersey-says-uber-owes-nearly-650m-in-taxes-and-interest-that-its-drivers-are-employees/#33d92d551ecd.

218. *Id.*

219. *Id.*

220. Opfer, *supra* note 216.

With several states taking measures to ensure that the gig economy is regulated and misclassification is justly punished,[221] the federal government also needs to take action. Multiple departments of the federal government maintain varying definitions of employee and independent contractor that they use to classify individual workers.[222] Currently, FLSA is silent on a definition of independent contractor. As such, the outdated language of the statute should be updated to account for the growing and changing gig economy.

The U.S. House of Representatives has made progress in attempting to adopt the ABC test by introducing and passing H.R. 2474,[223] also known as the Protecting the Right to Organize Act of 2019. This bill amends the National Labor Relations Act[224] to include the ABC test as the standard for determining whether an individual worker is an employee or an independent contractor.[225] Unfortunately, the U.S. Senate has not brought the legislation up for a floor vote, effectively stalling implementation of the ABC test at the federal level.[226]

The U.S. Department of Labor has also considered adopting the ABC test for FLSA purposes but argued that the test is too restrictive to be used to determine protections under the FLSA.[227] The agency has instead opted to propose a five-factor test[228] that attempts to simplify the economic realities test.[229] By using this test, the Department of Labor intends to implement a more relaxed test while also keeping the economic reality focus of the test.[230] This test, however, is still too similar to the economic realities test and has several factors that can complicate enforcement and application.

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221. *Id.*

222. The I.R.S., Department of Labor, and the National Labor Relations Board all maintain different subjective definitions of the terms employee and independent contractor. Mulcahy, *supra* note 6.

223. H.R. 2474, 116th Cong. (2019).

224. The National Labor Relations Act is the leading statute that offers protections for private sector employees from unfair labor and management practices and encourages these private sector employees to pursue collective bargaining. NAT'L LAB. REL. BOARD, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Oct. 4, 2020).

225. H.R. 2474, 116th Cong. (2019).

226. Jeff Kowalsky, *House Vote on Union-Backed Bill Sets Up Test for 2020 Elections*, BLOOMBERG (Jan. 30, 2020), https://news.bloomberglaw.com/daily-labor-report/house-vote-on-union-backed-bill-sets-up-test-for-2020-elections.

227. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, 795).

228. The five-factor test proposed by the U.S. Department of Labor uses the following factors: (1) the nature and degree of the worker's control over the work; (2) the worker's opportunity for profit and loss; (3) the amount of skill required; (4) the permanence of the working relationship; and (5) the "integrated unit." Christopher Feudo, James Fullmer & Jonathan Keselenko, *Department of Labor Proposes New Rule on Independent Contractors*, JD SUPRA (Sept. 24, 2020), https://www.jdsupra.com/legalnews/department-of-labor-proposes-new-rule-67487/.

229. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60634 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, 795).

230. *Id.* at 60600.

Adopting the ABC test federally would eliminate the need for the economic realities test that was considered when determining if an individual worker was an independent contractor or an employee for FLSA purposes.[231] The ABC test, when all terms are well defined, is a clear, simplified method for determining whether an individual worker should be considered an employee or an independent contractor. This will limit the amount of misclassification that occurs especially within the gig economy and results in individual workers not being eligible for benefits and coverage under numerous federal statutes, such as FLSA, the Americans with Disabilities Act, and the Civil Rights Act.[232]

231. *See* Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 754 (9th Cir. 1979).
232. Canon, *supra* note 7.

CONCLUSION

For the foregoing reasons, the gig economy needs to be regulated and AB 5 is a step in the right direction in ensuring that this portion of the American workforce is protected. However, AB 5 will be more effective when the terms of the ABC test are clearly defined and there is no dispute as to their meaning. Further, the federal government should adopt the ABC test as the standard for determining when an individual worker is an independent contractor or an employee and to further avoid misclassification of workers.

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