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Proposition 22 and evolving law governing California contractors

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With voter approval of Proposition 22, ridesharing companies succeeded in creating a new kind of independent contractor profession under California law consisting of app-based drivers. The law gives drivers some of the rights of employees, such as minimum hourly pay and the right to reimbursement of some expenses.

But app-based drivers represent a tiny fraction of the independent contractor workforce. Changes with far greater consequences than Proposition 22 to the law governing independent contractors may be coming.

The overarching goal of the ridesharing companies in sponsoring Proposition 22 — and spending over $200 million to secure its passage — was to replace California's ABC test for classifying a worker as an independent contractor with a more limited, less demanding set of criteria applicable only to app-based ridesharing and delivery companies.

The ABC test is found at Labor Code section 2257, which revised AB 5, and which itself was based on the California Supreme Court's landmark 2018 Dynamex ruling. To classify a worker as an independent contractor, a hiring entity must prove the worker is (A) relatively free of the hiring entity's control in how the work is done; (B) performing work outside the usual course of the hiring entity's business, and (C) customarily and regularly doing work in an established trade, occupation, or business, of the same kind being performed for the hiring entity.

By contrast, the test for an independent contractor relationship under Proposition 22 focuses on the freedom of drivers to set their own schedules and their freedom to pursue other work, through competing ridesharing platforms or in other lawful occupations. The test is tailored to the existing relationship between the app-based platforms and drivers who perform services through those platforms.

The same day voters enacted Proposition 22, the California Supreme Court heard oral argument in a case raising the question whether the Dynamex ruling applies retroactively. According to published reports in the legal press, at least one justice was skeptical that Dynamex represented such a sharp break from existing law when it was decided that the normal rule that judicial rulings are retroactive should not apply. If the state supreme court ultimately rules that Dynamex applies to classification decisions made years before it issued the decision in 2018, numerous companies could face liability for back wages to independent contractors that do not pass the ABC test and for associated penalties.

There also is a remote possibility that the ABC test will be adopted as the national standard under which workers may be classified as independent contractors. The Democratic-controlled House of Representative included such a provision in a wide-ranging "Protecting the Right to Organize Act" passed in February. Among other things, the measure would make misclassification of workers as independent contractors a violation of the National Labor Relations Act. Owners and businesses would face fines of up to $100,000 for violating the NLRA.

The PRO Act died when the Senate declined to consider it. But Joe Biden has pledged to push for it if he becomes president, as is likely at this writing. If Biden does become president and the federal measure were adopted – uncertain under Republicans' continued control of the Senate – the new rules could apply to all industries nationwide, including ridesharing companies. That could undermine, perhaps nullify, the safe harbor those companies secured with the approval of Proposition 22.

And yet the passage of Proposition 22 also may open the door to reconsideration of the black-and-white distinction under current law between an employee and an independent contractor. Creative minds, with competing interests, may come together to develop one or more hybrid frameworks adaptable to the evolving nature of work in the 21st century.

The new model would combine the clarity and predictability of the ABC test with the breadth of arrangements more flexible tests allow. The question, then, is whether the enactment of Proposition 22 is the end of a dialogue about the classification of independent contractors in a single industry or the start of a dialogue aimed at accommodating the shifting nature of work across industries, a dialogue made more urgent by a persistent pandemic that has reshaped how, when, and where work is performed.

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