

Alert | Labor & Employment



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Voters Approve California Prop 22: Now What?

Rideshare companies like Uber and Lyft are celebrating the passage of Proposition 22 in a 58% to 42% victory. Through passage of the Proposition, certain gig-economy companies were able to secure a complete exemption from AB 5, the law passed in 2019 by the California legislature that codified the *Dynamex* decision and made the ABC Test for classifying workers as independent contractors the law in California, subject to a number of enumerated exemptions. This means that entities that engage workers covered by Prop. 22 would not have to comply with the ABC Test in order to classify certain workers as independent contractors.

Who Does Prop. 22 Cover?

Prop. 22 applies to app-based drivers who either: (a) provide delivery services on an on-demand basis through a business's online-enabled application or platform; or (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform.

Practically speaking, this means that Prop. 22 may only apply to delivery and rideshare drivers for "network companies" such as DoorDash, Lyft, Uber, and Postmates.

However, Prop. 22 classifies such workers as independent contractors only if the following requirements also are met:

- The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the drivers must be logged into the app or platform;
- The network company does not require the driver to accept any specific rideshare or delivery service request as a condition of maintaining access to the app or platform;
- The network company does not restrict the driver from performing rideshare or delivery services for other network companies, except when the driver is working for the network company; and
- The network company does not restrict the driver from working in any other lawful occupation or business.

What Benefits Does Prop. 22 Provide?

Prop. 22 provides the following benefits:

- For drivers who work at least 15 hours a week, a health care subsidy consistent with the average contributions required under the Affordable Care Act;
- A new minimum earnings guarantee tied to 120% of minimum wage, with no maximum;
- Compensation for vehicle expenses;
- Occupational accident insurance to cover on-the-job injuries; and
- Protection against discrimination and sexual harassment.

Does Prop. 22 Apply Retroactively?

It is unclear whether Prop. 22 will be applied retroactively. The Superior Court judge overseeing the Labor Commissioner's litigation against Uber and Lyft seems to think it does not. In his Aug. 10, 2020 preliminary injunction order, Judge Schulman stated that, "even if the ballot initiative passes, it would not moot out the People's prayer for remedies for past violations." Interestingly, California Assemblywoman Lorena Gonzalez, the architect behind AB 5, appears to think otherwise. In an Aug. 19, 2020, tweet to constituents, she commented that "...the proposition is retroactive" when discussing the potential effects of its passage with constituents online. The issue of retroactivity may well become the focal point of the Labor Commissioner's lawsuit against Uber and Lyft, assuming the California Labor Commissioner chooses to continue to prosecute the suit. Even if the Labor Commissioner decides not to pursue this case, the issue of retroactivity may well be resolved through litigation.

In a separate action filed by the State of California against DoorDash, also seeking a preliminary injunction for DoorDash's alleged violation of AB 5, Superior Court Judge Anne-Christine Massullo did not indicate that any such preliminary injunction would be moot. Instead, acknowledging that the votes in favor of Proposition 22 would not be certified for roughly a month, on Nov. 5, she allowed the People of the State of California to file an amended complaint and both sides to brief how the passage of Prop. 22 would impact the state's preliminary injunction motion.

Can The Legislature Repeal or Modify Prop. 22?

Probably not and maybe.

The general rule is that a law enacted by ballot measure can only be changed by another law enacted by ballot measure. However, Prop. 22 does contain language that permits the legislature to modify it:

After the effective date of this chapter, the Legislature may amend this chapter by a statute passed in each house of the Legislature by rollcall vote entered into the journal, seven-eighths of the membership concurring, provided that the statute is consistent with, and furthers the purpose of, this chapter.

Presumably this means that the legislature could modify, but not repeal, Prop. 22 so long as any modifications are consistent with the terms and purpose of Prop. 22. In addition, any modification would require a super-duper majority of 7/8 of *both* houses to vote for it. Time will tell.

What Does Prop. 22 Mean for Other Employers?

While Prop. 22 seems to bring some clarity to certain delivery and rideshare service drivers, it does not provide much solace to other employers who engage independent contractors. Such employers still must comply with the ABC Test, or the *Borello* multi-factor test, as set out in AB 5, and as further modified by the passage of AB 2257, which amended AB 5. For these other employers, the landscape for determining who qualifies for independent contractor status under California law remains as complicated and as fraught with peril as it was on Nov. 2. Employers are cautioned to tread this ground carefully and with the assistance of experienced employment law counsel.

Authors

This GT Alert was prepared by:

- [Timothy Long](#) | +1 916.868.0677 | longt@gtlaw.com
- [Radha D.S. Kulkarni](#) | +1 310.586.7724 | kulkarnir@gtlaw.com
- [Anthony E. Guzman II](#) | +1 415.655.1253 | guzmanan@gtlaw.com

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