



To: Members of the RCRC Board of Directors
From: Paul A. Smith, Senior Vice President Governmental Affairs
Arthur Wylene, General Counsel
Date: September 8, 2020
Re: Proposition 22 – Protect App-Based Drivers and Services Act – **ACTION**

Summary

This memo provides an analysis of Proposition 22, the Protect App-Based Drivers and Services Act, which revises employment classification rules for app-based transportation and delivery drivers. Proposition 22 will appear on the November 2020 General Election ballot for consideration. RCRC staff is recommending the RCRC Board of Directors adopt a “No Position” position on this measure.

Background

California state law distinguishes between employees and independent contractors for many reasons. Generally speaking, employees have greater job benefits and protections than independent contractors, but less independence. Historically, the determination of whether a particular worker was an employee or independent contractor was governed by a multifactor test (often referred to as the "Borello" test, after *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341), which took into account many aspects of the employment relationship, with particular emphasis on the level of control the hiring entity did (or did not) exercise over the details of the worker's performance.

In 2018, the California Supreme Court issued the *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, which altered these historical practices, and adopted a new standard - the "ABC" test - to determine employment status for purposes of the state's wage and hour regulations. Most notably, under the new "ABC" test, only persons who "perform work that is *outside the usual course of the hiring entity's business*" may qualify as independent contractors. This resulted in many workers who might formerly have qualified as independent contractors being reclassified as employees - particularly in "gig" industries whose business models are designed around contract workers.

The Legislature followed up the *Dynamex* decision in 2019 with Assembly Bill 5 (Gonzalez), which codified the “ABC” test, and extended it other areas of employment law. AB 5 also included a variety of exceptions from the new ABC test, some broadly applicable (such as "bona fide business-to-business contracting") and others targeted to certain occupations (such as physicians). While AB 5 had broad effects throughout all

sectors of California's economy, the legislative history indicates that the bill was specifically concerned with workers in the emerging "gig" economy.

AB 5 immediately resulted in litigation. A number of business organizations have sued, claiming that AB 5 is either unconstitutional or preempted by federal law. Only one of these challenges has been successful to date, concerning independent truckers covered by federal regulations. At the same time, the Attorney General sued Uber and Lyft, alleging that these businesses have misclassified their drivers as independent contractors under both Dynamex and AB 5. The San Francisco Superior Court initially agreed with the Attorney General and ordered Uber and Lyft to immediately start treating their drivers as employees, but this ruling has been temporarily stayed by the Court of Appeal, with a final decision expected after the November election.

Parallel to the litigation, several "gig" industry companies, including Uber, Lyft, and Postmates, have qualified Proposition 22 for the November ballot. Proposition 22 would override AB 5 and Dynamex as applied to "app-based drivers," and would explicitly classify such drivers as independent contractors, rather than employees. The initiative would not affect any other workers or industries. Proposition 22 would further provide app-based drivers with specific defined benefits, including an earnings minimum (120% of minimum wage for time spent driving, plus mileage), health insurance stipends, and certain coverage in the event of an on-the-job injury. The measure would also require rideshare and delivery companies to implement rest policies, anti-discrimination and sexual harassment policies, criminal background checks, and safety training. Finally, Proposition 22 would preempt local governments' authority to regulate most aspects of app-based driver employment and compensation.

Issue

Proposition 22 would override the enactment of AB 5 which was designed to determine a worker's status as an independent contractor or an employee or agent. Proposition 22 would enact labor and wage policies that are specific to app-based transportation and delivery drivers.

RCRC did not offer any formal position on AB 5 when it was being considered during the legislative process.

Staff Recommendation

RCRC staff recommends the RCRC Board of Directors adopt a "No Position" position on Proposition 22.

Attachment

- Copy of Proposition 22