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Passage of Proposition 22 Provides Independent Contractor Exemption for Uber, Lyft, and Other Online-Based Transportation Businesses

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Introduction

On November 3, 2020, California voters passed the long-awaited Proposition 22 (text available here), which exempts online-based transportation businesses from having to re-classify transportation drivers as employees. Therefore, these drivers will be exempt from the requirements of the California Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission's Wage Orders.

Summary

Although Proposition 22 permits hiring entities to continue classifying their drivers as independent contractors, they will be subject to certain conditions, including the following:

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1. The drivers are provided with an option to accept or reject each delivery request (without being required by the hiring entity to accept any specific delivery requests); and
2. The drivers are provided certain benefits typical of an employment relationship, such as:

    - **Minimum wage** calculated at a rate of 120% of the local minimum wage for time a driver spends driving after accepting a rideshare or delivery request until the driver completes that rideshare or delivery request;
    - **Reimbursement for vehicle expenses** calculated at a rate of 30 cents per mile (beginning in 2021 and to be adjusted on a yearly basis to account for inflation) actually driving after accepting a rideshare or delivery request until the app-based driver completes that request;
    - **Occupational accident insurance** to cover medical expenses and lost income resulting from injuries suffered while the driver is online with a network company's online-enabled application or platform;

- **Healthcare subsidies** for drivers who regularly work at least 15 hours a week in "engaged time" (time spent driving after accepting a rideshare or delivery request until the time of completion); and
- **Other protections** such as discrimination and sexual harassment policies, criminal background check requirements, and safety trainings for drivers.

Companies will not, however, be required to provide drivers with overtime premiums, meal and rest periods, unemployment insurance, or paid sick days.

Furthermore, although the minimum wage provided under Proposition 22 is calculated at a rate of 120% of the local minimum wage, it applies only to time spent between accepting a ride or delivery request and the completion of that request. (California employees, by contrast, are usually entitled to time spent waiting for an assignment if they are subject to employer control.) Similarly, the reimbursement for vehicle expenses is limited to mileage incurred during these periods of time. Therefore, drivers would not be paid for time or vehicle expenses incurred while waiting for a ride or delivery request or if a ride or delivery is not completed (e.g. through cancellation by either the customer or the driver).

Likely Impact

Although Proposition 22 would exempt certain categories of online platform-based and application-based businesses from having to classify their drivers as employees, other businesses should keep in mind that Proposition 22 is unlikely to provide their specific businesses with relief from AB 5 [discussed in greater detail here], unless they are able to replicate these online-based platforms and overall methodology for which Uber, Lyft, Postmates, and other similar entities provide "on-demand" transportation and/or delivery services.

Proposition 22 is the latest in a series of steps that dramatically scale back the breadth of AB 5, which took effect at the start of 2020 and codified the "ABC Test" established by the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903. This test presumes workers are employees unless an employer can establish that the worker: (A) 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) performs work that is outside the usual course of the hiring entity's business; and (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed (click here for a full discussion of *Dynamex*). For example, on August 31, 2020, the California Legislature enacted AB 2257, which created exemptions from AB 5 for certain types of workers, including writers, musicians, artists, and individuals who provide "professional services." (A further discussion of AB 2257 is available here).

However, unlike AB 2257, Proposition 22 provides much more certainty in exempting certain categories of workers from having to be classified as employees when explicit conditions are met, whereas AB 2257's exemptions would instead require workers to satisfy the multi-factor *Borello* test. Due to this uncertainty, the success of Proposition 22 may lead to similar initiatives for categorical exemptions from AB 5 in the future, particularly from gig economy players. Also remaining to be seen is whether Proposition 22 itself will be subject to legal challenges, including whether federal law (which contains its own tests for employee versus independent contractor status, and which may also change based on the

results of the Presidential election, which has not been called at the time of publication) would pre-empt it.

For these reasons, companies who utilize independent contractors in California should continue to evaluate the viability of that classification, particularly because any "relaxing" changes in the law, whether through a ballot initiative or other challenges, are unlikely to be retroactive, as indicated in the existing enforcement action of AB 5 filed against Uber and Lyft. In a prior court order in a pending lawsuit filed by the State of California against Uber and Lyft, the judge stated just weeks before Election Day that it cannot "duck its obligation to rule on a matter properly before it based on speculation that current law may be struck down or modified in the future." He further stated that "Even if the ballot initiative passes, it would not moot out the People's prayer for remedies for past violations." (A full discussion of the lawsuit can be found here).

Given the numerous twists and turns this issue has taken in just the past few months, it is likely that the story is far from over. We invite your comments and questions about the fate of AB5 and the future of the gig economy following Proposition 22.

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