

ZOOM WEBINAR

The ABCs of Worker Classification:  
**CALIFORNIA'S LEGAL  
LANDSCAPE POST-AB 5**

Presented by  | **McManis+Faulkner**

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# Agenda

- Legal Landscape Before AB 5
- California Supreme Court *Dynamex* Decision
- California Assembly Bill 5 (AB 5)
- Enforcement and Challenges to AB 5
- Proposition 22 and the Potential Outcomes
- Testing the ABCs of Worker Classification

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## Law Prior to AB 5

For nearly 30 years, the multifactor test from *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 determined if a worker should be classified as an employee or independent contractor.

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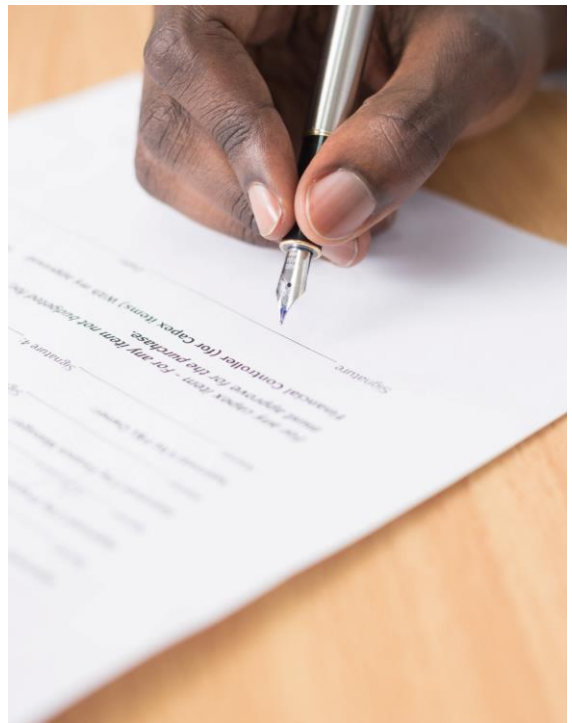
## The *Borello* test

*The test examines the total circumstances of the relationship between the business and the person performing the work, in light of the following factors:*

- Whether the employer has all necessary control over the manner and means of accomplishing the result desired;
- Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
- Whether the work is a regular or integral part of the employer's business;
- Whether the employer or the worker invested in the business or supplies the instrumentalities, tools, and the place for the worker doing the work;
- Whether the service provided requires a special skill;
- The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
- The worker's opportunity for profit or loss depending on their managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job;
- Whether the worker hires their own employees;
- Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
- Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).

## The *Borello* test

\*Simply labeling someone as an "independent contractor," having workers sign documents agreeing to be treated as an independent contractor, or paying someone using an IRS Form 1099 **does not settle the issue.**



## The *Dynamex* Decision



- Plaintiffs were delivery drivers who were converted from employees to independent contractors for cost-saving purposes despite no change in work.
- Drivers sued to challenge reclassification.
- Drivers won the case, and in the process the ABC test was adopted.

LAW360

**Calif. Justices Reject Previous Worker Classification Test**

## The *Dynamex* “ABC Test”



**A**

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 the performance of the work and in fact;

**B**

The worker performs work that is outside the usual course of the hiring entity’s business; and

**C**

The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

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## The *Dynamex* “ABC Test”



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## The *Dynamex* “ABC Test”



**B**

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## The *Dynamex* “ABC Test”



The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.



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## The *Dynamex* “ABC Test”

- The ABC test imposes a significantly higher burden on companies than the *Borello* test and made it more difficult to establish independent contractor status.
- Prior to AB 5, the *Dynamex* ABC test only applied to wage-order claims, and the *Borello* test applied to all other claims under the Labor Code.



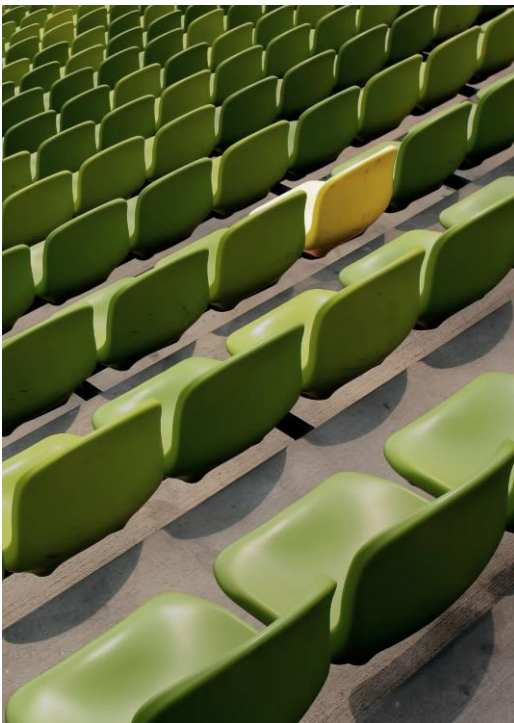
# California Assembly Bill 5 (AB 5)

December 2018

AB 5 was introduced in the Assembly to codify – and expand – the “ABC” from *Dynamex* into the Labor Code.

**Why do I say expand?** Well, while *Dynamex* held that the ABC Test applied only to claims brought under the Industrial Welfare Commission Wage Orders, AB 5 makes the ABC Test applicable to **any claim** under the Labor Code or any unemployment claim, unless an exclusion applies.

- Because AB 5 classifies workers as employees, it entitles them to greater labor protections, such as minimum wage laws, meal and rest breaks, sick leave, expense reimbursements, unemployment and workers' compensation benefits;
- AB 5 does not permit an employer to reclassify an individual who was an employee on January 1, 2019 to an independent contractor.



## California Assembly Bill 5 Exceptions

- AB 5 exempts **over 50 professions, industries, and business relationships from the *Dynamex* test**. These include:
  - Certain professional occupations;
  - Workers operating under certain types of professional services contracts;
  - “Bona fide business-to-business contracting relationships”;
  - Certain “referral agencies”.
- Because of AB 5’s varying requirements, depending on the particular exemption, a “one size fits all” approach to a properly drafted agreement is not an option.
- If an exemption applies, the hiring entity is not home free as it **must still satisfy the pre-*Dynamex* multi-factor test** set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.



## AB 2257 (was § 2750.3(a)(1) under AB 5)

**September 4, 2020**

AB 2257 was signed as an “urgency measure” which means it took effect immediately upon signing.

- While AB 2257 maintains the essential framework of AB 5, it does “clean-up” some things as well as adding additional exceptions and amending others.
- Criteria for each exception (whether the one’s continued over from AB 5 or the one’s newly added) are very specific and set forth in the statute so one needs to read each exception carefully to make sure the employer qualifies for it.
- A couple of the amended exceptions that I want to highlight:
  - Business-to-Business exception (Labor Code 2776);
  - Referral Agency Exception (Labor Code 2777).

## Retroactivity Dynamex

- As to the *Dynamex* decision itself, last year the Ninth Circuit, in *Vazquez v. Jan-Pro Franchising, International*, held that *Dynamex* was retroactive. It then withdrew that opinion and subsequently certified the question to the CA Supreme Court which accepted it.
- *Vazquez* was fully briefed as of mid-July, and on Sept. 15th, the court sent out a letter to counsel advising them that oral argument “could” be set within the next few months.





# Retroactivity

## AB 5 and AB 2257

- Both laws provide that they do not “constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders.”
- Both laws also provide that, to the extent any of the exceptions “would relieve an employer from liability, those sections shall apply retroactively to existing claims and actions to the maximum extent permitted by law.”
- Typically, clarifications generally apply retroactively. At the same time though, unless there is an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature must have intended a retroactive application.
- Keep in mind that, if they are retroactive, thanks to the UCL, there is, in effect, a 4-year statute of limitations on these claims.

## Challenges to AB 5



# Olson et al. v. State of California

*Postmates, Inc., and Uber Technologies, Inc., along with two individuals (Lydia Olson and Miguel Perez—app-based workers)*

## December 30, 2019

Filed lawsuit to challenge AB 5 under the [U.S. Constitution](#) and [California Constitution](#)

- AB 5 → "an irrational and unconstitutional statute designed to target and stifle workers and companies in the on-demand economy."
- AB 5 → violates the equal protection clause by creating different legal standards for similarly situated groups, "arbitrarily ratcheting up the legal standard for some industries and ratcheting down for those not lucky enough to receive an exemption."

## September 18, 2020

US District Court (Central Dist.) Judge Dolly Gee granted most of state's motion to dismiss an amended suit from plaintiffs

- No evidence that gig-economy companies were unfairly singled out by lawmakers' allegedly "irrational animus" or "favoritism towards unions or other groups"
- Plaintiffs may amend equal protection, due process and contracts clause claims by Oct. 9, 2020.

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# State of California v. Uber and Lyft

## May 5, 2020

CA Attorney General, City Attorneys of LA, San Diego, and SF filed suit against Uber and Lyft

- Alleged misclassification of ride-hailing drivers as independent contractors rather than employees in violation of AB 5 and Unfair Competition Law, Bus. & Prof. Code section 17200.
- Requested preliminary injunction enjoining Uber and Lyft from classifying their drivers as independent contractors.

Uber and Lyft opposed motion for preliminary injunction



- Also seek to stay litigation until the Ninth Circuit rules on Uber's pending constitutional challenge to AB 5; until the Nov. 2020 election, when voters will consider Prop. 22; or until final disposition of similar lawsuits.



# State of California v. Uber and Lyft



## August 10, 2020

San Francisco Superior Court Judge Ethan Schulman granted an injunction in favor of California enjoining Uber and Lyft from classifying their drivers as independent contractors

- “To state the obvious, drivers are central, not tangential, to Uber and Lyft’s entire ride-hailing business.”

## August 20, 2020

California Court of Appeal (First Dist.) stayed Judge Schulman’s injunction from taking effect pending Oct. 13, 2020 hearing.

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## Responses

### Uber, Lyft, Doordash

- Suspension of ride-hailing services throughout California, Aug. 20, 2020
  - Cost of reclassifying gig workers as employees → potential bankruptcy.
- Prop 22 – Each placed initial \$30M to fund ballot initiative



# Proposition 22

## App-Based Drivers as Contractors and Labor Policies Initiative



November 3, 2020 Ballot Initiative

### What would it do?

- “App-based drivers” would be independent contractors, not employees or agents.
- Override AB 5 as to whether app-based are employees or independent contractors.

### What is an “App-based Driver”?

- A worker who:
  - Provides delivery services on an on-demand basis through a business’s online-enabled application or platform; or
  - Uses a personal vehicle to provide prearranged transportation services for compensation via a business’s online-enabled application or platform.



# Proposition 22

## App-Based Drivers as Contractors and Labor Policies Initiative

### What else would it do?

- Minimum guarantee of **120% of minimum wage** during driver’s “engaged time” and **30 cents per “engaged mile”** (adjusted for inflation after 2021);
- **Limits app-based drivers from working more than 12 hours during a 24-hour period**, unless the driver has been logged-off for an uninterrupted 6 hours;
- Drivers that average **at least 25 hours** per week of engaged time during a calendar quarter - **healthcare subsidies equal to 82%** the average Covered California premium for each month;
- Drivers that average **between 15 and 25 hours** per week of engaged time during a calendar quarter - **healthcare subsidies equal to 41%** the average Covered California premium for each month;
- Occupational accident insurance to cover **at least \$1 million in medical expenses and lost income** resulting from injuries suffered while a driver was “online” but not engaged in personal activities;
- Occupational accident insurance to provide **disability payments of 66 percent of a driver’s average weekly earnings** during the previous four weeks before the injuries suffered while the driver was online but not engaged in personal activities up to 104 weeks;
- **Accidental death insurance** for the benefit of a driver’s spouse, children, or other dependents when the driver dies while using the app;

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## Proposition 22

### App-Based Drivers as Contractors and Labor Policies Initiative

#### What else would it do?

- Companies must develop **anti-discrimination and sexual harassment policies**;
- Companies must develop **training programs for drivers** related to driving, traffic, accident avoidance, and reporting sexual assault and misconduct;
- Companies must have **zero-tolerance policies for driving under the influence** of drugs or alcohol;
- Require **criminal background checks** for drivers;
- **Criminalize false impersonation** of an app-based driver as a misdemeanor;
- **Requires a seven-eighths (87.5%) vote in each chamber of the California State Legislature and the governor's signature** to amend Proposition 22, provided that the amendment furthers the purpose of Proposition 22;
- **Requires voter approval** for any changes that are not considered consistent with, and furthering the purpose of, Proposition 22.

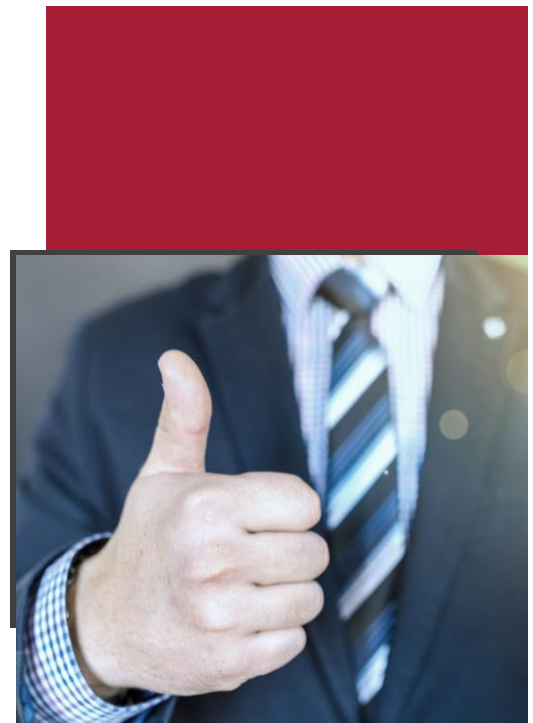
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## Proposition 22

### Supporters


- Uber (\$48 million)
- Lyft (\$48 million)
- DoorDash (\$48 million)
- InstaCart (\$28 million)
- Postmates (\$10 million)

As of Sept. 4, 2020 - **\$181.4 million**  
spent in support of Prop. 22




## Proposition 22 Opposition

**Unions**



- Teamsters
- SEIU
- California Teachers Associations
- Transport Workers Union of America

**Politicians**



- Joe Biden
- Kamala Harris
- Elizabeth Warren

As of Sept. 4, 2020 - **\$4.8 million spent in opposition to Prop. 22**

## Proposition 22 Vote Potential Outcomes



*Gig-industries last real hope*



**Pass**

- Creates legal hodgepodge in California employment law;
- Does not affect application of AB 5 to other types of workers;
- Pending litigation enforcing AB 5 would become moot.



**Not Pass**

- Enforcement actions against gig-industry will continue;
- Cease ridesharing services in California;
- Autonomous vehicles.

# Testing the ABCs of Worker Classification

## Scenario #1



- Jane is a professional executive leadership trainer. She trains and coaches executive teams throughout the country on how to improve their leadership skills and positively impact morale and productivity within their organizations.
- She is currently working with the executive team at a gaming company in Silicon Valley, called Radical Games. She has a contract with Radical that requires her to commit 10 hours per week at Radical headquarters providing training and coaching to executives for the next 4 months.
- Jane determines when and how to allocate her time during the week. She develops her own training content. Jane established an LLC for her business called LTX. She typically engages with up to 3 organizations at one time.

# Testing the ABCs of Worker Classification

## Scenario #2

- Sam is a marketing professional. He is currently working with a medical device company called HeartOne, Inc. He has a contract with HeartOne to work 20 hours per week on the company's social media and other marketing services. The term of the contract is 6 months.
- Sam works from home using his own computer. He reports to HeartOne's Director of Public Relations, who provides Sam marketing content and direction.
- Prior to Sam, the position was performed by a fulltime HeartOne employee, however, the employee was laid off when the position went part-time.
- Sam is not incorporated and does not engage in advertising his services to the general public. He typically works with one company at a time, and finds work through word of mouth and job postings.



# Testing the ABCs of Worker Classification

## Scenario #3



- Marie is a genetics professor at a prominent university. She has an expertise in how specific genes play a role in the development of a particular disease.
- During the summer, when she is not teaching, Marie works with a team of scientists at a biomedical start-up company called ABO. ABO is working on gene therapy for the disease within Marie's expertise. No one at ABO has Marie's level of expertise regarding the genes at issue.
- Marie's hours are flexible. She can come and go as she pleases. However, she is expected to work in the lab at least 30 hours per week during the summer months.
- At this point, Marie is not receiving pay for her work, instead it is understood that she will have an equity interest in ABO in the near future. Marie is not incorporated and does not advertise her services to other biomedical companies.

**Any  
Questions?**



**Michael Warren**



**Matthew Schechter**



**Hilary Weddell**



**A.J. Bastida**

