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## Bill AB5 and the Gig Economy

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# Bill AB5 and the Gig Economy

Peter Buckley

## *Abstract*

*This paper explores California Assembly Bill No. 5 and its effect on the “gig economy.” Notably, this paper takes an in-depth look at companies providing cheap services to California residents and the detrimental effects on California business models by labeling independent contractors as employees. I will contrast the Bill with previous California court decisions on independent contracts and the joint ballot initiatives being jointly proposed by Uber, Lyft, DoorDash, and other gig companies. Within this paper I will refer to workers as “drivers” for the sake of simplicity; however, it should be noted that these companies refer to them as “independent service providers” in an attempt to distance themselves from an employee classification.<sup>1</sup> Additionally, I will outline the current legal attempts taken by Uber to prevent the Bill from going into effect. Lastly, I will speculate as to AB5’s future implications on the gig economy for California residents and the services they previously took for granted.*

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<sup>1</sup> See Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 6, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

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## I. INTRODUCTION

On September 18, 2019, California Governor Gavin Newsom signed California Assembly Bill No. 5 (“AB5”) into law, setting California’s gig economy and participating companies up for a drastic change in the landscape within which they operate.<sup>2</sup> The bill, sponsored by Assemblywoman Lorena Gonzalez, was drafted with the intent of ensuring that “workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law.”<sup>3</sup>

AB5 employs a test provided by the California Supreme Court in *Dynamex Operations W. v. Superior Court*<sup>4</sup> where a person shall be considered an “employee rather than an independent contractor unless the hiring entity”<sup>5</sup> demonstrates the following: (1) the person is free from control and direction of the hiring entity; (2) the person performs work outside the usual course of the business; and (3) the person is customarily engaged in similar work as being performed by the hiring entity.<sup>6</sup> This test is commonly referred to as the “ABC Test.”<sup>7</sup>

<sup>2</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>3</sup> *Id.*

<sup>4</sup> *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018).

<sup>5</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>6</sup> *Id.*

<sup>7</sup> *Remarks made for Uber AB5 Press Call*, UBER: UBER NEWSROOM, (Sept. 11, 2019), <https://drive.google.com/file/d/1thl2WvzyKe5QYaGVgE-Fh1U-juEWob0Y/view>

Should a situation arise where the ABC test is not applicable, AB5 provides that the “Borello Test” should be used as backup to determine whether a person is an employee or independent contractor.<sup>8</sup> To determine whether a person is an independent contractor under the Borello Test, a hiring entity must show the following: (1) the individual maintains a separate business location from the hiring entity; (2) the individual has a business license; (3) the individual has the ability to set or negotiate their own rates; (4) the individual may set their own hours; (5) the individual customarily is engaged in the same type of work with other hiring entities; and (6) the individual exercises their own discretion and independent judgment in their work.<sup>9</sup> For the purposes of this paper, viewing the effect of AB5 on technology companies such as Uber, Lyft, and DoorDash, the Borello Test is largely inapplicable as it relates primarily to professional services.<sup>10</sup>

Although AB5 has been praised by its drafters and supporters as providing protection for workers who lack the ability to demand rights afforded to employees under the law, opponents claim that the law’s negative ramifications outweigh the potential benefit.<sup>11</sup> Notably, many companies claim that AB5 will result in less opportunity for employment and limit worker flexibility, the primary factor that draws the majority of workers into the gig economy in the first place.<sup>12</sup> This is because the reclassification of workers to employees will likely cause companies to implement shifts as opposed to drivers determining when and how much drivers work.<sup>13</sup>

## II. THE GIG ECONOMY

In order to understand the effect of AB5 on the gig economy, it is important to understand what the gig economy is. Gig economy is one of those buzz words often thrown around by startups and savvy entrepreneurs, but what does it actually entail?

The gig economy, or freelance economy, refers to a workplace environment “in which short-term engagements, temporary contracts, and

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(transcript available at <https://drive.google.com/file/d/1O9EDg-wmgZBOWeUmGNUvZ2JOVFZch54z/view>).

<sup>8</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See Uber AB5 Press Call*, supra note 7.

<sup>13</sup> *See Uber AB5 Press Call*, supra note 7.

independent contracting is commonplace.”<sup>14</sup> This economy differs from that of a traditional one in the sense that, as opposed to engaging in full-time employment, individuals may choose to perform small tasks for a variety of companies.<sup>15</sup> This is typically mutually beneficial.

Extremely relevant to the gig economy is the distinction between workers and independent contractors. The status of workers determines how they are taxed and what, if any, benefits they are afforded.<sup>16</sup> It is also important to note that independent contractors are typically not given overtime, whereas an hourly or salaried employee may be subject to overtime.<sup>17</sup>

Prior to AB5, at the federal level, there was “no overall one-shoe-fits-all” test and the Internal Revenue Service (“IRS”) made the employee-independent contractor determination on a “case-by-case” basis.<sup>18</sup> There are three categories used by the IRS to determine worker status: (1) “Behavioral control (whether there [i]s a right to direct or control how the worker does the work);” (2) “Financial Control (whether there [i]s a right to direct or control the business part of the work);” and (3) “Relationship of the parties (how the business and the worker perceive the relationship).”<sup>19</sup>

The Notable Difference between the IRS test and the ABC test provided in AB5 is the perception of the relationship between the parties.<sup>20</sup> The IRS places value on what the employer and employee think their relationship is, however, under AB5, California is not interested in considering this as a portion of the test.<sup>21</sup>

#### A. *Individual Opportunity*

For the individual, the gig economy provides the freedom to work when they want, for whom they want, and for as much as they want.<sup>22</sup> Workers may use gig jobs to supplement their full-time employment or as their only source of income. While most workers cite flexibility as the

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<sup>14</sup> Angela Stringfellow, *What is the Gig Economy? How It Works, Benefits, and More*, WONOLO (July 2, 2019), <https://www.wonolo.com/blog/what-is-the-gig-economy/>.

<sup>15</sup> *Id.*

<sup>16</sup> Jean Murray, *Difference Between Independent Contractor and Employee*, THE BALANCE SMALL BUSINESS (May 7, 2020), <https://www.thebalancesmb.com/independent-contractor-or-employee-what-s-the-difference-397912>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> FORM 1099-MISC & INDEPENDENT CONTRACTORS, <https://www.irs.gov/faqs/small-business-self-employed-other-business/form-1099-misc-independent-contractors> (last visited Jan. 20, 2020).

<sup>20</sup> *Id.*; Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>21</sup> *See generally* Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>22</sup> Stringfellow, *supra* note 14.

biggest appeal to the gig economy, skilled professionals can use it to “exert more control over their career trajectory by engaging in challenging projects and building an impressive resume of results.”<sup>23</sup>

In the situation at hand, prior to the enactment of AB5, drivers were afforded their number one priority: flexibility. According to Uber, 45% of drivers drive less than ten hours per week, and 92% drive less than 40 hours per week.<sup>24</sup> Many drivers enjoy working on their own schedule because it allows them the freedom to devote time to things important in their own lives. Many drivers cite the ability to take care of a sick loved one or attend their children’s sporting events as a major factor in wanting to participate in the gig economy.<sup>25</sup>

On the contrary, the gig economy carries some negative aspects for workers such as zero benefits, more difficult tax planning, incurring more personal expenses, and poor mental health due to uncertainty in their future employment.<sup>26</sup> Companies typically do not offer benefits for gig workers, so that means they are often left with paying for private health insurance and planning for retirement on their own.<sup>27</sup> Additionally, because taxes are not typically deducted from their payment, workers need to plan ahead to ensure they have enough saved up to pay their quarterly taxes.<sup>28</sup> Lastly, gig economy jobs can often lead to negative mental health for employees.<sup>29</sup> Employees typically undergo stress as their next job is not guaranteed and working in isolation as some jobs require may lead to mental health issues.<sup>30</sup>

### *B. Company Interest*

The gig economy is also extremely appealing to employers. Employers like the gig economy because it allows them to reap the benefits of employees without incurring the administrative costs full-time employees bring.<sup>31</sup> Companies can operate more efficiently by not bearing the cost of health insurance or contributions to retirement savings

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<sup>23</sup> *Id.*

<sup>24</sup> *Uber AB5 Press Call*, *supra* note 7.

<sup>25</sup> Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 2, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

<sup>26</sup> *The pros and cons of the gig economy. What is the gig economy?*, WESTERN GOVERNORS UNIVERSITY BLOG (Aug. 31, 2018), <https://www.wgu.edu/blog/pros-and-cons-gig-economy1808.html>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Stringfellow, *supra* note 14.

accounts.<sup>32</sup> This is extremely beneficial to startups which may not be able to pay an employee a salary, but can afford to pay them following the completion of a task the company makes money on.<sup>33</sup> Furthermore, as startups begin to mature, the gig economy makes it easier for them to scale by sparing them the expense of full-time employees.<sup>34</sup>

Additionally, companies that deal with fluctuating demand for service enjoy the gig economy because they can meet demand by offering higher paying tasks and incentivizing more workers to take on those tasks.<sup>35</sup> Employers often utilize technology platforms to post jobs “in a centralized location such as an app or website.”<sup>36</sup> This allows employers to have a “diverse pool of flexible workers” ready to work as the company needs them.<sup>37</sup>

As expected, there are several negatives for companies choosing to hire via the gig economy such as less reliable workers and tight regulations on contractor status, such as AB5.<sup>38</sup> While the benefit for freelance workers may be the freedom of setting their own schedule, this is often a con for employers who often have limited means of ensuring quality work.<sup>39</sup> Additionally, companies will be required to navigate regulations on contractor status, and AB5 only makes this headache more difficult.<sup>40</sup>

### C. *Uber, Lyft, and DoorDash’s Operation in the Gig Economy*

With roughly 400,000 independent contractors working for platform-based companies such as Uber, Lyft, DoorDash, and others, these entities are staples of the gig economy.<sup>41</sup> Uber and Lyft operate similar ride-hailing platforms, essentially making traditional taxis of the past obsolete.<sup>42</sup> DoorDash teams up with restaurants to provide consumers with food delivery from restaurants that do not otherwise offer delivery services.<sup>43</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> WESTERN GOVERNORS UNIVERSITY BLOG, *supra* note 26.

<sup>35</sup> *See* Stringfellow, *supra* note 14.

<sup>36</sup> *Id.*

<sup>37</sup> WESTERN GOVERNORS UNIVERSITY BLOG, *supra* note 26.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> Margot Roosevelt, Johana Bhuiyan, & Taryn Luna, *Sweeping bill rewriting California employment law sent to Gov. Newsom*, LOS ANGELES TIMES (Sep. 11, 2019, 4:35 PM), <https://www.latimes.com/business/story/2019-09-11/sweeping-bill-rewriting-california-employment-law-moves-to-gov-newsom>.

<sup>42</sup> Zachary Elfman, *Lyft vs. Uber: Hailing a Rode to Public Markets*, TOPTAL (last visited Jan. 1, 2020), <https://www.toptal.com/finance/market-research-analysts/lyft-vs-uber>.

<sup>43</sup> Tony Xu, *How DoorDash Works*, DOORDASH (Jun. 24, 2016), <https://blog.doordash.com/how-doordash-works-fbddb311590>.

Uber additionally operates UberEats under a similar business plan as DoorDash.<sup>44</sup> All three companies rely heavily on independent contractors to efficiently provide their services to the end consumer.<sup>45</sup> Additionally, all contractors are able to accept and deny work as they please and are not prevented from performing work for competing apps.<sup>46</sup>

Critical to Uber, Lyft, and DoorDash's argument to refrain from classifying workers as employees is that they argue they are not employing drivers but providing a platform to connect drivers with customers.<sup>47</sup> These companies do not hold themselves out to be delivery or ride-hailing platforms, but rather technology companies.<sup>48</sup> These companies claim their role within the gig economy is one of facilitation.<sup>49</sup> The companies claim to not hire drivers, but rather create and operate apps, which facilitate the connection of consumers and independent service providers, so that consumers can hire an independent service provider to perform particular services.<sup>50</sup> In layman's terms, the companies do not provide rides or deliver food, they provide a network upon which someone wanting a ride or food can be connected to someone willing to complete the job. This internal distinction is critical to their argument that these companies pass the ABC test.<sup>51</sup>

Uber and Lyft's use of the independent contractor is an integral part of their business models. In essence, Uber and Lyft provide a platform to consumers seeking a ride, and pair them with drivers willing to provide the service of giving a ride, in turn the companies take a percentage of the ride cost and give the remaining to the driver.<sup>52</sup>

Prices are determined by demand to ensure that rides are available when a customer wants one.<sup>53</sup> In the event there is a high demand for rides, both companies increase their fares to entice more drivers to begin driving and meet the demand of the riders.<sup>54</sup> Uber refers to this as a "surge" while Lyft calls it "Prime Time," but the concept is the same.<sup>55</sup> For example, a

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<sup>44</sup> Elfman, *supra* note 42.

<sup>45</sup> *See Id.*

<sup>46</sup> *See* Brett Helling, *Uber vs Lyft: A Comprehensive Comparison for 2020*, RIDESTER (Jan. 15, 2020), <https://www.ridester.com/uber-vs-lyft/#options>.

<sup>47</sup> Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 6, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

<sup>48</sup> *Id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *See Uber AB5 Press Call*, *supra* note 7.

<sup>52</sup> Helling, *supra* note 46.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

ride that is typically \$10.00, during a time of high demand, such as New Years, may have a “surge” of 5x, causing the ride to now cost \$50.00.<sup>56</sup> This entices the driver to forgo his own New Year’s Eve plans for the opportunity to make 5x the normal pay, while ensuring that riders who are willing to pay for a ride are able to find one. It is supply and demand at its purest form.

Additionally, both platforms offer varying vehicle sizes and options for riders to choose from.<sup>57</sup> Riders who are willing to pay more for a larger or more luxurious vehicle may do so in order to ensure a comfortable ride.<sup>58</sup> On the flip side, drivers who wish to invest more money up front for a nicer or larger vehicle may enjoy a higher earning potential by earning more money per trip.<sup>59</sup> Both apps also offer some form of carpooling option pairing riders going in similar directions to cut costs for consumers and promote more environmentally friendly forms of transportation.<sup>60</sup>

DoorDash employs a similar business model, but with food delivery. Drivers for DoorDash make money per delivery and are free to accept and reject deliveries as they please.<sup>61</sup> Drivers may earn more per delivery during times of high demand, and are entitled to a fee per delivery as well as the tip from the customer.<sup>62</sup> Drivers may additionally make more money by completing multiple deliveries at once.<sup>63</sup>

Uber, Lyft, and DoorDash all provide a unique opportunity to its drivers—freedom. These companies provide their drivers with the ability to dictate their own schedule and work as much as they would like.<sup>64</sup> Earning potential is up to the driver, and the better they understand their area and market, the more successful they will be.<sup>65</sup> Companies also provide consumers with the opportunity for services that otherwise would not be offered and use technology to promote efficiency.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *How Much Does DoorDash Pay Couriers in 2020?*, RIDESTER (Aug. 14, 2020), <https://www.ridester.com/how-much-do-doordash-drivers-make/>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Robert Farrington, *The Ultimate Lyft vs. Uber Comparison (For Drivers and Riders)*, THE COLLEGE INVESTOR, <https://thecollegeinvestor.com/20641/ultimate-lyft-vs-uber-comparison-drivers-riders/> (last updated Feb. 11, 2020).

<sup>65</sup> *Id.*

### III. AB5

California Assembly Bill No. 5, also known as the “Gig Worker” bill, is new legislation signed by California Governor Gavin Newsom on September 18, 2019, which went into law on January 1, 2020.<sup>66</sup> The new law will essentially require “companies that hire independent contractors to reclassify them as employees, with a few exceptions.”<sup>67</sup> AB5 expands the California Supreme Court ruling in *Dynamex Operations West, Inc. vs. Superior Court of Los Angeles* in 2018 into law.<sup>68</sup>

The Supreme Court in *Dynamex* created a three-part test, commonly known as the “ABC Test,” for employers to demonstrate that workers are not employees and are indeed independent contractors.<sup>69</sup> Under the test, workers are considered to be employees unless the hiring company can demonstrate otherwise, meaning employers can no longer just claim workers are independent contractors, they must prove it.<sup>70</sup> This test creates a significantly higher burden on companies than previously required in California to demonstrate that independent contractors are in fact not employees.<sup>71</sup>

AB5 also provides teeth to the ABC test by imposing criminal penalties for non-compliance by employers.<sup>72</sup> In addition to codifying the ABC test into law, it codifies the ABC test for “the California Unemployment Insurance Code and the entirety of the California Labor Code.”<sup>73</sup> This creates criminal penalties for hiring entities by making misclassification of workers up to a felony offense under the California labor code. Assemblywoman Gonzalez has even gone as far as to encourage city attorneys in California cities to file for injunctive relief under AB5.<sup>74</sup>

While the legislature carved out exceptions for some professions such as lawyers or insurance agents, it is silent on the drivers who work for ride sharing companies such as Uber, Lyft, or DoorDash.<sup>75</sup> This is important because the business models for these companies rely entirely on

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<sup>66</sup> Rebecca Lake, *California Assembly Bill 5 (AB5)*, INVESTOPEDIA, <https://www.investopedia.com/california-assembly-bill-5-ab5-4773201> (last updated Aug. 11, 2020).

<sup>67</sup> *Id.*

<sup>68</sup> *Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 7.

<sup>71</sup> Lake, *supra* note 66.

<sup>72</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>73</sup> Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 10, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

<sup>74</sup> *Id.* at 24.

<sup>75</sup> *See* Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

independent contractors to perform services such as food delivery or ride sharing, and turning their workers into employees could cause these companies to file for bankruptcy or pass their increased costs onto customers in the form of higher rates.<sup>76</sup>

The California government states that the intent of AB5 is to ensure protection of workers who are being taken advantage of by companies participating in the gig economy.<sup>77</sup> The bill even goes as far as to blame the misclassification of workers as independent contractors as a “significant factor in the erosion of the middle class and the ride in income inequality.”<sup>78</sup>

The bill is designed to afford protections to workers such as minimum wage, workers’ compensation, unemployment insurance, paid sick leave, and paid family leave.<sup>79</sup> According to its drafters, AB5 will restore important protections to “potentially several million workers.”<sup>80</sup> The opposition however, claims that while the bill may afford these protections to the remaining workers, the implications could cause a significant reduction in workers actually working, therefore causing less Californians to be employed and granted these protections afforded to employees under the law.<sup>81</sup>

Technology companies such as Uber, Lyft, and DoorDash claim that Assemblywoman Gonzalez’s intent is not what is explicitly written in the bill, but rather one to specifically target technology companies.<sup>82</sup> These companies reached this conclusion based on two ideas: (1) AB5 actually affords workers less rights than the previous law handed down by the California Supreme Court; and (2) Assemblywoman Gonzalez and other supporting lawmakers actions and statements outside the written language of the bill highlight her intent to target technology companies as opposed to provide protection to California workers.<sup>83</sup>

Technology companies claim that that AB5 actually provides less protection for workers than previously afforded under California law is

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<sup>76</sup> Lake, *supra* note 66.

<sup>77</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Uber Says California’s AB5 Law Could Cost 150,000 Drivers Their Jobs*, PYMNTS.COM (May 29, 2020), <https://www.pymnts.com/news/ridesharing/2020/uber-says-158000-drivers-will-lose-work-if-theyre-reclassified-as-employees/>.

<sup>82</sup> Complaint for Violation of Federal And California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 22-23, *Olson v. California*, (C.D. Cal. Dec. 30, 2019) (No. 2:19-cv-10956).

<sup>83</sup> *See Uber AB5 Press Call*, *supra* note 7.; Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 22-24, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

based on the many exempted professions included within the bill's language.<sup>84</sup> Under the *Dynamex* decision, the ABC Test was to be used in every profession.<sup>85</sup> Since the *Dynamex* decision was handed down by California's Supreme Court in 2018, this caselaw became enforceable in California before AB5.<sup>86</sup> While AB5 codified the decision, it implemented many exceptions to the test that were not previously there.<sup>87</sup> The result of these exceptions is fewer Californians are protected under AB5 as opposed to the *Dynamex* decision alone.<sup>88</sup> There are many professions such as lawyers and insurance agents who were previously governed by the ABC Test under *Dynamex*, but were exempt under AB5.<sup>89</sup> These exemptions cause less workers to be subject to the test under AB5 as opposed to under the *Dynamex* decision.<sup>90</sup>

More importantly, technology companies assert that because existing law was already on the books, the purpose of AB5 was not to afford protection to workers, but rather to specifically target the technology companies doing business in California.<sup>91</sup> While technology companies are not explicitly listed within the text of the bill, they are notably absent from the list of exceptions and have been depicted negatively by name in the press by supporters of the bill.<sup>92</sup>

Technology companies cite a series of negative statements by Assemblywoman Gonzalez and other supporters of AB5 such as the following:

a. "On September 9, 2019, while defending AB 5, Assemblywoman Gonzalez accused platform companies like Uber and Postmates of engaging in "wage theft."<sup>93</sup>

b. "On September 11, 2019, Assemblywoman Gonzalez criticized network companies like Uber and Postmates, stating that they 'rely on a contract workforce'

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<sup>84</sup> See *Uber AB5 Press Call*, supra note 7.

<sup>85</sup> *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (Cal. 2018).

<sup>86</sup> *Uber AB5 Press Call*, supra note 7.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>90</sup> *Uber AB5 Press Call*, supra note 7.

<sup>91</sup> Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 22, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

<sup>92</sup> See *id.* at 24.

<sup>93</sup> *Id.* at 23.

and, according to her, AB 5 will stop such ‘gig economy companies’ from relying on independent contractors.”<sup>94</sup>

c. “On September 12, 2019, Assemblywoman Gonzalez stated that California has ‘allowed a great many companies—including ‘gig’ companies such as Uber . . . to rely on contract workforce, which enables them to skirt labor laws, exploit working people, and leave taxpayers holding the bag.’”<sup>95</sup>

d. “On September 18, 2019, Assemblywoman Gonzalez stated that Uber’s Chief Legal Counsel is “full of sh\*t.”<sup>96</sup>

e. “On September 26, 2019, Assemblywoman Gonzalez proposed legislation that would mandate that Uber publicly disclose sensitive information in its internal investigations.”<sup>97</sup>

f. “On November 21, 2019, Assemblywoman Gonzalez publicly asked the City Attorneys in California’s four largest cities to immediately file for injunctive relief under AB 5 against network companies on January 1, 2020.”<sup>98</sup>

g. “On November 25, 2019, Assemblywoman Gonzalez encouraged app-based independent service providers to file unemployment insurance claims.”<sup>99</sup>

h. “On November 27, 2019, Assemblywoman Gonzalez took sides in pending litigation, opposing Uber’s efforts to enforce its arbitration agreements with its drivers.”<sup>100</sup>

i. “On December 29, 2019, the Los Angeles Times reported that Assemblywoman ‘Gonzalez said she is open to changes in the bill next year, including an exception for

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 24.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

musicians—but not for app-based ride-hailing and delivery giants.”<sup>101</sup>

j. Further, “[o]n September 7, 2019, California State Assemblywoman Buffy Wicks advocated for AB 5 and stated that ‘just because your employer uses a smartphone app, doesn’t mean they should be able to misclassify you as an independent contractor.’”<sup>102</sup>

These technology companies claim that these statements, outside the language of AB5, along with the exceptions provided that were previously not present, highlight the true intent of the bill, not to protect workers, but to target large technology companies operating within the gig economy.<sup>103</sup>

California passed AB5 in the hope of preventing free-riding businesses from “pass[ing] [on] their own business costs on to taxpayers and workers.”<sup>104</sup> Their concern stems from the fact that independent contractors under their current definition are not guaranteed minimum wage, overtime, insurance, sick leave, or protection from discrimination or sexual harassment under pre-AB5 legislation.<sup>105</sup> The thought process is that turning the roughly 400,000 current independent contractors into employees will afford them better benefits and pay; however, the cost may end up getting shifted onto consumers via increased fares or the elimination of the many of the positions.<sup>106</sup>

#### IV. COMPLIANCE BY TECHNOLOGY PLATFORMS

Since AB5 went into effect on January 1, 2020,<sup>107</sup> there is no doubt that technology companies are going to be faced with the difficult task of compliance under the law. While the companies may claim to already comply, they are likely faced with three options moving forward: (1) pass the ABC test; (2) receive an exception via a statewide ballot initiative; or (3) win a lawsuit for injunctive relief.

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 25.

<sup>103</sup> *Id.* at 22; see *Uber AB5 Press Call*, supra note 7.

<sup>104</sup> Margot Roosevelt, Johana Bhuiyan & Taryn Luna, *Sweeping bill rewriting California employment law sent to Gov. Newsom*, LOS ANGELES TIMES (Sept. 11, 2019), <https://www.latimes.com/business/story/2019-09-11/sweeping-bill-rewriting-california-employment-law-moves-to-gov-newsom>.

<sup>105</sup> *Id.*

<sup>106</sup> See *id.*

<sup>107</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

### A. *Compliance by Satisfaction*

The simplest and most obvious solution for technology companies facing the ABC test is compliance. If companies are able to satisfy the three prongs of the test, there is no risk to the businesses of Uber, Lyft, DoorDash, or other technology companies. The most difficult portion of the ABC Test for technology companies is the second prong, requiring companies to demonstrate that the person performs “work [that is outside] the usual course” of the hiring entities business.<sup>108</sup>

The important distinction in the satisfaction of the second prong of the ABC Test is the determination as to what type of the company Uber, Lyft, and DoorDash are.

Supporters of the bill claim that Uber, Lyft, and DoorDash are delivery and ride-sharing companies.<sup>109</sup> These supporters claim that because the normal course of business for these companies is food delivery and providing rides, the hiring of workers is within the normal course of business and therefore should be considered an employee under the ABC test.<sup>110</sup>

However, these companies consider themselves to be technology companies, and hiring of workers is not within their normal course of business.<sup>111</sup> This distinction between a technology company and a delivery or ride-sharing company is critical to determining whether these companies are in compliance.<sup>112</sup> It is difficult to predict how courts will interpret this because previous disagreements with drivers have been settled through arbitration.<sup>113</sup> However, the intent of lawmakers is clear: they intend for workers to be considered within the normal scope of business for these companies and it is likely that the judiciary follows that interpretation.<sup>114</sup>

### B. *Ballot Initiative*

Alternatively, the technology companies can lobby for a ballot initiative that would allow them to be exempt from AB5 compliance. This

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<sup>108</sup> *Uber AB5 Press Call*, supra note 7.

<sup>109</sup> Noam Cohen, *How Tech Firms Like Uber Hide Behind the ‘Platform Defense’*, WIRED (Sept. 13, 2019), <https://www.wired.com/story/how-tech-firms-like-uber-hide-behind-the-platform-defense/>.

<sup>110</sup> Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 6, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

<sup>111</sup> *Id.*

<sup>112</sup> *See Uber AB5 Press Call*, supra note 7.

<sup>113</sup> *See id.*

<sup>114</sup> Lorena S. Gonzalez (LorenaSGonzalez), TWITTER (Sept 9, 2019, 6:29 PM), <https://twitter.com/LorenaSGonzalez/status/1171234109999341569>.

is a complicated avenue that has resulted in several of the companies teaming up and combining resources to have one simplified and concise plan of attack.

Currently, Uber and Lyft have pooled together a combined \$60 million dollars into a campaign account.<sup>115</sup> While DoorDash is not currently contributing, it would reap the benefits should these two giants succeed.<sup>116</sup> Uber and Lyft are in the process of hiring a top-tier campaign team and are “working to expand the coalition to include other businesses who also face uncertainty in the wake of AB5.”<sup>117</sup>

Interestingly, the ballot initiative would allow California voters, including the millions who use their platforms, to make the decision regarding their future.<sup>118</sup> This initiative, however, would not be arguing for the status quo pre-*Dynamex*.<sup>119</sup> While the initiative has not yet been proposed, they claim that it would allow drivers to some benefits while still retaining their independent status and ability to work when choose.<sup>120</sup>

Uber has hinted that a ballot initiative may share similarities with the structure many of their European drivers operate within.<sup>121</sup> According to Uber, if you go to Europe you will find that that unlike in the United States where workers are limited to employees and independent contractors, Europe has a third category.<sup>122</sup> Within this third category are many platform workers who determine when and how much to work, but are still afforded some benefits and a social safety net paid for by Uber through insurance.<sup>123</sup> Uber claims that this partnership with the largest insurance company in Europe allows workers to not make the choice between “flexibility and security.”<sup>124</sup>

While an ambitious goal, these technology companies believe this ballot initiative could be a progressive way to both provide benefits to workers, while striking a balance between the desire of California to prevent mislabeled workers, and the goal of technology companies to continue their normal business operations without making drastic changes in order to comply with AB5.<sup>125</sup>

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<sup>115</sup> *Uber AB5 Press Call*, supra note 7.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

### C. *Lawsuit to Stop*

The last and most drastic avenue to avoid compliance issues with AB5 is through the courts. There is currently pending litigation, filed December 30, 2019, two days before the implementation of AB5 in which Uber, along with another technology platform oppose the implementation of AB5 on the grounds that it violates constitutional rights and the fundamental liberty to work in a manner of workers choosing.<sup>126</sup>

The lawsuit puts forward several arguments as to why AB5 is unconstitutional and is brought by two individual plaintiffs, Lydia Olson and Miguel Perez, as well as two company plaintiffs, Uber Technologies (“Uber”) and another technology company.<sup>127</sup> The plaintiffs claim that AB5 is unconstitutional for five reasons: (1) a violation of the U.S. and California Constitution’s Equal Protection Clause;<sup>128</sup> (2) a violation of the California Constitution’s Inalienable Rights Clause;<sup>129</sup> (3) a violation of the U.S. and California Constitution’s Due Process Clause (Right To Pursue Chosen Occupation);<sup>130</sup> (4) a violation of the U.S. and California Constitution’s Ninth Amendment;<sup>131</sup> and (5) a violation of the U.S. and California Constitution’s Contracts Clause.<sup>132</sup>

The primary plaintiffs, Lydia Olson and Miguel Perez, are both citizens of the state of California who have chosen to seek work on the app for the flexibility it offers.<sup>133</sup> Mrs. Olson drives for Uber and other apps, and enjoys it because it allows her the flexibility to take care of her ill husband and make money on the side.<sup>134</sup> Mr. Perez is a former overnight truck driver, who switched to food delivery because it gives him the freedom to attend his son’s sporting events, he makes double the money, and it is safer than working the overnight shift driving for his previous company.<sup>135</sup>

Both individual plaintiffs claim their ability to work for the technology companies on the side as well as the freedom to work when they want as what drew the plaintiffs into becoming independent contractors.<sup>136</sup> The

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<sup>126</sup> Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief at 2, *Olson v. California*, No. 2:19-cv-10956, (C.D. Cal. Dec. 30, 2019).

<sup>127</sup> *Id.* at 1.

<sup>128</sup> *Id.* at 35.

<sup>129</sup> *Id.* at 38.

<sup>130</sup> *Id.* at 41.

<sup>131</sup> *Id.* at 42.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 29-30.

<sup>134</sup> *Id.* at 29.

<sup>135</sup> *Id.* at 30.

<sup>136</sup> *Id.* at 29.

Plaintiffs believe that the passing of AB5 will limit the flexibility that brought them into the business to begin with.

Within the lawsuit, the Plaintiffs claim their Equal Protection Clause has been violated because the legislators arbitrarily draw a distinction between independent contractors and workers that do the same work and singles out a certain class of citizens.<sup>137</sup> Additionally, they claim that their Inalienable Rights and Due Process Clause have been violated because AB5 interferes with their right to pursue their chosen profession without sufficient Due Process.<sup>138</sup> Lastly, the lawsuit claims that the plaintiffs Ninth Amendment Rights have been violated because the Plaintiffs have lost the “right to work on one’s own terms—as an independent service provider, rather than an employee.”<sup>139</sup>

Within the lawsuit, Plaintiffs hope the courts will rule that AB5 is invalid and unenforceable, and enter a permanent injunction enjoining the State of California from taking any action to enforce it against the Plaintiffs.<sup>140</sup> While it is unlikely that the Plaintiffs will win this lawsuit, it does buy them time while they work out the ballot initiative and attempt to negotiate something with the government. It is unlikely that the law will be completely overturned, this is likely just merely a last resort or stall technique.

#### *D. Operating within AB5*

In the likely event that the technology companies do not satisfy the second prong of the ABC Test, that persons are performing work outside the hiring entity’s normal course of business, or that their ballot initiative and lawsuit are not successful, the landscape of the gig economy of California will likely change significantly.<sup>141</sup> However, every party within the gig economy will not be affected equally; the current workers, hiring entities, and consumers will all likely have a different result.

##### *i. Current Independent Contractors*

Currently, the 400,000 independent contractors working for technology companies are not sustainable should they become employees of the respective companies whose platforms they utilize.<sup>142</sup> Technology companies are unable to provide benefits to all 400,000 while still maximizing profits. While AB5 intended to provide them with benefits,

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<sup>137</sup> *Id.* at 35.

<sup>138</sup> *Id.* at 39.

<sup>139</sup> *Id.* at 42.

<sup>140</sup> *Id.* at 48.

<sup>141</sup> *See* Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>142</sup> *See* Roosevelt, Bhuiyan & Luna, *supra* note 104.

minimum wage, and paid leave, among other things, it is more likely that it provides them with higher unemployment and a job they do not enjoy.<sup>143</sup> Like the plaintiffs in the Uber lawsuit, the majority of independent contractors chose to join the gig economy for the flexibility.<sup>144</sup> Contractors enjoy the ability to work when they want, for whom they want.<sup>145</sup> Should AB5 render these workers as employees, they will likely lose that flexibility and many may lose employment altogether.<sup>146</sup>

In their own press call, Uber admitted that classification of these workers as employees would likely lead to drivers working shifts, being deployed to specific areas, and the inability to work multiple apps.<sup>147</sup>

Under their current model, these technology companies meet growing demand by increasing fares.<sup>148</sup> By increasing the fares, these companies are able to draw contractors into working when they may not otherwise be willing to.<sup>149</sup> By implementing these contractors as employees, they will lose a significant portion of the pool that workers are pulled from. It is not feasible for these technology companies to pay benefits for all 400,000 workers; so instead, they likely would keep say a quarter of them that are willing to work under the new conditions. Instead of drawing workers to consumers via increased fares, technology companies would simply station them in respective zones, and they would be unable to work as they please.<sup>150</sup> This is the exact opposite of what the drivers chose to work for technology companies for and they would likely lose all of their desired flexibility.

## ii. Technology Companies

Although the companies themselves are the target of AB5, they would likely bear the least amount of the damage between the independent contractors, themselves, and the consumers. Companies would likely cut back on the amount of drivers they let on the app, therefore limiting the expenses incurred as having them as employees. Additionally, as Uber does in Europe, companies would also likely obtain insurance to cover the cost of the new added benefits should they arise.<sup>151</sup>

These companies will also pass their new higher costs onto the consumer. It is unlikely the average consumer will notice their \$4 ride

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<sup>143</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>144</sup> *Uber AB5 Press Call*, supra note 7.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> Ridester, supra note 61.

<sup>149</sup> *Id.*

<sup>150</sup> *Uber AB5 Press Call*, supra note 7.

<sup>151</sup> *Id.*

increase to \$5, but it will cover the cost of the new expenses for the companies. Technology companies will likely need to develop new algorithms and internal infrastructure to handle both ride shifts and employee deployment. However, they earn billions in revenue and this should not be a major hurdle for them to overcome.

The absolute worst-case scenario for these technology companies would be to leave California completely. If the cost to transition from their current business model to a new one was too steep, companies would simply pull out of California completely and rely on the remaining forty-nine states and global economy to keep their companies afloat. Although targeted at them, technology companies are in the best position to weather the storm of AB5 compared to independent contractors and the California consumer.

### iii. The California Consumer

The California consumer is the one to most likely feel the effects of AB5. While the legislature may claim that the gig economy is the source of the erosion of the middle class and source of income inequality, the numbers do not support that.<sup>152</sup> AB5 is likely to lead to a scenario where a significant amount of current gig workers are out of part-time work, therefore further lowering the income that is brought into the home.

The technology companies also provide a significant increase in the quality of life for California consumers. Consumers in California may use Uber or Lyft, to find a safe ride in a clean vehicle of their choice.<sup>153</sup> If consumers are unable to pick their kids up from school because of work, they can call them a ride on their smartphone and check the rating of the driver to ensure their safety.<sup>154</sup> Food delivery platforms such as Uber Eats or DoorDash provide an opportunity for the elderly who may be confined to their home or professionals working late to get a meal delivered that would not be otherwise possible.

By implementing AB5, there is no doubt that the technology companies will need to increase their prices in order to ensure compliance. This increase in prices will get passed onto the end consumer who then has to make a decision whether or not to take a ride or have food delivered. Should the price increase be so drastic the companies pull out of California, the consumer will lose that decision and the opportunity to have a ride or food delivered altogether. The consumer is the one who will notice the negative repercussions that come as a result of the implementation of AB5.

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<sup>152</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>153</sup> Helling, *supra* note 46.

<sup>154</sup> *Id.*

## V. CONCLUSION

Re-classification of independent contractors working for Uber, Lyft, and DoorDash will likely crush the companies and do more to hurt the drivers than actually help them. The intent of AB5 was to ensure that companies did not impose costs onto general contractors, and to ensure that workers were provided fair compensation. However, while passed with good intention, it will likely lead to adverse results.<sup>155</sup> There are likely three possible outcomes of AB5 should the ballot initiative fail: (1) the companies leave California and the workers are left with nothing; (2) the companies raise prices and the average consumer pays the cost of the bill; or (3) drivers lose their freedom to work when they want, and their job loses the appeal that drew them to it in the first place.

Should AB5 be implemented and the companies ballot initiative fail, it is possible that companies decide that doing business in California is not worth the hassle, and citizens suffer the costs with less services available. There are estimates that re-classification alone would cost the companies \$290 million in costs and could bankrupt the companies.<sup>156</sup> Obviously companies are not going to go bankrupt, leaving the easiest solution to simply not do business in California. This now leaves the workers the bill sought to protect without work and Californians without the services they were willing to pay for.

Alternatively, the companies can raise fares for deliveries and rides to cover the increased costs of employing the newfound employees. However, providing minimum wage and benefits to 400,000 employees is expensive, and the costs will ultimately be passed onto the consumer.<sup>157</sup> Like any free-market example, when costs go up, demand goes down, so this is also likely to cause many drivers to lose employment.

Finally, should Uber, Lyft, and DoorDash overcome the burden of retaining employees and covering the costs via increased fares, it is likely that drivers will lose the freedom to work when they please, a staple of the independent contractor.<sup>158</sup> Once drivers are considered employees, it is easier for the companies to hire fewer workers and make the remaining employees work more hours, at times the company wants. This is the likely outcome should it get to this point, and this is opposite of what attracted drivers in the first place.<sup>159</sup>

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<sup>155</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>156</sup> Graham Rapier & Rosie Perper, *Uber and Lyft just took a major blow in California, and now they're gearing up for war*, BUSINESS INSIDER (Sept. 18, 2019), <https://www.businessinsider.com/california-bill-to-treat-contract-workers-as-employees-2019-9>.

<sup>157</sup> *Id.*

<sup>158</sup> See Stringfellow, *supra* note 14.

<sup>159</sup> See *Uber AB5 Press Call*, *supra* note 7.

While well-intentioned, AB5 is likely to cause significantly more harm than good. The drafters of AB5 claim that the misclassification of workers has led to an increase in income inequality and the erosion of the middle class.<sup>160</sup> The drafters believe that workers are being taken advantage of, and working long hours without making enough money. If that were the case, workers would just stop working and find work elsewhere. AB5 does more to damage the middle class than help. By implementing this bill, it is more likely that less workers have the opportunity to supplement their income by working part time.

As Uber's statistics demonstrate, 45% of drivers are driving for less than ten hours per week.<sup>161</sup> These are not full-time workers who would be reaping the benefits, they are Californians who are supplementing another form of income or working the time they can because of other obligations. Should AB5 be enforced against technology companies, they will likely lose the opportunity to work at all, because the easiest drivers to transfer into employees would be the ones currently logging the most hours.

The bill was passed with good intentions, but will likely cause more damage than good. Although the technology companies believe they are being targeted by Assemblywoman Gonzalez, she more likely has an optimistic view of what the bill would do that is different from reality. The best outcome in this situation would be for the technology companies and the lawmakers to sit down and reach a conclusion that both affords the current workers some benefits while maintaining their independent contractor status. This would allow the lawmakers to achieve their goals, while simultaneously allowing the drivers to keep their freedom and companies to keep their business model.

In conclusion, AB5 will likely crush the gig economy and cause more harm to the workers it sought to protect. The beauty of the gig economy is its close resemblance to the free market. If drivers are not happy with their pay, they are free to work more, or in the alternative, decide to work elsewhere in a full-time position at a job that guarantees the benefits AB5 seeks to provide. No one forces drivers to drive for Uber, Lyft, or DoorDash, they drive because they want to. Drivers believe the pay is sufficient to overcome the lack of benefits, and AB5 is the government seeking to stick its hand in an industry that is already efficiently providing drivers with work, while simultaneously providing consumers with services they would not otherwise have.

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<sup>160</sup> Cal. State Assemb. 5, Reg. Sess. (Cal. 2019).

<sup>161</sup> *Uber AB5 Press Call*, supra note 7.