

## How to Pay Off Hard Work

Juliette Hernandez

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# How to Pay Off Hard Work

Juliette Hernandez

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## I. INTRODUCTION

A new modern gig economy has emerged as a result of technology-based gig work in the twenty-first century.<sup>1</sup> Technology-based gig work companies are companies that “provide online platforms that match consumers with workers for short-term tasks.”<sup>2</sup> Within these technology-based gig work companies are “transportation network companies,” which are companies like Uber and Lyft, whose business model utilizes an online application to connect passengers to drivers in a prearranged method for a fee.<sup>3</sup>

The modern gig workforce refers to individuals that work with any technology-based gig work companies. The size of the gig workforce in the United States is approximately 59 million, with an estimated 2 million working for transportation network companies like Uber and Lyft.<sup>4</sup> Of these 2 million drivers, approximately 45% of drivers have achieved an education level of high school diploma or less, approximately 77% of drivers identify as male,<sup>5</sup> and approximately 63% do not consider themselves white, where 34% are Hispanic/Latino and Black/African American. Studies have shown that drivers for application-based transportation network companies earn below the city and/or state mandated minimum wage.<sup>6</sup>

The modern gig economy’s employment classification is currently in controversy—between independent contractor classification or traditional employee classification—where gig companies strive to maintain the independent contractor status and gig workers are pushing for traditional employee status. Gig workers advocate for a traditional employee

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<sup>1</sup> Brandie P., *The History of the Modern Gig Economy*, WRITER ACCESS, <https://www.writeraccess.com/blog/the-history-of-the-modern-gig-economy/> (last visited Feb. 26, 2021).

<sup>2</sup> Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 480 (2016).

<sup>3</sup> *Transportation Network Company*, INTERNATIONAL RISK MANAGEMENT INSTITUTE, <https://www.irmi.com/term/insurance-definitions/transportation-network-company-tnc> (last visited Apr. 12, 2021).

<sup>4</sup> Melissa Berry, *How Many Uber Drivers Are There?*, RIDE SHARE GUY (Nov. 1, 2021), <https://therideshareguy.com/how-many-uber-drivers-are-there/> (last accessed Apr. 12, 2021).

<sup>5</sup> *Who Are Rideshare Drivers: A Demographic Breakdown of Rideshare Drivers in the U.S.*, GRIDWISE (Aug. 19, 2020), <https://gridwise.io/who-are-rideshare-drivers-a-demographic-breakdown-of-rideshare-drivers-in-the-u-s>.

<sup>6</sup> Frank Manzo IV & Robert Bruno, *On-Demand Workers, Sub-Minimum Wages*, ILLINOIS ECONOMIC POLICY INSTITUTE (Jan. 19, 2021), <http://publish.illinois.edu/projectformiddleclassrenewal/files/2021/01/ILEPI-PMCR-On-Demand-Workers-Sub-Minimum-Wages-FINAL.pdf> (quoting Lisa Xu & Mark Erlich, *Economic Consequences of Misclassification in the State of Washington*, HARVARD LABOR AND WORKLIFE PROGRAM (Dec. 2019), [https://lwp.law.harvard.edu/files/lwp/files/wa\\_study\\_dec\\_2019\\_final.pdf](https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf)).

classification because the independent contractor classification has made working conditions worse for gig workers. As a result, gig workers seek employment protections to give them a basic minimum above what they currently have, including: the ability to earn enough income to live a relatively comfortable life, fair and dignified treatment, the ability to bargain collectively, and increased worker protections. Gig companies strive to maintain the independent contractor status because this classification enables companies to avoid compliance with labor regulations and protections.<sup>7</sup> If gig companies were to classify independent contractors as employees, its business structure would need to support social security payments, unemployment insurance payments, health care benefits, and tax withholding payments, to name just a few.<sup>8</sup> Thus, gig companies pursue the independent contractor status, maintaining that they are technology companies and denying the workers the traditional employee status by claiming that their business model gives workers freedom in these positions.<sup>9</sup> This classification controversy is producing significant, fierce litigation. This significant and fierce litigation is based on the issue known as misclassification—where gig workers are alleging the companies are misclassifying them as independent contractors instead of employees.<sup>10</sup> It is emerging as a significant matter because of its public policy implications, where gig workers are being denied basic life entitlements such as a livable wage and worker protections.<sup>11</sup>

This aim of this comment is to critique and analyze existing and proposed approaches to the gig economy employment status through state legislation of transportation network companies (“TNC’s”). Evaluation of two different approaches—gig workers as independent contractors through states’ ABC test legislation, and gig workers as carved out of this classification through Proposition 22—reveals that the legislations’ employment classification tests are inadequate. The existing legislation to the gig economy employment classification is inadequate because it has not resulted in a stable rule for transportation network company workers’ classification. Courts across different jurisdictions are interpreting existing

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<sup>7</sup> *Id.* at 481.

<sup>8</sup> *Employment Law: Employee vs. Independent Contractor*, LAW SHELF, <https://lawshelf.com/shortvideoscontentview/employment-law-employee-vs-independent-contractor/> (last visited Apr. 12, 2021).

<sup>9</sup> Bruno, *supra* note 6, at 481.

<sup>10</sup> Lisa Xu & Mark Erlich, *Economic Consequences of Misclassification in the State of Washington*, HARVARD LABOR AND WORKLIFE PROGRAM (Dec. 2019), [https://lwp.law.harvard.edu/files/lwp/files/wa\\_study\\_dec\\_2019\\_final.pdf](https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf).

<sup>11</sup> *Id.* at 4.

state legislation and yielding “indeterminate results.”<sup>12</sup> These interpretations are the result of misclassification litigation. Thus, the existing tests have not resulted in a stable rule for gig employment classification. Ultimately, a model approach is proposed—a federal legislation comprised of an ABC test. This legislation will focus specifically on transport, and only on wage and hour law, to ensure a pragmatic, feasible, and stable employment test for gig workers within this sub-section of the industry. The federal ABC test will be an element-based test, as opposed to a balancing test, to minimize judicial discretion, and produce a stable rule for gig workers engaged in transportation network companies.

## II. BACKGROUND

### A. *Introduction of Transportation Network Companies*

The modern gig economy emerged at the end of the last century with the introduction of technological applications facilitating transactions. The gig economy is comprised of three components: (1) independent workers paid by the ‘gig,’ which is a task or project; (2) consumers who need a particular service; and (3) companies that connect the consumer to the worker.<sup>13</sup> A gig worker is an individual that pursues income-earning activities outside of the traditional employment relationships of employee and employer.<sup>14</sup> This type of alternative work arrangement can take the form of freelancing, temporary agency work, self-employment, and subcontracted work.<sup>15</sup> The legal classification of gig workers is as an independent contractor; however, this legal classification has been challenged.<sup>16</sup>

The gig economy is comprised of a variety of industries. The technology companies that are focused on transportation, specifically Uber and Lyft, are referred to in legislation as Transportation Network Companies.<sup>17</sup> Uber was founded in March 2009, with its first ever ride in

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<sup>12</sup> Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 379 (2019).

<sup>13</sup> Emilia Istrate & Jonathan Harris, *The Future of Work – The Rise of the Gig Economy*, NACO COUNTIES FUTURES LAB (Nov. 2017), <https://www.naco.org/featured-resources/future-work-rise-gig-economy>.

<sup>14</sup> *What is a Gig Worker?*, GIG ECONOMY DATA HUB, <https://www.gigeconomydata.org/basics/what-gig-worker> (last visited Feb. 26, 2021).

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

<sup>16</sup> *Id.*

<sup>17</sup> Dave Baron, *When Ridesharing Comes to Main Street*, 105 ILL. B.J. 1, 2 (2017).

July of 2010.<sup>18</sup> In April of 2015, Uber launched UberEats.<sup>19</sup> Lyft was founded in 2007, as a side project for another company, and its application launched officially in 2012.<sup>20</sup> As of Fiscal Year 2019, Uber had five million drivers globally,<sup>21</sup> an increase from 3.9 million drivers in December 2018.<sup>22</sup> In the United States, there are approximately one million drivers.<sup>23</sup> Similarly, Lyft has 1.5 million drivers globally, and 700,000 drivers in the United States.<sup>24</sup> Ultimately, this rapid growth of the gig economy can be attributed to the offline and online intermediaries that have been introduced.<sup>25</sup>

The modern gig economy has experienced rapid growth over the last twenty years.<sup>26</sup> The American Action Forum found that the gig economy workers' employment rate surpassed the increased rate of total employment.<sup>27</sup> Specifically, in the transportation sector, “[o]n average, in metropolitan areas the total average annual growths of establishments and receipts in the transportation sector were 7.7 percent and 9.4 percent respectively prior to the introduction of a ridesharing service, and 39.3 percent and 20.4 percent, respectively, in the years after the introduction of a ridesharing service.”<sup>28</sup> Another study, from the National Bureau of

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<sup>18</sup> *The History of Uber*, UBER NEWSROOM, <https://www.uber.com/newsroom/history/> (last visited Feb. 26, 2021).

<sup>19</sup> *Id.*

<sup>20</sup> Ipei Takahashi, *Lyft has been around longer than Uber. History Lesson.*, RIDE GURU (last visited Feb. 26, 2021), <https://ride.guru/lounge/p/lyft-has-been-around-longer-than-uber-history-lesson>.

<sup>21</sup> UBER, 2020 INVESTOR PRESENTATION (2020), [https://s23.q4cdn.com/407969754/files/doc\\_financials/2019/sr/InvestorPresentation\\_2020\\_Feb13.pdf](https://s23.q4cdn.com/407969754/files/doc_financials/2019/sr/InvestorPresentation_2020_Feb13.pdf).

<sup>22</sup> *The History of Uber*, UBER NEWSROOM, <https://www.uber.com/newsroom/history/> (last visited Feb. 26, 2021).

<sup>23</sup> Melissa Berry, *How Many Uber Drivers Are There?*, RIDE SHARE GUY (NOV. 1, 2021), <https://therideshareguy.com/how-many-uber-drivers-are-there/>.

<sup>24</sup> *How Many Licensed Drivers Are There in the US?*, HEDGES & COMPANY, <https://hedgescompany.com/blog/2018/10/number-of-licensed-drivers-usa/> (last visited Feb. 26, 2021).

<sup>25</sup> Lawrence Katz & Alan Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Sept. 2016), [https://www.nber.org/system/files/working\\_papers/w22667/w22667.pdf?utm\\_campaign=PANTHEON\\_STRIPPED&utm\\_medium=PANTHEON\\_STRIPPED&utm\\_source=PANTHEON\\_STRIPPED](https://www.nber.org/system/files/working_papers/w22667/w22667.pdf?utm_campaign=PANTHEON_STRIPPED&utm_medium=PANTHEON_STRIPPED&utm_source=PANTHEON_STRIPPED).

<sup>26</sup> Ben Gitis ET AL., *The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends*, AMERICAN ACTION FORUM 15–16 (2017), <https://www.americanactionforum.org/research/gig-economy-research-policy-implications-regional-economic-demographic-trends/> (citing the American Action forum, based on the University of Chicago's General Social Survey, found that from 2002 to 2014, even though total employment increased by 7.5%, “gig economy workers increased by between 9.4% and 15%.”).

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

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

Economic Research, determined there was a 5% increase of workers engaged in alternative work arrangements from 2005 to 2015.<sup>29</sup> More specifically, gig workers that provide their services through online platforms accounted for 0.5% of all workers in 2015.<sup>30</sup>

*B. What is the Transportation Network Company business model?*

Gig economy companies, specifically the technology platform companies, all have some form of the following characteristics: (1) facilitating direct transactions between the consumer and producer, (2) providing flexible work schedules for gig workers, (3) online payment methods, for which the companies take a portion, and (4) online profiles and reviews of both producers and consumers.<sup>31</sup>

The transportation network companies, specifically Uber and Lyft, have a business model that centers on an internet-based app created by an intermediary that matches customers to workers who will perform personal services.<sup>32</sup> Focusing on the ridesharing branch of Uber and Lyft, both operate by connecting drivers and passengers. Passengers generate demand, while the drivers perform as the supplier, and the application is the facilitator of the transaction.<sup>33</sup> The passenger then pays for the driver through the application and Uber transfers this payment, less a commission fee, to the driver.<sup>34</sup> Several distinct features of the transportation network companies' business model include (1) that the internet-based application pre-arranges the payment between the passenger and driver, which precludes direct negotiations between the driver and the passenger; (2) that the internet-based application, acting as an intermediary, directly controls the supply of drivers and customers as the application precludes passengers and drivers from initiating direct contact, and vice versa; and (3) that the internet-based application supervises and terminates drivers from the platform.

Focusing on the obligations of the driver to the company, there is a contract by which drivers must adhere to in order to work with the company. The contractual terms between the companies and the drivers

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<sup>29</sup> Katz & Krueger, *supra* note 25, at 7.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> Istrate & Harris, *supra* note 13.

<sup>32</sup> Seth Harris & Alan Kreuger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker,"* THE HAMILTON PROJECT (2015), [https://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

<sup>33</sup> Nitin Lahoti, *Uber Business Model Explained: From Start to Finish*, MOBISOFT (Jan. 2, 2019), <https://mobisoftinfotech.com/resources/blog/uber-business-model-explained/>.

<sup>34</sup> *Id.*

are what has led to significant litigation. Both Uber and Lyft “explicitly state that drivers are independent contractors rather than employees.”<sup>35</sup> Uber’s contractual terms with its drivers are incredibly detailed. Prior to partnering with Uber, drivers are required to upload their driver’s license, car registration and insurance, pass a background check, pass a “city knowledge test,” and “be interviewed by Uber.”<sup>36</sup> Moreover, the day-to-day conduct is also somewhat controlled. Uber requires drivers to send client messages upon arrival to the pickup location, dress professionally, play a neutral radio station, and open the door for the passenger.<sup>37</sup> Uber also requests passengers to rate and provide written feedback of their drivers. Uber “uses these ratings and feedback to monitor drivers and to discipline or terminate them,” and it “regularly terminates the accounts of drivers who do not perform up to Uber’s standards.”<sup>38</sup> Lyft’s contractual terms with its drivers are less detailed than Uber’s, however, it imposes similar standards.<sup>39</sup> Their contracts require the drivers car to be clean, for the drivers to ask passengers about a preferred route, prohibits drivers from talking on the phone, and prohibits drivers from asking personal information.<sup>40</sup> Like Uber, Lyft also reserves the right to terminate drivers if reports indicate the drivers are failing to comply with Lyft’s contractual policies.<sup>41</sup> Although the contractual provisions seem pervasively controlling, the companies maintain the employment legal status of their drivers is that of independent contractors.

### C. *Employees’ Rights*

When a worker is considered an employee, the worker is not free from the company’s direction or control. As an employee, the worker enjoys a considerable amount of protections and benefits in comparison to their independent contractor counterpart.<sup>42</sup> Employees at businesses are protected by labor laws that include a federal minimum wage, the right to organize collectively, and workplace health and safety protections.<sup>43</sup>

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<sup>35</sup> Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV 479, 490 (2016) (citing *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (2015)).

<sup>36</sup> *Id.* at 491.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (citing *O’Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133, 1143 (N.D. Ca. 2015)).

<sup>39</sup> *Id.* at 491 (citing *Cotter*, 60 F. Supp. 3d at 1072–1073).

<sup>40</sup> *Id.* at 491 (citing *Cotter*, 60 F. Supp. 3d at 1072–1073).

<sup>41</sup> *Id.* (citing *Cotter*, 60 F. Supp. 3d at 1072–1073).

<sup>42</sup> *Id.* at 486.

<sup>43</sup> Murray, Brown, *DeLauro Introduce Landmark Bill Expanding Labor Laws to Protect Workers*, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS (Sept. 24,



Moreover, if an employer interferes or violates any of these laws, the employers can be held legally liable.<sup>44</sup>

When a worker is considered an independent contractor, the worker is free from the company's direction or control. However, as an independent contractor, workers do not have access and are not entitled to certain workplace protections that traditional employees are. Independent contractors "lose protection to basic labor standards, including minimum wage laws, overtime pay laws, paid family and medical leave policies, workers' compensation coverage, and unemployment insurance benefits."<sup>45</sup> More specifically, independent contractors are not protected by Occupational Safety and Health Administration, Title VII, labor law, Family and Medical Leave Act (FMLA), worker compensation laws, state unemployment insurance, and receive no federal paid sick leave.<sup>46</sup>

Companies are incentivized to classify their workers as independent contractors for several reasons.<sup>47</sup> By classifying workers as an independent contractors, employers save a substantial amount of money—federal and state tax payments are eliminated, benefits are the responsibility of the contractor, and workers compensation premiums are not applicable.<sup>48</sup> The Bureau of Labor Statistics calculated that the average benefits for the "legally mandated and optional—for private sector workers make up 30.3% percent of total compensation."<sup>49</sup> Eliminating that benefit payment is perhaps the most cost-efficient measure an employer can make.<sup>50</sup> As such, companies have been restructuring their business to avoid the legally recognized employment relationship, which means avoiding payments, increasing profits, and shifting responsibility to workers.<sup>51</sup>

#### D. *Employment Legal Tests*

There are two categories of workers in the United States labor, employment, and tax schemes, namely employees and independent contractors. In order to determine what category a worker falls in, there are specified tests that evaluate the parties' relationships through a factual

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2019), <https://www.help.senate.gov/ranking/newsroom/press/-murray-brown-delauro-introduce-landmark-bill-expanding-labor-laws-to-protect-workers->.

<sup>44</sup> *Id.*

<sup>45</sup> Bruno & Manzo, *supra* note 6, at 1.

<sup>46</sup> Jean Murray, *Independent Contractor Laws and Regulations: What Employers Need to Know*, THE BALANCE SMALL BUSINESS (Nov. 11, 2020), <https://www.thebalancesmb.com/laws-and-regulations-affecting-independent-contractors-398603>.

<sup>47</sup> Mark Erlich, *1099 Nation Spreads its Tentacles*, COMMONWEALTH (Apr. 10, 2018), <https://commonwealthmagazine.org/economy/1099-nation-spreads-its-tentacles/>.

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> U.S. SEN. COMM. ON HEALTH, EDU., LABOR, & PENSION, *supra* at note 43.

elements list.<sup>52</sup> There is a control test to determine an employee and a separate independent contracting test to determine who constitutes independent contractors; both are rooted in agency law and both are supplemented with federal and state legislation that provides further contours of a worker.<sup>53</sup>

Under the common law of agency, the control test “defines an employment relationship as a relationship of control: the employer gives orders, plans out jobs in minute detail, and monitors the employee’s performance.”<sup>54</sup> The multiple factual elements considered are the workers’ skill level, the duration of this relationship, the payment method during the relationship, and the ability of the employer to discontinue the worker relationship.<sup>55</sup> The independent contracting test, is where “the principal in such a relationship asks a contractor to complete particular tasks, but typically has neither the ability nor the desire to supervise that work because it requires such specialized skill.”<sup>56</sup>

Under federal and state legislation, employment is defined more broadly. The federal Fair Labor and Standards Act discarded the control test, and defined “employ” as “suffer or permit to work.”<sup>57</sup> State legislation, for example, in California, creates a presumption that “anyone providing services to a business is an employee, shifting the burden of proof to the party seeking to avoid employment status.”<sup>58</sup> In *S.G. Borello & Sons, Inc. v. Department of Industrial and Labor Relations*, the Supreme Court of California established a multi-factor test that aims to look beyond the “strict, formal right of control:

- (a) whether the one performing services is engaged in a distinct occupation or business;
- (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (c) the skill required in the particular occupation;
- (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job;

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<sup>52</sup> Rogers, *supra* note 2, at 484.

<sup>53</sup> *Id.* at 484–485.

<sup>54</sup> *Id.* at 485.

<sup>55</sup> *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 220 (Am. L. Inst. 1958)).

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

<sup>57</sup> *Id.* (quoting Fair Labor Standards Act, Pub. L. No. 75–718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. § 203(g) (2012)).

<sup>58</sup> *Id.* at 487.

(g) whether or not the work is a part of the regular business of the principal; and  
(h) whether or not the parties believe they are creating the relationship of employer–employee.”

Even though these tests are meant to provide clarity as to which category a worker is in, in application they provide little clarity as to what an independent contractor engaged in the transportation network companies is because judiciaries have interpreted this federal legislation and its respective state legislation, which has resulted in varied reasoning and conclusions. The California Supreme Court, specifically, has interpreted these employment tests to “embrace a simplified standard—the ABC test—to determine whether contemporary workers are independent contractors.<sup>59</sup> This new legal standard for classifying independent contractors was developed in *Dynamex Operations West, Inc. v. Superior Court*.<sup>60</sup> In *Dynamex*, Charles Lee, an independent contractor for the same–day courier Dynamex, filed a law suit alleging labor law violations of wages, hours, and working conditions as a result of the independent contractor misclassification.<sup>61</sup> The court held that any individual is an employee, and not an independent contractor, if any one of these conditions are met: (1) the employee exercises control over the worker’s hours, wages, or working conditions; (2) the employee suffers, or permits, the worker to work; and (3) the employer engages the worker, thus creating an employment relationship.<sup>62</sup> The court defined the second prong by adopting the “ABC test,” which presumes that a worker in California is a an employee unless all three of the conditions in the ABC test are met.<sup>63</sup> This new legal standard creates a presumption of employment, and thus shifts the burden from the independent worker that provides services, to the employer.

This is but one example of one the judiciary interpreting federal legislation. Ultimately, the transportation network company business model produces workers that have left the judiciaries interpreting federal and/or state legislation, resulting in an unstable rule for transportation

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<sup>59</sup> Cunningham–Parmeter, *supra* note 12, at 383.

<sup>60</sup> Kathleen Lucchesi, *The Gig Economy, Classification in Session*, LINCOLN DERR (Nov. 20, 2020), <https://lincolnderr.com/employment-law-the-gig-economy-classification-in-session/>; See also Bruce Sarchet, Michael Lotito & James Paretti, Jr., *AB 5: The Aftermath of California’s Experiment to Eliminate Independent Contractors Offers a Cautionary Tale to Other States*, JD SUPRA, (Mar. 10, 2020), <https://www.jdsupra.com/legalnews/ab-5-the-aftermath-of-california-s-40627/>.

<sup>61</sup> *Id.*

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

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

network company workers and leading to significant misclassification litigation.

*E. Misclassification of Independent Contractors*

Misclassification is the issue in which a company treats their workers as independent contractors instead of employees.<sup>64</sup> The consequences of misclassification are voluminous for all parties. For federal and state governments, they lose “substantial revenues from taxes that would have been paid had the workers had been properly treated as employees. These include income taxes and Social Security and Medicare payroll taxes . . . as well as unemployment insurance taxes and payments into state-administered workers’ compensation funds.” For businesses, those that properly classify their employees, they operate at a “competitive disadvantage” where they will either “lose work opportunities or feel the pressure to sufficiently consider evading the law in order to compete on what is no longer a level playing field.”<sup>65</sup> For employees, they lose the basic rights that regular employees are entitled to have, including “legal entitlements to receive minimum wage, overtime payments, paid sick leave, unemployment insurance, workers compensation insurance, anti-discrimination protections, and the right to collectively bargain.”<sup>66</sup>

The proportion of employers that are misclassifying their workers is increasing—from 5% in the 2008 fiscal year to 14.4% in the 2017 fiscal year.<sup>67</sup> In a study that identified the misclassification in Washington from 2013–2017, the study demonstrated that urban areas have a higher probability of misclassification, along with the state losing \$152 million in unemployment taxes, the workers compensation system losing \$268 million in unpaid premiums, the federal government losing \$384 million in income taxes, the federal government losing \$299 million in payroll taxes for Social Security and Medicare, the federal government losing \$9 million in federal unemployment insurance, and, ultimately, all the misclassified workers losing traditional employee protections.<sup>68</sup>

If courts were to determine that Uber misclassified its workers as independent contractors and must classify them as employees, the estimated financial amount Uber has evaded paying is \$4.1 billion a year.<sup>69</sup>

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<sup>64</sup> Xu & Erlich, *supra* note 10, at 4.

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

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 5.

<sup>68</sup> *Id.* at 5.

<sup>69</sup> Stephen Gandel, *Uber-nomics: Here’s What it Would Cost Uber to Pay its Drivers as Employees*, FORTUNE (Sept. 17, 2015) <https://fortune.com/2015/09/17/ubernomics/> (showing that \$4.1 billion a year is comprised of: (1) \$2.6 billion in reimbursement for miles, gas, and tolls; (2) \$110.4 million in vacation and sick leave; (3) \$72 million in

The \$4.1 billion a year is comprised of nearly \$3 billion that Uber has taken from its workers in unpaid expenses such as miles, gas, and tolls, vacation and sick leave, and insurance premiums.<sup>70</sup> The remaining \$1 billion, approximately, is owed to states, specifically in unemployment, workers compensation, and payroll taxes.<sup>71</sup> Consequently, as a result of the vast amounts owed by Uber, and other transportation network companies alike, there is an insurmountable pressure on the classification of transportation network company workers, which has resulted in significant challenges to the way transportation network companies classify their employees.

#### *F. Current Legal Landscape of Transportation Network Companies*

There are several landmark cases that define the current legal landscape of the gig economy. These cases demonstrate a shift from perpetuating that transportation network companies maintain the independent contractor status of its workers, to considering a holistic approach allowing juries to decide. For the aforementioned reasons, the companies continue to pursue the independent contractor status of its employees and, conversely, gig workers seek employment status.

In *Razak v. Uber Technologies*, a group of individuals in Pennsylvania driving for UberBLACK as independent contractors sued Uber, alleging they were misclassified and independent contractors and seeking minimum wages and overtime pay.<sup>72</sup> The Eastern district of Pennsylvania, just like California and Florida already have, ruled that the drivers were in fact independent contractors.<sup>73</sup> The court looked at the amount of control the company exercised over the drivers, specifically how there is some control over safety and work standards, however, there was no control when drivers could drive for other competitors, the drivers are capable of making or losing profits, the drivers invested their own equipment, and the drivers make their own hours.<sup>74</sup> Nonetheless, a unanimous Third Circuit vacated and remanded this District Court ruling, finding that a reasonable juror could side with the drivers on key factual issues regarding worker

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retirement plan; (4) \$612 million in payroll taxes; (5) \$512 million in workers compensation; (6) \$80.9 million in unemployment; and (7) \$112 million in health insurance).

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

<sup>71</sup> *Id.*

<sup>72</sup> Lucchesi, *supra* note 60.

<sup>73</sup> *Id.*

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

classification.<sup>75</sup> The Third Circuit is the “first court of appeals decision to address the classification of gig workers.”<sup>76</sup>

In *Rutherford Food Corp. v. McComb*, the Supreme Court interpreted employee status under the FLSA. The Supreme Court held that the determination of a relationship between an employee and a worker is not dependent on isolated factors, but rather “upon the circumstances of the whole activity.”<sup>77</sup> In *Donovan v. Sureway Cleaners*, the court found that changes in the company contracts with its employees did not transform the employees to independent contractors.<sup>78</sup> Moreover, the court claimed that “neither the presence nor absence of any particular factor is dispositive.”<sup>79</sup> Therefore, “courts should examine the circumstances of the whole activity,” determining whether, “as a matter of economic reality, the individuals are dependent upon the business to which they render service.”<sup>80</sup> The current legal landscape of the gig economy demonstrates a shift towards a holistic and fact specific determination to the issue of classification.

### III. APPROACHES TO TRANSPORTATION NETWORK COMPANY WORKERS

Transportation Network Companies have struggled with the issue of worker classification. Below are two different approaches to worker classification currently in state legislation—transportation network company workers as independent contractors and transportation network company workers as exempt. Neither of these approaches are optimal because each one either prioritizes business from an efficiency perspective or prioritizes the worker from a public interest perspective. These varying legislations result in an unstable rule for the transportation network company workers’ classification because they are the subject of misclassification litigation. Ultimately, a model approach has been proposed consisting of a federal legislation incorporating an ABC test. This legislation will focus specifically on transportation network companies, and only on wage and hour law, to ensure a pragmatic,

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<sup>75</sup> Alisha Jarwala, *Razak v. Uber: The Third Circuit Addresses Driver Classification*, ON LABOR (Mar. 4, 2020), <https://onlabor.org/razak-v-uber-the-third-circuit-addresses-driver-classification/>.

<sup>76</sup> *Id.*

<sup>77</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

<sup>78</sup> *See Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370–71 (9th Cir. 1981).

<sup>79</sup> Defendant’s Motion for Summary Judgment at 14, *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020) (quoting *Donovan*, 656 F.2d at 1382–83).

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

feasible, and stable employment test for gig workers within this subsection of the industry.

#### IV. GIG WORKERS AS INDEPENDENT CONTRACTORS

States have begun to take legislative action regarding the gig economy employment status of the transportation network companies; specifically, various states have redefined their independent contractor and employee tests, known as ABC tests. The legislation has been crafted deliberately so that transportation network companies may easily meet the new criteria to establish their workers as independent contractors.

##### A. *Transportation Network Company Worker Favorable Legislation*

California adopted its ABC test from *Dynamex Operations West, Inc. v. Superior Court* and codified this new legal standard in the legislation known as Assembly Bill 5.<sup>81</sup> Assembly Bill 5 adopted a test for whether a worker is an independent contractor or an employee under the California Labor Code.<sup>82</sup> The “ABC” test states that an individual providing services or labor for compensation “shall be considered an employee, rather than an independent contractor, unless the ‘hiring entity’ demonstrates that all of the following conditions are satisfied:

- (1) the person 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;
- (2) the person performs work that is outside the usual course of the hiring entity’s business;
- and (3) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”<sup>83</sup>

This legal standard creates a presumption of employment, and thus shifts the burden from the independent worker that provides services, to the employer. “This favorable legislation to workers, however, has since been overturned with more favorable legislation to transportation network companies.”<sup>84</sup>

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<sup>81</sup> Lucchesi, *supra* note 60; *See also* Sarchet, *supra* note 60.

<sup>82</sup> Sarchet, *supra* note 60.

<sup>83</sup> *Id.*

<sup>84</sup> *See Id.*

## B. *Transportation Network Company Favorable Legislation*

### i. Florida Legislation

Florida passed HB 221—Transportation Network Companies Act—in 2017.<sup>85</sup> This Act was the first of its kind and essentially ensured that ride-sharing drivers will be classified as independent contractors.<sup>86</sup> This Act designates “drivers for ride-sharing companies in the . . . gig economy as ‘independent contractors’ as long as the ‘transportation network company’ meets four criteria that are currently met by Uber, Lyft, and other similar companies.”<sup>87</sup> Section 9 states:

“Limitation on Transportation Network Companies. – A TNC Driver is an independent contractor and not an employee of the TNC if all of the following conditions are met: (a) The TNC does not unilaterally prescribe specific hours during which the TNC driver must be logged on to the TNC’s digital network. (b) The TNC does not prohibit the TNC driver from using digital networks from other TNCs. (c) The TNC does not restrict the TNC driver from engaging in any other occupation or business. (d) The TNC and the TNC driver agree in writing that the TNC driver is an independent contractor with respect to the TNC.”<sup>88</sup>

The Act also imposes minimum insurance requirements for transportation network companies and transportation network company drivers, a zero-tolerance policy on alcohol and drug use of drivers, non-discrimination policies, and disability access.

#### 1. Disadvantages to Workers

The Transportation Network Companies Act has many disadvantages for workers. First, gig workers are precluded from making any claims under the state unemployment and workers’ compensation scheme. This clause deprives gig workers of every avenue for potential relief because

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<sup>85</sup> TROUTMAN PEPPER, *Limited Impact of New Florida Law Deeming Uber, Lyft, and Other Ride-Sharing Drivers Independent Contractors and Not Employees*, J.D. SUPRA (May 12, 2017), <https://www.jdsupra.com/legalnews/limited-impact-of-new-florida-law-23241/>.

<sup>86</sup> Richard Meneghello, *Gig-Economy Game Changer? New Florida Law Ensures Contractor Status for Drivers*, FISHER PHILLIPS (Apr. 25, 2017), <https://www.fisherphillips.com/resources-alerts-new-florida-law-ensures-contractor-status-for-drivers>.

<sup>87</sup> Pepper, *supra* note 85.

<sup>88</sup> FLA. STAT. § 627.748 (2020).



there is no federal counterpart to those laws.<sup>89</sup> Second, this Act preempts local governments from imposing further requirements than the Act purports, specifically prohibiting local governments from instituting taxes, licensing requirements, and other restrictions.<sup>90</sup> This preemption, similar to the Proposition 22 preemption, undercuts a feasible method where local governments could have circumvented the state legislation to make it more fair for gig workers of the transportation network companies. Third, and most notably, classification of gig economy transportation workers suppresses the earnings of gig workers and shifts their potential income to the executives and shareholders of the transportation network companies.<sup>91</sup>

## 2. Advantages to Transportation Network Companies

The Transportation Network Companies Act has many advantages for transportation network companies. Besides every disadvantage to the worker being an advantage to the company in regard to efficiency and profits, there are additional advantages. First, the bill preempts any local ordinances or rules on transportation network companies and specifies that state law will regulate transportation network companies.<sup>92</sup> This is a significant advantage because, as the legislation is already skewed towards favoring the companies, it demonstrates that the State is unlikely to make any unfavorable changes to such companies.

Second, this bill ultimately provides a ‘safe-harbor’ for transportation network companies because it shields them from liability with respect to misclassification of employees as independent contractors in Florida labor and employment law.<sup>93</sup> This liability extends to laws governing minimum wages, workers compensation, workplace discrimination, and unemployment.<sup>94</sup>

Ultimately, this legislation ensured that that transportation network company drivers were deemed independent contractors and thereby shielded the companies from challenging this classification. This legislation prioritizes the business from an efficiency perspective because transportation network companies no longer face legal liability for misclassification and because they have no expenditures regarding worker protections. This legislation does not prioritize the gig worker because it

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<sup>89</sup> Pepper, *supra* note 85.

<sup>90</sup> FLA. SEN. BANKING AND INS. COMM., 2017 SUMMARY OF LEGISLATION PASSED: CS/HB 221—TRANSPORTATION NETWORK COMPANIES (2017), <https://www.flsenate.gov/Committees/bills/summaries/2017/html/1606>.

<sup>91</sup> Manzo & Bruno, *supra* note 6, at 10.

<sup>92</sup> Fla. Sen. Banking and Ins. Comm., *supra* note 90.

<sup>93</sup> Pepper, *supra* note 85.

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

provides hardly any advantages. Thus, this legislation is not an effective solution to address the gig economy workers and their classification.

## ii. Illinois Legislation

Illinois passed the Transportation Network Providers Act in 2015. The Transportation Network Providers Act focuses on transportation network companies, defining them as any “entity operating in this State that uses a digital network or software application service to connect passengers to transportation network company services provided by transportation network company drivers.”<sup>95</sup> This Act designates that a transportation network company “is not deemed to own, control, operate, or manage the vehicles used by transportation network company drivers, and is not a taxicab association or a for-hire vehicle owner.”<sup>96</sup> The Act codifies that a transportation network company driver is an independent contractor because it acknowledges the transportation network company has no ownership of the vehicle, does not control the vehicle, and does not oversee the daily operations of the driver or the vehicle.<sup>97</sup>

### 1. Disadvantages to Workers

The Transportation Network Providers Act has several disadvantages for workers. First, and most notably, classification of gig economy transportation workers suppresses the earnings of gig workers and shifts their potential income to the executives and shareholders of the transportation network companies.<sup>98</sup> A study conducted in Chicago from September 2019 to September 2020, with a sampling of 77,974 trips, “suggests that the treatment of [transportation network company] drivers as ‘independent contractors’ suppresses their earnings.”<sup>99</sup> The study makes the following two assumptions: (1) that transportation network companies charge 20% of commission to the fares and company drivers keep the remaining 80% and (2) that the weighted average per-mile costs for fuel, maintenance and repair, and vehicle depreciation used is that of the American Automobile Association.<sup>100</sup> The results are that a transportation network company driver in Chicago “earned \$19.01 per hour in gross income, before vehicle expenses and taxes in 2019” and earned \$23.23 per hour in gross income, before vehicle expenses and taxes in 2020.<sup>101</sup> This

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<sup>95</sup> 625 ILL. COMP. STAT. 57/5 (2015).

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

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

<sup>98</sup> Manzo & Bruno *supra* note 6, at i.

<sup>99</sup> *Id.* at 10.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *Id.* at 7–8

difference is artificially inflated due to “reduced traffic congestion” as a result of the COVID–19 crisis.<sup>102</sup> When this is accounted for, with the typical traffic levels, a transportation network company driver would have “earned an estimated \$20.78 per hour in gross income, before vehicle expenses and taxes, which is about 11% less than the actual estimates for 2020.”<sup>103</sup> After accounting for these expenses in 2019, the average transportation network company driver earned approximately \$12.30 an hour, which is below the \$13 per hour minimum wage in Chicago in 2019.<sup>104</sup> After accounting for these expenses in 2020, the average transportation network company driver earned approximately \$13.62 an hour, which is below the \$14 per hour minimum wage in Chicago in 2020.<sup>105</sup> Evidently, an average transportation network company driver has continued to fall below the legislated minimum wage as a result of their independent contractor status.

Second, several municipalities in Illinois have enacted their own ridesharing ordinances.<sup>106</sup> The ridesharing ordinances span across Chicago, Evanston, Bloomington, Normal, Springfield, Peoria, Rockford, and Maywood.<sup>107</sup> Several provisions in the ordinances negatively affect workers, and other provisions shift the cost to the transportation network company. Several municipalities augmented the qualifications for drivers, specifically, that the minimum transportation network company driver age is 21, drivers with three or more violations within the past two years are prohibited, and forbid transportation network company drivers that have certain criminal convictions, focused on drugs, prostitution, hate crimes, and child pornography.<sup>108</sup> These provisions in the ridesharing ordinances are a disadvantage to workers because they are more stringent standards than the Act itself, and it imposes heightened requirements on workers who already are disadvantaged socially or economically.

## 2. Advantages to Transportation Network Companies

Very few municipalities have supplemented the Act with ordinances that affect the transportation network company financially. The supplements only require transportation network companies to pay annual fees—”a \$1,500 license fee in Springfield, a \$2,500 application fee in Rockford, a \$3,000 license fee in Peoria, and a \$100 application fee and

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<sup>102</sup> *Id.* at 7.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.* at 9.

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

<sup>106</sup> Baron, *supra* note 17, at 2.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 3.

\$3,000 license fee in Bloomington and Normal”<sup>109</sup>—and to submit detailed background checks, annual vehicle inspections with specific standards, and limit the “surge” pricing when there are cases of municipal emergencies.<sup>110</sup> These fees and heightened standards only apply to the municipalities that enacted these ordinances. Moreover, and most notably, transportation network company drivers being classified as independent contractors allows the company to circumvent applicable minimum wage laws in the state.<sup>111</sup> Ultimately, this legislation is favorable to transportation network companies because it ensured that company drivers were independent contractors, and left municipalities with the potential to legislate heightened standards, if, and only if, they decided to.

The ‘ABC’ tests, as amended by states like Florida and Illinois, are being crafted deliberately so that transportation network companies can easily designate its workers as independent contractors. Nonetheless, the legislation still imposes requirements for the transportation network company workers. This type of legislation is not an effective solution to address the gig economy workers because it varies from state to state and results in continuous challenges to the classification. Thus, it is not effective legislation because it does not provide a stable rule for transportation network company workers.

#### V. TRANSPORTATION NETWORK COMPANY WORKERS EXEMPTION

In an effort to circumvent federal, state, civil, and criminal liability, transportation network companies are turning to legislation that would exempt its workers them from regulations. California adopted this type of legislation, known as Proposition 22. Proposition 22 was adopted after the California Supreme developed a new legal standard for classifying independent contractors in *Dynamex Operations West, Inc. v. Superior Court* and codified this new legal standard in the legislation known as Assembly Bill 5.<sup>112</sup> Assembly Bill 5, as aforementioned, created a presumption of employment, where the worker is considered an employee unless all conditions of the ABC test are satisfied.<sup>113</sup> After the AB5 Bill, Uber and Lyft began unsuccessfully pleading with the lawmakers to

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2–4.

<sup>111</sup> See Manzo & Bruno, *supra* note 6, at 1.

<sup>112</sup> Lucchesi, *supra* note 60; Sarchet, *supra* note 60.

<sup>113</sup> Lucchesi, *supra* note 60.

exempt them from this bill.<sup>114</sup> Uber and Lyft turned to the unions to seek compromise because “[e]ven if California deemed these workers employees, that wouldn’t give them unionization rights unless the federal government agreed, and even if that happened, organizing at Uber or Lyft promised to be a fight on the level of unionizing . . . .”<sup>115</sup> In 2019, Uber, Lyft, DoorDash, and Instacart spent \$200 million in campaigning for this ballot measure.<sup>116</sup> The AB5 Bill has since been overturned with the passage of Proposition 22, which is the gig worker exemption legislation.

Proposition 22, passed on November 3, 2020, is a ballot measure that exempts the gig economy from state labor law.<sup>117</sup> Proposition 22 reinforces the independent contractor classification on app-based rideshare and delivery drivers.<sup>118</sup> This ballot measure overrode California’s Assembly Bill 5 because it considered app-based drivers to be independent contractors and not agents or employees.<sup>119</sup> Under Proposition 22,

“app-based drivers may be properly classified as independent contractors if the hiring entity: (1) does not unilaterally prescribe specific dates, times of day, or minimum number of hours during which the driver must perform services; (2) does not require the driver to accept any specific service request or assignment as a condition of maintaining access to the company’s application or platform; (3) allows drivers to perform rideshare or delivery services for any other company, including direct

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<sup>114</sup> Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG BUSINESSWEEK (Feb. 26, 2021), <https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Ellen Huet, *Uber, Lyft Win California Bid to Keep Drivers as Contractors*, BLOOMBERG TECHNOLOGY (Nov. 17, 2020), <https://www.bloomberg.com/news/articles/2020-11-04/california-projected-to-side-with-gig-economy-on-labor-issue>.

<sup>118</sup> Lindsay Ryan, *California Voters Pass Proposition 22, Changing How App Based Drivers are Classified*, NAT’L L. REV. (Nov. 17, 2020), <https://www.natlawreview.com/article/california-voters-pass-proposition-22-changing-how-app-based-drivers-are-classified>.

<sup>119</sup> *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative*, BALLOTPEDIA (Nov. 20, 2020), [https://ballotpedia.org/California\\_Proposition\\_22,\\_App-Based\\_Drivers\\_as\\_Contractors\\_and\\_Labor\\_Policies\\_Initiative\\_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020))

competitors; and (4) does not restrict the worker from performing any other kind of lawful work.”<sup>120</sup>

Further, app-based drivers are defined as workers “who (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.”<sup>121</sup>

Despite reinforcing the independent contractor classification, Proposition 22 provides certain benefits and protections. These benefits and protections include: (1) a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA); (2) a new minimum earnings guarantee tied to 120 percent of minimum wage with no maximum; (3) compensation for vehicle expenses; (4) occupational accident insurance to cover on-the-job injuries; and (4) protection against discrimination and sexual harassment.<sup>122</sup>

#### A. *Analysis of the Gig Worker Exemption*

This app-based driver exemption appears to be a quid pro quo, where the app-based companies maintain the independent contractor classification and the independent contractors also obtain rights, but it is not an overall fair compromise. Unfortunately, Uber and Lyft have been reluctant to release trip earnings and data for their drivers, despite their regulator, California Public Utilities Commission, pressing for data.<sup>123</sup> As such, there is very limited public data, but several analysts have made predictions that this paper will rely on.

##### i. Disadvantage for Workers

Proposition 22 has several disadvantages for workers. First, Proposition 22 limits the app-based drivers to “a set of sub-employee alternative perks such as an ‘earnings guarantee’ that doesn’t count the time or gas they burn waiting between trips.”<sup>124</sup> The time the app-based drivers wait, and the amount of gas the drivers expend are a significant factor that drives down their hourly earnings. A study by Uber data analyst Alison Stein estimates that the average, statewide driver pay is

<sup>120</sup> Ryan, *supra* note 118.

<sup>121</sup> BALLOTPEDIA, *supra* note 119.

<sup>122</sup> Text of Proposed Laws: Proposition 22 30, 30 (Cal.), <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf>.

<sup>123</sup> Michael Reich, *Pay Passengers and Profits: Effects of Employee Status for California TNC Drivers*, 5 (INST. FOR RSCH. ON LAB. AND EMP. Working Paper # 107-205, 2020), <http://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf>.

<sup>124</sup> Eidelson, *supra* note 114.

approximately \$23 per hour, before any expenses.<sup>125</sup> After expenses, the study implies the hourly earnings are \$10.65 per hour, which is well below the California minimum wage of \$13.00 per hour.<sup>126</sup> A Lyft-commissioned study by Tucker suggests that after expenses, Lyft drivers earn approximately \$20.00 per hour, but this does not include wait time.<sup>127</sup> When waiting time is factored in, an average Lyft driver earns approximately \$13.40 per hour, yet the study further suggest after including more expenses, this earnings is below the California minimum wage as well.<sup>128</sup> Under this ballot measure, application based drivers do not make, not even close, to the minimum wage due to factors of waiting time and gas that the application based companies either did not address or desired to change.

Second, traditional employees in other fields are beginning to be displaced with app-based drivers. In December 2020, a supermarket chain based in California, Albertsons & Co., advised their employee delivery drivers that they will be replaced by independent contractors.<sup>129</sup> Hundreds of Albertson's delivery drivers will be replaced by DoorDash Inc. workers as a result of their appn-based driver independent contractor status.<sup>130</sup> Moreover, Albertsons & Co. claims this change "is happening in multiple states to 'help [Albertson's] create a more efficient operation.'"<sup>131</sup> Eventually, companies that have a multi-state operations will begin to shift their workforce, where feasible, to independent contractors that are exempt under Proposition 22. And after multi-state operations prove successful, it will expand globally. Ubers' CEO Dara Khosrowshahi stated that the company will "more loudly advocate for laws like Prop 22" and make it a company priority to "work with governments across the U.S. and the world to make this a reality."<sup>132</sup>

Third, Proposition 22 has prompted other types of companies that are not app-based drivers to seek similar, independent contractor exemptions. Specifically, Jyve Corp., a startup that sends its contractors to stock shelves in the grocery stores, is seeking a similar exemption.<sup>133</sup> In due time, companies in a variety of industries will seek the similar exemptions. The potential of Proposition 22's vision of work extends "from

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<sup>125</sup> Reich, *supra* note 123, at 6.

<sup>126</sup> *Id.*

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

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

<sup>129</sup> Eidelson, *supra* note 114.

<sup>130</sup> *Id.* at 5.

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

<sup>132</sup> Kirsten Korosec, *After Prop 22's Passage, Uber is Taking Its Lobbying Efforts Global*, TECH CRUNCH (Nov. 5, 2020, 6:22 PM) <https://techcrunch.com/2020/11/05/after-prop-22s-passage-uber-is-taking-its-lobbying-effort-global/>.

<sup>133</sup> Eidelson, *supra* note 114.

agriculture to zookeeping . . . [to] nursing, executive assistance, tutoring, programming, restaurant work, and design.”<sup>134</sup>

Lastly, Proposition 22 has protected itself from attack because the legislation preempts local laws and requires a seven–eighths supermajority by the state legislature to make any changes.<sup>135</sup> Requiring a seven–eighths supermajority is stringent. Requiring a supermajority to amend the legislation makes it nearly impossible to amend the legislation due to plethora of lobbying that app–based driving companies can assert. As aforementioned, \$200 million dollars was the initial campaign investment for lobbying Proposition 22.<sup>136</sup> Moreover, Proposition 22, having a preemption of local law clause, undercuts a feasible method that could have circumvented the stringent supermajority requirement. Given that the ballot measure was recently approved, any legislative amendments to assist gig economy workers seems wholly infeasible for the near future.

## ii. Advantage for Workers

Nonetheless, the inconsequential benefits that independent contractors now have access to are somewhat advantageous because, before this legislation, they were denied any protections. That being said, the minimum earnings guarantee of 120% is tied to either the local or statewide minimum wage, however, it is only applicable on the time spent on rides.<sup>137</sup> Moreover, the healthcare subsidy is based on a sliding scale where workers will receive a stipend when they work at least fifteen hours and this stipend will increase for those who work more than 25 hours per week.<sup>138</sup> These provisions, coupled with accident insurance and workplace protections against discrimination and sexual harassment, are advantageous to app–based drivers because the financial burden has partially shifted to the app–based company.

Ultimately, Proposition 22 does not strike a balance between companies and workers because it perpetuates the disadvantages of gig workers from a public interest perspective. An app–based driver does not come close to having similar protections as their traditional employee counterpart. Thus, this legislation, although it appears as a compromise, prioritizes app–based companies more, and, as such, is not an effective solution to address the gig economy workers and their classification.

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<sup>134</sup> *Id.* at 5.

<sup>135</sup> *Id.* at 4.

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

<sup>137</sup> Suhauna Hussain & Johana Bhuiyan, *Prop 22 Passed, a Major Win for Uber, Lyft, DoorDash. What Happens Next?*, LOS ANGELES TIMES (Nov. 4, 2020, 7:06 PM), <https://www.latimes.com/business/technology/story/2020-11-04/prop-22-passed-what-happens-next>.

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



## VI. PROPOSAL

The current legislation regarding gig workers employment classification is inadequate. State legislation deliberately designating transportation network company drivers as independent contractors, coupled with transportation network companies launching initiatives pushing towards exemption of its workers from applicable wage and hour laws, has not resulted in a stable rule for transportation network company workers' classification. As a result, the legislation is consistently being challenged as a misclassification of employment status. Ultimately, a model approach is proposed—federal legislation comprised of an ABC test. A federally designated ABC test is the optimal approach to the transportation network company worker classification because it will produce a rule that is uniform, stable, and feasible.

The federal ABC test will reinvigorate the ABC test set forth in the *Dynamex* decision. The federal ABC test will be an element-based test consisting of three prongs. It will begin with the common presumption that “firms employ workers whom they hire.”<sup>139</sup> The first element evaluates whether the individual exerts labor subject to a firms' retained control.<sup>140</sup> The second element evaluates whether the designated individuals work within a firms' usual course of business.<sup>141</sup> The third element evaluates whether workers operate their own separate business.<sup>142</sup> It will encompass much of the Fair Labor Standards Act; specifically, entitling gig workers to the same benefits and protections as their traditional employee counterpart, namely: minimum wage laws, overtime pay laws, paid family and medical leave policies, workers' compensation coverage, unemployment insurance, Title VII protection, Occupational Safety and Health Administration protection, coverage under the Family Medical Leave Act, workers compensation laws coverage, statute unemployment insurance coverage, and federal paid sick leave. Moreover, it will strengthen the existing ABC test in the Fair Labor Standards Act to the aforementioned three-pronged *Dynamex* rule.

The federal ABC test will be one test that applies to all employment classification disputes, specifically, wage and hour laws. Currently, twenty-seven states use the ABC test for employment classifications, however, their standards vary state by state.<sup>143</sup> This variation has served as one of the many impetus's for misclassification litigation. A federally

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<sup>139</sup> Cunningham–Parmeter, *supra* note 12, at 409.

<sup>140</sup> *Id.* at 411.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 409.

designated ABC test will produce uniformity because it will be a single legislation that is applicable to all states, thereby precluding any variation.

The federal ABC test will be an elements-based test, versus a balancing test, to minimize judicial discretion, and produce a stable rule for gig workers engaged in transportation network companies. An elements based-test will preclude judicial and legislative discretion because it will prescribe the employee/employer classification to any type of worker that meets at least one element.<sup>144</sup> In this manner, a platform company “cannot classify its workers as independent contractors if it fails to prove any part of the test.”<sup>145</sup> Moreover, the elements-based test expressly enables the judge to not consider the indeterminate control analysis or engage in balancing reasoning.<sup>146</sup>

The federal ABC test will also be its own separate legislation, targeted to transportation network companies, to ensure feasibility. A federal ABC test is feasible, because, in applying the *Dynamex* ABC test to recent misclassification decisions, this standard “provides a more effective mechanism for scrutinizing the nonemployee designations of gig workers.”<sup>147</sup> For instance, in *Razak*, Uber successfully persuaded the court that its UberBLACK drivers were independent contractors who were not entitled to overtime.<sup>148</sup> The court in *Razak* applied the economic realities test, which focused on the drivers’ apparent entrepreneurship.<sup>149</sup> They reasoned that because plaintiffs operated their own companies, had the ability to hire additional drivers to this company, some paid for advertising, and they were free to provide rides to customers without the Uber application, that these drivers resembled independent business people and thus, precluded from collecting overtime.<sup>150</sup> If, however, the court had applied the *Dynamex* ABC test, the decision would have (1) evaluated the varying levels of entrepreneurship that actually existed and (2) addressed the question of “whether the drivers’ work fell within Uber’s usual course of business.”<sup>151</sup> In applying the *Dynamex* ABC test, the court would have acknowledged that (1) only some plaintiffs hired other drivers, (2) not all plaintiffs drove for other competitors, and (3) many plaintiffs earned all of their income from Uber in certain years, suggesting that the drivers did not have an apparent entrepreneurship.<sup>152</sup> The court in *Razak*

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<sup>144</sup> *Id.* at 418.

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

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

<sup>147</sup> *Id.* at 421.

<sup>148</sup> *Id.* at 422.

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

<sup>150</sup> *Id.*

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

<sup>152</sup> *Id.* at 423.

did acknowledge that these drivers are as essential part of Uber's business, however, this played an inconsequential role in the analysis. Whereas, in applying the *Dynamex* ABC test, this classification dispute would be neatly resolved because the court would have determined that UberBLACK drivers do work within the firms' usual course of business, and in actuality, were not independent business owners since most of their income was in fact derived from Uber.

A. *Counterarguments to the Proposed Legislation*

This legislation is different than the already proposed Worker Flexibility and Small Business Protection Plan for several strategic reasons. First, because it does not propose to amend the Fair Labor Standards Act. It will be unequivocally more difficult to garner support to amend an existing bill that is decades old than it would be to craft a new legislation. Second, because this proposed federal ABC test will have an immediate effect by focusing specifically on transportation network companies first, namely Uber, Lyft, Postmates, DoorDash, and the remaining transportation network companies first. After there has been a trial period of its effectiveness, then the legislation can begin to absorb other categories of the modern gig economy with a sliding scale approach.

Critics of this approach, undoubtedly, assert that gig workers perform functions that are outside of the firms' ordinary course of business, and, as such, should not be held out to be employees under the ABC test.<sup>153</sup> Particularly, transportation network companies hold themselves out to be technology companies, rather than service providers. For example, Uber argues that it is a technology company and that those individuals that work with Uber are engaging in transportation of passengers, which is a service, and thus, the workers are performing a function outside of the firms' ordinary course of business and not advancing the platforms primary mission. However, any strategy "that requires platforms to argue against their own brands is unlikely to yield long-term success."<sup>154</sup>

Moreover, the *Dynamex* decision already provides clarity on the argument. In *Dynamex*, the California Supreme Court referred to this second prong of the ABC test as a firms' "usual course of business," and "not its primary brand."<sup>155</sup> The *Dynamex* court created the distinction between an outside plumber being hired as an independent contractor because the plumber does not work within the usual course of this business. As such, the independent contractor designation is limited to a nonemployee that "performs outside, isolated jobs on a very limited

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<sup>153</sup> *Id.* at 412.

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

<sup>155</sup> *Id.* at 413.

basis.”<sup>156</sup> This distinction separates companies that hire individuals to perform tasks that “occur regularly and indefinitely as part of the firm’s normal business activities” because they are engaging in usual forms of company work.<sup>157</sup> Essentially, this distinction serves to include transportation network company workers as employees because transportation of passengers is with the firms’ normal business activities.

## VII. CONCLUSION

Ultimately, evaluation of existing approaches to the gig economy employment status through state legislation of transportation network companies reveals that the gig economy employment classification is inadequate because it has not resulted in a stable rule for transportation network company workers’ classification. A new proposal—a federal ABC test targeted at transportation network companies—is the most pragmatic approach to transportation network company workers employment classification because it produces a rule that is uniform, stable, and feasible.

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<sup>156</sup> *Id.*

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