

## ***The California Gig Economy Law: Just How Far Will Employers Go to Avoid Providing Health Insurance?***

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### ABSTRACT

*App-based drivers deserve the protections afforded employees for fairness, to maintain the current healthcare system, and to avoid free-riding and corporate welfare. A ballot proposal challenging the new California law introduced to enforce corporate responsibility undermines workers' rights. This paper examines the ethics and the practical implications of AB5 and Proposition 22.*

Keywords: Gig economy, healthcare, health insurance, ACA, workers' rights, corporate ethics, labor law, employment law, bioethics, healthcare policy

### INTRODUCTION

Employer-based insurance models work when the laws compelling employers to offer insurance are enforced. Corporate failure to provide insurance to full time employees undermines the system and results in corporate welfare: the government pays to subsidize healthcare plans for workers who should receive employer-based insurance. This paper focuses on the role of employer-based healthcare in the current healthcare system in the United States and the controversy surrounding a California law enforcing a definition of employee crucial to the US healthcare system. Employers must treat certain workers in the gig economy as employees for fairness and to avoid corporate welfare. Employer-based insurance is in keeping with the approach of the Affordable Care Act (ACA); if employers are not held accountable, the current US healthcare system is at risk.

There is longstanding debate over the role of government and how much people should pay to support the healthcare of others through taxes. American views fall along a long continuum from libertarian beliefs that a

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healthcare mandate is beyond the amount of freedom necessary for human flourishing to the concept of healthcare as a human right that the government should provide to everyone. The current system, which relies on the role of employers as payers, represents middle ground. Employer based healthcare plans, the ACA individual marketplace for subsidized and unsubsidized purchases, and the myriad of government run systems like Tricare, Medicaid, Medicare, and the Children's Health Insurance Fund each are crucial to the system as a whole.

## ANALYSIS

### A. California Law AB5 and Ballot Proposition 22

Gig economy refers to jobs that are short-term, freelance, and generally involve a direct to customer service. Independent contractors and freelancers often operate in the gig economy indefinitely indicating a shift away from steady long-term employment. Assembly Bill 5 (AB5) in California was passed to help workers in the gig economy.<sup>1</sup> Corporations have been treating workers central to the businesses' primary purpose as independent contractors absolving the corporations from providing benefits that would be legally mandated if the workers were categorized as employees. The bill requires certain corporations operating in the gig economy to provide healthcare insurance, paid sick leave, disability insurance, and unemployment insurance. In *Olson v. California*, US District Court, Central District of California, Western Division, corporations (mostly driving apps) sought an injunction to stop the law from taking effect.<sup>2</sup> They did not succeed and the law went into effect January 1, 2020. May 5, 2020, in *California v. Uber*, the California Attorney General sued app-based driving companies Uber, Lyft, Postmates, DoorDash, Instacart and others (the defendants) for failure to comply.<sup>3</sup>

AB5 codified a three-pronged test: a worker is an employee unless the employer can demonstrate the worker is free of the company's control, the work performed is not central to the business, and the worker has an independent business in the same industry as the work performed. The test, known as the ABC test,<sup>4</sup> puts app-based drivers, essential to car service and delivery businesses, in the category of employees. On August 10, a judge ordered the defendants to treat drivers as employees and provide the mandated benefits.<sup>5</sup> Then, a California appellate court granted an emergency stay to the defendants.<sup>6</sup> Prior to the stay, the defendants had created a ballot proposal (Proposition 22) to override AB5 through an exemption for app-based drivers that includes a minor compromise.<sup>7</sup> The ballot measure deprives workers of employee rights but offers a meager stipend for healthcare insurance and offers to cover on the job injuries.<sup>8</sup> The stay will allow the companies to continue their noncompliance through October and likely through the November 3 election when the ballot proposal will be decided.

### B. Corporate political power and social media

The emergency order allows time for voters to weigh in on the rights of app-based drivers. Uber, Lyft and a few others have spent \$111 million dollars on the Yes on Proposition 22 Campaign.<sup>9</sup> The emergency stay caters to the desires of corporations who should be subject to labor and employment laws designed to ensure workers' rights. Corporations have an outsized influence on policy exacerbated by lax campaign finance laws and *Citizens United*.<sup>10</sup> The Prop 22 campaign is declaring that Prop 22 will protect app-based drivers. That could imply to workers that Prop 22 would improve conditions for them. I assert it conveys a well-known threat: Uber and Lyft will stick around if workers vote for Prop 22 to neuter AB5. A court's involvement should not result in an opportunistic appeal to voters using misinformation, undue influence, and unmatched

advertising dollars. Workers' rights advocates are unlikely to have \$111 million dollars to use in a savvy social media and television campaign appeal to the voters.

The ballot proposal suggests a winner-take-all mentality. Elected officials paid to legislate represent the voters. The California Uber lawsuit is part of a trend that empowers the corporation over the elected officials. A proposition brought to the voters<sup>11</sup> might bring a result that works against the least empowered many of whom do not vote. California's ballot proposition is corporate power run amok. The California ballot proposal process fails to distinguish between ballot access for organizations representing the marginalized and corporations.<sup>12</sup> All special interests must go through the same process despite the prohibitive costs of running an expensive campaign to support a measure. The defendants even paid people to get the necessary petition signatures. The costly Yes on Proposition 22 Campaign evidences the economic incentive to misclassify drivers as independent contractors rather than employees to evade social and legal responsibilities.<sup>13</sup>

C. Corporate welfare, the free rider, and fairness

By putting more people in the individual market, companies are shifting the cost of healthcare to the government in the form of subsidies. ACA subsidies for people who work for one company full time are corporate welfare. ACA subsidies should benefit people without other sources of healthcare insurance. The court held that app-based drivers are employees by the three-prong definition. While their incomes vary according to location, hours driving, time spent without a customer, and surge pricing shifts, many are eligible for ACA subsidies.<sup>14</sup> Corporations should spend the money on health insurance so that taxpayers do not have to.

Subsidies for health insurance are based on the federal poverty rate. If income is equal to or below the 138 percent of poverty threshold, individuals become eligible for Medi-Cal based on the ACA Medicaid expansions. Income-based subsidies are available for those earning from 138 percent of federal poverty up to 400 percent of the federal poverty rate.<sup>15</sup> Usually, the free rider argument is that the insured or hospital systems should not support the people who choose not to insure themselves which was the case under EMTALA.<sup>16</sup> Here, the free rider argument is that the government should not pay to insure people who work full time for large corporations that should pay for their insurance. For the defendants, Medicaid and subsidies for the drivers are corporate welfare.

The gig economy is a new model that distorted the definition of an independent contractor. AB5 would be a valuable reset that forces new industries that meet large demand and provide innovative services to behave the way traditional corporations are expected to: simply provide insurance. Under AB5, the app-based corporations would still profit immensely from the primary benefit of their business model: avoiding paying for the cars.<sup>17</sup> Like AirBnB does not own houses or properties, Uber, Lyft, DoorDash, Instacart, and Postmates do not own the most basic equipment necessary for their services. Drivers bear the burden of purchase, upkeep, and storage of vehicles among many other business costs. The corporations already benefit from the gig economy by not purchasing the expensive assets.

The misuse of the term entrepreneur is a driving factor in the gig economy. Drivers are not truly entrepreneurs; they are workers performing a form of relatively unskilled labor. The US glorifies entrepreneurship for qualities like drive, innovative ideas, and grit, none of which are necessary to join Uber. Many Uber drivers happen to have grit and the determination to seek loans, purchase cars and insurance, and sign on with Uber but those traits are not signs of entrepreneurial spirit as much as they are signs of doing tasks necessary to join the app-

based sector. In the app-based sector, the entrepreneurs developed the software and created the corporations. The entrepreneurship claims are an excuse to justify a practice that exacerbates income inequality.<sup>18</sup> The independent contractor designation evades fairness in how the money is earned and shared; the employee designation makes up for a missing corporate ethic.

The argument that the independent contractor arrangement favors the drivers is also invalid. The gig economy offers perks like control over hours worked, but the more drivers are trying to earn a living, the more hours they drive and the job becomes full time. While driving an Uber or Lyft may be a second or third job for workers, an economy in which one job is not enough is problematic. When the workers do work the number of hours that comprises full time work for one company, they must be entitled to benefits. Working the hours without receiving the benefits hardly can be described as freedom or control over one's schedule.

Drivers doing the essential work in the app-based driving businesses take on risks that are sometimes not worth the low earnings. There are many financial and legal problems in the app-based driving industry. Drivers take on debt to purchase cars, insurance, and safety equipment like cameras. The gig economy creates desperation and provides drivers with temptation to break laws. *All in a Day's (Dirty) Work* tells the personal stories of Task Rabbit, Uber, and Airbnb workers stumbling into illegal activity condoned and ignored by their corporate executives. From driving drug dealers, mailing drugs illegally, to violating housing laws, the gig economy laborers take on personal risks for which their corporations claim to bear no responsibility.<sup>19</sup>

#### D. Implications for a lasting healthcare structure

The defendants' failure to provide insurance to the app-based drivers undermines the US system, possibly pushing the country toward a single payer plan unnecessarily. The individual markets were not meant for people who work full time for large corporations. Since the ACA mandate was undermined, the drivers might choose not to insure themselves. The drivers would then become or remain free riders in the sense relevant before the ACA: they would use emergency rooms for care and then the insured would bear the costs that are not shifted to public programs or charities.<sup>20</sup> As a result, the country risks a return to the systemic pressure that led to the ACA. In a politically charged atmosphere where cries of socialism abound, a single payer plan may not be politically feasible. I also argue it is not the best route based on the principles behind providing access to healthcare for all and the economics.<sup>21</sup>

Some argue the opposite: that the drivers would add people to the individual market creating a healthier larger healthcare insurance customer base, increasing demand, and untethering insurance from employment.<sup>22</sup> While these are worthy goals, the hourly income of the drivers is evidence that many would require subsidies and essentially cause a market inefficiency rather than drive a robust free market.<sup>23</sup>

#### E. The job creator responsibility

The app-based group is leveraging their power as job creators by threatening to leave California. Many argue that had Uber and Lyft simply shut down in California as they threatened to do, more responsible and innovative companies would immediately fill the gap. If the court had not issued the stay, and instead called Uber and Lyft's bluff, and the corporations gave up the lucrative California market, other competitors would possibly drive prices down.<sup>24</sup> If corporations are to argue that their status as job creators calls for special exemptions, then they should be held to labor and employment laws and pay a living wage.

F. Will consumers just have to pay more?

Some argue that if AB5 is enforced, the cost of the insurance would be passed on to the consumer. While that would seem unfortunate, it is possible that prices have been artificially low due to the failure of the companies to provide benefits. Passing some of the cost on remains preferable to leaving drivers uninsured or financially burdened by the costs of their insurance. A wealth transfer from customers to workers could be a beneficial outcome.<sup>25</sup> Heavier competition in the industry could drive down the prices to balance out attempts to pass along the entire cost to consumers. A lack of competition has plagued the industry of app-based driving services both for transportation and deliveries, especially since Uber acquired Postmates.

## CONCLUSION

Drivers are the mainstay of the app-based driver industry. Fairness calls for treating workers central to the business as employees. Allowing the defendants to treat workers like independent contractors is corporate welfare: taxpayers will continue to pay for subsidies on the ACA exchanges while Uber's CEO enjoys a package with cash and stock worth over \$42.4 million dollars.<sup>26</sup> With \$14 billion in revenue in 2019 and a market cap of almost \$60 billion, should Uber really be subsidized by the taxpayers? Healthcare insurance for app-based drivers falls within the already established rights of employees. An industry-influenced expensive social media campaign that is not concerned with workers' rights should not be permitted to undermine the moral code enforced by labor and employment law.

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<sup>1</sup> Section 2750.3 of California Labor Code. AB5 codified and clarified *Dynamex Operations West Inc. v. Superior Court of Los Angeles*, (2018) 4 Cal. 5th 903 (Cal. Sup. Ct. April 30, 2018).

<sup>2</sup> 2:19-cv-10956. Also, in 2015, several Uber drivers sued Uber demanding treatment as employees and not independent contractors. The California Labor Commission sided with the drivers and awarded damages. *Berwick v. Uber Technologies*, Superior Court of California (2015) Link to state Labor Commission award: <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical>

<sup>3</sup> *California v. Uber, Lyft, and Does 1-50*, complaint: <https://oag.ca.gov/system/files/attachments/press-docs/2020-05-05%20-%20Filed%20Complaint.pdf>, referred to as the *People v. Uber*.

<sup>4</sup> In 2004, the Massachusetts legislature adopted the ABC test. See St. 2004, c. 193, § 26, effective July 19, 2004.

<sup>5</sup> Link to the August 10 ruling. Order CGC-20-584402 filed in the Superior Court of the State of California, County of San Francisco: <https://assets.documentcloud.org/documents/7032764/Judge-Ethan-Schulman-Order-on-Lyft-and-Uber.pdf>

See also "California Judge Orders Uber And Lyft To Consider All Drivers Employees." *All Things Considered*, August 10, 2020. *Gale General OneFile* (accessed August 31, 2020). <https://link-gale-com.ezproxy.cul.columbia.edu/apps/doc/A632756257/ITOF?u=columbiau&sid=ITOF&xid=3511136b>. <https://www.npr.org/2020/08/10/901099643/california-judge-orders-uber-and-lyft-to-consider-all-drivers->

[employees#:~:text=The%20judge%20said%20Uber%20and,insurance%2C%20workers'%20compensation%20and%20paid](#)

<sup>6</sup> *People of the State of California v. Uber Technologies, Inc. et al.*, Division 4, Case Number [A160706](#), 1<sup>st</sup> Appellate District.

[https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc\\_id=2325037&doc\\_no=A160706&request\\_token=NilwLSEmXkw3W1BNSCMtVEtIMFw6UVxfJSJeWzpSUCAgCg%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2325037&doc_no=A160706&request_token=NilwLSEmXkw3W1BNSCMtVEtIMFw6UVxfJSJeWzpSUCAgCg%3D%3D) See also Charlie Osborne, "Emergency Order Keep Uber & Lyft Running in California," ZDNET, August 21, 2020. <https://www.zdnet.com/article/emergency-order-keeps-uber-lyft-running-in-california/>

<sup>7</sup> Tina Bellon, Norma Geleana, "California Court Ruling Gives Voters Last Word," Reuters, August 20, 2020.

<https://www.reuters.com/article/us-uber-california/california-court-ruling-gives-voters-last-word-over-uber-lyft-worker-rights-idUSKBN25G21S>

<sup>8</sup> <https://yeson22.com/get-the-facts/>

<sup>9</sup> Dara Kerr, "A totally different ballgame: Inside Uber and Lyft's fight over gig worker status," CNET, August 28, 2020.

<https://www.cnet.com/features/uber-lyfts-fight-over-gig-worker-status-as-campaign-against-labor-activists-mounts/> Investigations revealed an aggressive social media campaign fueling the controversy. The defendants hired 19 firms to support the Prop 22 initiative.

<sup>10</sup> *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)

<sup>11</sup> Description of how special interests get initiatives on the ballot in California:

<https://calmatters.org/explainers/california-november-2020-ballot-propositions-final-list/>

<sup>12</sup> <https://calmatters.org/explainers/california-november-2020-ballot-propositions-final-list/>

<sup>13</sup> Malos, Stan, Vogelgesang Lester Gretchen, and Meghna Virick. "Uber Drivers and Employment Status in the Gig Economy: Should Corporate Social Responsibility Tip the Scales?" *Employee Responsibilities and Rights Journal* 30, no. 4 (12, 2018): 239-251. doi:<http://dx.doi.org.ezproxy.cul.columbia.edu/10.1007/s10672-018-9325-9>.

<http://ezproxy.cul.columbia.edu/login?url=https://www-proquest-com.ezproxy.cul.columbia.edu/docview/2128364636?accountid=10226>.

<sup>14</sup> Jason Millman, "Why Uber Loves Obamacare," *Washington Post*, November 17, 2014.

<https://www.washingtonpost.com/news/wonk/wp/2014/11/17/why-uber-loves-obamacare/> ACA subsidies are available for individuals making \$16,105 to \$46,680 and families of four making \$32,900 to \$95,400.

<sup>15</sup> Based on 2018 levels, according to California, the Federal Poverty Rate is \$12,140 for individuals, \$16,460 for a family of two, \$20,780 for a family of three, \$25,100 for a family of four, \$29,420 for a family of five, \$33,740 for a family of six, \$38,060 for a family of seven, \$42,380 for a family of eight.

The following Covered California income restrictions apply to adults:

- 0 to 138 Percent of FPL: Qualification for Medi-Cal (a Medicaid program)
- > 138 to 400 Percent of FPL: Qualification for a subsidy on a Covered California plan

The breakdown of the subsidies between 138 and 400 percent of FPL is as follows:

- > 138 to 150 Percent: You also qualify for the Silver Enhanced 94 Plan
- > 150 to 200 Percent: You also are eligible for the Silver Enhanced 87 Plan
- > 200 to 250 Percent: You also qualify for the Silver Enhanced 73 Plan

<https://www.healthforcalifornia.com/blog/how-do-you-report-your-income-to-covered-california-when-it-fluctuates>; <https://www.healthforcalifornia.com/covered-california/income-limits>

<sup>16</sup> Menzel, Paul, "The Cultural Right to a Basic Minimum of Accessible Health Care," *Kennedy Institute of Ethics Journal*. 2011; 21(1):79-119.

<sup>17</sup> <https://www.thestreet.com/personal-finance/education/how-much-do-uber-lyft-drivers-make-14804869>

<sup>18</sup> Ahsan, Mujtaba. "Entrepreneurship and Ethics in the Sharing Economy: A Critical Perspective: JBE." *Journal of Business Ethics* 161, no. 1 (01, 2020): 19-33. doi:<http://dx.doi.org.ezproxy.cul.columbia.edu/10.1007/s10551-018-3975-2>. <http://ezproxy.cul.columbia.edu/login?url=https://www-proquest-com.ezproxy.cul.columbia.edu/docview/2073877713?accountid=10226>.

<sup>19</sup> Alexandra J. Ravenelle, *Hustle and Gig*, (Berkeley: University of California Press, 2019), Ch. 6 All in a Day's (Dirty) Work.

<sup>20</sup> Menzel.

<sup>21</sup> Anne Zimmerman, *Reframing the healthcare debate: targeted problems and solutions* (2020) Master's Thesis, archived by Columbia University. <https://doi.org/10.7916/d8-yg1m-w324>

<sup>22</sup> David Dranove and Craig Garthwaite, "Uber and the Twisted Logic of the Affordable Care Act's Employer Mandate," *The Healthcare Blog*, June 25, 2015.

<https://thehealthcareblog.com/blog/2015/06/25/uber-and-the-twisted-logic-of-the-affordable-care-acts-employer-mandate/>

<sup>23</sup> Millman. See also Christina Farr, "Who's Responsible for Your Uber Driver's Health Coverage?" NPR, October 11, 2015. <https://www.npr.org/sections/health-shots/2015/10/11/447157698/who-s-responsible-for-your-uber-driver-s-health-coverage>

<sup>24</sup> Paris Marx, "Uber, Lyft want to defy California's gig economy law. The state should call their bluff." *NBCNews.com Think*, August 17, 2020.

<https://www.nbcnews.com/think/opinion/uber-lyft-want-defy-california-s-gig-economy-law-state-ncna1236686>

<sup>25</sup> This outcome could also be environmentally beneficial and encourage more use of public transportation.

<sup>26</sup> Sissi Cao, "Big Uber Shareholders Rebel on CEO's Huge Pay Package Amid Coronavirus Layoffs,"

*Observer*, May 13, 2020. <https://observer.com/2020/05/uber-ceo-pay-shareholder-backlash-coronavirus/> Also see: <https://www.businessinsider.com/uber-ceo-dara-khosrowshahi-salary-total-compensation-45-million-in-2018-2019-4#:~:text=Uber%20paid%20its%20top%20five%20executives%20%24143%20million,officer%2C%20who%20receive%20%2447.3%20million%20in%20total%20compensation.>