

## Blog Post

# California Voters OK Independent Contractor Status for App Service Drivers

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On November 3, 2020, nearly 60% of California voters approved a ballot measure to create a carve-out from the state's expansive independent contractor law, AB 5, for drivers on technology platforms such as Lyft, Uber, Doordash, and Postmates. [Proposition 22](#) essentially creates a new category of workers by allowing transportation technology companies to continue to treat drivers on their platforms as independent contractors while simultaneously requiring the companies to provide a new array of benefits traditionally reserved for employees.

## The Nitty Gritty of Prop. 22

[AB 5](#), which was signed by California Governor Gavin Newsom on September 18, 2019, creates a presumption of an employee-employer relationship unless workers engaged as independent contractors meet the elements of the "ABC" test. The ABC test requires that an independent contractor (a) be "[free from the control](#)" of the hiring entity, (b) perform work "[outside the usual course](#)" of the hiring entities business, and (c) be "customarily engaged in an independently established trade, occupation, or business" that is the same as the services rendered. Although the ABC test is simple on its face, AB 5 is not, because it is replete with exceptions for numerous categories of work that, based on their own individual standards, may instead be subject to

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the old common law test used prior to AB 5's enactment.

Technology transportation companies were not the beneficiaries of one of those exceptions, even though they viewed employment status as incompatible with their business model. In an October 2020 [blog post](#), Uber CEO Dara Khosrowshahi predicted that over 900,000 Uber drivers would no longer be able to drive if Uber was forced to treat drivers as employees. Thus, Uber, Lyft, and other technology transportation companies publicly refused to comply with AB 5 even after it went into effect in January 2020.

At the same time, these companies also decided to go directly to voters to create their own exemption from AB 5, pouring nearly \$200 million into funding the campaign initiative. Proposition 22, provides that, notwithstanding any other provision of law, an app-based driver is an independent contractor, provided that he or she meets certain minimum requirements, which include the following:

**1) Don't Schedule Me!** The hiring company may not mandate specific dates, times of day, or a minimum number of hours which the driver must be logged into the company's application. The driver may not be required to accept any specific rideshare service or delivery request.

**2) Don't Control Me!** The company may not restrict the driver from performing rideshare services or delivery services through other network companies (except during engaged time) or from holding any other lawful job.

**3) Don't Underpay Me!** The company must ensure that the driver earns a certain minimum amount, specifically, 120% of the applicable minimum wage, plus compensation for mileage for all "engaged" time.

**4) Don't Leave Me Hanging!** The company must provide a quarterly health care subsidy as well as occupational accident and accidental death insurance for certain drivers.

**5) Don't Overwork Me!** The drivers are limited to working 12 hours in any 24-hour period unless the driver has logged off for an uninterrupted period of 6 hours.

**6) Don't Terminate My Contract For No Reason!** The company must enter a written contract with the driver and may not terminate the contract unless based on a ground specified in the contract.

Further, while antidiscrimination laws usually only cover employees, this proposition makes it unlawful to discriminate against the independent contractor driver on the basis of race, color, ancestry, sex, gender, and other protected categories. The proposition also requires the hiring company to develop a sexual harassment policy to protect the drivers and users of the apps. The company is required to conduct (or hire a third party to conduct) a criminal background check for each driver and is also required to mandate safety training for its drivers.

## On the Horizon

In the short run, Proposition 22 will enable technology transportation companies to continue to operate using independent contractor drivers with the additional protections and benefits the new law requires. There is very little the legislature can do to amend or repeal the law: any amendment would require either a seven-eighths legislative supermajority or a new ballot initiative, and repeal could only be achieved through a new initiative.

Proposition 22 is limited to the transportation technology companies; the rest of the business community will still need to comply with AB 5. The newly-approved ballot measure only adds to an

already complex patchwork of exceptions to the law which are far more intricate than the underlying legal standard itself. Earlier this year, the legislature enacted [AB 2257](#), which we covered in a [previous post](#), that expanded and clarified some of the existing exceptions. The question remains whether more exceptions to AB 5 are on the way. Several large industries have still not obtained their own exceptions to the law, and may be expected to step up their own lobbying efforts or go to the voters themselves in the wake of Proposition 22's success.

Proposition 22 may also portend changes beyond California. While California's model of direct democracy does not exist in many other states, Proposition 22 provides a template for similar legislation in other states. Technology transportation companies may pursue similar legislation in other jurisdictions like Massachusetts, which already follows the ABC test, or New York, where legislators are considering enacting a law similar to AB 5. It remains to be seen whether the technology transportation companies will have the same ability to enact their own scheme in other states.

For now, however, the technology giants have notched a major win in their biggest market. In the meantime, we continue to watch the horizon for further developments in AB 5.

If you have questions about how these proposed changes may impact your workplace, contact your Akerman attorney.

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