

Rigging the Gig:

How Uber, Lyft, and DoorDash's Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers

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CONTENTS

- I. EXECUTIVE SUMMARY.....1
- II. INTRODUCTION..... 3
- III. A CLEAR TEST TO STOP MISCLASSIFICATION..... 6
 - A. Codification of *Dynamex* in Assembly Bill 5 7
 - B. A Tried and True Approach: Deny, Delay, Defeat..... 7
- IV. PROPOSITION 22 IN DETAIL 9
 - A. Proposition 22 helps exempt app-based transportation and delivery companies from a broad swath of California law, not just AB 5..... 9
 - B. The proposed benefits in Proposition 22 are far weaker than those available under current law. 10
 - 1. Wages and Expense Reimbursement..... 10
 - 2. Health Benefits 12
 - 3. Workers’ Compensation and Accident Coverage..... 13
 - 4. Paid Leave..... 15
 - 5. Unemployment Insurance 16
 - 6. Employment Discrimination 17
 - 7. The Right to Organize 19
 - 8. Occupational Safety and Health 20
- V. A NEAR PERMANENT, TAKE-IT-OR-LEAVE-IT BARGAIN 21
 - A. Proposition 22 contains harmful lock-in mechanisms that will prevent any changes to the law and that undermine democratic will and good governance. 21
 - B. Other provisions in Proposition 22 are equally aggressive at entrenching the deregulation of these companies. 22
 - 1. Applying the Lock-in Mechanisms to Other Legislation..... 22
 - 2. Near Complete Preemption of Local Regulation..... 23
 - C. The lock-in mechanisms, compared to recent propositions, are unprecedented. 23
- VI. CONCLUSION..... 24

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I. EXECUTIVE SUMMARY

FOR MANY, WORK IS A SOURCE OF DIGNITY, IDENTITY, AND PURPOSE – a way to provide for a family and support a community. All work should be safe, free from discrimination, and provide a fair wage. Yet, however many times app-based companies like Uber, Lyft, Instacart, DoorDash, and Postmates profess to be “the future of work,”¹ it’s becoming clearer than ever that workers at the core of their businesses have been – and continue to be – shortchanged and exploited.

These companies have promoted their platforms as a way to earn a living while maintaining flexibility and freedom. **But in the face of COVID-19, this exchange has proven completely one-sided.** These companies pocket billions by misclassifying their workforce as independent contractors while blocking them from accessing basic workplace protections.

Here in California, however, the courts, the executive branch, and the legislature have spoken in one clear voice: these workers are employees under California law entitled to the same benefits and protections enjoyed by all California employees. Recent legislation simplified the misclassification test and explicitly extended worker protections to a broad swath of the state’s workforce.

Yet, having failed to obtain an exemption from this legislation and in the face of mounting legal challenges **these companies are funding a deceptive and dangerous ballot initiative – Proposition 22 – that would close off decades of protective labor and anti-discrimination laws in California for their workers.** The initiative – entitled the “Protect App-Based Drivers and Services Act” – would grant app-based transportation and delivery companies a complete exemption from AB 5, freeing them from complying with California’s labor laws (which they have flouted since their founding) and signaling that corporations can establish a permanent class of unprotected workers.

This tactic is part of a broader national strategy to interfere with state policy and preempt local governments when they seek to regulate these app-based corporations.² In fact, companies like Uber and Lyft have followed the well-worn path cut by gun and tobacco industries to manufacture crises, spread misinformation about the need for “uniform regulation,” and deploy deceptive lobbying campaigns that have persuaded more than half of state legislatures to exempt them from state labor laws.³

Proposition 22 directly imperils economic stability for people of color working on the app platforms. A recent survey found that 78 percent of their companies’ front-line workforce are Black, Latinx, Asian, or multi-racial (and more than half are immigrants).⁴ Workers of color face disproportionate and racist barriers to stable employment, housing, and education and are left with precious little choice but to accept the low-wage, unsafe, insecure conditions of app-based work. While the companies like to portray their workers as enjoying independence from the exclusions of the “traditional” economy, they are perpetuating the same occupational segregation that shunts workers of color into low-quality jobs while their white counterparts enjoy access to more gainful employment.⁵

Simply put, a yes vote on Proposition 22 would create a permanent underclass of workers in a growing sector of the economy and allow these companies to:

1. **Aviod** ever paying for overtime, critical work expenses (such as full mileage reimbursements or cell phones), or even the state’s minimum wage, resulting in as much as \$500 in lost wages per worker, per week;
2. **Discriminate** on the basis of immigration status while severely weakening existing discrimination and harassment protections;
3. **Deny** workers health or income protections if they are hurt on the job;
4. **Prevent** workers from accessing a single day of California paid sick or family leave or the unemployment benefits many need during the COVID-19 pandemic.

The companies are working hard to sell this one-sided deal, describing the meager benefits offered in the proposition – such as a “guaranteed” wage floor or limited mileage reimbursement – as “historic.” But, as explained in this report, if the measure passes, workers would not only stand to be paid sub-minimum wages, but would have a host of worker protections to which they are now entitled stripped away.

Moreover, if enacted, the measure would prevent local governments from protecting their communities by overriding nearly every local law that would conflict with the ballot measure. This includes many emergency laws put into place to protect workers in the face of COVID-19. Finally, the measure would all but eliminate the ability of the state’s elected representatives to ever change the law or enact new laws that might affect the companies. For example, any amendment to the law requires a 7/8ths vote of the Legislature; an insurmountable threshold. These “lock-in” mechanisms only further insulate these corporations from accountability to our basic democratic system of laws and institutions.”

As described in this summary table and reflected in more detail in the report, Proposition 22 is regressive and deeply harmful, and should be rejected by voters.

— Snapshot of Current App-Based Worker Protections Compared to Prop 22 —

	Under Current State and Federal Law	Under the Ballot Proposition
Wages	Clear minimum wage; guaranteed overtime (150% of wages for work over 8 hours in one day, 40 hours in one week)	No overtime; sub-minimum wage likely
Expense Reimbursement	All expenses reimbursed (mileage, cell phones, car cleaning, etc.) – standard IRS rate is over 57 cents per mile	Thirty cents per mile, but only mileage expenses for “engaged” miles (e.g., no reimbursement for time without package/passenger)
Workers’ Compensation	No-fault coverage for work-related injuries	Limited health coverage; not “no-fault;” easier for insurers to deny coverage
Paid Family Leave	8 weeks of paid leave	None
Paid Sick Days	Three days of paid leave for illness or care of family – up to 10 in some cities; additional COVID-19 leave in some cities	None
Unemployment Compensation	Up to 26 weeks of cash benefits after no-fault job loss	None
Disability Insurance	Lifetime access to wage replacement if injured	Limited – caps total coverage for 104 weeks
Health Insurance	Access to federal benefits under the Affordable Care Act	Limited – calculated based on “engaged” time, reducing the benefit amount
Discrimination	Protection against discrimination based on a broad set of characteristics	No explicit protection against discrimination based on immigration status
Right to Organize and Collectively Bargain	Could be created under state law	None – and may only be afforded if state passes legislation by 7/8ths majority which is nearly impossible
Protection from Retaliation	Protection from termination or discipline for reporting harassment, discrimination, or wage theft	None
Health and Safety	Requirements put in place injury prevention plans; give workers access to sanitation facilities	No similar requirement

II. INTRODUCTION

FOR YEARS, APP-BASED COMPANIES, SUCH AS UBER AND LYFT, have been selling a lie. They claim to have revolutionized work, enabling individuals to pick up some side income or earn a full-time living on their own terms. Yet, the recent coronavirus pandemic has revealed the truth: years of venture-capitalist-funded growth have been fueled by artificially low labor costs that leave every single worker on these platforms at risk. Their business models more closely resemble 19th century sweatshops than 21st century innovation.

This is because these companies have spun the courts, twisted state legislatures and local governments, and dizzied the public into thinking that drivers and delivery persons were so-called “independent contractors,” akin to independent business owners.⁶ As they slapped this label on workers, the companies proceeded to avoid and undermine nearly every labor protection on the books, pocketing hundreds of millions of dollars in the process⁷

Far from the entrepreneurial opportunity advertised by the companies, “gig” work is a race to the bottom that preys on the desperation of people with little choice but to accept the terms of insecure, low-paying, unsafe work. It is no



coincidence that Black and Latinx workers who face racist obstacles to entering the “formal” economy – with decent wages and benefits - are overrepresented on the app platforms.⁸ Yet the app-based economy is no escape from entrenched racism. It is age-old occupational segregation packaged in a new gloss of micro-entrepreneurship. If workers of color are “their own boss” on these platforms, it is a cruel irony that they have been made to reproduce the conditions that perpetuate vast wealth gaps between themselves and their white peers. All the while, the companies amass their dazzling wealth by avoiding any and all obligations to their employees.

The current unemployment crisis exemplifies the unfair conditions for people working on the platforms. First, these app-based companies refused to report wage data to California or pay into the state’s unemployment insurance fund (a practice that has saved Uber and Lyft a combined \$413 million since 2014).⁹ As a result, their workers – who face unprecedented rates of unemployment due to the pandemic – are being denied state unemployment benefits.¹⁰ All the while, companies like Uber used the crisis to lobby the federal government to create a taxpayer-funded bailout for their unemployed workforce¹¹ and simultaneously demand that California keep workers from accessing state benefits.¹²

Moreover, in the midst of this pandemic, Uber, Lyft, and other companies have also fought to keep workers from accessing California’s paid sick leave benefits¹³ and skirted around their obligation to provide basic safety protections to workers.¹⁴ This is in addition to years of avoiding paying overtime wages to drivers putting in 50-hour workweeks, foisting business expenses onto workers – such as car repairs and mileage expenses – and denying workers’ compensation protection for on-the-job injuries.¹⁵

The sheer scope of the companies’ mendacity led all three branches of California’s government to take a series of landmark legislative and legal actions to make clear that, in this state, corporations cannot deny workers basic protections just by calling them independent contractors. With the passage of Assembly Bill 5 last year, app-based transportation and delivery companies must now reckon with a legal test that clearly designates their workers as employees under much of California law, opening up crucial labor protections at a moment when these workers need them the most.¹⁶

State and local officials have begun to enforce the new law. In San Diego, a Superior Court judge sided with the City Attorney and ordered the delivery company Instacart to refrain from misclassifying its workers.¹⁷ Similarly, the District Attorney in San Francisco filed a recent lawsuit against DoorDash alleging that the company has engaged in unfair business practices by misclassifying its delivery workforce.¹⁸ And, in a landmark lawsuit filed in May 2020 by California’s Attorney General and the City Attorneys from three of the state’s largest cities, the state of California is seeking to put an end to the unlawful misclassification schemes used by Uber and Lyft.¹⁹

Yet, having failed to obtain a special exemption from state law and facing the ongoing legal challenges described above,²⁰ five of the largest app-based companies – Uber, Lyft, Instacart, Postmates, and DoorDash – have committed more than \$110 million²¹ to support the “Protect App-Based Drivers and Services Act.”²² **This ballot measure is designed to:**

- **Overturn** AB 5 as it relates to these app-based companies;
- **Exempt** transportation network and delivery network companies from broad swaths of California law such as overtime, discrimination protections, or sick leave (which they have flouted since their founding);
- **Completely prevent** future elected officials from amending the law; and
- **Override** local governments to stop them from regulating these companies or protecting their communities.

The companies supporting this initiative have described the effort as simply a means to protect flexibility and “[improve] the quality of on-demand work.”²³ However, as described in more detail below, **the effort is more accurately described as a coordinated attempt to permanently deregulate the industries in which these companies operate.**²⁴



Moreover, the ballot initiative reveals the companies’ hypocrisy as they publicly announce corporate support for racial justice. Following the mass movements against police violence and repression, Uber – the industry leader in dispossessing workers of their rights under the law – tweeted that they “stand for racial justice”²⁵ and announced that they would waive delivery fees for Black-owned businesses (a largely empty gesture as restaurants reported that Uber Eats continued to charge them a 30% fee on each order).²⁶

Yet, the ballot initiative for which Uber has committed \$33 million would strip Black workers of critical workplace rights that provide financial stability, including paid sick leave, broad anti-discrimination protections, and a pathway to organizing. **Proposition 22 is directly at odds with the Movement for Black Lives’ Economic Justice platform, which calls for “[t]he right for workers to organize in public and private sectors especially in ‘On Demand Economy’ jobs.”**²⁷

What follows is a description of the current legal landscape, how Proposition 22 fits into an overall corporate interference campaign, and how the ballot initiative would strip workers of critical protections to which they are currently entitled while offering meager and illusory benefits in return.



III. A CLEAR TEST TO STOP MISCLASSIFICATION

The *Dynamex* Opinion

ON APRIL 30, 2018, IN A UNANIMOUS OPINION AUTHORED BY THE CHIEF JUSTICE, the California Supreme Court clarified the rules regarding independent contractor classification.

In *Dynamex Operations West, Inc. v. Superior Court*,²⁸ the court adopted the “ABC test” for determining when a worker is properly classified as an employee or an independent contractor.²⁹ This is an essential distinction, since many requirements under the law that benefit workers – e.g., sick leave, overtime, or expense reimbursement – only apply to “employees” and not independent contractors.



Dynamex

Unscrupulous employers stand to save thousands of dollars per worker every year by simply describing their workforce as one composed of independent contractors.

Thus, to ensure that workers are granted maximum protections under law, and that the employer does not evade its duties by obscuring the employment relationship, the court declared that a hiring entity has the burden to establish three elements: (A) the worker is free from the employer’s direction and control, (B) the work is outside of the “usual course” of the employer’s business, and (C) the worker is engaged in an independent trade, occupation, or business.³⁰ The hiring entity has the burden of meeting this test, and if *any* of these elements are not present, then the worker is properly classified as an employee, not an independent contractor.

The three-part test in *Dynamex* better implemented California’s wage and hour law than the multi-factor standard embedded in prior court rulings.³¹ And, it relied on the broad definitions the state had adopted to determine when a “hiring entity” employs a worker.³² In its opinion, the court in *Dynamex* recognized the significant costs that misclassification has on workers, businesses, and the state in the form of weaker workplace protections, unfair competition, and the loss of contributions to social safety net programs.³³



A. Codification of *Dynamex* in Assembly Bill 5

The central issue in *Dynamex* was the application of the ABC test to the state's wage orders, which govern minimum wages, overtime, and certain working conditions, such as meal and rest breaks.³⁴ Yet, the court left undecided the issue of the new test's application to the Labor Code and other areas of California law. This was significant, since many labor protections, including unemployment insurance or paid family leave, are not included in the state's wage orders.

To remedy this gap, the California legislature adopted Assembly Bill 5 to ensure that a stronger independent contractor test would stem the tide of misclassification and extend more protections to workers.³⁵ The legislature found a clear link between persistent misclassification (a phenomenon that reaches nearly every industry) and the "erosion of the middle class and the rise in income inequality."³⁶



The legislation, enacted after extensive lobbying and debate,³⁷ codified the three-part test announced in *Dynamex* and applied it to the state's Labor Code (which includes workers' compensation), the Unemployment Insurance Code (which includes disability insurance and paid family leave), and all of the state's wage orders.³⁸

The reach of California's ABC test, covering a broad array of workplace standards, is unique among the many states that use such a test; a fact that was cheered on by its supporters, but which raised the specter of liability and increased labor costs among those who rely on a misclassified labor force to operate.³⁹ Specifically, Uber, Lyft, Instacart, DoorDash, and Postmates – major app-based transportation and delivery companies that have relied on the labor of millions of "independent contractors" to sustain their business models – failed to gain the type of carve-outs or exemptions in the law that they have in other states.⁴⁰

B. A Tried and True Approach: Deny, Delay, Defeat

Without an exemption from AB 5, and having lost their fight in the legislature, these transportation and delivery companies now face a crisis for their business model. As has become clear since the law's enactment, the companies and their allies have orchestrated a multi-pronged strategy to stop AB 5's enforcement.

First, they have sought to deny the law's effect on their companies. For example, Uber's chief legal officer claimed that while AB 5 "certainly sets a higher bar for companies to demonstrate that independent workers are indeed independent," Uber can (somehow) satisfy the test.⁴¹ Yet, Uber's claim that its drivers are outside the course of its business because it is merely a platform has been nearly universally rejected by courts.⁴²

In addition, knowing that ongoing enforcement would be costly, the companies and their allies have attempted to delay the law's effect. Only days before AB 5 was to go into effect, Uber and Postmates filed an action in federal court to enjoin the enforcement of the law against them.⁴³ This effort has so far failed.⁴⁴ In fact, in early April, a federal court judge noted that AB 5 applied to Lyft (the defendant in the case) and that "any argument to the contrary is frivolous."⁴⁵ Indeed, "rather than comply with a clear legal obligation" to treat their drivers as employees for the purposes of state law, **"companies like Lyft are thumbing their noses at the California Legislature, not to mention the public officials who have primary responsibility for enforcing [AB 5]."**⁴⁶



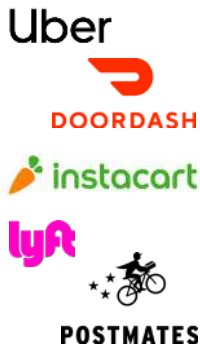
Recently, the companies appear to have pursued a similar effort with allies in the legislature. Assembly Member Kevin Kiley introduced AB 1928 and forced an urgent vote on the measure, which would have temporarily halted the effect of the new law.⁴⁷ The legislator claimed that the bill was intended to “simply put AB 5 on hold” while compromise legislation was introduced.⁴⁸ Despite the member’s effort to force a vote on the bill, the measure failed.⁴⁹

Indeed, these delay tactics come at the same time that enforcement efforts have intensified. Not only have thousands of workers filed complaints for unpaid wages with the state’s Labor Commissioner,⁵⁰ the Attorney General, along with the City Attorneys from three of California’s largest cities, filed a lawsuit challenging Uber and Lyft’s failure to comply with AB 5.⁵¹ In addition, the Public Utilities Commission in California – the agency tasked with regulating transportation network companies like Uber and Lyft – has confirmed that it will presume drivers to be employees, and will regulate the companies accordingly.⁵² And along with the enforcement action against Instacart in San Diego, the District Attorney in San Francisco recently filed a lawsuit seeking to end the misclassification of DoorDash delivery drivers using their enforcement powers under AB 5.⁵³

Without a stay from the courts, an exemption or delay from the legislature, or quick relief from state enforcement actions, the companies have taken the dramatic and costly step of seeking to pass a ballot measure Proposition 22 that reverses the effect of the law. As detailed below, while this measure would reverse AB 5 for these app-based companies, it goes much further, **effectively exempting these and other app companies from a broad swath of worker-protective laws, cementing this carve-out in place with no options for amendments or correction, and preempting local labor protections.**

IV. PROPOSITION 22 IN DETAIL

Background



RECOGNIZING THAT THE POLITICAL WINDS HAVE SHIFTED AGAINST

THEM and that the passage and enforcement of new misclassification laws will expose them to liability, five app-based companies have struck back with a ballot measure that all but eliminates regulation of their industry.⁵⁴

Proposition 22 – entitled the “Protect App-Based Drivers and Services Act”

– is supported with more than \$110 million from Uber, Lyft, DoorDash,

Postmates, and Instacart.⁵⁵ While promoted by the companies as a “historic” attempt to establish workers’ rights,⁵⁶ as detailed below, **the effect of the proposed initiative goes beyond AB 5 and is deregulatory, anti-worker, and undemocratic.**



A. Proposition 22 would exempt app-based transportation and delivery companies from a broad swath of California law, not just AB 5.

As described by supporters of the measure, the initiative is simply attempting to roll back recent policy changes related to the California Supreme Court’s decision in *Dynamex* and the state’s adoption of AB 5.⁵⁷ However, Proposition 22 would do far more.

The proposition would strip the legislature, state and local agencies, and the courts of the power to determine whether the companies’ workers are employees entitled to protections under current law. If a company meets a few minimum requirements,⁵⁸ then the employment relationship will be defined by the terms of a contract with the company and the provisions of the ballot initiative alone. Indeed, after this threshold finding, the employment relationship will be interpreted “[n]otwithstanding any other provision of law, including but not limited to the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations.”⁵⁹

Thus, if passed, **the proposition would have the effect of rolling back decades of court decisions, agency policy, and statutory law** related to the definition of the employment relationship. That means that not only would the companies be excused from complying with AB 5 and the holding in *Dynamex*, but judicial decisions establishing

the scope of the employment status of workers would no longer apply to app-based transportation and delivery workers.⁶⁰

The far-reaching implications of this change are staggering. Multiple state agencies, boards, and commissions are designated to protect workers' rights and would be stripped of jurisdiction to hear cases.⁶¹ Workers would be prevented from accessing key remedies that are designed as much to make workers whole as to prevent future violations by employers.⁶² But most worrisome, this change would put the companies in complete control of the employment relationship through their contracts, meaning an employee could be protected today but vulnerable tomorrow if the company changes the terms and conditions of their contract (which the worker is obliged to accept or risk losing access to the app they work on).

B. The proposed benefits in Proposition 22 are far weaker than those available under current law.

Proponents of the initiative counter by arguing that the benefits contained in the proposed initiative are designed to ensure freedom and flexibility while offering "historic" protections to workers.⁶³ However, the benefits contained in the initiative pale in comparison to what workers are entitled to under state law.

1. Wages and Expense Reimbursement

BOTTOM LINE ON WAGES AND EXPENSE REIMBURSEMENT:

Workers stand to make far less under Proposition 22 than under current law. Not only does the initiative contain no overtime protections for workers, it dramatically shortchanges them regarding mileage reimbursement, fails to fully reimburse them for other significant expenses – like cell phone plans or cleaning equipment – and pays \$0 for time spent driving without a passenger or package, which can be more than a third of the time a worker spends working on these apps. Moreover, the proposition would not include many basic workplace protections, such as access to meal and rest breaks, the right to a detailed pay stub, and much more.

The initiative establishes a base level of compensation for app-based transportation or delivery workers that consists of two factors: (a) 120 percent of the "applicable minimum wage" (the state minimum or its local equivalent) and (b) 30 cents per mile, adjusted for inflation after 2021.⁶⁴ However, both the minimum wage and mileage reimbursements are calculated and paid using "engaged time" or "engaged miles." This means that only the time spent by the worker after they accept and complete a ride or delivery request is paid, **not any time waiting for rides or delivery requests while logged on to the app and ready to work.**⁶⁵

Simply put, under the initiative, workers would be worse off than under California law. First, as recent studies (funded by the industry) have indicated, drivers spend as much as 37 percent of their time logged into a transportation app, but without a passenger.⁶⁶ This not only means that time without a package or passenger would go uncompensated under this measure,⁶⁷ but as a result, **drivers would be forced to work longer shifts** to make up for the loss.

Moreover, the initiative does not include a provision for overtime pay. Under state law, employers must pay workers 150 percent of the state or local minimum wage after working eight hours in one day or after working 40 hours in one week.⁶⁸ This means that full-time and part-time drivers in many major metropolitan areas in the state would make less

money under the ballot initiative, but would also stand to make *less than the current minimum wage* if the initiative succeeds (see Tables 1.1 and 1.2).

TABLE 1.1: Sample Minimum Wage Floor Under Prop 22 and Current Law; Full-Time Work

City/Minimum Wage	Current State Law	Ballot Measure	Difference
	Minimum Wage + 150% Overtime Premium for 50 Hour/Week (all hours)	120% of Minimum Wage for 50 Hour/Week (applying “engaged time”)	
San Francisco (\$15.59/hr)	\$798.99	\$589.30 (\$11.79/hr)	-\$209.69
San Jose (\$15.25/hr)	\$781.56	\$576.45 (\$11.53/hr)	-\$205.11
Los Angeles (\$14.25/hr)	\$730.31	\$538.65 (\$10.77/hr)	-\$191.66
San Diego (\$13/hr – same as CA Minimum)	\$666.25	\$491.40 (\$9.83/hr)	-\$174.85

TABLE 1.2: Sample Minimum Wage Floor Under Prop 22 and Current Law; Part-Time Work

City/Minimum Wage	Current State Law	Ballot Measure	Difference
	Minimum Wage for 25 Hour/Week	120% of Minimum Wage for 25 Hour/Week (applying “engaged time”)	
San Francisco (\$15.59/hr)	\$389.75	\$294.65 (\$11.79/hr)	-\$95.10
San Jose (\$15.25/hr)	\$381.25	\$288.23 (\$11.53/hr)	-\$93.03
Los Angeles (\$14.25/hr)	\$356.25	\$269.33 (\$10.77/hr)	-\$86.93
San Diego (\$13/hr – same as CA Minimum)	\$325.00	\$245.70 (\$9.83/hr)	-\$79.30

Finally, the initiative includes some mileage reimbursements for drivers (30 cents per mile), but it is far lower than what drivers are entitled to under state law.⁶⁹ The standard IRS mileage reimbursement rate for time spent driving is calculated at 57.5 cents per mile and does not rely on “engaged miles” to calculate the reimbursement.⁷⁰ This means if a worker is driving 22 miles per hour on average (as estimated by the California Air Resources Board)⁷¹ in a 40-hour workweek, they would stand to make about **\$287 less each week** under the ballot initiative compared to current law (see Table 1.3). Moreover, California law requires an employer to reimburse a worker for *all other* work-related expenses, such as the cost of the worker’s phone plan or necessary cleaning equipment, something that the ballot proposition fails to include.⁷²

TABLE 1.3: Sample Mileage Reimbursement Under Prop 22 and Current Law

Mileage Reimbursement	Current Law	Ballot Measure	Difference
	57.5 cents/mile X All Miles	30 cents/mile X “Engaged Miles”	
Full-time (40 hr/week, 22 miles/hr)	\$453.29	\$166.32	-\$286.97
Part-time (25 hr/week, 22 miles/hr)	\$305.71	\$103.95	-\$201.76

If passed, Proposition 22 would also completely exempt the companies from standard wage and hour protections that workers in California enjoy, including, but not limited to:

- Protected meal breaks at work;⁷³
- Paid rest breaks;⁷⁴
- Access to detailed wage stubs with standardized information;⁷⁵
- Protections against certain unlawful withholding from wages;⁷⁶
- One day of rest every seven days;⁷⁷
- Immediate payment of wages on discharge⁷⁸ or resignation; and⁷⁹
- Semi-monthly wage payments.⁸⁰

2. Health Benefits

BOTTOM LINE ON HEALTH BENEFITS:

Proposition 22 would appear on its face to offer new health benefits to app-based workers, but makes accessing these benefits harder than advertised and offers paltry compensation towards a worker's actual premiums. The initiative would reduce the companies' legal obligations significantly by lowering the benefits they are required to offer and increasing the hours a worker must spend driving or delivering goods before they get covered.

Under Proposition 22, some app-based transportation or delivery workers would have access to healthcare subsidies to buy health insurance on the California exchange (i.e., Covered California). As the text of the proposition would suggest, the companies would reimburse drivers for 100 percent of premium expenses if they drive more than 25 hours a week, or 50 percent if they drive between 15-25 hours a week.⁸¹

However, the definitions, buried deep in the initiative, actually reduce payments considerably in two key ways:

- By using the definitions section to ensure that the maximum benefit is actually 82 percent of an average premium payment for the lowest-cost healthcare plan on the Covered California insurance exchange, not a worker's actual premium expenses, and⁸²
- Requiring that hours worked in order to qualify for coverage come from "engaged time," defined the same way as the section on minimum compensation.⁸³

Thus, the measure not only obscures the actual premium assistance on offer, but would require that the worker drive, on average, 37 percent more time than the threshold in the initiative to receive premium assistance (because it relies on the same measure of "engaged time" as used to calculate wages).⁸⁴ This means an app-based transportation or delivery driver would actually have to work more than 39 hours a week to get 82 percent of an average premium payment (not their *actual* premium expenses) or approximately 24-39 hours a week to receive 41 percent of the premium payments, all pegged to a low-cost health insurance plan on Covered California (see Table 2).

TABLE 2: Effect of “Engaged Time” on Health Benefits Access Under Prop 22

	Health Premium Coverage as Suggested by the Initiative	Actual Hours Needed for a Worker to be Covered (counting “Engaged Time”)	Actual Premium Contribution (applying the initiative’s deceptive definition)
Full-Time Worker	100% of “Average ACA Contribution” for >25 hours of work	39.6 Hours per week	82% of “Average ACA Contribution” not a worker’s actual premium expenses
Part-Time Worker	50% “Average ACA Contribution” for 15-25 hours of work	23.8-39.6 Hours per week	41% of “Average ACA Contribution” not a worker’s actual premium expenses



3. Workers’ Compensation and Accident Coverage

BOTTOM LINE ON WORKERS’ COMPENSATION AND ACCIDENT COVERAGE:

Proposition 22 would eliminate benefits that workers are entitled to if they are injured on the job and replaces them with inferior protections. For example: coverage can be denied – or left in doubt – if a company says a driver was at fault (in contrast to the current “no-fault” system); disability benefits, available for life under current law, are capped; and the initiative indicates that drivers may be required to pay for their own occupational injury policy, which is not permissible under the state program already in place. Worse, if workers dispute their injury award – or are denied – they bear the entire cost of litigating their claim and obtaining evidence.

As drafted, Proposition 22 would require app-based transportation and delivery companies to provide occupational accident insurance to cover injuries, as well as disability payments that would cover 66 percent of a worker’s earnings for up to 104 weeks.⁸⁵ The initiative would also extend accidental death coverage to families of drivers who die while

logged into their app.⁸⁶ Finally, automobile insurance coverage is included, but only extends to third-party injuries, not the driver's injury or damaged vehicle.⁸⁷



First, regarding accident coverage to workers under the initiative, the benefit is only available to those who are online (i.e., logged into the app, regardless of whether they have a passenger or delivery).⁸⁸ The initiative would require up to \$1 million in coverage for medical expenses and two years of disability benefits as described above. Yet, glaringly, the initiative fails to detail whether the insurance coverage would be offered on a no-fault basis. This likely deliberate omission allows the companies to offer insurance under which workers who are injured and seek coverage could be denied if the insurance carrier can show that the worker was even partially at fault. Further, the coverage offered in the initiative can be denied by the carrier if the worker was online, but “engaged in personal activities,” providing a convenient way to narrow the coverage while providing an easy excuse to deny benefits.⁸⁹

This is in stark contrast to California law, which requires an employer to carry workers' compensation coverage to insure workers in case of injury that occurs on the job, at no cost to

the worker.⁹⁰ Indeed, the coverage extends to workers even if they are engaged in minor detours at work (unlike the vague “personal activities” standard in the initiative).⁹¹ And, most importantly, the benefits are offered on a “no-fault” basis, meaning every injury arising out of work is covered.⁹²

In addition, the measure would seem to allow a company to foist the cost of occupational injury and disability insurance onto the worker. The operative language states that an app-based delivery or transportation company may not operate unless it “carries, provides, or otherwise makes available” the insurance coverage options in the initiative.⁹³ This phrasing is seemingly intentional, given that the preceding section on health benefits would clearly require the company to pay for premiums, however meager. Because we won't have the benefit of an extensive legislative inquiry or expert testimony, we're left to wonder what this section actually means for workers who may simply be offered coverage options that they have to pay for out-of-pocket.

Further, both existing state law and the ballot measure provide for temporary disability payments. But current law gives permanently disabled workers a benefit for life;⁹⁴ the ballot measure caps disability payments at 104 weeks.⁹⁵ Current workers' compensation law has no cap on medical expenses;⁹⁶ the ballot measure, as described above, caps medical expenses at \$1 million.⁹⁷ Current law allows for vocational retraining for some workers; the ballot initiative contains no such provision. And while Section 7455 of the initiative refers to death benefits for surviving children, those benefits are in Labor Code Section 4703.5, which is not referred to in the initiative.⁹⁸

Finally, as is true with other provisions of this initiative that strip enforcement power from state agencies, Proposition 22 takes jurisdiction away from the Workers' Compensation Appeals Board. This means that if there is a dispute (and the worker's claim is not compelled to private arbitration), workers must take their claim to Superior Court. This is significant: filing fees and the costs of obtaining subpoenas to gather medical records or obtain forensic reports about an injury are generally borne by the workers' compensation insurance carrier;⁹⁹ here, if workers have to file in Superior Court, they shoulder all expenses of pursuing their claim, which could easily be thousands of dollars.¹⁰⁰

TABLE 3: Summary of Workers' Compensation Differences Under Prop 22

Existing State Law	Under the Ballot Proposition
Temporary disability	Temporary disability
No cap on medical expenses	Medical expenses capped at \$1 million
Permanent disability benefit for life for workers who are 100% disabled	No permanent disability benefit
Vocational retraining	No vocational retraining
Death benefits cover decedent's children under age 18	Death benefits do not appear to cover decedent's children
No cost administrative process via Workers' Compensation Appeals Board	If benefits disputed, worker must file a complaint in Superior Court and pay all costs

4. Paid Leave

BOTTOM LINE ON PAID LEAVE:

Workers, no matter what they do, will at some point need to take time away from work to care for themselves or a family member. Rather than enable this crucial flexibility, Proposition 22 is completely silent on leave protections. The initiative fails to offer paid or even unpaid leave for workers who might need to go to the doctor, care for a family member, or bond with a new child. What's worse, the ballot initiative would override local paid sick leave laws, particularly those that extend emergency leave to workers during the COVID-19 crisis.

Nearly 18 million employees in California pay State Disability Insurance taxes, which provide, among other things, access to Paid Family Leave (PFL).¹⁰¹ The program offers wage replacement to workers – between 60 and 70 percent of wages – for up to eight weeks in any 12 month period, to care for a sick or injured child, spouse, parent, grandparent, grandchild, sibling, or domestic partner, or to bond with a new child.¹⁰² The ballot initiative provides no paid family leave to workers for these purposes.

Moreover, the California Family Rights Act provides 12 weeks of unpaid, job-protected leave to workers to care for a family member or bond with a new child.¹⁰³ Many workers take this leave along with their PFL benefits so that they have income protection and can reliably return to their jobs. The ballot initiative contains no protections for workers taking unpaid leave.

Under current state law, employers are also required to offer paid sick days to employees. California's paid sick leave is accrued at the rate of one hour for every 30 hours worked, and workers may use 24 hours over the course of a year (or three days).¹⁰⁴ Many cities in California have even more generous programs that entitle employees to accrue up to 80 hours of sick leave (or 10 days). Indeed, in response to the COVID-19 pandemic, major cities in California have extended emergency paid sick leave to workers, and the governor has ensured that essential food sector workers across the state – specifically including app-based food delivery drivers working for companies such as DoorDash, Instacart, UberEats, and Postmates – have access to 80 hours of sick leave during the pandemic.¹⁰⁵

Yet, Proposition 22 provides for no paid time off for workers for any reason, a glaring omission given the crisis facing rideshare and delivery drivers, many of whom are considered “essential” workers. Although some app-based companies have created limited sick leave benefits to respond to this crisis, these plans are voluntary and temporary, and cannot be added to this initiative before voters can weigh in on the ballot measure.

TABLE 4: Summary of Paid Leave and Job Protection Differences Under Prop 22

Paid Time Off Under Existing Law	Paid Time Off Under the Ballot Proposition
Paid family leave: 60 to 70 percent of wages for up to six weeks within any 12-month period.	No paid family leave
Paid sick days at regular rate of pay; one hour accrued for every 30 hours worked; worker may use 24 hours in a year. In some cities, may use 40-72 hours (with a temporary COVID-19 related 80 hours of sick leave for essential workers in some cities)	No paid sick days

5. Unemployment Insurance

BOTTOM LINE ON UNEMPLOYMENT INSURANCE:

Workers may lose their job through no fault of their own, as is evident during the COVID-19 pandemic. When that happens, unemployment insurance fills the gaps, providing a lifeline for workers. Rather than provide job loss protection for workers, Proposition 22 is silent on this issue. Since workers would be treated as independent contractors, they would be completely prevented from accessing California unemployment insurance.

California, like every other state in the country, has an unemployment insurance system that pays a portion of lost wages to workers who are unemployed or underemployed (e.g., had their hours reduced) through no fault of their own. To qualify for benefits, a worker must have sufficient recent work history as an employee, and be able to work, available for work, and actively seeking work.¹⁰⁶

This is a permanent component of the social safety net to which employers contribute via payroll taxes.¹⁰⁷ Workers who are fired from jobs are often eligible, and workers who quit work with “good cause” are eligible as well, including workers who leave jobs because they have been subject to sexual harassment or due to compelling family circumstances.¹⁰⁸ Workers who lose part-time jobs are similarly eligible.¹⁰⁹

Proposition 22 includes no provision for compensation for workers who lose their jobs through no fault of their own, including workers who are “deactivated” from their apps. And since the proposition would treat all app-based transportation and delivery company workers as independent contractors, they would be completely prevented from accessing traditional benefits. As many workers suffering from the COVID-19 pandemic can attest, these benefits make the difference between being able to make rent and buy groceries or going without.



6. Employment Discrimination

BOTTOM LINE ON DISCRIMINATION:

If approved by voters, Proposition 22 would radically turn back the clock on discrimination protections in the workplace. For example, the initiative would exclude immigration status as a protected characteristic. In addition, the initiative would undermine compliance by creating various “processes” for harassment or discrimination reporting, without detailing how a worker could seek or obtain remedies. Worse, the initiative would strengthen defenses these companies can rely on to justify their discrimination and would provide no protections for workers harassed by passengers in the rideshare context.

The initiative notes that the employment relationship will be defined solely by a written agreement between the company and the worker.¹¹⁰ A worker may not be terminated except on grounds contained in the contract, and any worker will be able to access an “appeals process” if terminated by the company.¹¹¹ The initiative would make it an “unlawful practice” to refuse to contract with, terminate, or deactivate a worker based on certain characteristics.¹¹² Yet, the protections offered by Proposition 22 amount to a pale, likely unenforceable imitation of the discrimination provisions in California law.¹¹³

First, the initiative makes no mention of protections against discrimination based on immigration status, protections that are covered in California’s Labor Code¹¹⁴ and that are of clear importance to immigrants who make up as much as half of the platform-based workers in major cities in California.¹¹⁵ California law also protects workers from discrimination for taking time off for court appearances as victims of crime, jury duty, and to appear in school with their children,¹¹⁶ but the initiative offers no protection from discrimination for these reasons.

Second, while the initiative promises other anti-discrimination and sexual harassment protections, it does not clearly include any effective mechanism for the enforcement of those protections. It refers to “procedures” under the Unruh Civil Rights Act, but does not refer to the actual process and remedies section of that law.¹¹⁷



In particular, for sexual harassment protection, the initiative would require companies to establish a “sexual harassment policy” to be published on their website (without even mentioning what that policy must contain), and a “process” for workers or customers to submit complaints.¹¹⁸ The initiative’s provisions would only require a company to ensure that a worker reviewed the policy, which can be accomplished by “electronic confirmation.” It promises protection against retaliation, but only for sexual harassment claims.¹¹⁹

In addition, the initiative provides the companies an undefined “bona fide occupational qualification” (BFOQ) defense and an undefined “public or app-based driver safety need” defense that would justify the app-based company’s adverse employment action.¹²⁰ Under California law, the BFOQ defense is a narrow exception to the general prohibition on discrimination that an employer may assert where it has a practice that, on its face, excludes an entire group of individuals because of their protected status.¹²¹ By broadening this available defense, the initiative would make it much easier for app-based companies to evade their obligations under the law to prevent discrimination in the workplace.

— TABLE 5: Summary of Discrimination Differences Under Prop 22 —

Discrimination Protections Under Existing Law	Discrimination Protections Under the Initiative
Protection for discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.	Covers many of the same characteristics, but contains no apparent protections for immigration status and no specified enforcement procedures
The BFOQ defense is a narrow exception to the general prohibition on discrimination. Employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status.	Contains a very broad BFOQ defense. Also allows a defense for an undefined “public or app-based driver safety need”
Protections against retaliation for filing a claim of discrimination	No retaliation protections other than for sexual harassment
Protection against third-party harassment	No protection against third-party discrimination
Remedies include monetary and non-monetary damages	No apparent remedies for violations of discrimination, harassment, or retaliation protections





7. The Right to Organize

BOTTOM LINE ON THE RIGHT TO ORGANIZE:

App-based transportation workers have been determined not to be employees for purposes of federal labor law under a recent National Labor Relation Board (NLRB) ruling. That means California is free to develop its own laws that would allow for these workers to organize and collectively bargain with their companies while being protected from retaliation (which the state has extended to farmworkers excluded from federal labor law). However, Proposition 22, if passed, would eliminate this possibility and prevent workers from legally exercising their collective strength. Workers would continue organizing in spite of these limitations, but in the place of these rights would be thousands of individual contracts of adhesion that no worker would have the power to negotiate or change.

Federal law protects employees' right to collective action by providing a process for workers to select a bargaining agent, offering protection from retaliation and unfair labor practices, and requiring employers to bargain collectively with their employees.¹²² A recent General Counsel memo from the current Republican-dominated NLRB found that Uber drivers are not employees and are therefore not subject to the National Labor Relations Act.¹²³ This technical finding is crucial, since it means that drivers for these companies cannot join together and bargain for better wages and working conditions using the procedures and protections provided in federal law.

However, the Ninth Circuit Court of Appeals, in a case involving Uber and Lyft, held that states can establish their own collective bargaining regimes for workers who are not considered "employees" under federal law.¹²⁴ California has done just this for farmworkers, who are excluded from the protections of federal labor law, but can organize and collectively bargain under California law.¹²⁵

Proposition 22 would all but erase California's ability to protect app-based workers' rights to organize, by requiring that any statute that would allow any form of collective bargaining must be passed by a 7/8ths majority of the California legislature.¹²⁶ So while the initiative elevates the contract between the companies as essentially the only determinant of workers' rights, it takes away any real opportunities that workers have to affect the terms of that contract through collective action. Under the initiative, workers have no rights but those that the companies deign to bestow.

8. Occupational Safety and Health

BOTTOM LINE ON OCCUPATIONAL SAFETY AND HEALTH:

When it comes to the health and safety of app-based workers, Proposition 22's silence is damning. Not only would the initiative undo crucial workplace safety and enforcement provisions, it would allow the companies to turn a blind eye to injuries on the job and allow them to avoid making plans to correct them so they don't happen in the future. And at a very basic level, the ballot initiative would eliminate requirements to offer personal protective equipment or guarantee access to basic sanitation, leaving worker safety at the whim of corporate interests.

California law requires all employers to ensure a safe and healthy workplace. For example, all employers must develop and implement an Injury and Illness Prevention Program for all employees within the organization, including periodic assessment of new workplace hazards.¹²⁷ Proposition 22 would eliminate this requirement.

California law also requires that employers keep a log of work-related injuries and illnesses.¹²⁸ No such requirement is included in the initiative, though the Public Utilities Commission does require some reporting of accidents.¹²⁹

In addition, California law mandates that employers must ensure workers have access to toilets and washing facilities, but the initiative does not address workers' needs for bathroom facilities – a very basic but glaring omission.¹³⁰ Nor does the initiative include any indication that the companies will assess, address, or prevent workplace violence¹³¹ –



as recommended by CalOSHA guidelines – even though drivers and chauffeurs are frequent targets of workplace violence.¹³² Of special relevance during the COVID-19 pandemic, California law requires that companies assess the need for personal protective devices; however, the initiative is again silent on this issue.¹³³

The ballot initiative does include a requirement that drivers complete a safety training course, which is already required by existing law.¹³⁴ The training is an inadequate substitute for the protections offered by the California Occupational Safety and Health Code since it puts the companies in sole command of what safety and health

protections their workers receive. The initiative accomplishes this by eliminating both the substantive protections of the law,¹³⁵ such as protections against retaliation and discrimination,¹³⁶ and stripping jurisdiction from CalOSHA to investigate violations and assess penalties.¹³⁷

V. A NEAR PERMANENT, TAKE-IT-OR-LEAVE-IT BARGAIN

Locking Out Progress

AS DESCRIBED ABOVE, THE BENEFITS AND PROTECTIONS OFFERED THROUGH PROPOSITION 22 do not come close to what would otherwise be provided to drivers under current law. Since the companies face a significant uphill fight to satisfy all three factors of the ABC test – a result that a court in San Diego recently highlighted when evaluating Instacart’s business model¹³⁸ – it’s no wonder this initiative would attempt such a broad and deep re-writing of protective California law.

However, to ensure that its proponents are never again threatened with the prospect of protecting workers’ rights, the initiative contains aggressive and unprecedented provisions designed to lock-out any future debate about what drivers should be entitled to. **Combined, these tools make the initiative a long-term take-it-or-leave-it bargain that undermines workers’ rights and creates real harm to local communities.**



A. Proposition 22 contains harmful lock-in mechanisms that will prevent any changes to the law and that undermine democratic will and good governance.

First, in order for the legislature to pass an amendment to the proposed initiative in the future, the legislation must surpass a 7/8th roll call vote of all members in each house – an unprecedented super majority rule that is profoundly undemocratic.¹³⁹ To put this in context, no amendment to the law will pass if only 10 members of the 80-person Assembly or five members of the 40-person Senate fail to consent during the roll call vote. In practical terms, **this means there will likely be enough votes to permanently prevent amendments**, since AB 5 was passed over the objections of only 16 assembly members and 11 senators, more than enough to stop any amendments to the law.¹⁴⁰

Second, the ballot proposition would require that before any vote is taken on an amendment (before even applying the 7/8ths requirement), the bill must be printed in final form and presented to the members in both houses 12 business days in advance.¹⁴¹ This type of requirement artificially extends the legislative process and puts a near month-long pause on any amendment, increasing the odds that it doesn't meet legislative deadlines or is overcome by lobbying campaigns.

Third, even if the amendment can survive a 7/8th roll call vote and delay provision in each house, the proposed amendments to the law must still be "consistent with, and further the purpose of" the act, which the act itself defines.¹⁴² A "consistent" amendment means one that:

- Protects independent contractor status;
- Allows workers to set their own hours and time of work; or
- Generally seeks to promote worker "flexibility."¹⁴³

In addition, any amendment that would seek to alter the status of drivers as independent contractors or change any of the requirements for establishing independent contractor status would be considered per se inconsistent and thus **could not be modified**.¹⁴⁴



Finally, the initiative includes a grandfathering provision that would prevent the current legislature from preemptively regulating the companies before the initiative is even voted on by the people. The proposed Section 7465(b) states that no statute enacted by the legislature after October 29, 2019 that would have the effect of amending the initiative would be effective unless it meets the 7/8th roll call vote threshold, the 12 day waiting period, and is consistent with the purposes of the initiative, as defined by the initiative. Thus, this provision creates a phantom hand over the current legislature, potentially nullifying duly enacted legislation that does not comply with strictures of an as-yet-unpassed ballot initiative. All told, the result of the lock-in measures means that, with enough money, a small number of corporate actors can – literally – write the laws which govern their conduct and largely exempt themselves from democracy.

B. Other provisions in Proposition 22 are equally aggressive at entrenching the deregulation of these companies.

1. Applying the Lock-in Mechanisms to Other Legislation

While the provisions described above are broad and unprecedented hurdles to amending the initiative, they focus solely on the initiative itself. However, the proposition goes further and applies the 7/8th vote threshold, the delay provisions, and the consistency requirement to *any other legislation* that would:

- Prohibit app-based company from providing a service a non-app-based company provides or otherwise impose an "unequal regulatory burden" on app-based companies compared to similar competitors, e.g., put app-based companies at a disadvantage compared to taxi companies,¹⁴⁵ or
- Authorize an organization or entity to represent the interests of drivers in connection to their contracts or negotiations related to wages, benefits, or working conditions.¹⁴⁶

Simply put, these provisions would strip the legislature of its ability to make policy affecting these companies in critical areas. The initiative would not only supplant any government role regarding the employment relationship with the company, but also prevent unrelated restrictions on app-based services and directly interfere with – and permanently prevent the state from establishing – worker organizing rules.

2. Near Complete Preemption of Local Regulation

The final tool that enables a near complete deregulation of the app-based transportation and delivery industries is Proposition 22's local preemption provisions. The initiative declares that, "[i]n light of the cross-jurisdictional nature of . . . rideshare services and delivery services" and the plethora of "overlapping, inconsistent, and contradictory local regulations" the state must establish uniform standards.¹⁴⁷

By doing so, the measure would completely preempt a wide swath of local standards as they relate to app-based transportation and delivery workers. **Specifically, the initiative would prevent local governments from enforcing or adopting ANY policies related to:**

1. Compensation or gratuities;¹⁴⁸
2. Scheduling, healthcare subsidies or any other workplace "stipend, subsidy, or benefit;"
3. Licensing or insurance requirements, and
4. The rights that workers possess if their contract is terminated by the company (e.g., protections for workers terminated by the companies).¹⁴⁹

As should be apparent by this aggressive and near complete preemption, the provision is intended simply to stymie local policy innovation and protections. Indeed, the effort of countless advocates and millions of voters to pass historic sick leave protections in San Francisco and Los Angeles, for example, would be permanently nullified by this initiative for these workers.

What's more, cities around the state are responding aggressively to COVID-19 by passing expanded paid sick leave laws that would cover these app-based companies.¹⁵⁰ However, these laws would not be enforceable against these companies under the ballot initiative, nor would any additional regulations, such as a city using licensing requirements, for example, to ensure that public health measures are implemented by these companies.

C. The lock-in mechanisms, compared to recent propositions, are unprecedented.

A review of the last five years of ballot initiatives in California reveals that this combination of lock-in mechanisms is unprecedented.¹⁵¹ Prior ballot initiatives have contained modest limitations on the authority of state or local policymakers. For example, Proposition 67, passed by voters in 2016, helped usher in a ban on single-use plastic bags¹⁵² and preempted any local law that would seek to regulate the same single-use bags.¹⁵³ Proposition 7, approved by the voters in the 2018 general election, authorizes the legislature (if permitted by the federal government) to change daylight savings time.¹⁵⁴ This can only be accomplished by a two-thirds vote of the state legislature.¹⁵⁵



Proposition 11, passed by the voters, may be the most similar to this current ballot proposition. The initiative was advanced and passed by the voters in the 2018 general election, and was designed to exempt private ambulance companies from complying with California's meal and rest break regulations.¹⁵⁶ The measure can only be altered by the legislature so long as any amendment is consistent with the initiative and garners more than 4/5ths of the legislature's support.¹⁵⁷

However, some propositions unleash, rather than constrain, local control, such a Proposition 63, which increased threshold requirements for individuals to purchase firearm ammunition,¹⁵⁸ and Proposition 64, which legalized the possession, cultivation, and certain uses of marijuana.¹⁵⁹ Both initiatives, in turn, grant explicit authority to local governments to increase penalties on ammunition sales or transfers¹⁶⁰ or zone, license, or otherwise regulate marijuana dispensaries.¹⁶¹

Yet, of the 45 propositions reviewed by the authors since 2014, none contained an amendment threshold, local preemption, and broad statutory reach as aggressive as the ballot initiative proposed by these app-based companies.¹⁶²

VI. CONCLUSION

AS DESCRIBED IN DETAIL THROUGHOUT THIS REPORT, the “Protect App-Based Drivers and Services Act,” is clearly a misnomer. Far from protecting workers, the initiative strips away numerous critical worker protections and all but ensures a near-complete deregulation of the app-based transportation and delivery network industry.

By exempting the companies from workplace safety, anti-discrimination, wage and hour, and social safety net laws and simultaneously constraining the laws the state legislature or city governments can consider, these companies have created a noxious combination that serves only one purpose: **protect corporate wealth and power at the expense of worker health, safety, and dignity.**

This approach should not be a surprise to anyone familiar with the way these companies operate. For example, Uber alone employed more than 370 lobbyists in 44 states in 2016 to shape state laws and preempt or quash local initiatives.¹⁶³ Instead of presenting their ideas for negotiation, these companies issue ultimatums and are unwilling to compromise.¹⁶⁴ This effort fits a long pattern of corporate interference that has so far not held sway with California policymakers – likely the primary reason these app-based companies are presenting a misleading ballot proposition rather than complying with the law.

In fact, the State of California has responded to the intransigence of these companies and their continued misclassification in no uncertain terms. From the courts, to the legislature, to the executive branch, the state has declared that misclassification of app-based workers (much like misclassification in many other industries) should come to an end. To affirm this initiative now would not only enable the continued harm the companies have inflicted on their workers, but would set a pernicious new standard for corporations seeking their own path toward undermining worker protections.

The people who work for these companies deserve better.



Endnotes

- 1 “Uber and the American Worker: Remarks from David Plouffe,” Uber Newsroom (Nov. 4 2015) available at <https://www.uber.com/newsroom/1776/>.
- 2 See generally Joy Borkholder, et al., “Uber State Interference,” National Employment Law Project & Partnership for Working Families, 6 (Jan. 2018) (detailing how corporate lobbyists for Uber were able to write state laws in Oregon and Ohio that were incredible favorable to the company) available at: bit.ly/2SYgOUW.
- 3 *Id.*
- 4 Chris Benner, et al., “On-demand and on-the-edge: Ride hailing and Delivery workers in San Francisco,” Institute for Social Transformation, UC Santa Cruz (May 5, 2020) available at <https://transform.ucsc.edu/on-demand-and-on-the-edge/>.
- 5 For example, nearly 60 of Uber’s leadership is white, a pattern reflected in nearly every sector of the company’s employee workforce – from tech to support to operations. See “Diversity and Inclusion Report,” Uber Technologies, p. 17 (2019) available at <https://d1nyezh1ys8wfo.cloudfront.net/static/PDFs/Uber+D%26l+Report+2019.pdf>.
- 6 In fact, nearly a majority of states preempt local government authority to regulate local minimum wages, labor agreements, or paid sick days, and in more than half of those states, the law presumes that drivers for app-based companies are independent contractors and not employees who would otherwise be protected. This has been accomplished by the concerted efforts of Uber, Lyft, and others to avoid their obligations under the law. See Joy Borkholder, et al., “Uber State Interference,” National Employment Law Project & Partnership for Working Families, 10, 13, and 26 (Jan. 2018) available at: bit.ly/2SYgOUW (showing how such efforts at deregulation are specifically harmful to communities of color, which make up a majority of drivers who work for Uber and Lyft in many markets).
- 7 Cyrus Farivar, “Uber Really Doesn’t Want its Drivers to be Considered Employees,” *Ars Technica*, (Sept. 21, 2017), bit.ly/37DPs0i.
- 8 See “Electronically mediated work: new questions in the Contingent Worker Supplement,” U.S. Bureau of Labor Statistics (Sept. 2018) available at <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm> (observing that Black workers are 12.1 percent of the workforce, but 23 percent of in-person app workers, and Latinx workers are 16.6 percent of the workforce, but 18.5 percent of in-person app workers, i.e. Black and Latinx workers comprise less than 29 percent of the workforce, but almost 42 percent of workers on apps like Uber, Handy, Postmates, and Amazon Flex); see also Chris Benner, “On-demand and On-the-Edge: Ride hailing and Delivery workers in San Francisco,” Institute for Social Transformation, UC Santa Cruz (May 5, 2020) available at https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOnTheEdge_ExecSum.pdf (detailing survey results of San Francisco platform workers showing that 78% are people of color and 56% are immigrants); Joy Borkholder, et al., “Uber State Interference,” National Employment Law Project & Partnership for Working Families, p. 5 (Jan. 2018) available at: bit.ly/2SYgOUW.
- 9 Ken Jacobs and Michael Reich, “What would Uber and Lyft owe to the State Unemployment Insurance Fund?” UC Berkeley Labor Center (May 7, 2020) available at <http://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>.
- 10 Noam Scheiber, “Drivers Say Uber and Lyft Are Blocking Unemployment Pay,” *New York Times* (May 5, 2020) available at <https://www.nytimes.com/2020/03/24/business/economy/coronavirus-uber-lyft-drivers-unemployment.html>
- 11 Chris Mills Rodrigo, “Labor groups urge Congress to Reject Uber’s Push for New Labor Classification,” *The Hill* (April 8, 2020) available at <https://thehill.com/policy/technology/491880-labor-groups-urge-congress-reject-ubers-push-for-a-new-labor-classification>.
- 12 Sam Harnett, “Uber and Lyft Aren’t Paying for Drivers’ Unemployment: You Are, Confirms Newsom,” *KQED* (April 15, 2020) available at <https://www.kqed.org/news/11812496/uber-and-lyft-arent-paying-for-drivers-unemployment-you-are-confirms-newsom>.
- 13 See, e.g., *Rogers v. Lyft Inc.*, No. CGC-20-583685 (S.F. Superior Court 2020) (holding, on a motion for emergency injunctive relief, that Lyft may successfully deploy their arbitration agreements to prevent plaintiff drivers from asserting their right to paid sick leave in California).
- 14 Megan Rose Dickey, “Gig Workers Say They are Struggling to get Personal Protective Equipment from Companies,” *TechCrunch* (April 16, 2020) available at <https://techcrunch.com/2020/04/16/gig-workers-personal-protective-equipment/>.
- 15 See, e.g., Avi Asher-Schapiro “Uber Still Doesn’t Get it: Company Doc Reveals Flimsy Plan for Injured Workers,” *The Intercept* (June 28, 2017) available at <https://theintercept.com/2017/06/28/uber-but-for-workers-comp-companys-plan-neglects-injured-drivers/> (detailing Uber’s partnership with insurance providers to offer low-cost, optional coverage that would be paid for by workers).
- 16 See Assembly Bill 5 (Gonzalez), Ch. 296, Reg. Sess. 2019-2020 (Sept. 18, 2019).
- 17 *The People of the State of California v. Mapbear, Inc.*, Case No. 37-2019-00048731-CU-MC-CTL (Feb. 18, 2020) (order appealed by Instacart).
- 18 See *The People of the State of California v. DoorDash, Inc.*, Case No. CGC-20-584789 (June 16, 2020).
- 19 *The People of the State of California v. Uber Technologies, Inc.*, Case No. CGC-20-584402 (S.F. Superior Court, May 5, 2020).
- 20 As recent data on lobbyist spending indicates, Uber and Lyft spent more than \$1 million lobbying the state legislature – much of it no doubt an attempt to win an exemption from AB 5. See Cheryl Miller, “Uber and Lyft Spent More Than \$1M on State Lobbying in 2019,” *The Recorder* (Feb. 3, 2020) available at <https://www.law.com/therecorder/2020/02/03/uber-and-lyft-spent-more-than-1m-on-state-lobbying-in-2019/?srlreturn=20200117162528>.
- 21 While its official “Top Funder” list filed with the Secretary of State only lists Lyft, Uber Technologies, and DoorDash, both Instacart and Postmates have committed to spend \$10 million each to pass the measure. See “Official Top Funders,” California Secretary of State (Feb. 2020) available at <https://elections.cdn.sos.ca.gov/ballot-measures/top-funders/1883-top-funders-2-3-20.pdf>; see also “California App-Based Drivers Regulations Initiative (2020),” *Ballotpedia* (accessed Feb. 17, 2020), available at [https://ballotpedia.org/California_App-Based_Drivers_Regulations_Initiative_\(2020\)_detailing_the_spending_commitments_from_Instacart_and_Postmates_on_the_initiative](https://ballotpedia.org/California_App-Based_Drivers_Regulations_Initiative_(2020)_detailing_the_spending_commitments_from_Instacart_and_Postmates_on_the_initiative).
- 22 See Protect App-Based Drivers and Services Act (PADSA) (Dec. 9, 2019) (including statutory language to add Chapter 10.5 to the Business and Professions Code – Sections 7448-7467 – and amend Section 17037 of the Revenue and Taxation Code) available at: <https://www.oag.ca.gov/system/files/initiatives/pdfs/19-0026A1%20%28App-Based%20Drivers%29.pdf>.
- 23 PADSA, accessed on Feb. 17, 2020, available at <https://protectdriversandservices.com/>.
- 24 An ironic twist, given that the roots of the California ballot proposition come from efforts to place a check on corporate power and overreach. See “History of the Ballot Initiative,” *Ballot Initiative Strategy Center* (Sept. 12, 2012) available at: <https://www.youtube.com/watch?v=cJEM336UUQ&feature=youtu.be>.
- 25 Uber Technologies (June 2, 2020, 10:18 AM) available at <https://twitter.com/uber/status/1267868227394326530>.
- 26 Sissi Cao, “Despite Promise, Uber Eats Still Charges Black Restaurant Owners Big Fees,” *Observer* (June 10, 2020) available at <https://observer.com/2020/06/uber-eats-waive-black-restaurant-delivery-fee-not-helpful/>.
- 27 “Economic Justice,” *The Movement for Black Lives* (accessed on June 12, 2020) available at <https://m4bl.org/policy-platforms/economic-justice/>.
- 28 4 Cal. 5th 903 (2018) (“*Dynamex*”).
- 29 Under *Dynamex*, failing to establish any one of the three ABC factors would require that the worker be treated as an employee for the limited purpose of the state’s wage orders, which govern basic workplace protections like minimum wage, overtime, and meal and rest breaks. *Id.* at 943 *et seq.*
- 30 *Id.* at 957. Indeed, while the court adopted the ABC test from Massachusetts’ law, the factors have been a part of California law for decades. For example, when attempting to apply the “right to control test,” among the many factors are whether the employer had control over the time and place the work is performed, whether the worker was performing work that is not ordinarily in the course of the principal’s work, and whether the worker did labor that requires a particular skill or license. See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 350-51 (1989) (“*Borello*”).

- 31 *Id.* Indeed, misclassification cases that were successfully litigated ended up creating little change as the companies were able to adapt their business model to fit the flexible standard. See generally Veena Dubal, “Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy,” 2017 Wis. L. Rev. 739 (detailing successful efforts by FedEx and other defendants to avoid reclassifying their workforce as employees regardless of court rulings that found employee status). In addition, recent litigation against Uber was settled for \$20 million after their motion for summary judgment was denied; likely a decision by the company to avoid the risk of a jury or judge applying the *Borello* standard. See *O’Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015) (noting however that “Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs.... Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products. If, however, the focus is on the substance of what the firm actually does..., it is clear that *Uber is most certainly a transportation company*) (emphasis added). However, the tide may be shifting. The Third Circuit recently remanded a motion for summary judgment awarded in Uber’s favor on the issue of their worker’s employee status, noting that genuine disputes of material fact exist with regard to the company’s control over the workers and the worker’s ability to share in profit or loss under the Fair Labor Standards Act’s “economic realities” test. See *Razak v. Uber Technologies, Inc.*, Case No. 18-1944, *18-24 (3rd Cir. March 3, 2020). And in San Diego, a state court judge granted the City Attorney’s extraordinary request for a preliminary injunction to prevent Instacart from claiming their workforce consists of independent contractors. See *The People of the State of California v. Maplebear, Inc.*, Case No. 37-2019-00048731-CU-MC-CTL (Feb. 18, 2020) (order appealed by Instacart).
- 32 See *Martinez v. Combs*, 49 Cal.4th 35 (2010).
- 33 See *Dynamex*, 4 Cal. 5th at 913.
- 34 While there is a current debate about the reach of the holding in *Dynamex*, the court did not explicitly extend the application of the ABC test to more than the state’s Wage Orders.
- 35 Assembly Bill 5 (Gonzalez), Ch. 296, Reg. Sess. 2019-2020 (Sept. 18, 2019).
- 36 *Id.*
- 37 See, e.g., Cheryl Miller, “Gig Companies Set Lobbying Records Amid Fight Against Landmark Labor Bill,” *The Recorder* (Nov. 1, 2019) available at <https://www.law.com/therecorder/2019/11/01/gig-companies-set-lobbying-records-amid-fight-against-landmark-labor-bill/>.
- 38 See Cal. Lab. Code § 2750.3(a)(1).
- 39 For example, the test does not allow a hiring entity to meet its burden under the B prong by having a workforce that works outside of the business’ premises, as a hiring entity may do in New Jersey. See *Dynamex*, 4 Cal. 5th at 956, n.23. In addition, through AB 5, the reach of the ABC test extends to more worker protective laws than in other jurisdictions. See generally, Rebecca Smith, “Washington State Considers ABC Test for Employee Status,” National Employment Law Project (Jan. 2019) (providing a map indicating the states that apply the ABC test to some portion of their states labor laws) available at <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/>.
- 40 Joy Borkholder, et al., “Uber State Interference,” National Employment Law Project & Partnership for Working Families, 6 (Jan. 2018) (detailing how corporate lobbyists for Uber were able to write state laws in Oregon and Ohio that were incredible favorable to the company) available at: bit.ly/2SYg0UW.
- 41 Tony West, “Update on AB5,” Uber Newsroom (Sept. 12, 2019) available at <https://www.uber.com/newsroom/ab5-update/>.
- 42 Uber’s chief support for that claim (specifically that the company can meet the “B prong” of the test to show that drivers are outside the usual course of their business), comes from a Vermont State Department of Labor advisory opinion and two of Uber’s own private arbitration proceedings – hardly a compelling legal argument. *Id.*
- 43 See *Olson v. State of California*, 2:19-cv-10956 (C.D. Cal. Dec. 30, 2019); see also, Catherine Shu, “Uber and Postmates Claim Gig Worker Bill AB-5 is Unconstitutional in New LawsUIT,” *TechCrunch* (Dec. 30, 2019) available at <https://techcrunch.com/2019/12/30/uber-and-postmates-claim-gig-worker-bill-ab-5-is-unconstitutional-in-new-lawsuit/>.
- 44 *Olson v. State of California*, Case No. CV 19-10956-DMG (RAOx) (C.D. Cal. Feb. 10, 2020) (denying a motion to preliminarily enjoin the enforcement of AB 5 against the app-based plaintiffs).
- 45 *Rogers v. Lyft Inc.*, Case No. 20-cv-01938-VC, *4 (N.D. Cal. April 7, 2020).
- 46 *Id.* at *5.
- 47 Assembly Bill 1928, Reg. Sess. 2019-2020 (2020).
- 48 Andrew Sheeler, “Another AB 5 Showdown,” *The Sacramento Bee* (Feb. 27, 2020) available at <https://www.sacbee.com/news/politics-government/capitol-alert/article240664846.html>.
- 49 “Assemblyman Kevin Kiley’s Bill to Repeal AB 5 Fails to Receive Enough Votes,” *KUSI* (Feb. 27, 2020) available at <https://www.kusi.com/assemblyman-kevin-kileys-bill-to-repeal-ab-5-fails-to-receive-enough-votes/>. The member’s concern about the need to consider changes to the law seem contrary to his ardent and complete opposition to the law. Indeed, he and the co-sponsor of AB 1928 were the lead organizers behind a February rally in Sacramento aimed at urging for the law’s complete repeal. See Mike Wilcott, “AB5: Diverse Crowd Marches on California Capitol to Overturn ‘Gig Economy’ Law,” *East Bay Times* (Jan 29, 2020) available at <https://www.eastbaytimes.com/2020/01/29/diverse-crowd-rallies-to-attempt-to-overturn-ab5/>. More recently, Assembly Member Kiley has announced AB 2075, legislation that would institute a “grace period” to halt the enforcement of the law through 2020. See Katy Grime, “AB 5 ‘Grace Period’ Introduced in New Bill,” *California Globe* (March 5, 2020) available at <https://californiaglobe.com/section-2/ab-5-grace-period-introduced-in-new-bill/>.
- 50 For example, more than 4,000 workers filed claims against app-based transportation and delivery companies across California. See, e.g., Carolyn Said, “Uber, Lyft Drivers Tell State to Enforce AB5, Get us Back Wages,” *San Francisco Chronicle* (Feb. 5, 2020) available at <https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-to-state-Enforce-AB5-get-us-15030205.php>; Tyler Sonnemaker, “Uber and Lyft Drivers are now Employees Under California Law, According to a New Ruling from Regulators,” *Business Insider* (June 10, 2020) available at <https://www.businessinsider.com/uber-lyft-drivers-declared-employees-by-california-regulators-2020-6>.
- 51 *The People of the State of California v. Uber Technologies, Inc.*, Case No. CGC-20-584402 (S.F. Superior Court, May 5, 2020).
- 52 See Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services: Rulemaking 12-12-011, “Public Utilities Commission, p. 5 (June 9, 2020) available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M339/K545/339545137.PDF>. Such a finding, if maintained, could expose these companies to liability for, among other things, failing to carry certificates of workers’ compensation coverage. Failure to do so could lead to the commission revoking Uber or Lyft’s ability to operate in California.
- 53 See *The People of the State of California v. DoorDash, Inc.*, Case No. CGC-20-584789 (June 16, 2020).
- 54 See Josh Eidelson, “Uber, Lyft, DoorDash Put \$90 Million to Possible Ballot War,” *Bloomberg News* (Aug. 29, 2019) available at <https://www.bloomberg.com/news/articles/2019-08-29/uber-lyft-pledge-60-million-to-possible-labor-law-ballot-fight>.
- 55 See “Official Top Funder,” California Secretary of State (Feb. 2020) available at <https://www.bloomberg.com/news/articles/2019-08-29/uber-lyft-pledge-60-million-to-possible-labor-law-ballot-fight>. While only Lyft, Uber Technologies and DoorDash are listed as funders, Instacart and Postmates have since committed funding to the initiative. See Carolyn Said, “Uber, Lyft, DoorDash campaign for California Gig Law Exemption has 1 Million Signatures,” *San Francisco Chronicle* (Feb. 28, 2020) available at <https://www.sfchronicle.com/business/article/Uber-Lyft-DoorDash-campaign-for-ballot-15090479.php>.
- 56 Megan Rose Dickey, “This is The Gig Worker Ballot Initiative Uber, Lyft, DoorDash and Instacart are Backing,” *TechCrunch* (Oct. 29, 2019) available at <https://techcrunch.com/2019/10/29/this-is-the-gig-worker-ballot-initiative-uber-lyft-and-doordash-are-backing/> (as noted by an Instacart spokesperson).
- 57 See “Key Facts About This Measure,” *Protect App-based Drivers and Services* (accessed on May 20, 2020), available at <https://protectdriversandservices.com/get-the-facts/> (describing how “a new state law, AB 5, threatens the availability of these services for millions and the earning opportunities for hundreds of thousands of Californians” without describing the broad protection workers would be able access under current law).
- 58 So long as an app-based company allows a worker (a) the ability to log

- into an app at a time and date of their choosing without requiring a minimum number of hours; (b) the right to “accept any specific rideshare or delivery service;” (c) the ability to work for other app-based companies (except for while engaged in a service); and (d) does not restrict their ability to work in any other field, then the employment contract and the meager benefits in the initiative control. PADSAs, proposed Bus. & Prof. Code § 7451(a)-(d).
- 59 PADSAs, proposed Bus. & Prof. Code § 7451 (emphasis added). Indeed, Section 7452.5 goes a step further and ensures that none of meager wages, benefits, and working conditions contained in the initiative would allow a worker to establish an employment relationship with the company.
- 60 See, e.g., *Yellow Cab Cooperative, Inc. v. Workers’ Compensation Appeals Board*, 226 Cal.App.3d 1288 (Cal. App. 1 Dist. 1991) (holding that where an employer does not control the work details – e.g., the *Borello* standard – “an employer-employee relationship may [still] be found if (1) the employer retains control over the operation as a whole, (2) the worker’s duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary”).
- 61 For example, the state’s Labor Commissioner’s office would be precluded from adjudicating disputes about the status of wages owed to workers.
- 62 See Section C *infra*.
- 63 Megan Rose Dickey, “This is The Gig Worker Ballot Initiative Uber, Lyft, DoorDash and Instacart are Backing,” TechCrunch (Oct. 29, 2019) [available at https://techcrunch.com/2019/10/29/this-is-the-gig-worker-ballot-initiative-uber-lyft-and-doordash-are-backing/](https://techcrunch.com/2019/10/29/this-is-the-gig-worker-ballot-initiative-uber-lyft-and-doordash-are-backing/).
- 64 PADSAs, proposed Bus. & Prof. Code § 7453(a) (establishing a “net earnings floor” for all engaged time, less “gratuities, tolls, cleaning fees, airport fees, or other customer pass-through” as defined in Section 7453(d) (3)(A)-(B)); proposed Bus. & Prof. Code § 7453(d)(1) (establishing the “applicable minimum wage” which includes the state minimum wage or an applicable local minimum wage); proposed Bus. & Prof. Code § 7453(d) (4)(A)-(B) (establishing a minimum reimbursement for “engaged miles” driven, adjusting that amount for inflation, and 120% of the “applicable minimum wage”).
- 65 PADSAs, proposed Bus. & Prof. Code § 7463(i)-(j) (also excluding any time spent driving after a ride or delivery request was cancelled or if a worker abandons performance).
- 66 Melissa Balding, et al., “Estimating TNC Share of VMT in Six U.S. Metropolitan Regions (Revision 1),” Fehr & Peters, p. 7 (Aug. 6, 2019), available at <https://drive.google.com/file/d/1FIUskVkj9IsAnWJQ6kLhAhNoVljFdx3/view>.
- 67 While the initiative would make only “engaged time” compensable, there is a strong legal argument to be made that the wait time is nonetheless compensable. For instance, since drivers must respond to ride or delivery requests at a moment’s notice to get work on the app, they are engaged to wait and thus should be compensated for the time. See, e.g., Ross Eisenbrey and Lawrence Mishel, “Uber Business Model Does not Justify a New ‘Independent Worker’ Category,” Economic Policy Institute (March 2016) available at <https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>.
- 68 Cal. Lab. Code § 510.
- 69 PADSAs, proposed Bus. & Prof. Code § 7453(4)(B)(i)-(iii).
- 70 “Standard Mileage Rates,” Internal Revenue Service (accessed March 11, 2020) available at <https://www.irs.gov/tax-professionals/standard-mileage-rates>.
- 71 California Air Resources Board, “SB 1014 Clean Miles Standard: 2018 Base-year Emissions Inventory Report,” (December 2019) available at https://www2.arb.ca.gov/sites/default/files/2019-12/SB%201014%20-%20Base%20year%20Emissions%20Inventory_December_2019.pdf?utm_medium=email&utm_source=govdelivery.
- 72 Under California law, an employer is required to “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties;” a provision which has liberal effect. Cal. Lab. Code § 2802 (emphasis added); see also *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1074 (N.D. Cal. 2015) (“The rule that employees be reimbursed for costs [under Section 2802] ensures that employers don’t undercut wages by passing the cost of doing business on to their employees.”).
- 73 Cal. Lab. Code § 512.
- 74 See, e.g., 8 C.C.R. § 11090(12) (governing rest periods available to workers in the transportation industry).
- 75 Cal. Lab. Code § 226.
- 76 Cal. Lab. Code § 224.
- 77 Cal. Lab. Code § 551. The initiative would require a period of rest after prolonged work on a company’s app. If a worker is logged in and driving for more than 12 hours in a 24-hour period, the worker will be logged off and will not be able to access the application for six hours. PADSAs, proposed Bus. & Prof. Code 7461. The section does not apply to cumulative totals among multiple companies.
- 78 Cal. Lab. Code § 201(a).
- 79 Cal. Lab. Code § 202.
- 80 Cal. Lab. Code § 204c.
- 81 The initiative suggests that workers who drive 15-25 hours of “engaged time” would receive 50 percent of the average ACA premium for a bronze plan and those over 25 hour of “engaged time” would receive 100 percent of the average ACA premium for a bronze plan. See PADSAs, proposed Bus. & Prof. Code § 7454(a)(1)-(2). However, the act would define an “Average ACA Contribution” to mean 82 percent of the dollar amount of a bronze plan. See PADSAs, proposed Bus. & Prof. Code § 7463(b)-(c) (defining by circular reference to Section 7454(g) that the average premium amount would be defined by the average published rates for a bronze plan on the Covered California exchange).
- 82 *Id.*
- 83 See *supra* Section(C)(1).
- 84 Defined, as described in the previous section, as time spent after accepting a ride or delivery up to completion, but not time between rides or deliveries.
- 85 PADSAs, proposed Bus. & Prof. Code §§ 7455(a) (occupational insurance); 7455(a)(2) (disability payments); 7455(c) (defining online to mean any time a worker is logged into and can receive requests for deliveries or rides).
- 86 PADSAs, proposed Bus. & Prof. Code § 7455(b).
- 87 PADSAs, proposed Bus. & Prof. Code § 7455(f)(1)-(3).
- 88 PADSAs, proposed Bus. & Prof. Code § 7455(d).
- 89 PADSAs, proposed Bus. & Prof. Code § 7455(d).
- 90 Cal. Lab. Code § 3700 et seq. See also “Answers to Frequently Asked Questions About Workers’ Compensation for Employers,” Department of Industrial Relations (accessed on May 21, 2020) available at <https://www.dir.ca.gov/dwc/faqs.html> (noting that employer are obligated to provide workers’ compensation to their employees and clarifying that employers may not require cost-sharing).
- 91 See, e.g., *Mason v. Lake Delores Group, LLC*, 117 Cal.App.4th 822, 830, 834, 838 (Cal. App. 4 Dist. 2004) (confirming the principles that an injury must arise out of employment to be covered by workers’ compensation; that if this is in dispute the question is a matter of fact; that workers’ compensation law be liberally construed in favor of coverage; and that coverage is not broken even if the worker is engaged in “certain acts necessary to the life, comfort, and convenience of the employee while at work”).
- 92 See, e.g., “Workers’ Compensation Fraud,” California Department of Insurance (accessed on May 21, 2020) available at <http://www.insurance.ca.gov/0300-fraud/0100-fraud-division-overview/10-anti-fraud-prog/Workers-Comp.cfm>.
- 93 PADSAs, proposed Bus. & Prof. Code § 7455 (emphasis added).
- 94 Cal. Lab. Code § 4213; Cal. Lab. Code § 4659.
- 95 Existing Labor Code provisions allow for temporary disability payments for 104 weeks, with some exceptions. But the code also provides for permanent disability payments. See Cal. Lab. Code §§ 4453, 4656. The ballot Initiative limits all disability payments to 104 weeks. PADSAs, proposed Bus. & Occ. Code § 7455(a)(2)(A).
- 96 See “Workers’ Compensation: Medical Care,” California Department of Insurance (accessed on May 21, 2020) available at <http://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm#medicalcare>.
- 97 PADSAs, proposed Bus. & Prof. Code § 7455(a)(1).

- 98 Cal. Lab. Code §§ 4701-4703.
- 99 Cal. Lab. Code §§ 4621, 5811.
- 100 See, e.g., “Statewide Civil Fee Schedule,” Superior Court of California (January 1, 2020) available at <https://www.courts.ca.gov/documents/StatewideCivilFeesSchedule-20200101.pdf> (detailing the initial filing, motion, and discovery fees).
- 101 Indeed, employers are required to withhold payroll taxes to fund the program, with the exception of hiring entities that employ domestic workers, government employees, some nonprofit agencies, and those institutions claiming a religious exemption. In addition, 3.4 percent of workers are enrolled in a voluntary plan, but those programs must be as generous and affordable as the state program. See “State Disability Insurance Program,” Employment Development Department (accessed on May 22, 2020) available at https://www.co.shasta.ca.us/docs/libraries/support-services-docs/personnel-forms/sdi-fact-sheet.pdf?sfvrsn=7199f989_4.
- 102 Cal. Unemp. Ins. Code § 3300 *et. seq.*
- 103 See Cal. Gov. Code § 12945.2. It is true that AB 5 does not extend the ABC test, by its express terms, to the Government Code. However, the overlapping policy justifications and case law would suggest that the principles of AB 5 could be extended to other areas of employment law. See, e.g., *Faust v. California Portland Cement Co.* 150 Cal.App.4th 864, 878 (Cal. App. 2 Dist. 2007) (noting that the California Family Rights Act (CFRA) furthers California’s “general goal of preventing the deleterious effects of employment discrimination, and also furthers the CFRA’s specific goal of promoting stability and economic security in California families”). In addition, while the CFRA does not contain an express definition of employee, one is supplied by its implementing regulations. See 2 C.C.R. § 11008(c) (defining an “employee” to be “[a]ny individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written”). Thus, establishing that workers are employees under AB 5 (particularly establishing the control and direction element under the A prong), could also lead to the conclusion that such workers are “employees” under the CFRA.
- 104 Cal. Lab. Code § 245 *et seq.*
- 105 See Robert Blumberg, “COVID-19 Supplemental Paid Sick Leave Docks in Long Beach, California,” *JDSupra* (May 21, 2020) (describing the emergency paid sick leave laws passed as a result of COVID-19 in the city of Long Beach as well as Los Angeles City and County, San Francisco, San Jose, and Oakland); see also Executive Order N-51-20 (April 16, 2020) available at <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-51-20.pdf> (extending emergency paid sick leave to all food sector workers in California left out of federal protections.)
- 106 Cal. Unemp. Ins. Code § 100 *et. seq.*
- 107 Cal. Unemp. Ins. Code §§ 1085, 1088.
- 108 Cal. Unemp. Ins. Code § 1256; 22 C.C.R. §§ 1256-10.
- 109 Cal. Unemp. Ins. Code § 1253.8
- 110 PADSAs, proposed Bus. & Prof. Code § 7452(a).
- 111 PADSAs, proposed Bus. & Prof. Code § 7452(b)-(c).
- 112 PADSAs, proposed Bus. & Prof. Code § 7456(a) (including discrimination on the basis of race, color, ancestry, national origin, religion, creed, age, physical or mental disability, sex, gender, sexual orientation, gender identity or expression, medical condition, genetic information, marital status, or military or veteran status).
- 113 See Cal. Gov. Code § 12940. As described in Section C(4) *supra*, the Fair Employment and Housing Act is not expressly covered by the terms of AB 5, but does not by its terms provide a definition of “employee.” *Vernon v. State of California*, 116 Cal.App.4th 114, 124 (Cal. App. 1 Dist. 2004) (“[T]he FEHA does not define an employer, employee, or what constitutes employment”); cf. *Jacobson v. Schwarzenegger*, 357 F.Supp.2d 1198, 1213 (C.D. Cal. 2004) (“The anti-discrimination provisions of Government Code section 12940(a) do not cover independent contractors.”). A court in this circumstance is directed to “consider the ‘totality of circumstances’ that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the defendant controls the plaintiff’s performance of employment duties.” *Vernon* 116 Cal.App.4th at 124 (citing the multi-pronged analysis contained in *Borello* as a guide star for this determination). This analysis would be guided by the clear public policy rationale of FEHA, which, as a remedial statute like the IWC wage orders, is designed to broadly “prohibit harassment and discrimination in employment on the basis of any protected classification.” *Fiol v. Doellstedt*, 50 Cal.App.4th 1318, 1324 (Cal. App. 4 Dist. 1997). Therefore, as with access to family leave under the CFRA, it is not inconceivable that a court, after having applied the ABC test to an employer, would extend the analysis of the *Dynamex* decision to the FEHA.
- 114 See Cal. Lab. Code § 1171.5(a) (making explicit that “[a]ll protections, rights, and remedies available under state law . . . are available to all individuals regardless of immigration status”).
- 115 See Chris Benner, “On-demand and on-the-edge: Ride hailing and Delivery workers in San Francisco,” Institute for Social Transformation, UC Santa Cruz (May 5, 2020) available at https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOnTheEdge_ExecSum.pdf (detailing survey results of San Francisco platform workers showing that 56% are immigrants).
- 116 Cal. Lab. Code § 230.7.
- 117 PADSAs, proposed Bus. & Prof. Code § 7457(6)(c). While the initiative does not expressly override the protections of California’s Fair Employment and Housing Act that apply to independent contractors, since it says that claims must be brought under a specific provision of the Unruh Civil Rights Act, it appears to preempt the remedies contained in FEHA.
- 118 PADSAs, proposed Bus. & Prof. Code §§ 7457(a); § 7457(a)(1)-(6) (requiring, for example, online submission of complaints, a policy for investigation of complaints, and that workers will not be retaliated by filing a complaint, among other things).
- 119 PADSAs, proposed Bus. & Prof. Code § 7457(b).
- 120 PADSAs, proposed Bus. & Prof. Code § 7456(a)
- 121 Cal. Gov. Code § 12940; see *Bohemian Club v. Fair Employment and Housing Commission*, 187 Cal.App.3d 1, 19 (Cal. App. 1 Dist. 1986) (“[T]he availability of a BFOQ defense is ‘an extremely narrow exception.’”).
- 122 National Labor Relations Act, 29 U.S.C. § 151 *et seq.*
- 123 National Labor Relations Board, Office of the General Counsel (NLRB GC). 2019. *Advice Memorandum, Subject: Uber Technologies Cases 13-CA-163062 et al.* April 16, 2019.
- 124 U.S. Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).
- 125 See Cal. Lab. Code § 1140 *et seq.* (authorizing farmworker labor organizing in California).
- 126 PADSAs, proposed Bus. & Prof. Code § 7465(a) and § 7465(b)(4),
- 127 8 C.C.R. §§ 3203; 14300; 14300.29, subds. (a) and (b).
- 128 8 C.C.R. §§ 14300, 14300.29. See, e.g., “Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services” Public Utilities Commission, pp 26-33 (Sept. 19, 2013) (detailing some minimum safety reporting information that is less onerous than current CalOSHA requirements).
- 129 Required Reports TNCs Must Provide the CPUC, Public Utilities Commission, <https://www.cpuc.ca.gov/General.aspx?id=3989>. Uber has been criticized for underreporting accidents in its public safety report, and the PUC has been criticized for making the required accident reports confidential. See Seth Rosenfeld, “Safety Report from Uber Leaves out Most Accidents,” San Francisco Public Press (Jan. 7, 2020), available at <https://sfpublicpress.org/news/2020-01/safety-report-from-uber-leaves-out-most-accidents>.
- 130 8 C.C.R. § 3360.
- 131 The initiative does include identifying behaviors that may constitute sexual harassment, including assault, but does not address how they will prevent such violence. PADSAs, Proposed Bus. & Prof. Code §§ 7457(a)(1), 7459(b)(3).
- 132 CalOSHA Guidelines for Workplace Security (Mar 30, 1995), available at https://www.dir.ca.gov/dosh/dosh_publications/worksecurity.html. SIC Code Uber, <https://siccode.com/business/uber>; U.S. Bureau of Labor Statistics, Work-related deaths for taxi drivers and chauffeurs at a record low in 2018, (Jan. 10, 2020), available at <https://www.bls.gov/opub/ted/2020/work-related-deaths-for-taxi-drivers-and-chauffeurs-at-a-record-low-in-2018.htm>.
- 133 8 C.C.R. § 3380(f).

- 134 PADSA, proposed Bus. & Prof. Code § 7459. Vehicle inspections are also required under existing law. Public Utilities Commission of the State of California, Decision Adopting Rules and Regulation to Protect Public Safety While Allowing New Entrants to the Transportation Industry, (Sept. 23, 2013), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF>.
- 135 Cal. Lab. Code § 6401 et seq.
- 136 Cal. Lab. Code §§ 6310; 6311.
- 137 Cal. Lab. Code §§ 6309; 6313; 6423-6433.
- 138 *The People of the State of California v. Maplebear, Inc.*, Case No. 37-2019-00048731-CU-MC-CTL (Feb. 18, 2020) (order appealed by Instacart).
- 139 PADSA, proposed Bus. & Prof. Code § 7465.
- 140 See Assembly Bill 5 (Gonzalez), Ch. 296, Reg. Sess. 2019-2020, “Votes” (Sept. 18, 2019).
- 141 PADSA, proposed Bus. & Prof. Code § 7465.
- 142 *Id.*; see, e.g., PADSA, proposed Bus. & Prof. Code § 7450 (outlining the initiative’s statement of purpose).
- 143 *Id.*
- 144 PADSA, proposed Bus. & Prof. Code § 7465(c)(2) (stating that “[a]ny statute that amends Section 7451 does not further the purposes of this chapter,” with Section 7451 in turn exempting the employment relationship from all other controlling law in California, save the contract between the company and the driver).
- 145 PADSA, proposed Bus. & Prof. Code § 7465(c)(3).
- 146 PADSA, proposed Bus. & Prof. Code § 7465(c)(4).
- 147 PADSA, proposed Bus. & Prof. Code § 7464(a)-(b).
- 148 PADSA, proposed Bus. & Prof. Code § 7464(b)(1) (preemption local wage regulations except for where a local government would establish a higher minimum wage that is generally applicable per Section 7453(d)(1)). Thus this provision while retaining the right of a local government to apply a higher minimum wage, that government would be prevented from establishing a higher industry-specific wage that would apply to app-based transportation and delivery companies.
- 149 PADSA, proposed Bus. & Prof. Code § 7464(b)(1)-(4).
- 150 See Robert Blumberg, “COVID-19 Supplemental Paid Sick Leave Docks in Long Beach, California,” *JDSupra* (May 21, 2020) (describing the emergency paid sick leave laws passed as a result of COVID-19 in the city of Long Beach as well as Los Angeles City and County, San Francisco, San Jose, and Oakland).
- 151 The authors reviewed the text of the 45 ballot propositions submitted to the voters for consideration during primary or general elections from 2014 to 2018. The authors conducted manual review and keyword searches for provisions on preemption and amendment vote thresholds.
- 152 See “General Election, November 8, 2016: Official Voter Information Guide” California Secretary of State (accessed on May 24, 2020) available at <http://vigarchive.sos.ca.gov/2016/general/en/propositions/67/>.
- 153 See Cal. Pub. Resources Code § 42287 et seq. (preempting local regulation of single-use plastic bags, but grandfathering in local regulation passed before September 2014).
- 154 See “General Election, November 6, 2018: Official Voter Information Guide” California Secretary of State (accessed on May 24, 2020) available at <https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop7>.
- 155 Cal. Gov. Code § 6808(c).
- 156 See “General Election, November 6, 2018: Official Voter Information Guide” California Secretary of State (accessed on May 24, 2020) available at <http://vigarchive.sos.ca.gov/2018/general/propositions/11/>.
- 157 Cal. Lab. Code § 890.
- 158 See “General Election, November 8, 2016: Official Voter Information Guide” California Secretary of State (accessed on May 24, 2020) available at <http://vigarchive.sos.ca.gov/2016/general/en/propositions/63/>.
- 159 *Id.* at <http://vigarchive.sos.ca.gov/2016/general/en/propositions/64/>.
- 160 See The Safety for All Act of 2016 § 9.
- 161 See Cal. Bus. & Prof. Code § 26200(a).
- 162 The only other propositions reviewed that contained local preemption or amendment threshold provisions were Proposition 42 in the 2014 primary election (extending the Brown Act to local governments); Proposition 52 in the 2016 general election (requiring a 2/3rds vote of the legislature to amend the Medi-Cal Hospital Reimbursement Improvement Act of 2013); Proposition 66 in the 2016 general election (requiring a 2/3rd vote of the legislature to alter new death penalty procedures); Proposition 70 in the 2018 primary election (requiring a one-time 2/3rds vote to appropriate certain cap and trade revenue). See “Voter Information Guides” California Secretary of State (accessed on May 24, 2020) available at <https://www.sos.ca.gov/elections/voting-resources/voter-information-guides/>.
- 163 Joy Borkholder, et al., “Uber State Interference,” *National Employment Law Project & Partnership for Working Families*, 5 (Jan. 2018) available at: bit.ly/2SYgOUW.
- 164 *Id.* at 21.