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California Shaking Up the Gig Economy: Should Uber and Lyft be Worried?

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California Shaking Up the Gig Economy: Should Uber and Lyft be Worried?

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On Wednesday, September 18, 2019, California Governor Gavin Newsom signed Assembly Bill 5 (AB-5) into law.[2] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn2)The purpose of AB-5 is to codify the 2018 California Supreme Court’s unanimous decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*[3] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn3) and clarify the decision’s application in state law. (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn4)[4] Ultimately, California hopes to “ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law...”[5] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn5)

In *Dynamex*, the California Supreme Court established a presumption that a person who performs services for a hiring entity is an employee rather than an independent contractor for purposes of compliance with California wage orders.[6] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn6) In order to overcome this presumption, the hiring entity must pass what is commonly referred to as the “ABC” test.[7] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn7) The ABC test requires the hiring entity to show: “(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs

work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed by the hiring entity.”[8] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn8)

For ridesharing companies such as Uber and Lyft, whose business models hinge on classifying drivers as independent contractors,[9] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn9) failure to pass the ABC test would require a fundamental change in their way of doing business.[10] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn10) These companies would likely have to exert more control over drivers by telling them where to work, requiring a minimum number of hours per week, scheduling driver shifts, and preventing drivers from working for other rideshare companies.[11] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn11) According to Uber, this change would likely lead to drivers only being able to work at times and in areas where the demand for rides exceeds the number of drivers, thereby eliminating the accessibility of the company's services "in areas of the state that need it most." [12] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn12)

Uber claims that AB-5 does not automatically reclassify drivers from independent contractors to employees.[13] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn13) According to Uber's Chief Legal Officer, Tony West, "arguably the highest bar [in passing the ABC Test] is that a company must prove that contractors are doing work 'outside the usual course' of its business." [14] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn14) West argues that several previous rulings have found that drivers work is outside Uber's usual course of business, which is "serving as a technology platform for several different types of digital marketplaces." [15] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn15) Essentially, West argues that Uber's usual course of business is providing an electronic app service to drivers, rather than providing rides to passengers.[16] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn16)

Regardless of the merits of that argument, it seems clear that Uber and Lyft would prefer not to take their chances with the ABC test.[17] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn17) In an effort to meet the California Legislature somewhere in the middle, the two companies have pledged a combined \$60 million to a California ballot initiative which would allow drivers to remain independent contractors while also being entitled to certain benefits.[18] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn18) Among these benefits include guaranteed earnings above the local minimum wage, access to paid time off and paid sick leave, as well as a legally-protected right to negotiate over earnings.[19] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_edn19)

[1] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref1) Staff Editor, *Kentucky Law Journal*, Volume 108; J.D. Candidate, University of Kentucky College of Law (2021); B.S., University of Kentucky (2018).

[2] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref2) Assembly Bill 5, 2019 Legis. Serv., Reg. Sess. (Cal. 2019).

[3] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref3) 4 Cal. 5th 903 (Cal. 2018).

[4] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref4) Assembly Bill 5, 2019 Legis. Serv., Reg. Sess. (Cal. 2019).

[5] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref5) *Id.*

[6] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref6) *Dynamex Operations W., Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903, 955 (Cal. 2018) ("The ABC test presumptively considers all workers to be employees...").

[7] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref7) *Id.* at 916-17.

[8] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref8) *Id.*

[9] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref9) *Moving work forward in California*, Medium (Aug. 29, 2019), <https://medium.com/uber-under-the-hood/moving-work-forward-in-california-7de60b6827b4>.

[10] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref10) *Id.*

[11] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref11) *Id.*

[12] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref12) *Id.*

[13] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref13) Tony West, *Update on AB5*, Uber Newsroom (Sep. 11, 2019), <https://www.uber.com/newsroom/ab5-update/>.

[14] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref14) *Id.*

[15] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref15) *Id.*

[16] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref16) Brad Templeton, *If Uber Drivers Become Employees, Can Uber Escape That? Plus How Employees Compete With Robocars*, Forbes (Sep. 17, 2019), <https://www.forbes.com/sites/bradtempleton/2019/09/17/if-uber-drivers-become-employees-can-uber-escape-that-plus-how-employees-compete-with-robocars/#72c7204253fb>.

[17] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref17) See West, *supra* note 13.

[18] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref18) *Moving work forward in California*, Medium (Aug. 29, 2019), <https://medium.com/uber-under-the-hood/moving-work-forward-in-california-7de60b6827b4>.

[19] (applewebdata://6EE4D685-5BC7-4872-BC0D-CE47D7B457F6#_ednref19) *Id.*

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