

# The Long and Winding Road That Turned California Rideshare Drivers Into Independent Contractors

*CA voters decided drivers who work for Uber, Lyft & DoorDash are not employees of the companies they work for. How did we get to this place? by Alan Barlow*

SAN FRANCISCO, CALIFORNIA, UNITED STATES, April 8, 2021 /EINPresswire.com/ -- The people have spoken. App-based drivers in California are independent contractors and not employees. People who drive for Uber, Lyft, DoorDash or any of the other innumerable transportation network or delivery network companies in the Golden State are not entitled to worker protections and benefits such as overtime pay, meal and rest breaks, or the right to organize a union and collectively bargain with the company.

This decision was made by the general public last November by voting on a measure – Proposition 22 – that got on the ballot through the initiative petition process. So much was at stake in this issue that the Prop 22 campaign set spending records for California ballot initiatives. The vote yes campaign, funded primarily by Uber, Lyft and DoorDash, spent nearly \$189 million, while folks on the other side spent almost \$16 million. More money was spent on Facebook ads by the vote yes campaign than was spent by either the Biden or Trump campaigns in the presidential election.

So how did we get here? Prop 22 is the latest word (and maybe not the last) on a question that goes back at least to a 2018 California Supreme Court decision, if not much earlier.

Employee or Independent Contractor? That Is the Question.

Absent any legislation on the matter, courts have long grappled with the question of how to define a worker as an employee or an independent contractor. For decades, California courts relied on the Borello test, which was not so much a single test as a set of a dozen factors courts



Richard Koss, San Francisco  
Employment Attorney

used to evaluate each job on a case-by-case basis. The point of the test was to determine who had the right to control the manner of the work and the means of accomplishing the desired result; the answer to this question would determine whether the worker was an employee or an independent contractor.

Under Borello, courts look at factors such as who owned the equipment that the worker used, whether the worker worked exclusively for the company, who set the work schedule, whether the company had the right to discharge the worker at will, the skill required, whether the work belonged to a distinct occupation, the duration of the work, the method of payment (hourly or by the job), whether the work is part of the company's regular business, and whether the parties believed they were creating an employer-employee relationship. Also folded into the equation was yet another six-factor test used by other courts that asked, among other questions, whether the worker employed helpers or had a special skill.

By 2018, the California Supreme Court had had enough of Borello, the test the court itself created in 1989. Deciding that Borello was too complex, the court in *Dynamex Operations West v. Superior Court of Los Angeles* replaced Borello with the deceptively simple-named ABC test, with ABC standing for autonomy, business and custom. Skeptics might allege that the Dynamex test only repackaged the factors from Borello, but it was generally held that applying Dynamex favored classifying workers as employees over independent contractors.



Rand L. Stephens, San Francisco  
Employment Attorney

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*Richard Koss, San Francisco  
Employment Attorney*

The Dynamex decision came amid the explosive popularity of app-based transportation and delivery services such as Uber, Lyft, DoorDash, Postmates, and countless others. Not surprisingly, these companies did their best to avoid Dynamex like the plague. They refused to respect the precedent, arguing it did not apply to their business model.

Into the fray steps the California legislature. Introduced at the tail end of 2018 and signed by the Governor on September 18, 2019, Assembly Bill 5 (AB5) codified Dynamex into California law and made it more or less clear that app-based rideshare and delivery drivers were covered under the law. AB5 contained a number of carve-outs to make it clear that professionals such as doctors, lawyers, accountants, stockbrokers and others wouldn't be considered employees under the law.

No such carve-out was included for app-based drivers, who were clearly intended to fall under the Dynamex ABC test (and become employees of the companies they drive for).

All of which brings us to Prop 22 and its key language, which states in no uncertain terms, “an app-based driver is an independent contractor and not an employee...”

Despite that blanket assertion, Prop 22 does include certain criteria that must be present to consider the driver an independent contractor and not an employee. The following must be in place to keep the app-based driver from being considered an employee:

1. The company does not set the driver’s hours. It doesn’t tell the driver which days to work or what times of day to work, and it doesn’t set any minimum number of hours required to drive for the app. These decisions are entirely in the hands of the driver.
2. It is up to the driver to accept a rideshare or delivery request. The driver can turn down any request and still be part of the app or platform.
3. The driver is allowed to drive for competing apps while not engaged with the company’s app.
4. The driver is allowed to work in any other lawful occupation or business and still drive for the app.

Additionally, a written contract between the company and driver is required, and the driver can’t be terminated except according to the terms of the contract. Prop 22 requires companies to have an internal appeals process for drivers who are terminated.

### Prop 22 Guarantees Benefits for Drivers, but Are They Enough?

To mollify voters who might have been disposed to grant these workers employment-style rights, Prop 22 included an earnings guarantee that drivers will receive at least 120% of the minimum wage or 30 cents per engaged mile. App-based drivers are also guaranteed some form of rest by prescribing that drivers shall not be logged in and driving for more than a cumulative total of 12 hours in any 24-hour period, unless the driver has already logged off for an uninterrupted period of six hours. Other important benefits provided in Prop 22 include a healthcare subsidy, accident injury insurance with medical and wage loss replacement, and an accidental death benefit. While not full employment rights, these benefits are significantly more than would be granted to independent contractors without Prop 22.

[Richard Koss, a San Francisco employment discrimination lawyer](#) who advises employers and employees in the Bay Area, points out that despite the benefits outlined in Prop 22, the bill still leaves drivers worse off as independent contractors than they would be as employees. “Under Prop 22, drivers do not get paid for waiting time,” notes Koss. “They don’t get paid for time spent

waiting between rides when they should be on the clock, and they don't receive pay for the time spent in traffic. Many will still receive less than minimum wage." Koss also points out that rideshare and delivery drivers don't have workers' compensation insurance, and they are not protected by employment laws that prevent discrimination or wage theft. Regarding healthcare, Koss remarks that this subsidy is far less than what is required under the Affordable Care Act. "It is a bad deal for workers," Koss says.

## The Road Keeps Going

It remains to be seen whether Prop 22 will be the last word on the matter. The measure was challenged on constitutional grounds in the California Supreme court in a lawsuit brought by an alliance of drivers, the Service Employee's International Union (SEIU), and others. Among the challenges were claims the law violates workers' rights to organize and be covered by workers' compensation, as well as an allegation that the measure was drafted improperly under California's initiative petition law. The Supreme Court decided not to hear the case, but it could still be filed in a lower court and work its way back up to the state's highest court. Since Prop 22 amended a statute and was not a constitutional amendment, it should be subject to a test in the courts, according to attorney Koss.

In a statement released by a pro-Prop 22 group, Uber driver Jim Pyatt praised the court for rejecting what he called a "meritless lawsuit." "We're hopeful this will send a strong signal to special interests to stop trying to undermine the will of voters," Pyatt said in the statement. Employment lawyer Richard Koss disagrees. "Uber, Lyft, and DoorDash spent \$200 million on Prop 22. Does anyone really think they spent that money for the benefit of their workers?"

Richard Koss  
Bay Area Employment Lawyers  
+1 650-722-7046

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