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A vehicle with an Uber sticker is pictured. Photographer: Andrew Harrer/Bloomberg

Uber Appeal of California Gig Classification Law at 9th Circuit

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- Ruling could affect thousands of gig workers in California
- Federal action parallel to state lawsuit challenging Prop. 22

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Attorneys for Uber Technologies Inc., Postmates Inc., and two gig workers want a federal appeals court to invalidate California’s worker classification law as unconstitutional and to block its enforcement.

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit on Wednesday will hear oral arguments that the California law to determine who’s an independent contractor and who’s an employee is irrational, treats similarly situated individuals and professions disparately, and discriminates against certain technology platforms like Uber by exempting errand-based apps like TaskRabbit that use the same driver and courier model.

Under California’s law known as **A.B. 5**, a worker is presumed to be an employee unless the party hiring the person can show the worker is an independent contractor under a three-factor “ABC test.” The classification rule affects thousands of gig workers who get flexibility and lack employer-paid protections such as worker’s compensation and unemployment benefits.

The Ninth Circuit’s ultimate decision in the high-profile case likely will be appealed to the US Supreme Court.

Documents

- [Docket](#)
- [Uber's Brief](#)
- [Unions' Brief](#)
- [California's Brief](#)
- [A.B. 5](#)
- [A.B. 2257](#)
- [Proposition 22](#)

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"I get the sense that companies with deep pockets of venture capital are playing the long game. And the long game is they're trying to create a monopoly" to run taxis out of business, and "when they're the only game in town, they can rewrite the laws," said [Erin Hatton](#), a State University of New York at Buffalo associate sociology professor whose research focuses on work and political economy.

"It's a matter of time. The trick for the resistance to this is to force them to compete under employment law as written so they cannot undercut other businesses unfairly and create that monopoly that gives them this unwieldy power," Hatton said.

States 'Paying Attention'

California's worker classification laws codified a 2018 decision from the state supreme court known as *Dynamex Operations West, Inc. v. Superior Court of L.A. Cty. ex rel. Lee*. Under *Dynamex*, an independent contractor is one who (a) is free from the hiring agent's control and direction in performing the work; (b) "performs work that is outside the usual course of the hiring entity's business"; and (c) is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."

Already known for its worker-protective laws, California enacted A.B. 5 in 2019, and a year later amended the law ([A.B. 2257](#)) to add jobs including photographers, appraisers, and home inspectors as [excluded from the designation](#).

Uber and Postmates appealed a federal judge's refusal to block California from implementing the laws.

A ruling favoring the state could dissuade "parties like Uber from bringing similar constitutional claims in other states that use the ABC test," said [Samantha Prince](#), an associate professor at Penn State Dickinson Law. A challenge in another circuit could increase the chance the US Supreme Court will take up the case, she said.

"There could be implications that go outside of California" she said in an email. "States that are considering incorporating the ABC test within their worker classification schema, are likely to be paying attention to what happens here."

[Massachusetts](#) is another of a handful of states that use the ABC test for wage and hour cases.

Staking Grounds

California [contends](#) nothing in the law or in a state court injunction prevents Uber and Postmates from offering workers the flexibility and autonomy that Uber driver Lydia Olson and Postmates—now Uber Eats—delivery person Miguel Perez desire, while still treating them as employees.

"Ultimately, Plaintiffs' claims boil down to disagreement with the Legislature's refusal to grant app-based companies an exemption from AB 5, a legislative choice that is fully within the prerogative of the legislative body. The mere fact that Plaintiffs might disagree with the policies behind AB 5 does not rise to a constitutional violation," the state said in its opening brief filed with the Ninth Circuit.

Attorneys with Gibson Dunn & Crutcher LLP, representing the companies and two workers, [said](#) their clients "pleaded specific facts plausibly showing that AB5's litany of irrational exemptions creates arbitrary distinctions among similarly situated workers; those exemptions contradict, and do not rationally relate to, the government's stated interests; and the statute's real purpose to target and eliminate prominent network companies used by app-based drivers is unconstitutionally illegitimate."

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Gig companies spent some \$200 million to pass the ballot measure known as [Proposition 22](#) to carve out their workers from A.B. 5. Separate from the federal lawsuit, an Alameda County Superior Court judge in August 2021 [declared](#) Prop. 22 invalid. The companies and state [appealed](#) that case to the [California Court of Appeal](#), where parties including the California Chamber of Commerce backed the companies, and worker unions back the state.

Employers are struggling to meet added expenses and determine compliance, particularly for workers who don't want to be employees and those hired to fill short-term needs, said Ashley Hoffman, a California Chamber of Commerce policy advocate. A chamber survey of 250 members in May found 58% indicated A.B. 5 made it more difficult or costly to operate their business.

Any answers, however, may be a long time coming from the courts.

In the meantime, between the two laws, there are over 100 exemptions. "I think that just goes to show it's really not a one-size-fits-all solution and deserves to be relooked at," Hoffman said.

The case is [Olson v. California](#), 9th Cir., No. 21-55757, oral arguments 7/13/22.

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