



5 Biggest Questions After California Voters Pass Landmark Gig Economy Law

Insights

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The dust is beginning to settle after California voters overwhelmingly approved a new test for determining whether app-based rideshare and delivery drivers are considered employees or independent contractors, essentially overturning the ABC Test as it applies to a wide swath of the gig economy. But now that Proposition 22 proved to be wildly successful, what's next? Here are the five biggest questions – and some answers – that remain in light of this groundbreaking development.

1. When Does The Law Go Into Effect?

First, the easy question: when does Prop 22 go into effect? Under California law, ballot matters go into effect five days after election results are formally certified. We expect that official certification to occur on December 11, so it appears that the new law will take hold on or about December 16.

2. What Happens To All The Pending Litigation?

One of the reasons that gig economy companies were so eager to see a uniform worker classification definition implemented is that it would reduce the amount of litigation filed over what had been an uncertain legal definition. But once the new law takes effect, does that mean that all the existing litigation over alleged misclassification magically disappears? The short answer: it depends.

First, it depends on the type of lawsuit that is being litigated. One very high-profile piece of litigation filed by government officials aimed at forcing major rideshare companies to reclassify their workers appears dead in the water. A trial court ordered the two biggest ridesharing companies to treat their workers as employees back in August, and an appeals court affirmed that ruling last month. But the legal test applied by the courts has now been wiped off the books, and the companies immediately asked the court to reverse that order following the election victory. “Neither the injunction nor the opinion are consonant with the soon-to-be law of this state, or the will of California voters, expressed at the ballot box on November 3,” said one of the legal briefs filed soon after Election Day. Presumably the court will agree with the companies and soon reverse course, although it might wait until the ballot results are officially certified to take action.

Less certain? The other claims filed by private parties seeking to recover monetary damages from gig economy companies. While these claims will not be immediately tossed out of court, the questions become whether and how far back in time the parties are allowed to look in order to recover their alleged lost wages. And the answers to these questions probably depend on the

individual posture of the cases being litigated and the considerations of the judges ruling on these matters.

3. What Will Happen In Other States?

Gig economy companies around the country were certainly eager to see this situation play out in California, but even more eager to know what it would mean for all of the other states. Could it be possible that measures similar to Prop 22 will be introduced in other states to usher in a similar result?

That's certainly possible. According to Al Jazeera, Uber CEO Dara Khosrowshahi told investors in a recent earnings call that the company may seek to apply the Prop 22 model nationwide. "We should be adding benefits to gig work to make it better, not getting rid of it altogether in favor of an employment-only system," he said. According to Bloomberg News, he also said, "you'll see us more loudly advocate for new laws like Prop 22," while DoorDash CEO Tony Xu said, "we're looking ahead and across the country, ready to champion new benefits structures that are portable, proportional, and flexible."

4. What About A Federal Solution?

But what about a federal solution to the classification question? What does Prop 22 mean for the prospects of a uniform set of laws that would govern the entire country?

We're currently awaiting for the Department of Labor to finalize a federal rule that would simplify the independent contractor test on the national level – but this would only impact claims brought under the Fair Labor Standards Act. Even if gets finalized and put into place before the change in administration at the White House, the patchwork of varying state laws would still exist.

So could we see the pendulum swing in the other direction once President-Elect Biden takes office? While he has indicated strong support for a national version of the ABC Test to be passed into law [via the PRO Act], we are still unsure whether (a) he will have 50 Democratic senators in place on January 20; and (b) even if so, whether moderate Democrats in the Senate would support a stringent national misclassification law.

5. What Does The Future Of Classification Hold?

The big question: taking a big step back, what does the Prop 22 victory mean for the future of the gig economy? One possible answer: this could be the dawn of a hybrid classification for a category of worker somewhere between employee and independent contractor, long-heralded as a needed development for the gig economy. You could start to see state legislatures across the country sitting down to negotiate with gig economy companies to determine what level of benefits they can capture for workers while still ensuring they are treated as contractors.

As noted in a recent Law360 article featuring some comments I provided in an interview, "though the measure's success spares gig businesses the expenses and legal liabilities they would incur with employees, it provides workers some protections and benefits. Among other things, Proposition 22

requires gig businesses to pay workers 120% of the minimum wage for their active time, provide partial stipends for workers to buy health care through the state's marketplace if they hit certain hours minimums, and cover workers who are hurt while using their apps. Proposition 22's success could lead lawmakers in other states and cities to provide gig workers scaled-down benefits instead of making businesses treat them as full-fledged employees." While such a safety net may not be as robust as some workers' advocates would have wanted, they may be more palatable for lawmakers wary of adopting a measure California voters just slapped down.

Indeed, Bloomberg reported that Lyft President John Zimmer said "it's time for peace" between tech companies and labor, while Postmates Vice President Vikrum Aiyer said his company will "continue to build on a multiyear, worker-led movement in 2021," and to extend a hand to organized labor, "in hopes of an unclenched fist."

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