



Insight

What's Next for Prop 22 and Debates Around Independent Workers

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Executive Summary

- A California court recently ruled that Proposition 22, a ballot initiative exempting workers from a worker-reclassification law and allowing delivery and ride-share drivers to retain their independent worker status, was unconstitutional under the California constitution.
- Worker reclassification laws, which shift workers from independent contractors to full employees, can limit the flexibility that many independent workers value and could limit the ability of innovators to create new services.
- The recent court decision illustrates that it is difficult to remedy the consequences of such reclassifications after the fact and policymakers would do better to avoid these laws altogether.

Introduction

A California court [recently found](#) Proposition (Prop) 22, a ballot initiative that allowed delivery and ride-share companies to continue to classify drivers as independent workers rather than traditional employees, unconstitutional under the state constitution. While Prop 22 passed with 59 percent of votes last November, the ruling could once again subject these workers to AB5, a California law reclassifying many independent workers as employees—limiting opportunities for independent work and non-traditional labor arrangement.

Uber has already stated its [intention to appeal](#), and such an appeal would likely allow Prop 22 to be in effect until the appellate court's decision, meaning that those companies exempted from AB5 by Prop 22 are likely to be able to continue business as usual for months or longer. Yet the appropriate classification of “gig economy” workers is the subject of debate beyond California, both in other states and at the federal level. Ironically, the challenges to existing independent worker classifications from independent worker reclassification proposals come at a time when many employees [are increasingly valuing flexibility](#) and nontraditional working arrangements in a range of industries. Prop 22 illustrates how many have concerns regarding the impact of such laws.

As state and federal policymakers consider changes to their own worker classification laws, they should carefully consider the potential consequences such reclassifications. As the latest legal challenge shows, it is far better to get policy right the first time than to rely on carveouts and court cases after the fact to attempt to remedy these problems.

Impact on Workers

AB5 and a similar federal-level proposal, the Protecting the Right to Organize (PRO) Act, are based on the

presumption that independent workers ranging from Uber and Lyft drivers to [freelance writers](#) and [mall Santas](#) are being harmed because they do not receive the same benefits as workers classified as employees. Worker classification plays a crucial role in the flexibility and services that many app-based and online services can offer as well as other seasonal, temporary, or flexible working arrangements.

The changes required under worker reclassification proposals redefine many of the contractual relationships for such workers and businesses. By redefining these workers as employees, they will be entitled to certain benefits and compensation, such as minimum wage protections, paid vacation, sick leave, and health care benefits, among others. Obtaining these benefits will likely result, however, in a loss in the flexibility and autonomy that many workers in such positions value. Additionally, it will translate into increased costs for employers, which will inevitably translate into higher prices for consumers and could limit the number of workers an employer continues to keep on. There are a range of ways and reasons why workers choose independent work and whether they desire these benefits. Some workers in the “gig economy” may be using it as a “[side hustle](#)” and already have access to these traditional benefits from their full-time job.

The California court ruling potentially removes the exemption for ride-sharing and delivery apps from AB5 that the public supported in Prop 22. This reversion will likely have a significant impact on the livelihoods of those workers. But the impact of AB5 stretches beyond these high-profile industries. As [the American Action Forum’s Isabel Soto highlights](#), much of the rhetoric around AB5 has focused on tech companies in the sharing economy such as Uber, Lyft, and DoorDash, but its impact extends over [multiple other industries](#). Broad reclassification will disproportionately impact [women](#), people of color, and [workers with disabilities](#) who rely on self-employment and independent contracting at higher rates.

Impact on Innovation

The ramifications of AB5 and potentially overturning Prop 22 extend beyond workers and existing businesses. These measures also signal future entrepreneurs to pursue business arrangements that only utilize traditional employee-employer relationships, limiting the potential options and raising the cost for new platforms seeking to connect service providers with consumers. By increasing the regulatory burden on new businesses, innovators face added costs both in terms of time and money spent on compliance, making it more difficult to start a new business. Beyond these costs, such regulations also [discourage “out of the box” thinking and entrepreneurship](#) in favor of more bureaucratic red tape and approval.

AB5 illustrates many of these issues. [Allegedly exempted businesses](#) have to carefully review the “fine print” to make sure they are using the correct worker classifications and meeting the requirements for exemptions. This may limit their ability to pivot or embrace new market opportunities that would benefit both providers and consumers. Such actions also raise the cost associated with compliance that will likely be passed along to consumers or through providing fewer opportunities for flexible employment. In the end, consumers are worse off, as they will not enjoy the benefits of innovative, market-disrupting competitors due to higher start-up costs.

AB5’s potential impact could seriously disrupt the viability of certain industries where independent workers are common. This includes traditional freelance work but is especially relevant to the “gig economy” platforms, ranging from apps such as Lyft and Uber to more creative services offering everything from haircuts to dog-walking on demand. Some workers tend to use these platforms as secondary income due to their flexible schedule and ease of entrance while others have made them their primary job. By forcibly reclassifying workers in these companies as employees, labor costs are estimated to [increase between 20 and 30 percent](#). Such an increase can completely change the financial viability of a business, which can translate into reducing its workforce or shutting down. This has already been the case, where freelancing journalists located in California

were [being laid off](#) prior to the passage of an exemption that excludes them from AB5 until 2022.

Prop 22 sought to address concerns about the impact AB5 would have on certain app-based platforms such as Uber and DoorDash by adding them to the list of exempted industries under AB5, such as truck drivers and [another 108 industries](#). Still, for some of the more creative aspects of the gig economy, worker reclassification can present barriers that raise costs and discourage the use of independent workers. Exemptions only for independent workers performing certain types of services or in certain industries could deter innovators in other, less favored industries from thinking of new opportunities to connect consumers and providers through apps or other technology.

Prop 22's Latest Challenge and Lessons for Policymakers

The court found Prop 22 unconstitutional under the California constitution based on the process by which the proposal amended the statute. In many ways this ruling is [based on the particularities](#) of California's unique ballot-initiative process.^[1] While other states don't have California's ballot-initiative system, this case illustrates the problems with trying to remedy bad policy after it has passed. Even with popular support for needed changes, the process of amending a law is not always smooth, and the damage of bad policy can be done while court battles or proposed legislative changes may be pending. In the current case involving Prop 22, it is [likely an appeal could stay](#) the current court decision for several months or even more than a year, but the case still results in lingering uncertainty for affected businesses and the economy as a whole. Additionally, the cost of legal challenges or other changes may discourage new ideas to provide opportunities for independent workers and consumers until better certainty about the applicable law is provided.

The carveouts seen in Prop 22 are a particularly problematic remedy. Carveouts fail to recognize the array of reasons for independent work in the business-contractor relationship and do not consider the wide range of industries in which independent workers operate. Additionally, these carveouts limit the ability of independent work options in new industries that would remain subject to the requirements of the law until achieving the cultural or political power to request their own carveouts. A far better solution is to avoid the underlying laws in the first place or seek to overturn them and replace them with policy that more specifically addresses the concerns animating their passage. As federal policymakers and those in other states debate if additional protections or reclassification of independent workers are needed, they should pay careful attention to the consequences and be aware of the difficulty that can arise in remedying those consequences.

^[1] The court held that, because the ballot initiative sought to constrain the legislature's power over workers' compensation through its language concerning collective bargaining, such an initiative must be done as a state constitutional amendment initiative rather than a statutory amendment initiative. The California process of amending via ballot initiative is unique, and aspects of the court's decision rely on many of the nuances of that process; the intention behind this process for amending statutes is designed for the policy consequences of proposals such as AB5. As California-based attorney Cathy Gellis notes in her analysis of the court's decision, "For better or for worse, the ballot initiative process exists for cases like these where the legislature gets policy wrong and then doesn't fix it (although, to be fair, it did mitigate a few of the problems with AB 5, but not all). Overturning a legislative decision via direct democracy is exactly the political process the California Constitution envisions and invites with the ballot initiative process."