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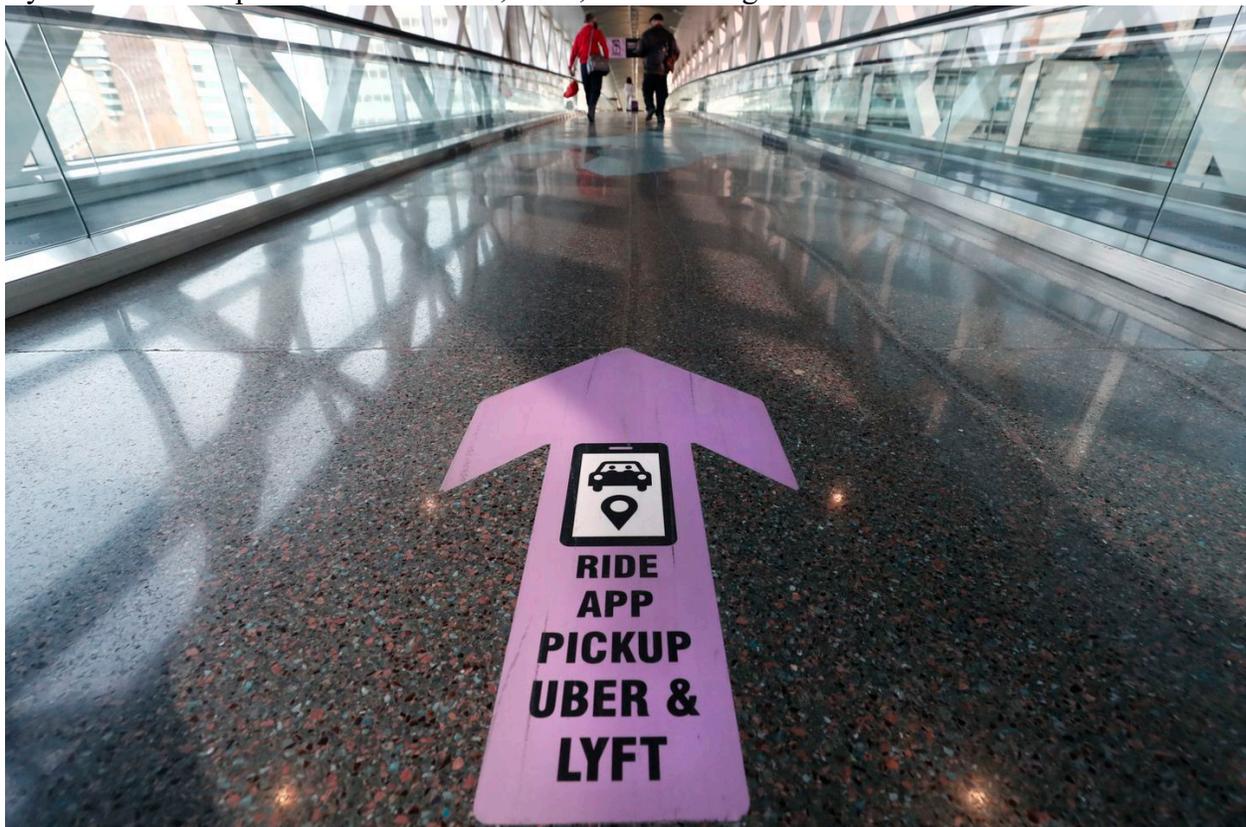
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OPINION

Gig workers deserve employment protections

The misclassification of employees as independent contractors predates the emergence of the gig economy and has been a method of skirting the cost of standard worker protections.

By Mark Erlich Updated December 18, 2020, 9 minutes ago



Gig workers are still a small fraction of the total workforce, but the extension of independent

contracting could shred decades of employment protections for future generations of workers. Michael Dwyer/Associated Press

In the midst of all the presidential transition drama, one of the most overlooked but consequential outcomes of the November election was the victory of [Proposition 22 in California](#). Funded by [Uber, Lyft, DoorDash, Instacart, and Postmates to the tune of a record-breaking \\$200 million](#), the ballot measure exempted ride-hailing and delivery drivers from a 2019 law, Assembly Bill 5, which brings California's gig economy into compliance with conventional employment laws.

[The law](#) codified a 2018 California Supreme Court ruling that established the "ABC test" as the determinant of employment status. The test presumes a worker is an employee unless three clear and simple criteria are met: the individual is free from the hiring company's direction and control; performs work that falls outside the usual course of its operations; and is customarily engaged in similar work. It is the cleanest and strongest of the numerous definitions in state and federal law, and the court's decision referenced a similar set of criteria in a 2004 pathbreaking Massachusetts 2004 law.

The misclassification of employees as independent contractors predates the emergence of the gig economy and has been a method of skirting the tax and insurance obligations that are associated with employee status in order to reduce labor costs. However, gig employers added a new wrinkle: advocating the use of independent contractors not as a questionable cost-saving device but as part of a bold vision of 21st-century employment that offered freedom, flexibility, entrepreneurialism, and the opportunity to "be your own boss." As Uber founder Travis Kalanick put it, "[There is a core independence and dignity you get when you control your own time.](#)"

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From the beginning, Uber and Lyft informed drivers that the ability to create their own schedule depended on being independent contractors, despite there being no legal precedent in employment law preventing employees from benefiting from the same kind of flexible schedules. More important, independent contractors lose basic rights available to employees, including entitlements to minimum wage and overtime payments, paid sick leave, unemployment insurance in case of layoffs, workers compensation benefits in case of an on-the-job injury, antidiscrimination protections, and the right to form a union and to collectively bargain.

Uber and Lyft greeted AB 5 [with outrage and issued dire warnings](#) that the new law posed a fundamental threat to their business model, one that would not survive if drivers were to be classified as employees. The unprecedented resources poured into Proposition 22 demonstrated their commitment. In addition to a barrage of television and radio ads, Uber forced drivers [to click through in-app messages](#) warning that a Prop 22 defeat would result in lost jobs and notified riders that a defeat would mean longer wait times and higher prices. The ballot measure incorporated elements aimed at creating the appearance of concern for driver welfare, including a minimum wage and marginal health care benefits, but a [UC Berkeley Labor Center analysis](#)

determined that, after accounting for expenses and wait times, the guaranteed hourly wage was as low as \$5.64. In the end, the companies' campaign won because they [outspent opponents by a 10-1 margin](#).

The election day victory has emboldened the ride-hailing companies to think beyond California. [“Going forward, you will see us more loudly advocate for new laws like Prop 22,” Uber CEO Dara Khosrowshahi told investors](#). And [Anthony Foxx](#), former Obama administration secretary of transportation and now Lyft's chief policy officer, said, [“We think that Prop 22 has now created a model that can be replicated and can be scaled.”](#) In late November, Uber spokesman [Josh Gold told The Salem News](#) that the company hopes to avoid a ballot fight in Massachusetts by proactively reaching an agreement with state leaders.

Felipe Martinez, of the Boston Independent Drivers Guild, said in an interview that “drivers will work aggressively to protect our members and defeat any effort like that.” In addition, any legislative maneuvers will have to contend with a [lawsuit filed by Massachusetts Attorney General Maura Healey](#) on July 10 in Suffolk Superior Court seeking a declaration that Uber and Lyft drivers are employees under the Commonwealth's 2004 statute. In September, the defendants filed motions to dismiss, and the matter is currently in the hands of the court.

In a remarkably cynical move, Uber's CEO lobbied the federal government in March to make independent contractors eligible for unemployment benefits under the CARES Act during the pandemic, yet remains unalterably opposed to extending those same benefits of the nation's basic social safety net on a permanent basis to those essential workers who ferry passengers, fetch groceries, and deliver food. Gig workers are still a small fraction of the total workforce, but the extension of independent contracting could shred decades of employment protections for future generations of workers.

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