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A Wolf in Sheep's Clothing: Prop 22 and the Exploitation of Californian Workers

Erica Oconnell

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A Wolf in Sheep’s Clothing: Prop 22 and the Exploitation of Californian Workers

Erica OConnell*

It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country.” - Franklin Delano Roosevelt

* * *

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I. INTRODUCTION

“I made a mistake,” said Joseph Stevens, an app-based driver from Corona, California, who voted “yes” on Proposition 22 (Prop 22) in the 2020 California General Election.¹ Prop 22 was a controversial ballot initiative which classified app-based drivers as independent contractors instead of employees.² Stevens, and many other Californian gig-economy workers, regret voting to pass Prop 22.³ To many gig-economy workers, Prop 22 appeared to benefit workers, as the “Yes on 22” advertisement campaign promoted numerous protections and benefits.⁴ In addition to these promises, “Yes on 22” fostered fear in many gig-economy workers that without Prop 22, gig-economy work would disappear and existing legislation would not protect workers.⁵

1. Joseph Stevens, *What the Hell Was I Doing Voting Yes on Prop. 22?*, PAYUP, <https://payup.wtf/prop-22-mistake> (last visited Jan. 8, 2022) (on file with the *University of the Pacific Law Review*).

2. See CAL. BUS. & PROF. CODE §§ 7448–7467 (West 2022), *invalidated by* *Castellanos v. State*, No. RG21088725, 2021 WL 3730951 (Cal. Super. 2021) (codifying app-based drivers as independent contractors in California law).

3. See Stevens, *supra* note 1 (acknowledging he was an uninformed voter when the author cast his vote); Faiz Siddiqui & Natasha Tiku, *Uber and Lyft Used Sneaky Tactics to Avoid Making Drivers Employees in California, Voters Say. Now, They’re Going National*, WASH. POST (Nov. 17, 2020), <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/> (on file with the *University of the Pacific Law Review*).

4. Quincy LeGardye, “Bait and Switch:” *Firings Make Some Drivers Regret Yes Vote on Prop 22*, L.A. SENTINEL (Jan. 28, 2021), <https://lasentinel.net/bait-and-switch-firings-make-some-drivers-regret-yes-vote-on-prop-22.html> (on file with the *University of the Pacific Law Review*); see also Andrew Hawkins, *Uber and Lyft Had an Edge in the Prop 22 Fight: Their Apps*, VERGE (Nov. 20, 2020), <https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications> (on file with the *University of the Pacific Law Review*) (reporting that Uber and Lyft’s online platform allowed the companies to reach a wider audience than opponents to Prop 22).

5. CAL. BUS. & PROF. CODE § 7449 (West 2022); see Siddiqui & Tiku, *supra* note 3 (reporting the

Prop 22 made alluring promises of higher wages, worker flexibility, healthcare stipends, and safeguarding low costs for consumers.⁶ In reality, none of these promises came to fruition; the corporate-funded Prop 22 was nothing more than bait and switch legislation.⁷ In the year since the law's enactment, Californian app-based drivers earn lower wages, have less flexibility, and rarely qualify for benefits.⁸ Even Prop 22's promise of lower consumer costs has yet to manifest, as Uber and Lyft raised service fees.⁹

Prop 22 creates an inequitable employment relationship that leaves app-based drivers without security and vulnerable to poor market conditions.¹⁰ The COVID-19 pandemic and its devastating economic effects left unemployed gig-economy workers without unemployment benefits.¹¹ As the pandemic forced people to remain in their homes, many drivers lost income opportunities as there were little ride requests during lockdowns.¹² The lack of available benefits and crisis protections resulted in sixty-nine percent of app-based drivers being unable to pay their rent or mortgage in April 2020.¹³ To add insult to injury, state tax money

misconceptions voters had regarding Prop 22, such as Prop 22 being the only way for drivers to receive benefits).

6. See Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), <https://www.nelp.org/blog/prop-22-unconstitutional/> (on file with the *University of the Pacific Law Review*) (reporting that Prop 22 promises to provide new earning guarantees and benefits while keeping prices low). But see Rachel Sandler, *Every Major Gig Company Has Now Raised Prices in California After Prop. 22*, FORBES (Feb. 19, 2021), <https://www.forbes.com/sites/rachelsandler/2021/02/19/every-major-gig-company-has-now-raised-prices-in-california-after-prop-22/> (on file with the *University of the Pacific Law Review*) (exposing how many drivers who are eligible for benefits had not received them months after they qualified).

7. See Alex Press, *No Surprise, Uber and Lyft Lied About Helping Workers*, JACOBIN (Aug. 28, 2021), <https://jacobinmag.com/2021/08/gig-companies-economy-california-prop-22-uber-lyft-door-dash-drivers-benefits-wages-health-care/> (on file with the *University of the Pacific Law Review*) (reporting that Uber and Lyft revoked the power to set their own fares and see passenger destinations before accepting rides once Prop 22 came into effect); LeGardye, *supra* note 4; Stevens, *supra* note 1; see also Adam Hayes, *Bait and Switch*, INVESTOPEDIA (Sept. 5, 2021), <https://www.investopedia.com/terms/b/bait-switch.asp> (on file with the *University of the Pacific Law Review*) (defining "bait and switch" as a disingenuous advertisement of an attractive offer—the bait—that is actually inferior in quality, and an upselling of a different product—the switch—for a higher price).

8. Press, *supra* note 7; Michael Sainato, *'I Can't Keep Doing This: Gig Workers Say Pay Has Fallen After California Prop 22*, GUARDIAN (Feb. 18, 2021), <https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-door-dash-prop-22-drivers-california> (on file with the *University of the Pacific Law Review*).

9. See Rachel Sandler, *Every Major Gig Company Has Now Raised Prices in California After Prop. 22*, FORBES (Feb. 19, 2021), <https://www.forbes.com/sites/rachelsandler/2021/02/19/every-major-gig-company-has-now-raised-prices-in-california-after-prop-22/> (on file with the *University of the Pacific Law Review*) (pointing to the \$200 million Uber and Lyft spent in furtherance of Prop 22 and hypothesizing that the likely reason for the price increase is the companies' attempt to recuperate that investment).

10. See Aziz Bah, *I'm a New York City Driver. The Pandemic Shows that My Industry Needs Fundamental Change or Drivers Will Never Recover*, INSIDER (July 29, 2020), <https://www.businessinsider.com/uber-lyft-drivers-covid-19-pandemic-virus-economy-right-bargain-2020-7> (on file with the *University of the Pacific Law Review*) (expressing distress over the lack of social safety nets for app-drivers who are dependent on their gig-income).

11. *Id.*

12. See Katie Conger, *Uber and Lyft Are Searching for Lifelines*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/04/17/technology/uber-lyft-coronavirus.html> (on file with the *University of the Pacific Law Review*) (reporting that Uber's business dropped at least 60% during the initial COVID-19 outbreak).

13. Bah, *supra* note 10.

funded the emergency funding program California created for app-based drivers.¹⁴ Other corporations pay into unemployment systems, while Uber and Lyft contribute nothing to the app-based driver unemployment program.¹⁵ The pandemic exposed the harsh realities of Prop 22's independent contract employment relationship.¹⁶

On August 20, 2021, the California Superior Court held Prop 22 unconstitutional—thus invalidating it—because it infringes on constitutionally-granted legislative power to regulate workers' compensation.¹⁷ Transportation Network Companies (TNCs)—such as Uber and Lyft—plan to appeal to the higher courts to overrule this decision and uphold Prop 22's enforcement.¹⁸ Irrespective of Prop 22's unconstitutionality, California should not enforce Prop 22 because it creates a substantially unfair employment relationship.¹⁹ The California Legislature should classify app-based drivers as employees to ensure they receive standard protections and additional protections specific to app-based drivers.²⁰ Section II describes current law and trends in the California labor market.²¹ Section III details Prop 22's creation and how it effects California labor law.²² Section IV

14. See Faiz Siddiqui & Andrew Van Dam, *As Uber Avoided Paying into Unemployment, the Federal Government Helped Thousands of Its Drivers Weather the Pandemic*, WASH. POST (Mar. 16, 2021), <https://www.washingtonpost.com/technology/2021/03/16/uber-lyft-unemployment-benefits/> (on file with the *University of the Pacific Law Review*) (exposing how classifying app-based drivers as independent contractors gives ride-sharing companies an unfair market advantage by passing unemployment insurance expenses to the public, while other companies have to contribute to unemployment insurance themselves).

15. *Id.*

16. CAL. BUS. & PROF. CODE § 7450 (West 2022); Bah, *supra* note 10.

17. *Castellanos v. State of California*, No. RG21088725, 2021 WL 3730951, 11 (Aug. 20, 2021), *appeal docketed*, No. A163655 (Cal. App. Dec. 13, 2021).

18. See CAL. PUB. UTIL. CODE § 5431(c) (West 2022) (defining transportation network company as a business entity that provides prearranged transportation services using an online application that connects customers to drivers with personal vehicles); see also *id.* (West 2022) (restricting the applicability of Prop 22 to TNCs, which Uber and Lyft are); Jackie Davalos, *Californian Customers Face Higher Rideshare Bill on Prop 22 Reversal*, MERCURY NEWS (Aug. 24, 2021), <https://www.mercurynews.com/2021/08/24/californians-face-higher-rideshare-bill-on-prop-22-reversal/> (on file with the *University of the Pacific Law Review*) (predicting an increase in fare prices as uncertainty of TNCs rises after the Alameda Superior Court held Prop 22 as unconstitutional).

19. See Chen & Padin, *supra* note 6 (reporting that Prop 22 will remain in effect as Castellanos makes its way through the appeal process); see *infra* Section V.B.

20. Idrian Mollaneda, *The Aftermath of California's Proposition 22*, CAL. L. REV. ONLINE BLOG (May 2021), <https://www.californialawreview.org/the-aftermath-of-californias-proposition-22> (on file with the *University of the Pacific Law Review*); see also Press, *supra* note 7 (demonstrating that TNCs will not act in drivers' best interests, as the corporation is loyal only to their bottom-line, which shows app-based drivers are in desperate need of employee protections).

21. *Infra* Part II.

22. *Infra* Part III.

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explains how Prop 22 harms California workers.²³ Section V argues that Prop 22's proponents are disingenuous about employment classification and how it affects TNCs' profitability.²⁴ Section VI concludes this Comment.²⁵

II. WORKING 9-TO-5: LAWS GOVERNING HUSTLIN' TIME²⁶

Prop 22 is a novel piece of legislation that essentially created a new employment classification: the gig-economy independent contractor.²⁷ Prior to Prop 22, California passed legislation that classified app-based drivers as employees, which obligated TNCs to cease classifying their drivers as independent contractors.²⁸ Section A provides basic information on California labor law, including the state's methods for classifying workers.²⁹ Section B explains how the gig economy functions.³⁰ Section C explores unconscionable employment contracts.³¹

A. Labor Law in the Golden State

California has long struggled to find an appropriate definition for "employee."³² Nevertheless, there is a consensus that employees have significantly less control over their work than independent contractors.³³ Independent contractor

23. *Infra* Part IV.

24. *Infra* Part V.

25. *Infra* Part VI.

26. DOLLY PARTON, 9 TO 5 (RCA Studios 1980) ("Working 9 to 5. . . Cause it's hustlin' time. . .").

27. See Sandler, *supra* note 9 (citing Uber CEO, Dara Khosrowshahi, who called Prop 22 the "third-way" to classify drivers); see also Stevens, *supra* note 1 ("Yes, it says we're independent contractors, but it doesn't "protect" independent contractor status—it creates a totally new definition.").

28. See Sam Harnett, *Prop 22 Explained: Why Gig Companies Are Spending Huge Money on an Unprecedented Measure*, KQED (Oct. 26, 2020), <https://www.kqed.org/news/11843123/prop-22-explained-why-gig-companies-are-spending-huge-money-on-an-unprecedented-measure> (on file with the *University of the Pacific Law Review*) (detailing the expenses gig companies are responsible for if the legislature classifies drivers as employees).

29. *Infra* Section II.A.

30. *Infra* Section II.B.

31. *Infra* Section II.C.

32. Peter Tran, Comment, *The Misclassification of Employees and California's Latest Confusion Regarding Who is an Employee or an Independent Contractor*, 56 SANTA CLARA L. REV. 677, 678, 681–87 (2016).

33. *Id.*; see also *Martinez v. Combs*, 49 Cal. 4th 35, 59 (2010) (detailing three definitions of employ: "(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship"); see also *Borello & Sons Inc. v. Dep't Indus. Rel.*, 48 Cal. 3d 341, 350 (1989) (stating the "right of control" test combined with eight other factors determines an employment relationship). Compare CAL. LAB. CODE § 3351 (West 2022) (defining "employee" as an individual "in the service of an employer under any appointment. . ."), with CAL. LAB. CODE § 3353 (West 2022) ("Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished"), and 29 U.S.C. § 203 (2022) ("[T]he term 'employee' means any individual employed by an employer.")

employment relationships provide some benefits; however, the classification is not appropriate for all workers as the law affords different rights and protections based on their classification.³⁴ Subsection 1 details the different regulations on employees and independent contractors.³⁵ Subsection 2 outlines how California decides the appropriate classification for workers.³⁶

1. Employee or Independent Contractor, it's a Big Deal

When the law classifies a worker as an employee, it saddles the employer with numerous responsibilities toward their employees.³⁷ These responsibilities include paying Federal Insurance Contribution Taxes (FICA), Federal Unemployment Taxes (FUTA), and state unemployment insurance and payroll taxes on behalf of their employees.³⁸ Additionally, the employer must comply with state and federal statutes that regulate employee wages, hours, working conditions, and safety standards.³⁹ The legislature designed these regulations to protect employees from dangerous and exploitative business practices.⁴⁰

When a business classifies a worker as an independent contractor, the hiring entity is free from many regulations and protections the law guarantees to employees.⁴¹ A business that hires an independent contractor does not have to pay federal and state payroll taxes nor provide unemployment and workers' compensation insurance.⁴² Additionally, state and federal regulations regarding

34. See Wood LLP, *Independent Contractors*, XPERTHR EMP. L. MANUAL § 266 (2015) (detailing how a contractor benefits in running their own business in providing services to third parties); Tran, *supra* note 32, at 678; Roxanne Wilson & Jeffrey Weston, *Hiring ABCs*, 44 L.A. LAW. 14, 14 (2021).

35. *Infra* Subsection II.A.1.

36. *Infra* Subsection II.A.2.

37. Wilson & Wetson, *supra* note 34, at 14.

38. See 26 U.S.C. § 3301 (2022) (declaring the FUTA payroll tax rate as 6% of the employee's wages); see also *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 913 (2018); 26 U.S.C. § 3111 (2022) (declaring the FICA payroll tax rate as 6.2% of the employee's wages for Social Security, and 1.42% for Medicare); see also *Retirement Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/learn.html#h1> (last visited Dec. 21, 2021) (on file with the *University of the Pacific Law Review*) (defining Social Security Benefits as government-provided post-retirement, disability, and survivor income based on lifetime earnings and taxes paid on said earnings). See *Fact Sheet: Unemployment Insurance Program*, CAL. EMP. DEV. DEP'T, https://www.edd.ca.gov/pdf_pub_ctr/de8714b.pdf (last visited Dec. 21, 2021) (on file with the *University of the Pacific Law Review*) ("The Unemployment Insurance Program, commonly referred to as UI, provides weekly unemployment insurance payments for workers who lose their job through no fault of their own"); see also *2021 Federal and State Payroll Taxes*, CAL. EMP. DEV. DEP'T (2021), https://www.edd.ca.gov/pdf_pub_ctr/de202.pdf (on file with the *University of the Pacific Law Review*) (showing California's employer payroll tax rate as 3.4% for unemployment and 0.1% for employee training).

39. See CAL. LAB. CODE § 1182.12 (West 2022) (dictating the 2022 minimum wage in California as \$15 an hour for employers employing 26 or more employees and \$14 an hour for employers with 25 or fewer employees); see also CAL. LAB. CODE § 510 (West 2022) (requiring overtime payment of one and a half of an employee's regular pay for hours worked in excess of eight hours per day and 40 hours per week); *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 913 (2018).

40. Tran, *supra* note 32, at 678.

41. Wilson & Wetson, *supra* note 34, at 14.

42. Tran, *supra* note 32, at 678.

employee wage, hours, and working conditions do not apply to independent contractors.⁴³ The business passes these responsibilities to the independent contractor, giving businesses a strong economic incentive to misclassify employees as independent contractors.⁴⁴ This employment relationship is beneficial for traditional independent contractors—such as plumbers or accountants—as the contractor runs their own business.⁴⁵ The independent contractor status becomes problematic when businesses apply the status to workers who do not run their own business, and rely solely on the company for earnings.⁴⁶

2. *Dynamex and AB 5: Adding Another Piece to the Employee or Contractor Puzzle*

In 2004, the delivery company Dynamex reclassified their delivery drivers as independent contractors rather than employees.⁴⁷ Dynamex reclassified their drivers to lower their expenses and operating costs.⁴⁸ In response, delivery drivers filed suit against Dynamex, claiming the company misclassified the drivers' employment status, thereby engaging in unfair and unlawful business practices.⁴⁹ The resolution required the California Supreme Court to determine the correct test to distinguish an employee from an independent contractor.⁵⁰

Prior to *Dynamex*, the *Borello* test was the standard test the courts implemented to determine whether a worker is an employee or a contractor.⁵¹ The *Borello* test considers multiple factors including the right-to-control, whether the work requires a special skill, and whether the work is integral to the employer's business.⁵² Instead of the *Borello* test, the Court held the ABC test as the correct test to determine whether a worker is an employee or a contractor.⁵³ At the time of the decision, multiple states already employed the ABC test.⁵⁴ This test finds a worker is an independent contractor when the hiring entity can satisfy all of the

43. *Id.*

44. *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 913 (2018).

45. Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. EQUITABLE GROWTH (July 31, 2019), <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/> (on file with the *University of the Pacific Law Review*).

46. Julia Weaver, Note, *Two Sides of the Same Coin: Examining the Misclassification of Workers as Independent Contractors*, 55 GA. L. REV. 1355, 1367 (2021).

47. *Dynamex*, 4 Cal. 5th at 916.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 929 (2018); see *Borello & Sons Inc. v. Dep't Indus. Rel.*, 48 Cal. 3d 341, 350 (1989) (creating a new test for employee classification, which *Dynamex* invalidated).

52. See *Borello*, 48 Cal. 3d at 350 (defining right to control as the worker's ability to perform their work without the hiring entity's direction or control).

53. *Dynamex*, 4 Cal. 5th at 956.

54. *Id.* at 955.

test's three prongs.⁵⁵ Part A requires that a hirer does not control, nor direct how a worker performs the work.⁵⁶ Part B requires that the worker does not work in the hiring entity's business, meaning the work is not necessary to the core business model.⁵⁷ Finally, part C requires that the worker routinely works in an independent trade, occupation, or business of the same nature of work they performed for the hiring entity.⁵⁸

Shortly after the *Dynamex* decision, Governor Newsom signed AB 5 into law.⁵⁹ AB 5 codified the ABC test and extended its scope into the Labor Code and Unemployment Insurance Code.⁶⁰ A few months after AB 5's enactment, Governor Newsom signed AB 2257, revising and clarifying AB 5's exemptions.⁶¹ These exemptions include specific categories of occupations and contractual relationships exempt from the ABC test.⁶² When an occupation falls under one of these exemptions, the *Borello* test determines the worker's classification.⁶³

Though an independent contractor status is beneficial to some occupations, an independent contractor status can prove harmful to workers in other occupations.⁶⁴ A true independent contractor has bargaining power because their work is separate from the hiring entity's industry.⁶⁵ Thus, a true independent contractor can solicit their services from various companies or individual parties, which provides meaningful choice in the market.⁶⁶

55. *Id.* at 957.

56. *See id.* at 929 (holding that part A is similar to the common law right-to-control test for employment).

57. *See id.* (holding that part B focuses on whether the individual is working in the hiring company's business); *see also* Great N. Constr., Inc. v. Dep't Lab., 204 Vt. 1, 13–14 (2016) (finding that a construction worker who specialized in historical restoration did not perform work necessary to the construction company's core business model of general construction).

58. *See* *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 960 (2018) (holding that part C asks whether the individual made the independent decision to go into the business for themselves); *see also* *Garcia v. Border Transp. Grp., LLC*, 28 Cal. App. 5th 558, 575–76 (2018) (finding that a taxi driver did not establish himself as a separate business from the taxi company because he relied on the business to facilitate performing the work).

59. CAL. LAB. CODE §§ 2750.3, 3351 (enacted and amended by 2019 Stat. Ch. 296, respectively); CAL. UNEMP. INS. CODE § 606.5 (amended by 2019 Stat. Ch. 296); Wilson & Wetson, *supra* note 34, at 14.

60. CAL. LAB. CODE §§ 2750.3, 3351 (enacted and amended by 2019 Stat. Ch. 296, respectively); CAL. UNEMP. INS. CODE § 606.5 (amended by 2019 Stat. Ch. 296); Wilson & Wetson, *supra* note 34, at 14.

61. Wilson & Wetson, *supra* note 34, at 14; CAL. LAB. CODE §§ 2775–2787 (enacted by 2020 Stat. Ch. 38).

62. CAL. LAB. CODE §§ 2775–2787 (enacted by 2020 Stat. Ch. 38).

63. *See* CAL. LAB. CODE §§ 2776–2782 (West 2022) (providing exemptions for bona fide business-to-business relationship, referral agencies, professional services, sole proprietors, music and performing arts, construction subcontractor, and data aggregators); *see also* CAL. LAB. CODE § 2783 (West 2022) (providing employee exceptions for *Borello* occupations, which include but are not limited to insurance, physicians, lawyers, and investment advisors).

64. Husak, *supra* note 45.

65. *See id.* (citing plumbers, wedding photographers, consultants, and lawyers as examples of independent contractors).

66. *See id.* (explaining properly classified independent contractors have a service that a separate company needs, giving bargaining power and ample potential clients, giving them a meaningful choice); *contra* Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*,

An independent contractor status is harmful to workers who have little bargaining power and are under company control.⁶⁷ It is harmful because the worker has no protection or control over their working arrangement.⁶⁸ The company, with superior bargaining power, can dictate the terms almost unilaterally; leaving the worker the choice to either agree to the terms or look for work elsewhere.⁶⁹ The ABC test aims to identify workers who lack bargaining power and properly classify them as employees to protect them from exploitative misclassification.⁷⁰

B. The App-Based Gig Economy

Gig work is not a new concept; it had existed long before application companies began offering alternative avenues to earn income.⁷¹ Traditional gig work is temporary, unreliable, and casual, where the skilled artisan can flit from job to job in exchange for money.⁷² Modern companies adapted this construct into the “gig economy,” where network companies host an online marketplace through mobile applications (apps).⁷³ App users sign up to either perform a singular service for payment or receive services for a fee.⁷⁴ The network company retains a percentage of that fee to generate profit and cover the expenses of hosting the app.⁷⁵

However, unlike the traditional gig worker, the gig economy requires the worker to obtain customers solely through their services.⁷⁶ This system creates a highly unequal bargaining relationship between the company and workers.⁷⁷ The

42 BERKELEY J. EMP. & LAB. L. 55, 60–61 (2021) (detailing how modern erosions of worker rights have affected independent contractor’s bargaining power).

67. Husak, *supra* note 45.

68. Weaver, *supra* note 46, at 1367.

69. *Id.* at 1372–73.

70. Lynn Rhinehart et al., *Misclassification, the ABC Test and Employee Status*, ECON. POL’Y INST. (June 16, 2021), <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates> (on file with the *University of the Pacific Law Review*).

71. See ALEX DE RUYTER & MARTYN BROWN, *THE GIG ECONOMY* 3–4 (2019) (detailing how through the 18th to the 20th century, the term “gig” more closely matched “freelancer,” and gig work was commonly referred to jazz musician’s paid performances by the 20th century); see also *id.* at 3 (detailing how through the 18th to the 20th century, the term “gig” more closely matched “freelancer,” and by the 20th century, gig work commonly referred to jazz musician’s paid performances); see generally *Gig*, MERRIAM-WEBSTER (2021), <https://www.merriam-webster.com/dictionary/gig> (on file with the *University of the Pacific Law Review*) (“[A] job, usually for a specified time; especially: an entertainer’s engagement.”); see also *Freelancer*, MERRIAM-WEBSTER DICTIONARY (2021), <https://www.merriam-webster.com/dictionary/freelancer> (on file with the *University of the Pacific Law Review*) (“[A] person who pursues a profession without a long-term commitment to any one employer.”).

72. ALEX DE RUYTER & MARTYN BROWN, *THE GIG ECONOMY* 4–5 (2019).

73. Jed Marcus, *Types of Workers*, XPERTHR EMP. L. MANUAL § 32041 (2015).

74. *Id.*

75. ALEX DE RUYTER & MARTYN BROWN, *THE GIG ECONOMY* 34 (2019).

76. *Id.*

77. See LAWRENCE MISHEL & CELINE MCNICHOLAS, ECON. POL’Y INST., *UBER DRIVERS ARE NOT ENTREPRENEURS* 9 (2019) (showing that Uber does not allow drivers to alter their driving strategies or allow

company dictates what the worker charges for their services while providing little to no opportunity to negotiate contract terms with the company.⁷⁸ Essentially, the network company negotiates on behalf of the worker, whereas the traditional gig worker negotiates their own terms to provide their services.⁷⁹

C. Employment Contracts that Shock the Conscience

Contract law—along with many other law sources—govern employment relationships.⁸⁰ When an employer hires an employee, the parties create an employment contract.⁸¹ Many common law principles of contract law govern employment contracts, such as the doctrine of unconscionability.⁸² Unconscionability generally refers to contracts that unreasonably favor one party, where the other party has little opportunity to negotiate.⁸³

Unconscionability has two components: the procedural element and the substantive element.⁸⁴ The procedural element comprises of oppression and surprise.⁸⁵ Oppression arises when one party has significantly more bargaining power, resulting in no real negotiation and a lack of meaningful choice.⁸⁶ Therefore, the contract is “adhesive” in nature.⁸⁷ Surprise occurs when the party with superior bargaining power drafts a contract that hides terms in lengthy provisions.⁸⁸ The substantive element focuses on whether the contract’s terms reallocate risk to one party unreasonably or unexpectedly, or is so unfair that it

drivers a choice in the types of rides they can accept).

78. *Id.* at 9; see also Rachel Sandler, *Uber Won’t Let California Drivers Set Their Own Prices Anymore After Rider Cancellations Increased 117%*, FORBES (Apr. 9, 2021), <https://www.forbes.com/sites/rachelsandler/2021/04/08/uber-wont-let-california-drivers-set-their-own-prices-after-rider-cancellations-increased-117/?sh=b105e2129616> (on file with the *University of the Pacific Law Review*) (reporting how Uber changed their policy of having drivers set their prices once the company did not need to demonstrate how little they control their drivers).

79. Compare MISHEL & MCNICHOLAS, *supra* note 77, at 12 (showing Uber controls most aspects of their drivers’ services), with Ari Herstand, *7 Negotiating Techniques Musicians Need to Get Paid*, DIGIT. MUSIC NEWS (Feb. 4, 2014), <https://www.digitalmusicnews.com/2014/02/04/negotiating-techniques/> (on file with the *University of the Pacific Law Review*) (showing traditional musician gig work provides multiple avenues for gig musicians to negotiate the terms of their service contract).

80. See *Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a contract as an agreement between two parties).

81. *Preface PR 15*, CAL. EMP. DEV. DEP’T (2021), https://www.edd.ca.gov/uibdg/preface_pr_15.htm (on file with the *University of the Pacific Law Review*) (explaining an employment contract as an agreement between an employer and employee or independent contractor); *Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019).

82. *Ellis v. McKinnon Broad. Co.*, 18 Cal. App. 4th 1796, 1803 (1993).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. See *Serpa v. California Sur. Investigations Inc.*, 215 Cal. App. 4th 695, 703–04 (2013) (finding adhesion contracts usually contain some aspects of procedural unconscionability); see also *Adhesion Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “adhesion contract” as a standard-form contract, which the party with more bargaining power creates, that the weaker party agrees and signs on a “take-it-or-leave-it” basis).

88. *Ellis*, 18 Cal. App. 4th at 1803.

shocks the conscience.⁸⁹ When a court finds a contract unconscionable, the court may sever the unconscionable clause.⁹⁰ If the court cannot sever the clause, the court can refuse to enforce the entire contract.⁹¹ Alternatively, the court may limit the application of the contract terms to avoid an unconscionable result.⁹²

III. PROPOSITION 22

The California Constitution grants the people of California the power to propose statutes or amendments to the Constitution through the initiative process; California calls these proposals propositions.⁹³ If the proposition satisfies basic state-mandated requirements, the Attorney General adds the proposition to the ballot, where the people vote to enact the proposition during the general election.⁹⁴ In the 2020 general election, California voters enacted Prop 22 into California law despite much controversy and public outcry.⁹⁵ Section A explains the events leading up to Prop 22's creation.⁹⁶ Section B details how TNCs funded Prop 22.⁹⁷ Section C clarifies what Prop 22 guarantees for app-based drivers.⁹⁸

A. Events Leading Up to Prop 22

Neither Uber nor Lyft have been profitable throughout both companies' decade-long time in operation.⁹⁹ Even with the companies utilizing the independent contractor status for their workers, they have been consistently operating at a multi-billion-dollar loss every year.¹⁰⁰ Despite many promises of

89. *Id.*; *Serpa*, 215 Cal. App. 4th at 703–04 (2013); *see Carboni v. Arrospide*, 2 Cal. App. 4th 76, 83 (1991) (finding that a substantial showing of substantial unconscionability will overcome a weak showing of procedural unconscionability).

90. CAL. CIV. CODE § 1670.5 (West 2022).

91. *Id.*

92. *Id.*

93. CAL. CONST. art. II § 8(a); *Statewide Initiative Guide*, CAL SEC'Y STATE, at i (revised Mar. 2021), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/statewide-initiative-guide.pdf> (on file with the *University of the Pacific Law Review*).

94. *See Statewide Initiative Guide*, *supra* note 93 (explaining the initiative process as requiring private parties to submit propositions after paying a \$2,000 fee, allowing the public to submit critiques, and undergo a fiscal impact analysis).

95. Mollaneda, *supra* note 20; Michael Sainato, 'A Slap in the Face:' California Uber and Lyft Drivers Criticize Pay Cuts Under Prop 22, *GUARDIAN* (May 16, 2021), <https://www.theguardian.com/us-news/2021/may/16/uber-lyft-drivers-california-prop-22> (on file with the *University of the Pacific Law Review*).

96. *Infra* Section IV.A.

97. *Infra* Section IV.B.

98. *Infra* Section IV.C.

99. Therese Poletti, *Uber and Lyft Are Staging a Ridiculous Race for Fake Profits*, *MARKETWATCH* (Aug. 6, 2021), <https://www.marketwatch.com/story/uber-and-lyft-are-staging-a-ridiculous-race-for-fake-profits-11628205337> (on file with the *University of the Pacific Law Review*).

100. *See* Mansoor Iqbar, *Uber Revenue and User Statistics (2022)*, *BUS. APPS*, <https://www.businessofapps.com/data/uber-statistics/> (last updated Feb. 17, 2022) (on file with the *University of Pacific Law Review*) (listing Uber's profit margin over its eight years in business, which shows a \$24.5 billion

achieving profit for numerous financial quarters, Uber and Lyft still have not turned a profit.¹⁰¹ This consistent pattern of negative profitability demonstrates TNCs will likely not see profitability any time soon.¹⁰² Even if Uber became profitable, it would still need to pay off \$11.60 billion in debt to break even.¹⁰³

A major barrier to the ridesharing industry generating profits is insurance costs.¹⁰⁴ Rideshare companies spend about fifty percent of their revenue maintaining third-party liability insurance.¹⁰⁵ The other fifty percent goes into other operating costs in maintaining the host app, and compensating the corporate staff and board members.¹⁰⁶ An employment classification for their drivers undoubtedly increases the companies' taxes.¹⁰⁷ An increase in overhead costs in the TNCs' over-expanded budget caused board members to panic.¹⁰⁸

When AB 5 officially classified app-based drivers as employees, many TNCs felt this would lead to the end of their companies.¹⁰⁹ They already could not afford the insurance costs of keeping their business running.¹¹⁰ Adding additional costs would accelerate their business's failure before the market could develop enough for a profitable system.¹¹¹ TNCs needed to find a way to avoid this classification to avoid bankruptcy.¹¹²

loss in total); *see also* Mansoor Iqbar, *Lyft Revenue and Usage Statistics (2022)*, BUS. APPS, <https://www.businessofapps.com/data/lyft-statistics/> (last updated Jan. 11, 2022) (on file with the *University of the Pacific Law Review*) (listing Lyft's profit margin over its three years in business, which shows a \$5.2 billion loss in total).

101. *See* Jon Porter, *Uber Thinks it Could Actually Turn a Profit This Quarter*, VERGE (Sept. 22, 2021), <https://www.theverge.com/2021/9/22/22687501/uber-adjusted-profit-q3-2021-pandemic-ride-hailing-food-delivery> (on file with the *University of the Pacific Law Review*) (reporting that Uber predicts their adjusted profits for quarter three, 2021 will be up to \$25 million); *see also* Iqbar, *supra* note 100 (showing a \$400 million loss for Uber in 2021); *see Lyft Announces Solid Q4'21 and Fiscal 2021 Results*, LYFT (Feb. 8, 2022), <https://investor.lyft.com/news-and-events/news/news-details/2022/Lyft-Announces-Solid-Q421-and-Fiscal-2021-Results/> (on file with the *University of the Pacific Law Review*) (reporting a \$1 billion loss for Lyft in 2022).

102. Poletti, *supra* note 99; Hubert Horan, *Will the Growth of Uber Increase Economic Welfare?*, 44 TRANSP. L.J. 33, 49 (2017).

103. *Balance Sheet for Uber Technologies*, WALL ST. J., <https://www.wsj.com/market-data/quotes/UBER/financials> (last visited Apr. 23, 2022) (on file with the *University of the Pacific Law Review*).

104. Tina Bellon & Noor Zainab Hussain, *Insurance Cost Strategy Key to Lyft's Path to Profitability*, INS. J. (Oct. 31, 2019), <https://www.insurancejournal.com/news/national/2019/10/31/547056.htm> (on file with the *University of the Pacific Law Review*); Joseph Kowaleski, *Insurance: The Primary Barrier to Uber's Profitability*, SEEKING ALPHA (Sept. 26, 2019), <https://seekingalpha.com/article/4293755-insurance-primary-barrier-to-ubers-profitability> (on file with the *University of the Pacific Law Review*).

105. Kowaleski, *supra* note 104.

106. Alexia Fernandez Campbell, *California Just Passed a Landmark Law to Regulate Uber and Lyft*, VOX (Sept. 18, 2019), <https://www.vox.com/2019/9/11/20850878/california-passes-ab5-bill-uber-lyft> (on file with the *University of the Pacific Law Review*).

107. *Id.*

108. *Id.*

109. *Id.*

110. Bellon & Hussain, *supra* note 104; Horan, *supra* note 102, at 49.

111. Bellon & Hussain, *supra* note 104.

112. Harnett, *supra* note 28.

B. Prop 22's Funding and Creation

Uber, Lyft, DoorDash, and other TNCs funded Prop 22 to circumvent AB 5's employee classification standards.¹¹³ If the legislature classifies drivers as employees, TNCs would incur significant labor costs in providing benefits and minimum wage to drivers.¹¹⁴ When TNCs classify their drivers as contractors, the company saves over \$100 million on Unemployment Insurance taxes alone.¹¹⁵ TNCs save a much greater total amount by not paying minimum wage, health insurance benefits, and other employee protection costs.¹¹⁶

Gig-economy companies invested over \$200 million into Prop 22's initiative, making the proposition the most expensive ballot initiative in California's history.¹¹⁷ Prop 22's proponents overwhelmed many California voters with endless political ads on television and social media.¹¹⁸ The "Yes on 22" campaign promoted the idea that Prop 22 would grant basic protections to app-based drivers, and without it, app-based job opportunities would disappear.¹¹⁹ These advertisements misled voters to believe Prop 22 was the only way to grant gig-workers minimum wage.¹²⁰

C. Prop 22's Big Promise

Prop 22 added a new law—known as the App-Based Drivers and Services Act—to the California Business and Professions Code.¹²¹ This new legislation is specific to TNCs and app-based drivers and delivery services.¹²² The Act posits that classifying drivers as employees threatens "flexibility" and forces drivers to

113. Mollaneda, *supra* note 20.

114. *Id.*

115. Ken Jacobs & Michael Reich, *What Would Uber and Lyft Owe to the State Unemployment Insurance Fund*, UC BERKLEY LAB. CTR. (May 7, 2020), <https://laborcenter.berkeley.edu/press-release-what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/> (on file with the *University of the Pacific Law Review*) (reporting only the amount of unemployment insurance gig-companies owes that does not factor in other expenses).

116. *Compare* Harnett, *supra* note 28 (detailing the expenses gig companies are responsible for, if drivers are classified as employees), *with* Jacobs & Reich, *supra* note 115 (reporting only the amount of unemployment insurance gig-companies owes that does not factor in other expenses).

117. *Proposition 22, App Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)#cite_note-finance-25](https://ballotpedia.org/California_Proposition_22_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#cite_note-finance-25) (last visited Oct. 31, 2021) (on file with the *University of the Pacific Law Review*); Dawn Geske, *Here's How Much Money Uber and Lyft Will Save From Prop 22*, INT'L BUS. TIMES (Nov. 4, 2020), <https://www.ibtimes.com/heres-how-much-money-uber-lyft-will-save-prop-22-3076284> (on file with the *University of the Pacific Law Review*).

118. Siddiqui & Tiku, *supra* note 3.

119. *Id.*

120. *Id.*

121. CAL. BUS. & PROF. CODE §§ 7448–7467 (West 2022).

122. *See* CAL. BUS. & PROF. CODE § 7451 (West 2022) (applying the provisions to delivery network companies (DNCs) as well, but this comment refers to TNCs solely for the sake of simplicity).

relinquish the right to set their own hours.¹²³ It also states that drivers need the classification of independent contractors to avoid forcing drivers into set shifts and mandatory hours.¹²⁴ The Act asserts this new legislation is “necessary to protect [drivers’] freedom to work independently” and provide drivers “new benefits and protections not available under existing law.”¹²⁵

The Act outlines Prop 22’s benefits and protections, ranging from compensation obligations to anti-discrimination and public safety mandates.¹²⁶ The Act prohibits TNCs from: setting drivers’ hours, requiring drivers to accept specific service requests, or preventing drivers from working for other companies or app-based services.¹²⁷ Prop 22 also details how TNCs must compensate drivers by mandating a “guaranteed minimum level of compensation” that is equal to 120% of the local minimum wage.¹²⁸ However, this guaranteed minimum compensation only applies to “engaged time spent,” meaning TNCs only include the minutes the driver fulfills a ride request in the compensation calculation.¹²⁹ TNCs do not include the time a driver spends waiting for a request.¹³⁰ The Act mandates TNCs to subsidize drivers’ earnings if their earnings do not meet the guaranteed minimum.¹³¹ Finally, the Act requires drivers to keep all of their gratuity tips.¹³² In other words, the law prevents TNCs from retaining any portion of these tips.¹³³

The Act also provides a health care subsidy and loss and liability protection.¹³⁴ The health care subsidy provides a driver a payment equal to the average Affordable Care Act (ACA) contribution.¹³⁵ But, the driver must average twenty-five hours in engaged driving time a week in the calendar quarter to qualify.¹³⁶ For drivers who averaging fifteen hours in engaged driving time average, the subsidy

123. CAL. BUS. & PROF. CODE § 7449 (West 2022).

124. *Id.*

125. *Id.*

126. CAL. BUS. & PROF. CODE §§ 7448–7462 (West 2022); *see* CAL. BUS. & PROF. CODE § 7456 (West 2022) (establishing protections from gig-companies terminating or refusing contracts with drivers based on their race, sex, national origin, and other protected classes); *see also* CAL. BUS. & PROF. CODE § 7457 (West 2022) (requiring gig-economy companies to provide a system where drivers and customers can submit complaints of discrimination or harassment, as well as providing safety training to drivers).

127. CAL. BUS. & PROF. CODE § 7451 (West 2022).

128. *See* CAL. LAB. CODE § 1182.12 (West 2022) (setting the 2022 minimum wage in California as \$15 an hour); *see also* CAL. BUS. & PROF. CODE § 7453 (West 2022) (accompanying Cal. Lab. Code § 1182.12, Prop 22 requires gig-economy companies to guarantee a minimum compensation of \$18 an hour).

129. CAL. BUS. & PROF. CODE § 7453 (West 2022).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. CAL. BUS. & PROF. CODE § 7454 (West 2022).

135. *Id.*

136. CAL. BUS. & PROF. CODE § 7463 (West 2022) (defining “engaged driving time” time the driver spent engaged in a ride request, which begins when the driver accepts the ride and concludes when the driver drops off the passenger).

payment is fifty percent of the average ACA contribution.¹³⁷ TNCs must provide drivers with a loss and liability policy, similar to workers' compensation.¹³⁸ The policy covers medical expenses of up to one million dollars.¹³⁹ Additionally, the policy provides for disability payments of up to sixty-six percent of drivers' weekly income from all network companies and accidental death insurance benefits for a driver's dependents.¹⁴⁰ TNCs supply the policy when accidents occur during the driver's online time.¹⁴¹ The company does not provide the policy when the driver is in the engaged driving time for another company or the driver is engaging in personal driving while online.¹⁴²

IV. PROP 22 IS AN EMBODIMENT OF CORPORATE GREED AND BAD FAITH ACTIONS

Gig-economy companies invested a lot of money towards creating and enacting Prop 22, and these companies will continue exerting fervent effort to maintain Prop 22's legislative effect.¹⁴³ Meanwhile, labor relations special interest groups and gig-economy worker's rights organizations are actively working to repeal Prop 22, creating an expensive and time-consuming litigation standstill.¹⁴⁴ Section A shows how Prop 22 harms California workers.¹⁴⁵ Section B uses the unconscionability doctrine to demonstrate Prop 22's inherent inequity.¹⁴⁶ Section C argues that app-based drivers are employees.¹⁴⁷

137. CAL. BUS. & PROF. CODE § 7454 (West 2022).

138. CAL. BUS. & PROF. CODE § 7455 (West 2022).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See Grace Manthey, *Prop 22: Rideshare-Driver Measure Is Most Expensive in California History*, ABC7 (Nov. 3, 2020), <https://abc7.com/22-california-prop-2020-ca-what-is/7585005/> (on file with the *University of the Pacific Law Review*) (reporting that Prop 22's proponents invested about \$200 million into the proposition's campaign).

144. Chen & Padin, *supra* note 6.

145. *Infra* Section IV.A.

146. *Infra* Section IV.B.

147. *Infra* Section IV.C.

A. Prop 22 Harms California Workers

Prop 22's misleading promotional campaign lured many app-based drivers into supporting and voting to enact it.¹⁴⁸ However, the benefits Prop 22 promised are negligible and TNCs are not following through on those promises.¹⁴⁹ Subsection 1 explains Prop 22 and TNCs' misrepresentations.¹⁵⁰ Subsection 2 discusses Prop 22's ramifications for gig-economy workers.¹⁵¹

1. Prop 22, a Classic Bait-and-Switch

Like many campaign promises, Prop 22 exaggerated the benefits it would confer on the public.¹⁵² Prop 22's promotional campaign and referendum language promised to protect gig-economy workers' economic security and gig-economy work opportunities.¹⁵³ Additionally, the Act claims to provide basic protection and benefits not available under current law.¹⁵⁴ In reality existing law—AB 5—provided gig-economy workers protection and benefits as employees that far exceeded what Prop 22 offered gig-economy independent contractors.¹⁵⁵ Prop 22 baited voters into believing Prop 22 was the better deal for workers; when it actually delivered subpar protections and benefits than advertised.¹⁵⁶

Prop 22's proponents claimed this Act was necessary to guarantee drivers' flexibility to set their own hours and work on their own time.¹⁵⁷ However, there is nothing in the California Labor Code restricting employees' ability to set their own hours; there are only limitations to how long an employee can work without a break.¹⁵⁸ In fact, most of the Labor Code regarding hours places restrictions on employers, not employees.¹⁵⁹ For example, the Labor Code requires employers to provide a thirty-minute meal period for every six hours they worked, but an employee may voluntarily waive this rest period.¹⁶⁰ Additionally, an employee

148. Press, *supra* note 7.

149. *Id.*

150. *Infra* Subsection IV.A.1.

151. *Infra* Subsection IV.A.2.

152. Chen & Padin, *supra* note 6.

153. *Id.*; CAL. BUS. & PROF. CODE § 7449 (West 2022).

154. CAL. BUS. & PROF. CODE § 7449 (West 2022).

155. See Kari Paul, *Prop 22 Explained: How California Voters Could Upend the Gig Economy*, GUARDIAN (Oct. 15, 2020), <https://www.theguardian.com/us-news/2020/oct/15/proposition-22-california-ballot-measure-explained> (on file with the *University of the Pacific Law Review*) (inferring that drivers and labor groups oppose Prop 22 because it provides weaker benefits and wages to app-based drivers compared to AB 5).

156. Chen & Padin, *supra* note 6.

157. CAL. BUS. & PROF. CODE § 7449 (West 2022).

158. See Siddiqui & Tiku, *supra* note 3 (“Nowhere does [the law] say employees have to give up flexibility in order to have worker protections”); CAL. LAB. CODE §§ 226.7, 512 (West 2022); *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2022).

159. CAL. LAB. CODE § 226.7; CAL. LAB. CODE § 512 (West 2022), *invalidated by* Int'l Brotherhood of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin., 986 F.3d 841 (9th Cir. 2021).

160. CAL. LAB. CODE § 512 (West 2022), *invalidated by* Int'l Brotherhood of Teamsters, Local 2785 v.

may work more than eight hours a day, but an employer must pay overtime for those hours.¹⁶¹ Since there are no predictive scheduling requirements under the Californian Labor Code, Prop 22's concerns of mandating a set schedule for drivers are illegitimate.¹⁶²

Prop 22 promised to secure numerous benefits and protections for gig-economy workers.¹⁶³ The law provides health care subsidies, a guaranteed minimum earning level, and protections similar to workers' compensation.¹⁶⁴ However, Prop 22's caveats in the law weaken these benefits significantly.¹⁶⁵ The proposition's 120% minimum wage earnings guarantee would appear beneficial for drivers as it suggests drivers will receive at least \$17.80 per hour; however, this guarantee only includes engaged driving time.¹⁶⁶ This limiting condition means the gig-economy company does not include a driver's time spent waiting for a service request in the earnings guarantee.¹⁶⁷ When a driver factors in all hours they spent waiting for a request, the equivalent wage is only \$5.64 an hour.¹⁶⁸

Additionally, the health care stipend falls short in subsidizing health insurance.¹⁶⁹ Eligible drivers receive around \$400 a month to subsidize their health insurance.¹⁷⁰ This subsidy is just under the \$448 per month for single coverage

Fed. Motor Carrier Safety Admin., 986 F.3d 841 (9th Cir. 2021); see *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1044 (2022) (quoting the law that allows employees to waive their second meal period for shifts less than 12 hours).

161. CAL. LAB. CODE § 510 (West 2022).

162. See Anthony Zaller, "Predictive Scheduling" and Scheduling Requirements Under California Law, CAL. EMP. L. REP. (Feb. 14, 2020), <https://www.californiaemploymentlawreport.com/2020/02/predictive-scheduling-and-scheduling-requirements-under-california-law/> (on file with the *University of the Pacific Law Review*) (defining predictive scheduling as an obligation for employers to release an employee's schedule well in advance of their shifts).

163. *A Breakdown of Prop 22 Benefits*, UBER BLOG (Dec. 13, 2020), <https://www.uber.com/blog/california/p22-independent-work/> (on file with the *University of the Pacific Law Review*) (stating Prop 22 would provide app-based drivers with guaranteed minimum earnings, injury protection, healthcare stipends, among other benefits).

164. CAL. BUS. & PROF. CODE § 7449 (West 2022).

165. *Id.*; Mollaneda, *supra* note 20.

166. CAL. BUS. & PROF. CODE § 7451 (West 2022); Jacobs & Reich, *supra* note 115 (stating that Prop 22's promise of 120% of the minimum wage would equate to \$15.60 per hour based on the minimum wage rising to \$13 per hour in 2021 which would be \$17.80 today since minimum wage is \$14 in California).

167. See Jacobs & Reich, *supra* note 115 ("Not paying for that time would be the equivalent of a fast-food restaurant or retail store saying they will only pay the cashier when a customer is at the counter.").

168. Ken Jacobs & Michael Reich, *Uber and Lyft Initiative Guarantees Only \$5.64 an Hour*, UC BERKLEY LAB. CTR. (Oct. 31, 2019), <https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/> (on file with the *University of the Pacific Law Review*).

169. See Mollaneda, *supra* note 20 (stating that under Prop 22, Uber's health care stipend only pays for a fraction of the cheapest health care plan for a family offered on Affordable Care Act exchanges).

170. See *A Breakdown of Prop 22 Benefits*, *supra* note 163 (informing that the healthcare stipend for eligible drivers is \$1,227.54 for the quarter, which is \$409.18 a month).

insurance premium for the lowest-tiered health insurance plan.¹⁷¹ Furthermore, the subsidy covers less than half of the \$1,041 family coverage premium, whereas other employee benefit programs provide family plans for dependents.¹⁷²

Not only was Prop 22 disingenuous, but TNCs also participated in deceitful strategies to convince Californian legislators, workers, and voters that their workers are independent contractors.¹⁷³ Before Prop 22, Uber granted drivers more control, allowing drivers to set their fare prices and see passengers' destinations before accepting ride requests.¹⁷⁴ As soon as Prop 22 went into effect, Uber revoked this control now that the company no longer needed to prove drivers were independent contractors.¹⁷⁵ Moreover, reports show gig companies are not following through on Prop 22's promised benefits, as many drivers are not receiving the health care stipends that they are eligible for.¹⁷⁶ Prop 22's attractive promises and TNCs' temporary perks for workers baited California voters into enacting subpar protections.¹⁷⁷ Then, once Prop 22 went into effect, these companies switched their policies to their workers' detriment.¹⁷⁸

2. Ramifications for App-Based Drivers

Prop 22's major purpose was to protect TNCs from possessing too much responsibility over their workers.¹⁷⁹ In exchange for Prop 22's minimal benefits, California gig-economy drivers lost a plethora of protections and entitlements that an employee classification guarantees.¹⁸⁰ The law does not entitle app-based drivers to overtime compensation, paid time off, or unemployment insurance as independent contractors.¹⁸¹ In response to COVID-19, California created a new unemployment program to assist those ineligible for regular unemployment benefits, including app-based drivers.¹⁸²

171. Anna Porretta, *How Much Does Individual Health Insurance Cost*, EHEALTH (Nov. 24, 2020), <https://www.ehealthinsurance.com/resources/individual-and-family/how-much-does-individual-health-insurance-cost> (on file with the *University of the Pacific Law Review*).

172. *Id.*

173. See Press, *supra* note 7 (stating gig companies used Prop 22's purported benefits, including mandatory wage minimums and health insurance stipends, to trick voters and drivers into supporting the proposition).

174. Tyler Sonnemaker, *Uber Gave Drivers More Control to Prove They're Independent. Now the Company Is Taking Back Control Because Drivers Actually Used It*, INSIDER (Apr. 5, 2021), <https://www.businessinsider.com/uber-california-driver-independent-contractors-pricing-destinations-prop-22-passage-2021-4> (on file with the *University of the Pacific Law Review*).

175. *Id.*

176. Press, *supra* note 7.

177. Press, *supra* note 7.

178. Sonnemaker, *supra* note 174; Chen & Padin, *supra* note 6.

179. CAL. BUS. & PROF. CODE § 7449 (West 2022); Mollaneda, *supra* note 20.

180. CAL. BUS. & PROF. CODE § 7449 (West 2022); Mollaneda, *supra* note 20.

181. CAL. BUS. & PROF. CODE § 7449 (West 2022); Mollaneda, *supra* note 20.

182. Siddiqui & Van Dam, *supra* note 14; Press Release, U.S. Senator Dianne Feinstein, Self-Employed, Part-Time and Gig Workers Can Now Apply for Unemployment Benefits (Apr. 28, 2020), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=91191FD9-9ECF-448E-B533->

In addition to losing employee protections and entitlements, app-based drivers pay more in taxes as independent contractors.¹⁸³ An employee normally pays 6.2% in Social Security taxes and 1.45% in Medicare taxes, while the employer pays the remaining other half.¹⁸⁴ As an independent contractor, the app-based driver will pay both halves, paying 12.4% in Social Security taxes and 2.9% in Medicare taxes.¹⁸⁵ TNCs undoubtedly received the benefit of the new arrangement as Prop 22 passed these expenses to the their drivers.¹⁸⁶ This transfer of monetary obligations to their lowest-tiered workers demonstrates that Prop 22 does not have the app-based driver's best interest at heart.¹⁸⁷

A troubling aspect of Prop 22's Loss and Liability Protection is that the policy only covers the driver's gig-economy earnings.¹⁸⁸ Since the proposition insists its earning opportunity is a "side-gig" for people to earn extra income, then this assertion assumes drivers have another source of income.¹⁸⁹ If TNCs only provide compensation for earnings under the gig economy, then TNCs leave drivers without compensation for their main source of income.¹⁹⁰ Less than ten percent of drivers work for TNCs more than 32 hours a week, so this compensation program leaves ninety percent of their drivers under-protected.¹⁹¹ California workers' compensation requires an employer cover the employee's lost wages from all employers, which is significantly more protection than Prop 22's policies.¹⁹²

Workers' compensation is an essential protection for workers in dangerous occupations; driving is one of the most dangerous activities in daily life, making app-based driving an incredibly dangerous "side-gig."¹⁹³ Some car accidents cause permanent disabilities and can preclude a person from returning to their employment.¹⁹⁴ Under Prop 22's liability protection, gig-economy companies only

BF257066CBD0 (on file with the *University of the Pacific Law Review*).

183. Liz Weston, *What Gig Workers Need to Know About Taxes*, ASSOCIATED PRESS (Feb. 8, 2021), <https://apnews.com/article/personal-taxes-medicare-coronavirus-pandemic-a8d2ea241381ecd5193b3306111c05cf> (on file with the *University of the Pacific Law Review*).

184. *Id.*

185. *Id.*

186. Mollaneda, *supra* note 20; Harnett, *supra* note 28.

187. Harnett, *supra* note 28.

188. See CAL. BUS. & PROF. CODE § 7455 (West 2022) (creating a special workers'-compensation like program specifically for the gig-economy independent contractor).

189. *Id.*

190. CAL. BUS. & PROF. CODE § 7456 (West 2022).

191. LOUIS HYMAN ET AL., CORNELL UNIV., PLATFORM DRIVING IN SEATTLE 33 (2020).

192. CAL. LAB. CODE. § 4453(c)(2) (West 2022).

193. See *Injuries and Violence Are Leading Causes of Death*, CDC (Feb. 11, 2021), <https://www.cdc.gov/injury/wisqars/animated-leading-causes.html> (on file with the *University of the Pacific Law Review*) (showing motor vehicle accidents as leading cause of unintentional death for ages 1–44 from 1981–2019).

194. Darnel Murgatroyd et al., *Predictors of Return to Work Following Motor Vehicle Related Orthopaedic Trauma*, 17 BMC MUSCULOSKELETAL DISORDERS 1, 4 (2019).

compensate injured drivers for their side-gig income.¹⁹⁵ This program could potentially leave many workers without an adequate source of income; should the worker sustain injuries while working for TNCs.¹⁹⁶

B. Prop 22 Secures an Unconscionable Contract

The doctrine of unconscionability is traditionally a defense a contracting party invokes to void a contract, but the doctrine does not hold contracts preemptively unenforceable.¹⁹⁷ However, this Comment employs the unconscionability analysis to show the unfair and inequitable terms gig-economy companies offer their workers.¹⁹⁸ Subsection 1 details how gig-economy worker contracts are procedurally unconscionable.¹⁹⁹ Subsection 2 explains how gig-economy worker contracts are substantively unconscionable.²⁰⁰

1. An Employment Contract That's Surprisingly Oppressive

Many gig-economy workers' contracts are rife with oppression.²⁰¹ TNCs have significantly more resources and capital than app-based drivers, as TNCs have access to billions of dollars and expensive legal advocacy.²⁰² In comparison, drivers have significantly less bargaining power because they do not have the same political and financial resources to fairly negotiate their contracts.²⁰³ Frequently, drivers are young immigrants with low education levels, and more than half have dependents.²⁰⁴ The TNCs are one of the few avenues where workers can access the market; as the app gathers customers and drivers cannot reach potential customers without the app.²⁰⁵ These factors give TNCs superior bargaining power; providing little to no opportunity for workers to negotiate contract terms.²⁰⁶ If the worker

195. CAL. BUS. & PROF. CODE § 7455 (West 2022).

196. Mollaneda, *supra* note 20.

197. CAL. CIV. CODE § 1670.5 (West 2022).

198. Kerbey Kniss, *Uber's Arbitration Trickery: Mohamed's Holding, the New Era of Limiting the Scope of Administration Protection and the Vindication of Rights Doctrine*, 51 J. MARSHALL L. REV. 439, 482 (2018).

199. *Infra* Subsection V.B.1.

200. *Infra* Subsection V.B.2.

201. Submission from Marshall Steinbaum, Professor, Univ. of Utah, Econ. Dep't, to H. Judiciary Subcomm. on Antitrust, Com. & Admin. Law (Apr. 2020), https://judiciary.house.gov/uploadedfiles/submission_from_marshall_steinbaum.pdf (on file with the *University of the Pacific Law Review*).

202. Iqbar, *supra* note 100.

203. JAMES PARROTT & MICHAEL REICH, CTR. FOR N.Y.C. AFF., AN EARNINGS STANDARD FOR NEW YORK CITY'S APP-BASED DRIVERS: ECONOMIC ANALYSIS AND POLICY ASSESSMENT 16 (2018).

204. *See id.* (reporting that many app-based drivers are young immigrants with low education levels, over half have children).

205. Steinbaum, *supra* note 201; Kniss, *supra* note 198, at 482; Richard Bales & Christian Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 479 (2017).

206. *Compare* Cubic Corp. v. Marty, 185 Cal. App. 3d 438, 450 (1986) (finding an adhesive employment contract between an employer and employee because the employee had no opportunity to negotiate and had to

wants to participate in the market, they must agree to the gig-economy company's terms on a take-it-or-leave-it basis.²⁰⁷ This relationship is a textbook adhesion contract.²⁰⁸

Much of the gig-economy worker contract terms—and the consequences of those terms—are a surprise to many gig-economy workers.²⁰⁹ Many terms-of-service agreements exceed twenty pages and include addendums that a user must access through separate links.²¹⁰ Buried in these long-winded clauses, the Lyft agreement finally relays that the worker is an independent contractor, not an employee.²¹¹ However, the driver addendum does not contain information relaying that drivers are independent contractors; the general terms-of-service agreement contains this information.²¹²

The “Yes on 22” advertisement campaign misled many California voters about Prop 22's ramifications.²¹³ Thus, it is a safe assumption that many California drivers do not fully understand what an independent contractor classification entails.²¹⁴ The Lyft agreement states the company does not control the worker's hours nor how the worker performs the service.²¹⁵ However, the terms do not explain that an independent contractor pays a greater proportion in state and federal taxes, nor that independent contractors are ineligible for employee benefits.²¹⁶ Potential drivers must find other sources that explain these stipulations, making the exact terms of an independent contractor status surprising indeed.²¹⁷

accept the terms on a “take-it-or-leave-it” basis), with Bales & Woo, *supra* note 205, at 479 (detailing how Uber drivers do not have an opportunity to negotiate terms regarding their performance and compensation for their work).

207. Miriam Cherry, *A Global System of Work, a Global System of Regulation?: Crowdwork and Conflicts with Law*, 94 TUL. L. REV. 183, 224–25 (2020).

208. See *Adhesion Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining “adhesion contract” as a standard-form contract, which the party with more bargaining power creates, that the weaker party agrees and signs on a “take-it-or-leave-it” basis).

209. Siddiqui & Tiku, *supra* note 3.

210. *Compare* OTO, LLC v. Kho, 8 Cal. 5th 111, 128 (2019) (finding an element of surprise in an employment contract requiring arbitration, as the contract set terms in legal jargon within a lengthy “visually impenetrable” paragraph wall of text), with *Lyft Terms of Service*, LYFT, <https://www.lyft.com/terms> (last updated Apr. 1, 2021) (on file with the *University of the Pacific Law Review*) (presenting a long terms of service agreement that requires the reader to click a separate link to read the Driver Addendum), and *Lyft Driver Addendum*, LYFT, <https://www.lyft.com/terms/driver-addendum> (last updated Dec. 9, 2020) (on file with the *University of the Pacific Law Review*) (setting forth a driver agreement separate from the general terms of service agreement).

211. *Lyft Terms of Service*, *supra* note 210.

212. *Id.*; *Lyft Driver Addendum*, *supra* note 210.

213. LeGardye, *supra* note 4.

214. See Siddiqui & Tiku, *supra* note 3 (“[V]oters who spoke with The Washington Post said they didn't realize they were choosing between benefits guaranteed through employment and an arbitrary set of supplemental benefits.”); see also Stevens, *supra* note 1 (warning other gig-economy drivers of Prop 22's implications, as the author describes how the “Yes on 22” campaign misled him about protections an employee classification entails).

215. *Lyft Driver Addendum*, *supra* note 210.

216. *Id.*

217. Joann Weiner, *The Hidden Costs of Being an Uber Driver*, WASH. POST (Feb. 20, 2015), <https://www.washingtonpost.com/news/get-there/wp/2015/02/20/the-hidden-costs-of-being-an-uber-driver/> (on file with the *University of the Pacific Law Review*).

2. An Employment Contract So Unfair, It's Shocking

Prop 22 allows a contract that reallocates most of the risks to app-based workers, particularly drivers, as Prop 22 eliminated much of TNCs' responsibilities to their workers.²¹⁸ The app-based driver bears the risk of property damage and personal injury while carrying out the terms of their contract.²¹⁹ The driver bears this risk while also standing as the party with fewer resources and less bargaining power.²²⁰ Injuries a driver sustains while working their "side-gig" can leave them unable to work their full-time occupation.²²¹ Compared to the considerable risk drivers incur, TNCs take on little to no risk as Prop 22 indemnifies the company from most costs the injury or property damage produces.²²² Prop 22 requires gig-economy companies to provide workers compensation only for gig-economy income.²²³ Thus, on average, the company bears the risk of a few hundred dollars a week, while the driver goes without their main source of income.²²⁴

Additionally, Prop 22 removes vicarious liability for gig-economy companies by codifying their workers as independent contractors.²²⁵ Should a passenger sue a driver, the driver is responsible for all legal fees and damages as an independent

218. *Compare* *Ellis v. McKinnon Broad. Co.*, 18 Cal. App. 4th 1786, 1806 (1993) (finding an employment contract provision, which required the employee to forfeit \$20,000 in commission compensation, as substantively unconscionable because the result was unjustifiably one-sided), *with* *Harnett*, *supra* note 29 (detailing how Prop 22 indemnifies TNCs from ensuring their drivers earn fair compensation for the work the driver performs for the company).

219. *MISHEL & McNICHOLAS*, *supra* note 77, at 13–14; *Injuries and Violence Are Leading Causes of Death*, *supra* note 193.

220. *Compare Uber (UBER)*, FORBES, <https://www.forbes.com/companies/uber/?sh=4017455b10b0> (last updated Jan. 7, 2022) (on file with the *University of the Pacific Law Review*) (showing Uber's assets of \$33.3 billion and revenue of \$12.1 billion), *with* Hope Mutie, *How Much Do Lyft Drivers Make?*, GOBANKINGRATES (Oct. 20, 2021), <https://www.gobankingrates.com/money/side-gigs/how-much-do-lyft-drivers-make/> (on file with the *University of the Pacific Law Review*) (estimating that a typical driver, driving 40 hours a week, earns between \$1,900 and \$2,700 a month).

221. *Murgatroyd et al.*, *supra* note 194, at 4.

222. *Contra* CAL. BUS. & PROF. CODE § 7455 (West 2022) (mandating ridesharing companies maintain insurance to compensate driver-caused injuries and losses to third parties). *But see* CAL. BUS. & PROF. CODE § 7455 (West 2022) (limiting the liability insurance to instances where the driver's personal insurance does not cover the loss, meaning the driver must expend their insurance before the company pays out). *Compare* *Serpa v. California Sur. Investigations, Inc.*, 215 Cal. App. 4th 695, 709 (2013) (finding an unconscionable employment contract where the provision required employees to bear their own attorney fees, as the term prevents employees from seeking remedy due to lack of resources), *with* CAL. BUS. & PROF. CODE § 7455 (West 2022) (obliging TNCs to a substantially lower compensation standard to injured drivers than what the law guarantees to employees).

223. CAL. BUS. & PROF. CODE § 7455 (West 2022).

224. CAL. BUS. & PROF. CODE § 4453 (West 2022); CAL. DEP'T INDUS. REL., *DWC ANNOUNCES TEMPORARY TOTAL DISABILITY RATES FOR 2021*, RELEASE NO. 2020-95 (Nov. 5, 2020) (reporting the minimum weekly disability payment rate as \$203.44 and the maximum rate as \$1,356.31).

225. *See* J. W. Neyers, *A Theory of Vicarious Liability*, 43 ALBERTA L. REV. 287, 290 (2005) (noting that the law imposes liability on employers for the injurious actions of their employees, but not for independent contractors).

contractor, whereas an employer is typically responsible for such expenses.²²⁶ In the event a driver's negligence injures a passenger, gig-economy companies' \$1,000,000 liability insurance only triggers after a driver exhausts their personal insurance policy.²²⁷ Thus, legal fees, medical expenses, and court awarded damages could financially cripple a gig-economy driver with significantly less capital and resources than gig-economy companies.²²⁸ Furthermore, the driver may not have the resources to adequately compensate an injured third-party; a problem vicarious liability aims to resolve.²²⁹

Prop 22 secured a contract where the gig-economy driver shoulders the majority of the risks as the party with substantially less bargaining power and resources.²³⁰ This working relationship requires the driver to perform the majority of the work and risk injury or financial ruin, while the company avoids these risks and collects a fee.²³¹ Moreover, Prop 22 implemented various loopholes for gig-economy companies where the company can evade paying the costs of Prop 22's mandated benefits and compensation.²³² Prop 22 cleverly reallocated almost all risk to the gig-economy worker, creating a contract with terms so unfair it shocks the conscience.²³³

C. Gig-Economy Workers Are Employees, Not Independent Contractors

Under the ABC test, app-based drivers are employees, not independent contractors.²³⁴ To satisfy part A of the test, a hiring entity must not control or direct how a worker performs the work.²³⁵ TNCs argue that drivers are free from control because drivers use their own cars and choose when to work.²³⁶ However, TNCs exert significant control over their drivers.²³⁷ TNCs use algorithmic supervision,

226. See *id.*; see also *Lyft Terms of Service*, *supra* note 210 (“By using the Lyft Platform. . . you agree to accept such risks and agree that Lyft is not responsible for the acts or omissions of Users on the Lyft Platform.”).

227. CAL. BUS. & PROF. CODE § 7455 (West 2022); Curtis Lee, *I Was Injured While Riding in an Uber or Lyft Vehicle*, NOLO, <https://www.nolo.com/legal-encyclopedia/i-was-injured-while-riding-in-an-uber-or-lyft-vehicle.html> (last visited Jan. 9, 2022) (on file with the *University of the Pacific Law Review*).

228. See *How Much is the Average Settlement for a Car Accident in California*, RIST L. OFF., <https://www.sdvictimlaw.com/how-much-is-the-average-settlement-for-a-car-accident-in-califor.html> (last visited Jan. 9, 2022) (on file with the *University of the Pacific Law Review*) (citing the average settlement amount for a car accident in California as \$21,000); *Uber (UBER)*, *supra* note 220; Mutie, *supra* note 220.

229. Neyers, *supra* note 225, at 292.

230. Harnett, *supra* note 28.

231. MISHEL & McNICHOLAS, *supra* note 77, at 14; *Injuries and Violence Are Leading Causes of Death*, *supra* note 193.

232. Press, *supra* note 7.

233. CAL. BUS. & PROF. CODE §§ 7448–7467 (West 2021); *Serpa v. California Sur. Investigations Inc.*, 215 Cal. App. 4th 695, 703–04 (2013) (discussing whether the contract shocked the conscience).

234. CAL. LAB. CODE § 2775 (West 2022); MISHEL & McNICHOLAS, *supra* note 77, at 9.

235. CAL. LAB. CODE § 2775 (West 2022).

236. N.L.R.B., OFF. OF THE GEN. COUNS., 13-CA-163062, ADVICE MEMORANDUM (2019).

237. MISHEL & McNICHOLAS, *supra* note 77, at 10.

rather than traditional human supervision.²³⁸ The app monitors drivers' acceptance rates, time on trips, their speed, driving acceleration, routes, and cancellation rates.²³⁹ Poor performance on these factors can cause the app to deactivate a driver's account—effectively firing them.²⁴⁰ Moreover, many TNCs require app-based drivers to accept a ride before the app reveals the destination and how much they will earn from the fare.²⁴¹ Also, TNCs usually dictate which route a driver takes, and some TNCs can adjust the fare price if the app deems the driver took an inefficient route.²⁴² This algorithmic oversight shows drivers have little control over most aspects of the work they perform.²⁴³

To satisfy part B of the test, the hiring entity must show that the worker is not performing work integral to the hiring entity's business.²⁴⁴ App-based drivers do not satisfy this part of the test.²⁴⁵ The work drivers perform for TNCs is the whole premise of the business model: they are performing rides and deliveries for a company that sells rides and deliveries to paying customers.²⁴⁶ Any counterargument against this premise is preposterous.²⁴⁷

Finally, app-based drivers do not satisfy part C of the test.²⁴⁸ Part C requires workers to regularly work in an independent occupation of the same nature as the work they perform for the hiring entity.²⁴⁹ TNCs argue drivers satisfy part C because drivers can work for competing TNCs simultaneously.²⁵⁰ However, that argument is a misapplication of the ABC test.²⁵¹ An indicator that a worker is in

238. *Id.*

239. *Id.*

240. *Id.*; *Uber Community Guidelines*, UBER (Sept. 2019), https://www.uber-assets.com/image/upload/v1571164076/legal/doc/ANZ_community_guidelines.pdf (on file with the *University of the Pacific Law Review*).

241. See MISHEL & MCNICHOLAS, *supra* note 77, at 9 (showing that for most of Uber's time in business, they did not let drivers see the destination before accepting the ride). *But see* Sonnemaker, *supra* note 174 (reporting that Uber temporarily gave drivers more control, then took it back shortly after); *contra* Doug H., *Upfront Fares on Uber: Trip Radar Shows Ride Payout and Passenger Destination*, RIDESHARING DRIVER (Feb. 22, 2022), <https://www.ridesharingdriver.com/uber-driver-upfront-fares/> (on file with the *University of the Pacific Law Review*) (detailing that Uber may be changing its policy soon by letter drivers see passenger destinations before accepting a ride, but this is not in effect yet). See *Just How Far is Your Uber Driver Willing to Take You*, FORBES (Mar. 24, 2015), <https://www.forbes.com/sites/harrycampbell/2015/03/24/just-how-far-is-your-uber-driver-willing-to-take-you/?sh=3d8540dd597c> (on file with the *University of the Pacific Law Review*) (explaining how drivers' inability to see rider destinations before accepting can cause the driver to end up hours away from their home market, losing hours of potential rides on the drive back).

242. MISHEL & MCNICHOLAS, *supra* note 77, at 9; *Uber Community Guidelines*, *supra* note 240.

243. MISHEL & MCNICHOLAS, *supra* note 77, at 9; Lawrence Mishel & Celine McNicholas, *supra* note 77; CAL. LAB. CODE § 2775 (West 2022).

244. CAL. LAB. CODE § 2775 (West 2022).

245. Advice Memorandum from Jayme Sophir, Assoc. Gen. Couns. Of N.L.R.B. to Jill Coffman, Reg'l Dir. Of N.L.R.B. (Apr. 16, 2019) (on file with *University of the Pacific Law Review*).

246. *Id.*

247. See *id.* (conceding that the work Uber drivers perform is essential to the business).

248. MISHEL & MCNICHOLAS, *supra* note 77, at 10–11; *Uber Community Guidelines*, *supra* note 240.

249. CAL. LAB. CODE § 2775 (West 2022).

250. Advice Memorandum from Jayme Sophir, Assoc. Gen. Couns. of N.L.R.B. to Jill Coffman, Reg'l Dir. of N.L.R.B. (Apr. 16, 2019) (on file with *University of the Pacific Law Review*).

251. See *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 962 (2018) (holding that a company

an independent occupation is when the worker takes steps to promote and facilitate their independent business.²⁵² Examples of these steps include licensing, marketing, advertising, and routine offerings of their individual services to potential customers without a hiring entity's facilitation.²⁵³ An app-based driver cannot access the market without a TNC.²⁵⁴ Also, TNCs do not allow drivers to build a customer base, nor do they allow drivers to offer additional services to increase their revenue.²⁵⁵ Since drivers are completely dependent on the TNC to provide services, then they do not work independently from the company.²⁵⁶

V. PAY NO ATTENTION TO THAT MAN BEHIND THE CURTAIN: UBER AND LYFT OBSCURING THE TRUTH OF EMPLOYMENT CLASSIFICATION AND PROFITABILITY

In their advocacy to maintain Prop 22, TNCs have espoused rhetoric that app-based drivers want an independent contractor classification. Further TNCs have stated that the legislature should uphold the will of the people.²⁵⁷ However, perhaps the proper question is not what app-based drivers want, but rather what protections do app-based drivers need.²⁵⁸ Section A argues that Prop 22's eroding of worker protections will have a lasting impact.²⁵⁹ Section B demonstrates app-based drivers can have employee protections while retaining flexibility in their work hours.²⁶⁰

A. Prop 22 Focuses on The Wrong Problem and Creates New Ones

Uber and Lyft postulate that one of their main intentions behind Prop 22 is to promote their drivers' right to choose and maintain their flexible working hours.²⁶¹ TNCs are not promoting Prop 22 out of benevolence for their drivers; they are

that does not prohibit workers from engaging in other work is not sufficient to establish the worker is in the business independently).

252. *Id.*

253. MISHEL & MCNICHOLAS, *supra* note 77, at 10–11; *Uber Community Guidelines*, *supra* note 240 (providing no steps for a driver to create an independent business).

254. MISHEL & MCNICHOLAS, *supra* note 77, at 6; *see also Uber Community Guidelines*, *supra* note 240 (omitting any opportunity to build a customer service).

255. MISHEL & MCNICHOLAS, *supra* note 77, at 7; *Uber Community Guidelines*, *supra* note 240.

256. Mishel & McNicholas, *supra* note 77, at 7; *Uber Community Guidelines*, *supra* note 240.

257. *Prop 22 Passed: Moving Forward with New Driver Benefits*, LYFT (Nov. 4, 2020), <https://www.lyft.com/blog/posts/ca-prop22-election-results> (on file with the *University of the Pacific Law Review*); *A New Way Forward for Independent Work*, UBER (Dec. 13, 2020), <https://www.uber.com/blog/california/p22-independent-work/> (on file with the *University of the Pacific Law Review*).

258. McGeorge School of Law, *California Dreaming: Regulating the Gig Economy*, YOUTUBE (Mar. 1, 2022), <https://www.youtube.com/watch?v=Z6ANEJ07xjc> (on file with the *University of the Pacific Law Review*).

259. *Infra* Section V.A.

260. *Infra* Section V.B.

261. *Prop 22 Passed: Moving Forward with New Driver Benefits*, *supra* note 257; *A New Way Forward for Independent Work*, *supra* note 257.

promoting Prop 22 to scapegoat their profitability issues and avoid paying taxes.²⁶² Subsection 1 explains how Uber and Lyft's business models are unsustainable.²⁶³ Subsection 2 details how Prop 22 saves TNCs money by burdening the public.²⁶⁴ Subsection 3 describes how Prop 22 started a new trend eroding worker's rights and protections.²⁶⁵

1. Employment Costs Are Not the Problem

Uber and Lyft have been unprofitable since their conception, even when they classify drivers as independent contractors.²⁶⁶ The companies have predicted they will turn a profit the next quarter.²⁶⁷ Yet they never have, and nothing in the market shows this will change any time soon.²⁶⁸ The first major barrier to ride-sharing companies' profitability is the exorbitant insurance costs.²⁶⁹ These costs are so burdensome that the insurance company, James River, actually ended its contract with Uber in 2019.²⁷⁰ Uber's contract with James River drained eighty-seven percent of the insurance company's cash reserves, and such a drain is unsustainable for any insurance company.²⁷¹ With insurance costs contributing to around fifty percent of TNCs' operating expenses, TNCs must find expenditures to cut their operating expenses in other areas.²⁷²

The second major barrier to TNCs' profitability is the lack of available drivers.²⁷³ When there are more ride requests than available drivers, then TNCs lose money because potential customers choose other means of transportation due to long wait times.²⁷⁴ Uber and Lyft have implemented numerous incentive programs to attract more drivers, spending hundreds of millions of dollars on sign-up bonuses and marketing.²⁷⁵ However, with the uncertainty of the pandemic, lack

262. Harnett, *supra* note 28.

263. *Infra* Subsection V.A.1.

264. *Infra* Subsection V.A.2.

265. *Infra* Subsection V.A.3.

266. Poletti, *supra* note 99.

267. See Porter, *supra* note 101 (reporting that Uber predicts their adjusted profits for quarter three, 2021 will be up to \$25 million).

268. Poletti, *supra* note 99; Horan, *supra* note 102, at 49.

269. Kowaleski, *supra* note 104.

270. Suzanne Barlyn, *Why James River Insurance Dumped Uber Account*, INS. J. (Nov. 8, 2019), <https://www.insurancejournal.com/news/national/2019/11/08/547942.htm> (on file with the *University of the Pacific Law Review*).

271. *Id.*

272. Kowaleski, *supra* note 104.

273. Andrew Hawkins, *Uber and Lyft Have a Driver Shortage Problem and It's Costing Them a Lot of Money*, VERGE (Apr. 7, 2021), <https://www.theverge.com/2021/4/7/22371850/uber-lyft-driver-shortage-covid-bonus-stimulus> (on file with the *University of the Pacific Law Review*).

274. *Id.*

275. *Id.*

of protections for drivers, and low earnings, these TNCs are struggling to maintain a healthy number of drivers.²⁷⁶ Perhaps if these companies gave their drivers protections and benefits, then they would struggle less to retain enough drivers.²⁷⁷

Prop 22's proponents claimed that an employee classification would cause income-earning opportunities to disappear.²⁷⁸ However, the market shows this claim is not entirely accurate, since TNCs were not profitable even when they classified drivers as independent contractors prior to AB 5.²⁷⁹ Uber and Lyft have only stayed in business due to generous investors and shareholder funds that supplement their operating expenses.²⁸⁰ These investors are now placing pressure on these TNCs to generate profit, or they will pull funding as the investors are not seeing a return on their investment.²⁸¹ With no clear change in the market or signs insurance expenses are lessening; it seems unlikely that Uber or Lyft will generate a profit in the near future.²⁸² Investors will pull out eventually; leaving Uber and Lyft unable to pay their operating expenses.²⁸³ Prop 22 was supposed to save the gig economy, but instead it delayed the inevitable downfall of the app-based driver model.²⁸⁴

2. *Prop 22 is an Elaborate Tax-Avoiding Scheme*

TNCs claim paying an hourly wage is too great of a financial burden for them to bear.²⁸⁵ However, the increase of expenses TNCs would incur are mostly from additional taxes, not from paying minimum wage.²⁸⁶ Both federal law and

276. Levi Sumagaysay, *Uber Spending \$250 Million to Lure Drivers Back to Work as Pandemic Restrictions Ease*, MARKETWATCH (Apr. 7, 2021), https://www.marketwatch.com/story/uber-spending-250-million-to-lure-drivers-back-to-work-as-pandemic-restrictions-ease-11617835211?mod=levi-sumagaysay&mod=article_inline (on file with the *University of the Pacific Law Review*).

277. See Tyler Sonnemaker, *Uber and Lyft Drivers Who Say They Don't Want to Drive for the Ride-Share Companies Now Are Holding Out for Higher Pay and Better Working Conditions. Others Say They May Never Return*, INSIDER (Apr. 20, 2021), <https://www.businessinsider.com/why-uber-lyft-expensive-taking-long-driver-shortage-2021-4> (on file with the *University of the Pacific Law Review*) (explaining the exodus of app-based drivers due to low pay and poor working conditions).

278. See CAL. BUS. & PROF. CODE § 7449 (West 2022) (claiming the legislation that classifies drivers as employees threatened to take away the work opportunities that TNCs provide).

279. Poletti, *supra* note 99.

280. *Id.*

281. Laura Forman, *Uber, Lyft Drive Investors Away*, WALL ST. J. (Aug. 4, 2021), <https://www.wsj.com/articles/uber-lyft-drive-investors-away-11628115638> (on file with the *University of the Pacific Law Review*).

282. Horan, *supra* note 102, at 49.

283. Forman, *supra* note 281.

284. David Trainer, *The Emperor Has No Clothes—Uber's Business Model Is Broken*, FORBES (Sept. 9, 2022), <https://www.forbes.com/sites/greatspeculations/2020/09/09/the-emperor-has-no-clothes—ubers-business-model-is-broken/?sh=656ad6bc706a> (on file with the *University of the Pacific Law Review*).

285. Uber, Registration Statement (Form S-1) (Apr. 11, 2019); Lyft, Registration Statement (Form S-1) (Feb. 9, 2019).

286. See 29 C.F.R. § 531.55 (2022) (allowing employers to utilize mandatory service fees the employer imposes on customers to satisfy minimum wage obligations).

California law allow employers to use service charges to satisfy minimum wage obligations.²⁸⁷ TNCs impose a fare charge on riders that TNCs use to pay the driver, which qualifies the charge as a service fee.²⁸⁸ The fee drivers receive directly from riders is a service fee, and TNCs can use these service fees to satisfy their minimum wage obligations.²⁸⁹ Thus, if the market is strong and drivers perform enough rides, then these service fees should exceed minimum wage.²⁹⁰ Therefore, TNCs are only responsible for a 12% tax on those service fees, making Prop 22 an elaborate method for businesses to avoid taxes.²⁹¹ This is particularly problematic as TNCs did not contribute to Pandemic Unemployment Assistance (PUA); where the government provided at least \$80 million in relief to gig-economy drivers.²⁹² Prop 22 shifted the burden of market performance away from the company and onto drivers and California taxpayers.²⁹³

Another significant expense TNCs reel against is providing health insurance benefits to their drivers.²⁹⁴ However, this fear is not legitimate as ninety percent of their drivers drive less than thirty hours per week.²⁹⁵ The ACA does not obligate employers to provide health insurance to employees working less than thirty hours a week.²⁹⁶ Also, since most drivers work part-time, then they often have another form of employment, and their main employer probably provides health insurance.²⁹⁷ Additionally, if major corporations are trying to avoid providing health insurance, they should probably focus their efforts in promoting legislation

287. See 29 C.F.R. § 351.55 (2022) (defining service charges as a “compulsory service charge, such as 15 percent of the bill,” that employers impose on customers, which is not a tip).

288. See *How Your Pay is Calculated*, LYFT (July 29, 2019), <https://www.lyft.com/hub/posts/pay-breakdown> (on file with the *University of the Pacific Law Review*) (showing that customers pay a fare rate for the gig-company’s services, which qualifies it as a service charge); Janet Grumer, Aaron Colby & Paul Rodriguez, *When Does a Service Charge Become a Tip in California*, DAVIS, WRIGHT, TREMAIN, LLP (Nov. 12, 2019), <https://www.dwt.com/blogs/employment-labor-and-benefits/2019/11/california-service-charge-tips-law> (on file with the *University of the Pacific Law Review*).

289. 29 C.F.R. § 531.55 (2022).

290. See 29 C.F.R. § 531.55 (2022) (showing that TNCs will need to pay wages outside of those service charges only when the market is poor and such service charges do not match minimum wage).

291. Campell, *supra* note 106.

292. Siddiqui & Van Dam, *supra* note 14.

293. Uber, Registration Statement (Form S-1) (Apr. 11, 2019); Lyft, Registration Statement (Form S-1) (Feb. 9, 2019).

294. LOUIS HYMAN ET AL., CORNELL UNIV., PLATFORM DRIVING IN SEATTLE 33 (2020).

295. Compare Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 253 (2010) (requiring large employers to provide health insurance to full-time employees, which are employees who work more than 30 hours a week), with LOUIS HYMAN ET AL., CORNELL UNIV., PLATFORM DRIVING IN SEATTLE 33 (2020) (showing 90% of drivers work less than 30 hours a week for TNCs).

296. See Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 253 (2010) (applying this exception to part-time and seasonal employees).

297. See JAMES PARROTT & MICHAEL REICH, CTR. FOR N.Y.C. AFF., AN EARNINGS STANDARD FOR NEW YORK CITY’S APP-BASED DRIVERS: ECONOMIC ANALYSIS AND POLICY ASSESSMENT 17 (2018) (showing that only 16% of New York City app-based drivers did not have health insurance in 2016).

that socializes health care.²⁹⁸ This systematic change to health care is a more effective solution than funding convoluted legislation that realigns employment classifications to side-step this obligation.²⁹⁹

*3. The Frog Boil Begins: Prop 22 Sets a Precedent that Facilitates the Erosion of Worker Protections*³⁰⁰

Prop 22 has spurred a new trend in labor law.³⁰¹ The broad language of Prop 22 provided opportunity for many industries to apply Prop 22's provisions to their own workers by making small adjustments to their employment model.³⁰² If a company avoids setting shifts for workers, allows them to pick tasks to perform, and allows workers to work for multiple companies, then the company falls within Prop 22.³⁰³ As the U.S. economy is a service-based economy, this model can apply to a multitude of jobs.³⁰⁴ In fact, some start-ups are aiming to apply the gig-economy model to retail.³⁰⁵ One company, Jyve, developed an app that outsourced single tasks for retail stores, in exchange for a one-time fee.³⁰⁶ For example, a retail location can request a user stock shelves for a few hours in exchange for \$100.³⁰⁷ The app would provide instructions on how to complete the task.³⁰⁸ Once the user completes the task, the app pays the user.³⁰⁹ Afterwards, the user must continue searching for other jobs.³¹⁰

298. Phil Galewitz, *Why Some CEOs Figure 'Medicare for All' is Good for Business*, KHN (June 7, 2019), <https://khn.org/news/a-large-employer-frames-the-medicare-for-all-debate/> (on file with the *University of the Pacific Law Review*) (discussing the efforts of small companies to push for socialized health care).

299. *Id.*; Mollaneda, *supra* note 20.

300. *See the Tail of the Boiling Frog*, NCBI (Dec. 7, 2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC534568/> (on file with the *University of the Pacific Law Review*) (“[I]f you put [a frog] in a pot filled with pleasantly tepid water and gradually heat it, the frog will remain in the water until it boils to death. Allegedly, the frog is not able to detect the gradual increase in temperature until it’s too late.”); *id.* (“This allegory is frequently used in economics, business, and marketing to point out that change has to be introduced gradually if it is to be successful.”).

301. *See* Alex Press, “Uber for Nurses” May Soon Be on the Ballot in California, JACOBIN (Feb. 8, 2022), <https://jacobin.com/2022/02/app-gig-economy-travel-nursing-shortage-lean-staffing> (on file with the *University of the Pacific Law Review*) (reporting that there is a Prop 22 copycat ballot initiative proposal that pertains to health care workers).

302. CAL. BUS. & PROF. CODE § 7451 (West 2022).

303. CAL. BUS. & PROF. CODE § 7453 (West 2022).

304. *See Service Economy*, CAMBRIDGE DICTIONARY (2022) (defining service economy as “an economy based on providing services rather than manufacturing or producing goods”).

305. Cale Guthrie Weissman, *How the Gig Economy Is Transforming Retail*, MODERN RETAIL (July 18, 2019), <https://www.modernretail.co/retailers/how-the-gig-economy-is-transforming-retail/> (on file with the *University of the Pacific Law Review*).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

The bleeding effect Prop 22 is having on the job market outside of TNCs is apparent in other industries as well.³¹¹ Albertson-owned grocery stores have recently laid off their union-run delivery drivers in favor of app-based delivery drivers because app-based independent contractors are cheaper.³¹² An even more concerning development is the mimicking of Prop 22.³¹³ On January 24, 2022, the law firm that drafted Prop 22 submitted a new initiative that applies to health care service providers.³¹⁴ This initiative aims to classify nurses, dental hygienists, and other health care workers who find work through apps, as independent contractors.³¹⁵ Prop 22 has set a dangerous precedent, where many workers can suddenly lose protections and benefits that an employee classification guaranteed them.³¹⁶

B. Uber and Lyft's Flexibility Argument is as Phony as Their Financial Success

TNCs promote the idea that an employee classification could never foster the type of work environment where employees can work free of scheduled shifts.³¹⁷ This assertion is not true; employees can have protection and flexible schedules.³¹⁸ Below are only two examples of how this can work; there are probably many more.³¹⁹ Subsection 1 posits TNCs share the burden of minimum wage obligations through a pro-rata system.³²⁰ Subsection 2 suggests a system that TNCs can implement on their apps to avoid setting schedules and paying overtime.³²¹

311. See Mike Dickerson, *Vons, Pavilions to Fire "Essential Workers," Replace Drivers with Independent Contractors*, KNOCKLA (Jan. 4, 2021), <https://knock-la.com/vons-fires-delivery-drivers-prop-22-e899ee24ffd0/> (on file with the *University of the Pacific Law Review*) (showing Prop 22 has affected employees of grocery stores, an industry people do not typically associate with transportation).

312. *Id.*

313. See Jacob Silverman, *The Battle Over the Future of Gig Work Isn't Even Close to Finished*, TNR (Aug. 23, 2021), <https://newrepublic.com/article/163343/proposition-22-uber-lyft-drivers-labor-wages> (on file with the *University of the Pacific Law Review*) (reporting that Prop 22 copy-cat legislation has appeared in at least three other states).

314. See Letter from Kurt R. Oneto, Att'y with Nielsen Merksamer, LLP, to Hon. Rob Bonta, Att'y Gen. of Cal. (Jan. 24, 2022) (on file with the *University of the Pacific Law Review*) (affirming that the law firm who wrote Prop 22 has submitted a new ballot initiative that mirrors Prop 22's provisions for app-based health care workers).

315. *Id.*

316. Dickerson, *supra* note 311.

317. *Prop 22 Passed: Moving Forward with New Driver Benefits*, *supra* note 257; *A New Way Forward for Independent Work*, *supra* note 258.

318. Siddiqui & Tiku, *supra* note 3.

319. *Infra* Subsections V.B.1–2.

320. *Infra* Subsection V.B.1.

321. *Infra* Subsection V.B.2.

1. A Pro Rata Share of Wages System

An employee status guarantees a driver minimum wage.³²² Since drivers can be online for multiple apps simultaneously, this presents a dilemma of how each TNC should compensate the driver for wait time.³²³ This situation assumes that the driver will earn a minimum wage from each app.³²⁴ For example, a driver online with Uber and Lyft at the same time could receive two paychecks of \$15 an hour.³²⁵ However, there are possible solutions that would institute a more equitable result.³²⁶

TNCs could establish a system that would allow them to pay their pro-rata share of wages.³²⁷ Many companies already use a third-party payroll management system.³²⁸ Thus, TNCs could agree to use the same payroll management system where the system logs the driver's online time and service fees in the same database.³²⁹ The driver could receive their service fees immediately.³³⁰ If these service fees do not equal minimum wage by the end of the pay period, the TNC will pay the difference.³³¹ Should a driver's service fees not equal minimum wage, the system divides the driver's waiting time between the TNCs the driver was online with during that period.³³² This way, each TNC can pay their fair share of compensation to the driver, which would alleviate some of the economic burden

322. CAL. LAB. CODE § 1182.12 (West 2022).

323. See CAL. BUS. & PROF. CODE § 7451 (West 2022) (demonstrating Prop 22 attempted to solve this issue by excluding time spent waiting for a ride).

324. See Jack Kelly, *The Remote Trend of Working Two Jobs at the Same Time Without Both Companies Knowing*, FORBES (Aug. 15, 2021), <https://www.forbes.com/sites/jackkelly/2021/08/15/the-remote-trend-of-working-two-jobs-at-the-same-time-without-both-companies-knowing/?sh=3add620a17f3> (on file with the *University of the Pacific Law Review*) (reporting some employees are making two paychecks by being clocked-in at two jobs at the same time while working from home).

325. See *id.* (describing how workers worked two full-time remote jobs during the pandemic but did not work more than forty hours a week for both jobs).

326. See *Pro rata*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "pro rata" as contributing proportionally according to the appropriate share).

327. Compare CAL. LAB. CODE § 1182.12 (West 2022) (requiring employers to pay hourly wages, i.e., a salary in proportion to hours the employee worked), with *Pro rata*, BLACK'S LAW DICTIONARY (11th ed. 2019) (showing the term "pro rata" applies to numerous legal principles).

328. See *Payroll Software*, SOFTWARE ADVICE, <https://www.softwareadvice.com/hr/payroll-software-comparison/> (last visited Mar. 6, 2022) (on file with the *University of the Pacific Law Review*) (listing numerous payroll management systems companies can purchase to assist with various administrative tasks related to scheduling and payroll).

329. *Id.*

330. *How Payments Work*, UBER, <https://www.uber.com/us/en/drive/basics/how-payments-work> (last visited Mar. 6, 2022) (on file with the *University of the Pacific Law Review*).

331. See *Guaranteed Earnings Offer for New Drivers*, UBER, <https://www.uber.com/us/en/drive/driver-app/new-driver-guarantees/> (last visited Mar. 6, 2022) (on file with the *University of the Pacific Law Review*) (showing Uber already makes delayed payments to drivers for their guaranteed earnings policy).

332. See *Payroll Software*, *supra* note 328 (demonstrating different business can use the same payroll system, and these systems include time tracking services).

employee costs impose.³³³ There are other factors TNCs would consider in implementing a system like this, such as responsibilities for accidents and driver misconduct, but TNCs can negotiate those issues themselves.³³⁴

2. Capping Hours Through the App

Another issue involving working hours and compensation is overtime and mandatory breaks.³³⁵ Proponents of Prop 22 claimed overtime compensation and mandatory breaks threaten drivers' working time flexibility and forces drivers into set schedules.³³⁶ However, the law does not force employers to set schedules for employees, nor does it prevent employees from working more than eight hours a day, or forty hours a week.³³⁷ Employers set schedules for employees to avoid paying overtime.³³⁸ Thus, Prop 22's proponents deflected the blame of taking away flexibility onto employment protections when actually the TNCs make the decision to limit drivers' hours.³³⁹

There is a simple solution to avoid overtime, comply with mandatory breaks, and still give drivers flexibility and control over when they work.³⁴⁰ TNCs can cap hours for drivers through the app.³⁴¹ Once a driver reaches eight hours of online time in a twenty-four-hour period, or forty hours in a seven-day week, the app can automatically turn off.³⁴² The driver can choose when they drive; the TNC just allots them a finite number of hours to use.³⁴³ Since only about four percent of drivers drive more than forty hours a week, this system should not impact many drivers.³⁴⁴ TNCs can also implement this system for breaks.³⁴⁵ When a driver

333. See *Pro rata*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *pro rata* in the legal context).

334. See CAL. BUS. & PROF. CODE § 7455 (West 2022) (requiring TNCs to maintain liability insurance for accidents with third-parties).

335. Uber, Registration Statement (Form S-1) (Apr. 11, 2019); Lyft, Registration Statement (Form S-1) (Feb. 9, 2019).

336. CAL. BUS. & PROF. CODE § 7449 (West 2022).

337. CAL. LAB. CODE §§ 226.7, 512 (West 2022); *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2022); Siddiqui & Tiku, *supra* note 3.

338. Dennis Najjar, *How to Manage Overtime More Effectively*, BALANCE SMALL BUS. (June 25, 2019), <https://www.thebalancesmb.com/four-ways-to-manage-overtime-more-effectively-13978> (on file with the *University of the Pacific Law Review*).

339. Siddiqui & Tiku, *supra* note 3.

340. *Does Being Classified as Employees Mean Drivers Will Lose Flexibility?*, GRIDWISE (Sept. 15, 2020), <https://gridwise.io/does-being-classified-as-employees-mean-drivers-will-lose-flexibility> (on file with the *University of the Pacific Law Review*).

341. See *Introducing a New Feature: Driving Hours Limit*, UBER BLOG (Apr. 23, 2018), <https://www.uber.com/en-ZA/blog/driving-hours-limit/> (on file with the *University of the Pacific Law Review*) (showing TNCs are capable of implementing this system for California, because they already use this system in South Africa).

342. See *id.* (using this proposal for a twelve-hour driving limit in South Africa).

343. *Introducing a New Feature: Driving Hours Limit*, UBER BLOG (Apr. 23, 2018), <https://www.uber.com/en-ZA/blog/driving-hours-limit/> (on file with the *University of the Pacific Law Review*).

344. LOUIS HYMAN ET AL., CORNELL UNIV., PLATFORM DRIVING IN SEATTLE 33 (2020).

345. *Introducing a New Feature: Driving Hours Limit*, *supra* note 341.

reaches six hours of continuous online time, the app can automatically turn off for thirty minutes to ensure the driver takes a break.³⁴⁶ These alternatives are simple to implement and show that drivers can have flexibility and protection.³⁴⁷

VI. CONCLUSION

The purpose of law is to effectuate justice and protect liberties and rights.³⁴⁸ Thus, the law must reallocate power between parties of vastly inequitable bargaining power to prevent unjust exploitation and protect the rights of those with lesser means.³⁴⁹ Labor law is a major component that serves the purpose of justified power reallocation.³⁵⁰ Businesses have always fought against passing new labor legislation that delegates more rights and protections to their employees.³⁵¹ Right now, Prop 22's proponents are repeating this cycle by claiming that classifying their workers as employees will cause the end of the industry.³⁵² However, even when their workers operate as independent contractors, TNCs fail to make a profit due to exorbitant insurance costs.³⁵³ These market conditions show the profitability issues TNCs face do not lie with employee costs, but rather with the current business model.³⁵⁴ The inability to misclassify workers will not cause the downfall of TNCs, but the failure to address critical weaknesses in their business model will.³⁵⁵

As the gig economy grows and more workers rely on gig-economy positions, it is more important than ever that the California Legislature establishes regulations to protect gig-economy workers.³⁵⁶ Prop 22 creates an unfair employment model; its core premise fosters the exploitation of gig-economy workers.³⁵⁷ Although

346. *Id.*

347. *See id.* (discussing the ease of implementing a break period in the Uber App).

348. Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 655 (2021).

349. *Id.*

350. *Id.*

351. Johnathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, DEP'T LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938#> (last visited Jan. 9, 2022) (on file with the *University of the Pacific Law Review*); *see* Franklin D. Roosevelt, *Fireside Chat*, AM. PRESIDENCY PROJECT (June 24, 1938), <https://www.presidency.ucsb.edu/documents/fireside-chat-14> (on file with the *University of the Pacific Law Review*) ("Do not let any calamity-howling executive with an income of \$1,000 a day . . . tell you . . . that a wage of \$11 a week is going to have a disastrous effect on all American industry.").

352. Roy Cellan-Jones, *Tech Tent: The End of the Gig Economy?*, BBC (Sept. 13, 2019), <https://www.bbc.com/news/uk-49688742> (on file with the *University of the Pacific Law Review*); CAL. BUS. & PROF. CODE § 7449 (West 2022).

353. Bellon & Hussain, *supra* note 104.

354. Bellon & Hussain, *supra* note 104.

355. Arindrajit Dube, *No, a \$15 Minimum Wage Won't Cost 1.4 Million Jobs*, WASH. POST (Feb. 24, 2021), <https://www.washingtonpost.com/outlook/2021/02/24/minimum-wage-economic-research-job-loss/> (on file with the *University of the Pacific Law Review*); Bellon & Hussain, *supra* note 105.

356. Kris Broda, *Gig Economy—The Backbone of the Future?*, BRODMIN (Dec. 28, 2021), <https://brodmin.com/case-studies/gig-economy-case-study/> (on file with the *University of the Pacific Law Review*).

357. Mollaneda, *supra* note 20.

employment costs do place a burden on businesses, it is a necessary cost to ensure a healthy society and strong economy.³⁵⁸ When employers do not take care of their employees, that burden falls upon the state to the detriment of the public.³⁵⁹ Prop 22 allowed TNCs to exploit drivers through independent contractor misclassification; thus, the new law cannot stand.³⁶⁰

358. David Madland, *The Middle Class Grows the Economy, Not the Rich*, CAP (Dec. 7, 2011), <https://www.americanprogress.org/article/the-middle-class-grows-the-economy-not-the-rich-2/> (on file with the *University of the Pacific Law Review*).

359. Horan, *supra* note 102, at 49.

360. Mollaneda, *supra* note 20.

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