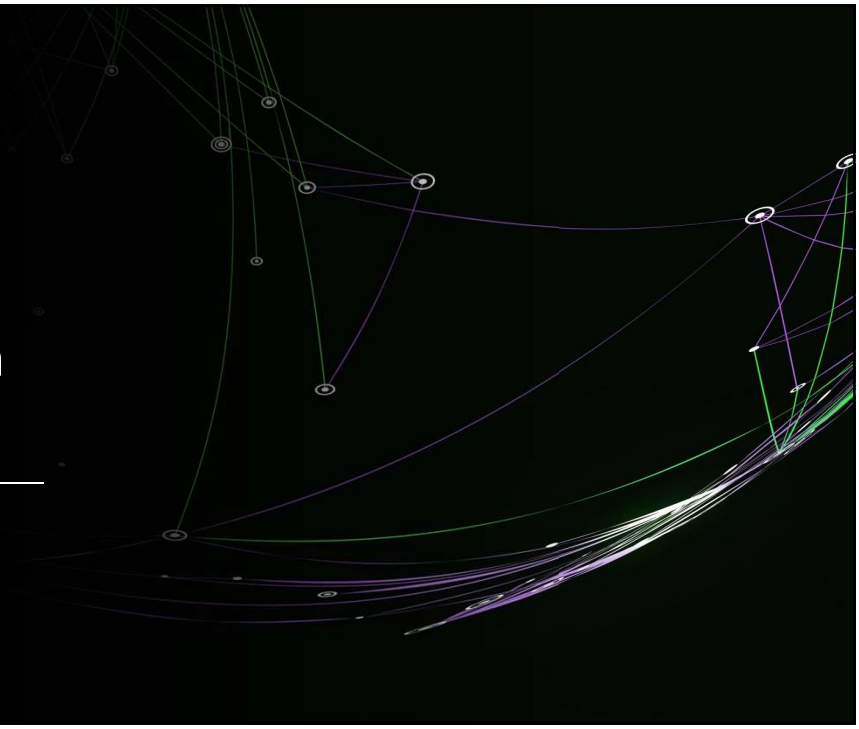
The Ongoing Saga of Gig Workers, AB5, and Proposition 22



By Randy Pollak, Esq.
Managing Partner, Practice Leader
Wintersteen | Casarez Law Corp.
r.pollak@wclawcorp.com

1

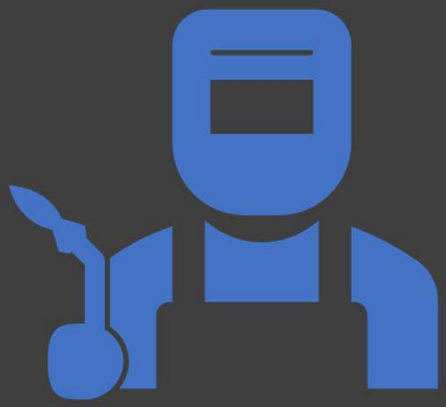
Summary

- CA law: Work done for another = employee. Unless employer can prove independent contractor.
- *Borello* factors: CA Supreme Court. WC case. Test whether employee vs. independent contractor. (Control work + 9 other factors.)
- *Dynamex*: CA Supreme Court. Wage/hour case. Adopts 3-part ABC test to determine if worker is independent contractor.
- AB 5: CA adopts *Dynamex* ABC test for all work requirements (Certain industries exempted.)
- Prop 22: Voters ***fully*** exempt gig work from AB 5. (e.g., UBER, Lyft, etc.)
- *Castellanos* finds Prop 22 unconstitutional.

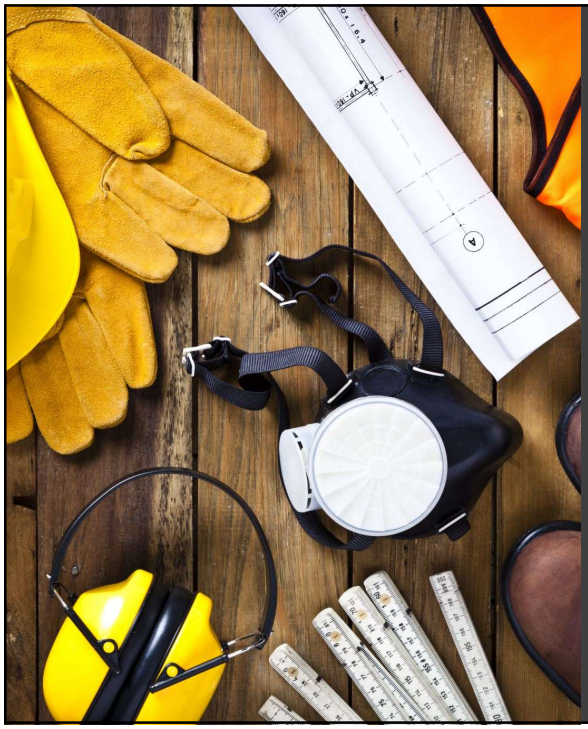
2

Labor Code section 3351

- "Employee" means every person in the service of an employer under any appointment or contract of hire…



3



Labor Code section 3353

- "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.

4

Consequences for Distinction (Not Exhaustive)

- Respondent Superior Tort liability.
- Wage/hour law.
- Workers' Compensation law.
- Antidiscrimination provisions of the Fair Employment and Housing Act.
- OSHA provisions governing employee health and safety .

5

S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341

Agricultural laborers (14 migrant families) harvesting cucumbers.

Written "sharefarmer" agreement.

Grower says = independent contractors. Don't need workers' compensation coverage.

Labor Commissioner says they were employees, stop order/penalty assessment.

Grower appeals to Department of Industrial Relations.

Division upheld. Said they are not independent contractors. They are employees.

Trial court denied mandamus request.

Court of Appeal reversed.

California Supreme Court takes case. Reverses, institutes new test.

6

Common Law: "Control of Details" Test

- "The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him. The principal's supervisory power was crucial in that context because ". [the] extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them. . . ." … Thus, the "control of details" test became the principal measure of the servant's status for common law purposes." (*Id*. at p. 350.)

7

Social Welfare Legislation: "Control" Test Extended

- "Much 20th-century legislation for the protection of 'employees' has adopted the 'independent contractor' distinction as an express or implied limitation on coverage…" (*Id*. at p. 350.)
- "California decisions applying such statutes uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.'" (*Id*.)

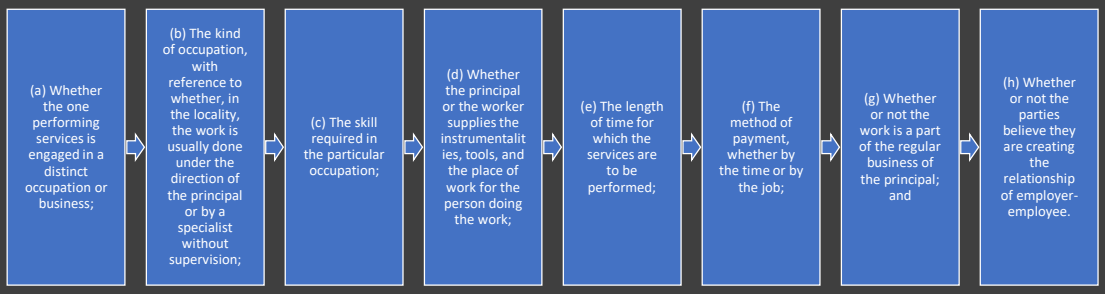
8

Problem: The Economy is Complex

- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*Id*.)

9

Additional Factors



10

Statutory Purpose

- "The common law and statutory purposes of the distinction between 'employees' and 'independent contractors' are substantially different. While the common law tests were developed to define an employer's liability for injuries caused *by* his employee, 'the basic inquiry in compensation law involves which injuries *to* the employee should be insured against by the employer.'" (*Id*. at p. 352.)

11

Statutory Purpose: Workers' Compensation

- (1) To ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society,
- (2) To guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production,
- (3) To spur increased industrial safety, and
- (4) In return, to insulate the employer from tort liability for his employees' injuries.

(*Id*. at p. 354.)

12

Dynamex Operations v. Superior Court (2018) 4 Cal. 5th 903.

- "[I]n the almost 30 years since the *Borello* decision, the California Legislature has not exhibited or registered any disagreement with either the statutory purpose standard adopted by the *Borello* decision or the application of that standard in *Borello* regarding the proper classification of the workers involved in that case. Instead, in response to the continuing serious problem of worker misclassification as independent contractors, the California Legislature has acted to impose substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors." (*Id*. at p. 935.)

13

Dynamex Summary

Delivery drivers classified as independent contractors.
Dynamex a nationwide package and document delivery company.
Drivers bring class action wage and hour claim, and unfair business practices claim.
Trial court granted class certification.
Court of appeals upheld.
Dynamex petition for review with CA Supreme Court.
CA Supreme Court, upholds, adopts "suffer or permit to work" with wage/hour claims, but need to use ABC test.

14

Employees vs. Independent Contractors

- "Under the current policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance." (*Id*. at p. 917.)

15

Trial Court: Use "suffer or permit to work" test to determine "employ"

- "An employee is suffered or permitted to work if the work was performed with the knowledge of the employer. This includes work that was performed that the employer knew *or should have known* about." (*Id*. at p. 921.)

16

Suffer or Permit to Work: Background

- "The adoption of the exceptionally broad suffer or permit to work standard in California wage orders finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied. Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions."(*Id*. at p. 952.)

17

Cont.

- "The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare." (*Id*.)

18

Problem

- "Dynamex argues that the suffer or permit to work standard cannot serve as the test for distinguishing employees from independent contractors because a literal application of that standard would characterize *all* individual workers who directly provide services to a business as employees. A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business." (*Id*. at pp. 948-949.)

19

Literal Application

- "A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business—including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like—who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Id*.)

20

Compromise

- "We conclude it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as:
- Placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and

21

ABC Test

- "[R]equiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely
  - (A) That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
  - (B) That the worker performs work that is outside the usual course of the hiring entity's business; *and*
  - (C) That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."

  (*Id*. at p. 958.)

22

Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?

- "[W]hen a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee." (*Id*. at p. 959.)

23

Cont.

- "On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company … or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes … the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Id*. at pp. 959-960.)

24

Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

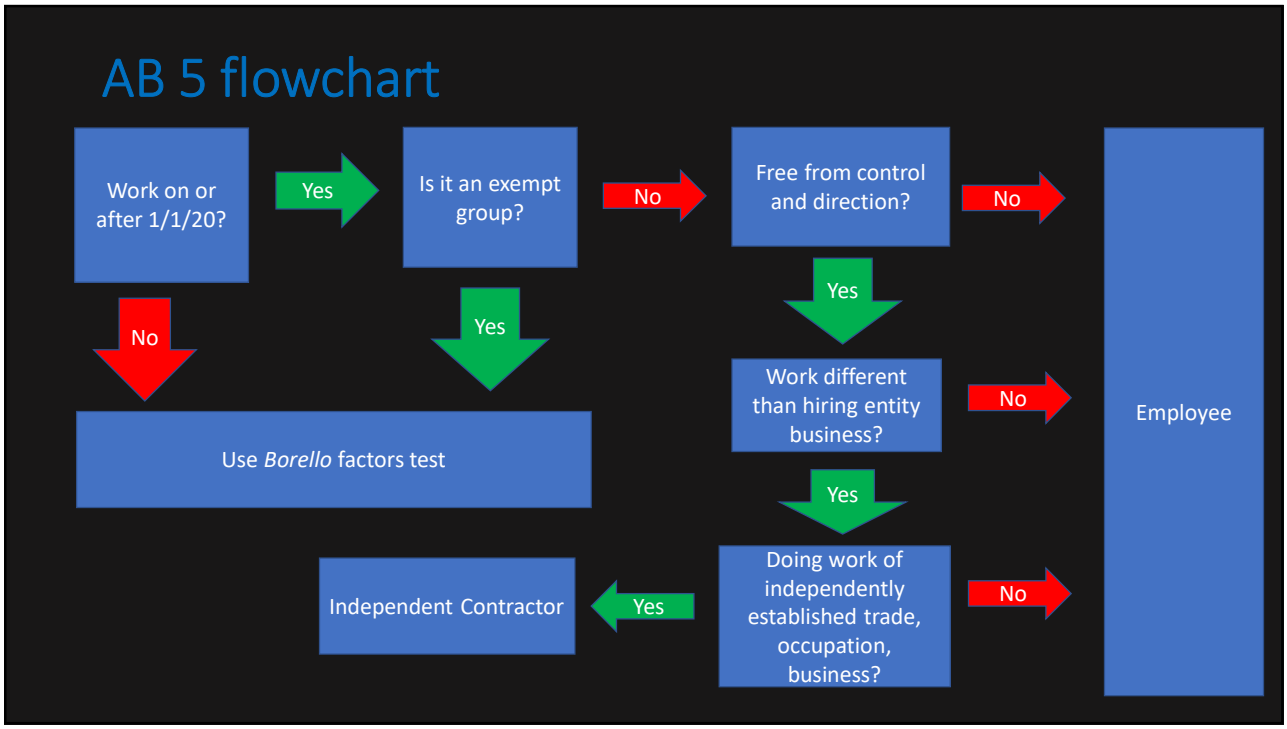
- "Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like." (*Id*. at p. 962.)

25

AB 5: (Labor Code section 2775)

- Gov. Newsom signed 9/18/2019.
- For work performed after 1/1/20 (some exceptions, negotiated by the industries).
- Non-exempt person doing work for another is presumed to be an employee, unless the employer demonstrates the following:
- (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
- (B) The person performs work that is outside the usual course of the hiring entity's business.
- (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

26



27

Proposition 22

- App-Based Drivers as Contractors and Labor Policies Initiative.
- Classify app-based drivers as independent contactors, not employees or agents. (e.g., Uber, Lyft, Door Dash).
- Exempts from workers' compensation, wage hour, systems.
- Create minimum compensation system (earnings, healthcare, insurance.)

28

Stated Reasons

- The people of the State of California find and declare as follows:
- **(a)** Hundreds of thousands of Californians are choosing to work as independent contractors in the modern economy using app-based rideshare and delivery platforms to transport passengers and deliver food, groceries, and other goods as a means of earning income while maintaining the flexibility to decide when, where, and how they work.
- **(b)** These app-based rideshare and delivery drivers include parents who want to work flexible schedules while children are in school; students who want to earn money in between classes; retirees who rideshare or deliver a few hours a week to supplement fixed incomes and for social interaction; military spouses and partners who frequently relocate; and families struggling with California's high cost of living that need to earn extra income.
- **(c)** Millions of California consumers and businesses, and our state's economy as a whole, also benefit from the services of people who work as independent contractors using app-based rideshare and delivery platforms. App-based rideshare and delivery drivers are providing convenient and affordable transportation for the public, reducing impaired and drunk driving, improving mobility for seniors and individuals with disabilities, providing new transportation options for families who cannot afford a vehicle, and providing new affordable and convenient delivery options for grocery stores, restaurants, retailers, and other local businesses and their patrons.
- **(d)** However, recent legislation has threatened to take away the flexible work opportunities of hundreds of thousands of Californians, potentially forcing them into set shifts and mandatory hours, taking away their ability to make their own decisions about the jobs they take and the hours they work.
- **(e)** Protecting the ability of Californians to work as independent contractors throughout the state using app-based rideshare and delivery platforms is necessary so people can continue to choose which jobs they take, to work as often or as little as they like, and to work with multiple platforms or companies, all the while preserving access to app-based rideshare and delivery services that are beneficial to consumers, small businesses, and the California economy.
- **(f)** App-based rideshare and delivery drivers deserve economic security. This chapter is necessary to protect their freedom to work independently, while also providing these workers new benefits and protections not available under current law. These benefits and protections include a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA); a new minimum earnings guarantee tied to 120 percent of minimum wage with no maximum; compensation for vehicle expenses; occupational accident insurance to cover on-the-job injuries; and protection against discrimination and sexual harassment.
- **(g)** California law and rideshare and delivery network companies should protect the safety of both drivers and consumers without affecting the right of app-based rideshare and delivery drivers to work as independent contractors. Such protections should, at a minimum, include criminal background checks of drivers; zero tolerance policies for drug- and alcohol-related offenses; and driver safety training.

29

Yes on 22 Ad Campaign

- https://www.youtube.com/watch?v=-7QJLgdQaf4

30

	Cash Expenditures
Support	$205,369,249.18
Oppose	$18,883,768.39

Campaign Spending

31

Major Backers

Donor	Total Contributions
Uber Technologies, Inc.	$59,532,466.24
DoorDash, Inc.	$52,070,515.82
Lyft, Inc.	$48,962,682.46
Maplebear Inc., DBA InstaCart	$31,595,580.28
Postmates Inc.	$13,331,768.85

32

Election Results

California Proposition 22

Result	Votes	Percentage
Yes	**9,958,425**	58.63%
No	7,027,820	41.37

33

Cal. Bus. & Prof. Code section 7450

- The purposes of this chapter are as follows:
- **(a)** To protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state.
- **(b)** To protect the individual right of every app-based rideshare and delivery driver to have the flexibility to set their own hours for when, where, and how they work.
- **(c)** To require rideshare and delivery network companies to offer new protections and benefits for app-based rideshare and delivery drivers, including minimum compensation levels, insurance to cover on-the-job injuries, automobile accident insurance, health care subsidies for qualifying drivers, protection against harassment and discrimination, and mandatory contractual rights and appeal processes.
- **(d)** To improve public safety by requiring criminal background checks, driver safety training, and other safety provisions to help ensure app-based rideshare and delivery drivers do not pose a threat to customers or the public.

34

Bus. & Prof. Code sec. 7451

- Notwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met:
- **(a)** The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.
- **(b)** The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
- **(c)** The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
- **(d)** The network company does not restrict the app-based driver from working in any other lawful occupation or business.

35

Bus. & Prof. Code sec. 7453 (Earnings)

- **(a)** A network company shall ensure that for each earnings period, an app-based driver is compensated at not less than the net earnings floor as set forth in this section. The net earnings floor establishes a guaranteed minimum level of compensation for app-based drivers that cannot be reduced. In no way does the net earnings floor prohibit app-based drivers from earning a higher level of compensation.

36

Cont.

- **(e)** Nothing in this section shall be interpreted to require a network company to provide a particular amount of compensation to an app-based driver for any given rideshare or delivery request, as long as the app-based driver's net earnings for each earnings period equals or exceeds that app-based driver's net earnings floor for that earnings period as set forth in subdivision (b). For clarity, the net earnings floor in this section may be calculated on an average basis over the course of each earnings period.

37

Bus. & Prof. Code sec. 7455 (Insurance)

- No network company shall operate in California for more than 90 days unless the network company carries, provides, or otherwise makes available the following insurance coverage:
- **(a)** For the benefit of app-based drivers, occupational accident insurance to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online with a network company's online-enabled application or platform. Policies shall at a minimum provide the following:
  - **(1)** Coverage for medical expenses incurred, up to at least one million dollars ($1,000,000).
  - **(2)**
    - **(A)** Disability payments equal to 66 percent of the app-based driver's average weekly earnings from all network companies as of the date of injury, with minimum and maximum weekly payment rates to be determined in accordance with subdivision (a) of Section 4453 of the Labor Code for up to the first 104 weeks following the injury.
    - **(B)** "Average weekly earnings" means the app-based driver's total earnings from all network companies during the 28 days prior to the covered accident divided by four.
- **(b)** For the benefit of spouses, children, or other dependents of app-based drivers, accidental death insurance for injuries suffered by an app-based driver while the app-based driver is online with the network company's online-enabled application or platform that result in death. For purposes of this subdivision, burial expenses and death benefits shall be determined in accordance with Section 4701 and Section 4702 of the Labor Code.

38

Cont.

- **(c)** For the purposes of this section, "online" means the time when an app-based driver is utilizing a network company's online-enabled application or platform and can receive requests for rideshare services or delivery services from the network company, or during engaged time.
- **(d)** Occupational accident insurance or accidental death insurance under subdivisions (a) and (b) shall not be required to cover an accident that occurs while online but outside of engaged time where the injured app-based driver is in engaged time on one or more other network company platforms or where the app-based driver is engaged in personal activities. If an accident is covered by occupational accident insurance or accidental death insurance maintained by more than one network company, the insurer of the network company against whom a claim is fled is entitled to contribution for the pro-rata share of coverage attributable to one or more other network companies up to the coverages and limits in subdivisions (a) and (b).
- **(e)** Any benefits provided to an app-based driver under subdivision (a) or (b) of this section shall be considered amounts payable under a worker's compensation law or disability benefit for the purpose of determining amounts payable under any insurance provided under Article 2 (commencing with Section 11580) of Chapter 1 of Part 3 of Division 2 of the Insurance Code.

39

Bus. & Prof. Code sec. 7465

- **(a)** After the effective date of this chapter, the Legislature may amend this chapter by a statute passed in each house of the Legislature by rollcall vote entered into the journal, seven-eighths of the membership concurring, provided that the statute is consistent with, and furthers the purpose of, this chapter. No bill seeking to amend this chapter after the effective date of this chapter may be passed or ultimately become a statute unless the bill has been printed and distributed to members, and published on the internet, in its final form, for at least 12 business days prior to its passage in either house of the Legislature.
- **(2)** Any statute that amends Section 7451 does not further the purposes of this chapter.

40

Bus. & Prof. Code sec. 7467

- **(a)** Subject to subdivision (b), the provisions of this chapter are severable. If any portion, section, subdivision, paragraph, clause, sentence, phrase, word, or application of this chapter is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this chapter. The people of the State of California hereby declare that they would have adopted this chapter and each and every portion, section, subdivision, paragraph, clause, sentence, phrase, word, and application not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid.
- **(b)** Notwithstanding subdivision (a), if any portion, section, subdivision, paragraph, clause, sentence, phrase, word, or application of Section 7451 of Article 2 (commencing with Section 7451), as added by the voters, is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision shall apply to the entirety of the remaining provisions of this chapter, and no provision of this chapter shall be deemed valid or given force of law.

41

Castellanos v. State of California (2021) 86 Cal. Comp. Cases 826

- Lawsuit to declare Bus. & Prof. Code sections 7748 et seq. unconstitutional.
- Arguments/Decision:
  - (1) California Constitution vests Legislature with "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation." Prop 22 infringed the Legislature's plenary power.
  - (2) Improper limitation on the ability of the Legislature to pass future legislation.
  - (3) Initiative violates single subject rule because it included prohibition on collective bargaining.
  - (4) Because 7467 says if 7451 struck down, then the whole act is stricken.

42

Status

- Appeal pending with Court of Appeal, 1st Appellate District, Division Four. (Case number A163655)
- Case argued and submitted on 12/13/2022.

43

WC
LAW CORP

QUESTIONS?

Randy Pollak
r.pollak@wclawcorp.com

805-914-9320 (cell)

wclawcorp.com

44