
RECENT LEGISLATION

LABOR AND EMPLOYMENT LAW — WORKER STATUS — CALIFORNIA ADOPTS THE ABC TEST TO DISTINGUISH BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS. — Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

One of the most significant, yet thorny, questions in labor and employment law is the classification of workers.¹ For individual workers, classification as employees or independent contractors poses an “important threshold question” for determining their entitlement to legal protections.² For employers, classification decisions may confer “unfair competitive advantage[s]” to those who misclassify their workers as independent contractors.³ And for federal and state governments, misclassification may “depriv[e] [them] of billions of dollars in tax revenue.”⁴ This question has become even more salient in the twenty-first century due to emerging forms of work arrangements, particularly within the so-called “gig economy.”⁵ On September 18, 2019, California enacted Assembly Bill No. 5⁶ (A.B. 5), which codifies the California Supreme Court’s decision on worker classification in *Dynamex Operations West, Inc. v. Superior Court*⁷ and extends its application within state law.⁸ A.B. 5 aims to ensure interpretive consistency and promote predictability while empowering workers across California.⁹ But it suffers from similar interpretive ambiguities as prior iterations of

¹ See, e.g., *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 4–5 (Cal. 2018) (stating that the question has “considerable significance for workers, businesses, and the public generally,” *id.* at 4); Katherine V.W. Stone, *Rethinking Labour Law: Employment Protection for Boundaryless Workers*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 155, 174 (Guy Davidov & Brian Langille eds., 2006) (noting difficulty in distinguishing employees and independent contractors).

² Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311, 311 (2014); see also *Dynamex*, 416 P.3d at 4–5; V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 71 (2017). For example, “[e]mployees, but not independent contractors, receive the protections of anti-discrimination laws, the Family and Medical Leave Act (FMLA), and federal labor law.” Richard Frankel, *The Federal Arbitration Act and Independent Contractors*, 2018 CARDOZO L. REV. DE NOVO 101, 102–03.

³ *Dynamex*, 416 P.3d at 5.

⁴ *Id.*; see also Frankel, *supra* note 2, at 103.

⁵ See William B. Gould IV, *Dynamex Is Dynamite, but Epic Systems Is Its Foil* — Chamber of Commerce: *The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 989 (2018) (arguing that many worker-classification disputes focus on the gig economy and defining the gig economy as a “labor market characterized by the flexibility and the prevalence of short-term work as opposed to permanent jobs”).

⁶ Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

⁷ 416 P.3d 1.

⁸ See Cal. Assemb. B. 5 § 1(d) (enacted).

⁹ See *id.* § 1(d)–(e).

worker-classification frameworks and raises the risk that employers may restrict worker flexibility. Furthermore, absent an increase in worker bargaining power, A.B. 5 may not adequately protect workers' rights going forward.

Both state and federal courts have long struggled to develop legal tests to classify workers as employees or independent contractors.¹⁰ In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,¹¹ the California Supreme Court conducted a multifactor analysis that considered "common law principles"¹² alongside the "history and fundamental purposes" of the law being interpreted in order to determine worker status.¹³ But the complex, subjective multifactor test in *Borello* did not promote consistency and rendered worker status unpredictable.¹⁴ Moreover, the *Borello* court's consideration of numerous factors¹⁵ gave employers free rein to "posit an almost endless number of factors that a court could consider in supporting a finding that the worker is an independent contractor."¹⁶ The federal courts have not fared any better. The "economic reality test" used to determine worker status under federal law considers a list of factors "briefer than, but somewhat comparable to," the list considered in *Borello*.¹⁷ As in *Borello*, federal courts hold that "no one factor [of the economic reality test] is determinative" and instead consider "all the circumstances."¹⁸ Such a "totality-of-the-circumstances approach" likewise "allows for a considerable amount of subjective judgments"¹⁹ and "begs questions about which aspects of 'economic reality' matter, and why."²⁰

Recently, in *Dynamex*, the California Supreme Court sought to offer a clearer approach by adopting a more rigid framework known as the ABC test.²¹ *Dynamex* concerned a state wage order that defined "employ" as "suffer or permit to work."²² Writing for a unanimous court, Chief Justice Cantil-Sakauye held that the state's definition of "employ"

¹⁰ For an overview of classification tests, see Dubal, *supra* note 2, at 72–75, 74 fig.1, 75 n.22.

¹¹ 769 P.2d 399 (Cal. 1989).

¹² *Id.* at 405; *see also id.* at 403–04 (citing an employer's "right to control work details," *id.* at 404, among other factors considered in worker classification at common law).

¹³ *Id.* at 405 (quoting *Laeng v. Workmen's Comp. Appeals Bd.*, 494 P.2d 1, 5 (Cal. 1972)).

¹⁴ *See Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 33–34 (Cal. 2018).

¹⁵ *See id.* at 18 (describing *Borello* court's consideration of factors from in-state and out-of-state cases and state labor law).

¹⁶ James F. Morgan, *Clarifying the Employee/Independent Contractor Distinction: Does the California Supreme Court's Dynamex Decision Do the Job?*, 69 LAB. L.J. 129, 131 (2018).

¹⁷ *See Dynamex*, 416 P.3d at 33.

¹⁸ *Id.*

¹⁹ Morgan, *supra* note 16, at 132.

²⁰ *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

²¹ *See Dynamex*, 416 P.3d at 35; *see also infra* note 43 and accompanying text.

²² *Dynamex*, 416 P.3d at 7.

in the wage order should not be read literally²³ and should be interpreted broadly.²⁴ Specifically, the Chief Justice held, the wage order’s definition of “employ” requires “placing the burden on the hiring entity to establish that the worker is an independent contractor” who is not covered by the order.²⁵ To meet this burden, the hiring entity must “establish *each* of the three factors embodied in the ABC test”:

(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.²⁶

In *Dynamex*, the court detailed the shortcomings of other multifactor tests²⁷ and concluded that the more rigid ABC test would “provide greater clarity and consistency, and less opportunity for manipulation.”²⁸ In addition, the court cabined the application of the ABC test to wage order cases.²⁹ Thus, an important remaining question was “whether and to what extent the court’s holding in *Dynamex* applies to other employment controversies beyond the wage order context.”³⁰

A.B. 5 enshrined the *Dynamex* decision and attempted to address that remaining question.³¹ The core of A.B. 5 — the ABC test — is stated in nearly every version of the bill.³² As the bill developed, so too did the test’s reach. The original bill expressed an intent to “codify” *Dynamex* and “clarify the decision’s application in state law,”³³ though it neither quoted the ABC test nor elucidated its reach. State legislators then amended the bill to add the language of the ABC test and specify that the test should be applied to provisions of the Labor Code and wage orders of the Industrial Welfare Commission.³⁴ The Assembly then amended the bill again to extend the application of the ABC test to provisions of the

²³ *Id.* (stating that the “suffer or permit to work definition is a term of art that cannot be interpreted literally” to include workers, such as independent plumbers, “who have traditionally been viewed as *genuine* independent contractors”).

²⁴ *Id.* at 32 (holding that the definition “must be interpreted and applied broadly” to best serve wage orders’ “remedial purposes”).

²⁵ *Id.* at 35.

²⁶ *Id.*

²⁷ *Id.* at 33–34.

²⁸ *Id.* at 40.

²⁹ *See id.* at 5, 42; *see also* Ben Burdick, Recent Case, *Dynamex Operations West, Inc. v. Superior Court*, 40 BERKELEY J. EMP. & LAB. L. 169, 175, 177 (2019) (stating that “*Dynamex* correctly applied existing law . . . in the narrow context of the wage orders,” *id.* at 177).

³⁰ Gould, *supra* note 5, at 1009.

³¹ *See* Cal. Assemb. B. 5 § 1(d) (enacted).

³² *E.g.*, Cal. Assemb. B. 5 (as amended in Senate, Sept. 6, 2019); Cal. Assemb. B. 5 (as amended in Assembly, Mar. 26, 2019).

³³ Cal. Assemb. B. 5 § 2(a) (as introduced by Assemb. Lorena Gonzalez, Dec. 3, 2018).

³⁴ Cal. Assemb. B. 5 § 2(a) (as amended in Assembly, Mar. 26, 2019).

Unemployment Insurance Code.³⁵ The final bill maintained this broad application of the test.³⁶ The bill also stated a goal of countering misclassifications, suggesting that part of the legislature's purpose was to create a more consistent and predictable legal standard.³⁷

A.B. 5 provides for a number of exemptions.³⁸ The final bill exempts seven different categories of occupations or business relationships from the ABC test, including licensed professionals such as lawyers and architects.³⁹ If, however, a court determines that the ABC test "cannot be applied . . . based on grounds other than an express exception," then the multifactor *Borello* standard will apply.⁴⁰

Since the passage of A.B. 5, ridesharing technology companies Uber and Lyft and online delivery services DoorDash, Instacart, and Postmates have led a \$110 million campaign to qualify a 2020 statewide ballot initiative to define many of their workers as independent contractors.⁴¹ They have also disputed the idea that the ABC test would classify their workers as employees.⁴²

The California legislature modeled A.B. 5 on *Dynamex*, with the hope that a simpler and broader test for determining worker status would afford increased consistency, predictability, and worker protection. While the legislature embraced lofty aims in enacting A.B. 5, the law's legal and practical consequences give powerful reasons for pause. First, A.B. 5's shift away from subjective multifactor inquiries does not on its own guarantee interpretive consistency and predictability. In fact, as opponents of the bill have noted, the ABC test raises some interpretive ambiguities. Second, A.B. 5 carries the risk that employers will restrict — or, at least, threaten to restrict — worker flexibility in response to the classification of their workers as employees. Lastly, even if interpreted consistently and predictably, the law would still fail to achieve worker empowerment without an increase in worker bargaining

³⁵ Cal. Assemb. B. 5 § 2(a) (as amended in Assembly, May 1, 2019).

³⁶ Cal. Assemb. B. 5 § 2(a)(1) (enacted) (adding CAL. LAB. CODE § 2750.3(a)(1)).

³⁷ See *id.* § 1(c)–(e). Intuitively, if the *Borello* standard was consistent and predictable enough to address worker misclassification, the California legislature probably would not have enacted A.B. 5 in the first place.

³⁸ See *id.* § 2(a)(2) (adding CAL. LAB. CODE § 2750.3(a)(2)) (upholding any express exceptions to worker-related definitions in the state's relevant codes and wage orders).

³⁹ *Id.* § 2(b)–(h) (adding CAL. LAB. CODE § 2750.3(b)–(h)).

⁴⁰ *Id.* § 2(a)(3) (adding CAL. LAB. CODE § 2750.3(a)(3)).

⁴¹ See Carolyn Said, *Uber, Lyft, DoorDash Campaign for California Gig Law Exemption Has 1 Million Signatures*, S.F. CHRON. (Feb. 28, 2020, 4:32 PM), <https://www.sfchronicle.com/business/article/Uber-Lyft-DoorDash-campaign-for-ballot-15090479.php> [<https://perma.cc/66RL-X3UX>]. The initiative would require the companies to provide various benefits and protections to the workers defined as independent contractors. *Id.*

⁴² See, e.g., Press Release, Tony West, Chief Legal Officer, Uber Techs., Inc., Update on AB5 (Sept. 11, 2019), <https://www.uber.com/newsroom/ab5-update> [<https://perma.cc/A6SM-NYFA>] [hereinafter Press Release, West] ("But just because the [ABC] test is hard does not mean we will not be able to pass it.").

power, which has emerged as an area ripe for state action under the Trump Administration.

To begin with, A.B. 5 embraces the clearer and broader ABC test⁴³ as a way to curb the interpretive ambiguities in commonly used multifactor tests. But given the lingering confusion around the ABC test, A.B. 5 fails to offer the kind of clarity promised by the *Dynamex* court.⁴⁴ For example, one major ambiguity lies in the lack of clarity in prong B, which asks whether a “worker performs work that is outside the usual course of the hiring entity’s business.”⁴⁵ *Dynamex*, one of the cases that discussed prong B, included a brief explanation of the prong and the public policy arguments behind it⁴⁶ but did not expressly define what counts as “within the usual course of business.”⁴⁷ Recently, the Ninth Circuit observed that *all* of the different “formulations” of prong B adopted by other jurisdictions should be considered in determining worker status.⁴⁸ That hardly helps because those formulations included “whether the work of the employee is necessary to or merely incidental to that of the hiring entity, whether the work of the employee is continuously performed for the hiring entity, and what business the hiring entity proclaims to be in.”⁴⁹ The Ninth Circuit’s approach thus reverted to the subjective multifactor inquiries that the ABC test aims to avoid. For example, it would probably be a stretch for Uber to argue that its drivers are not necessary to its business⁵⁰ or to claim their work (driving) is not continuously performed. But Uber could argue (and, in fact, has argued), based on the third formulation

⁴³ By “reject[ing] the application of a malleable list of subjectively-oriented factors,” Morgan, *supra* note 16, at 135, the ABC test is *clearer* than other standards. The ABC test is also *broader* in part because it establishes a rebuttable presumption that workers are employees. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 34–35 (Cal. 2018). Such a presumption “provides an efficient hurdle,” Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 71 (2015), and “root[s] out common misclassification tactics” while “put[ting] employers on notice,” *id.* at 72.

⁴⁴ See *Dynamex*, 416 P.3d at 40.

⁴⁵ *Id.* at 35. Prong B of the ABC test is potentially the main battleground of future litigation, as indicated by some commentators, see Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 299 n.181 (2018), and as acknowledged by Uber, see Press Release, West, *supra* note 42 (stating that prong B is “arguably the highest bar” for a company to meet).

⁴⁶ See *Dynamex*, 416 P.3d at 37–38. Most of the other relevant Ninth Circuit or California Supreme Court cases have included only a brief discussion or no discussion of prong B. One exception is *Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575, 596–99 (9th Cir. 2019), *withdrawn*, 939 F.3d 1045 (9th Cir.) (certifying question of *Dynamex*’s retroactivity to the California Supreme Court).

⁴⁷ *Dynamex*, 416 P.3d at 37. The court came closest to defining this phrase as services performed by someone who “would ordinarily be viewed by others as working in the hiring entity’s business and not as working, instead, in the worker’s own independent business.” *Id.* The court also contrasted cases discussing prong B in other jurisdictions. See *id.* at 38 n.29.

⁴⁸ See *Vazquez*, 923 F.3d at 597.

⁴⁹ *Id.*

⁵⁰ But see Press Release, West, *supra* note 42 (“In fact, several previous rulings have found that drivers’ work *is* outside the usual course of Uber’s business . . .”).

cited by the Ninth Circuit, that it is a “technology platform”⁵¹ as opposed to “a firm providing goods and services.”⁵² Thus, the Ninth Circuit’s interpretation of prong B offers an example of potential ambiguity in the ABC test, hindering the ability of A.B. 5 to achieve clarity in worker classification.

Another interpretive ambiguity is whether the ABC test will result in different classifications for the same type of workers under different state laws. This question arises because A.B. 5 codifies *Dynamex* and extends its ABC test to non-wage order cases, while *Dynamex* explicitly grounded its holding in wage order cases. *Dynamex* reasoned that applying the broader ABC test in wage order cases finds its rationale in part in the remedial objective of wage orders to guarantee “minimal wages and working conditions” for workers.⁵³ Furthermore, in its explanation of prong B, the *Dynamex* court emphasized the importance of ensuring that “workers who need and want the fundamental protections afforded by the wage order do not lose those protections.”⁵⁴ Some future courts may cite these public policy arguments that are tailored to wage order cases when applying the ABC test in different contexts.⁵⁵ Yet some courts may not. Indeed, since A.B. 5 was born from *Dynamex*, it remains unclear whether the ABC test, when conducted pursuant to A.B. 5, would apply with equal force to a range of state labor and employment laws.

Second, on a practical level, A.B. 5 fails to fully anticipate the risk of reduced flexibility among workers reclassified as employees.⁵⁶ For instance, upon the classification of their drivers as employees, companies like Uber and Lyft can (and have claimed they will) introduce restrictions on their drivers’ flexibility, including requiring uniforms,⁵⁷ instituting

⁵¹ See *id.* (defining the “usual course of Uber’s business” as “serving as a technology platform for several different types of digital marketplaces”); see also ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK* 141 (2018) (stating that “Uber describes its technology as merely a way to connect two groups of end users”).

⁵² Morgan, *supra* note 16, at 138 (stating this argument, though noting that such a characterization of ridesharing economy workers may not be successful).

⁵³ *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 32 (Cal. 2018) (holding that the “intended expansive reach” of the employment standard in the wage order in question and the “remedial” nature of wage orders call for such legislation to be “liberally construed”).

⁵⁴ *Id.* at 37.

⁵⁵ See, e.g., *Vazquez v. Jan-Pro Franchising Int’l, Inc.*, 923 F.3d 575, 595 (9th Cir. 2019) (stating some policy arguments in *Dynamex* “apply in the franchise context”), *withdrawn*, 939 F.3d 1045 (9th Cir.).

⁵⁶ See Cal. Assemb. B. 5 § 1(g) (enacted) (stating that the law does not intend to reduce worker flexibility). Loss of flexibility may disproportionately impact certain groups of workers. As one example, an ethnographic study found that immigrant drivers value their independent contractor status, which “enable[s] them to exert control over their bodies, to manage their time and transnational lives, and to affirm their sense of dignity as working-class men.” Dubal, *supra* note 2, at 112.

⁵⁷ See Shirin Ghaffary, *Some Uber and Lyft Drivers Say They Were Misled into Petitioning Against Their Own Worker Rights*, VOX (June 27, 2019, 4:00 PM), <https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign> [https://perma.cc/W4HU-EEGM] (citing drivers’ concerns about wearing uniforms if they are deemed employees).

rigid work shifts, mandating fixed locations, imposing a minimum number of hours per week, and so on.⁵⁸ The argument that employee status may hinder worker flexibility — adopted by A.B. 5's opponents as what some consider a manipulative tactic⁵⁹ — has resonated among some gig workers.⁶⁰ Yet many commentators have rebutted this concern, as it is employers, not labor laws, that “prohibit flexible working conditions.”⁶¹ And, as Professors Veena Dubal and Sanjukta Paul argue, it seems unlikely that gig economy companies would transition from their current business models to shift-based models because they “rely on an oversupply of workers who desire some schedule flexibility.”⁶² Dubal and Paul also argue employee status will “necessarily increase the bargaining power of these workers” and better position the workers to bargain for greater schedule flexibility due to heightened income security and predictability.⁶³ But even scholars acknowledge that they are unable to predict exactly how gig economy companies will react to A.B. 5.⁶⁴ Whether employers will restrict worker flexibility is unknown, but their discussion of this possibility may dissuade workers from supporting the law and thus impinge on its viability, especially in light of broader legal and political resistance.⁶⁵

Finally, even if A.B. 5 avoided the aforementioned legal and practical pitfalls, the law may not adequately protect workers without an increase in worker bargaining power. The minimum protections afforded by A.B. 5 through the use of the ABC test for employee classification are an improvement, but some commentators argue those protections “fall far short of ensuring that workers earn what they need.”⁶⁶ In particular, those protections may not be “adequately enforced” when workers lack the right to unionize and collectively bargain with employers.⁶⁷

⁵⁸ For example, Uber's public policy and communications team has stated Uber “would likely have to exert more control over drivers” if its drivers were classified as employees. Uber Under the Hood, *Moving Work Forward in California*, MEDIUM (Aug. 29, 2019), <https://medium.com/uber-under-the-hood/moving-work-forward-in-california-7de60b6827b4> [https://perma.cc/4TTP-7ZEN] (describing restrictions Uber may introduce if its drivers were classified as employees).

⁵⁹ See Carmel DeAmicis, *Despite Uber's Arguments, Flexibility for Employees Is a Company's Choice*, VOX (Aug. 11, 2015, 11:13 AM), <https://www.vox.com/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice> [https://perma.cc/JNK4-CQ2C].

⁶⁰ Ghaffary, *supra* note 57 (citing a survey in which seventy-six percent of polled rideshare drivers said they wanted to remain independent contractors).

⁶¹ DeAmicis, *supra* note 59.

⁶² Veena Dubal & Sanjukta Paul, *Law and the Future of Gig Work in California: Problems and Potentials (Part 1)*, ONLABOR (Sept. 9, 2019), <https://onlabor.org/law-and-the-future-of-gig-work-in-california-problems-and-potentials-part-1> [https://perma.cc/K9KC-C922].

⁶³ *Id.* (emphasis added).

⁶⁴ See, e.g., *id.*

⁶⁵ See, e.g., Ghaffary, *supra* note 57.

⁶⁶ Sharon Block & Benjamin Sachs, *What California Should Do Next to Help Uber Drivers*, WASH. POST (Sept. 13, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/09/13/how-trump-administration-gave-uber-drivers-california-way-unionize> [https://perma.cc/FG7U-4FBC].

⁶⁷ *Id.*

A.B. 5's silence on worker bargaining power is particularly regrettable given that recent developments at the federal level have produced an opportunity for worker empowerment at the state level. Since the beginning of the Trump Administration, the National Labor Relations Board (NLRB) has reversed its prior position and issued an opinion stating that Uber drivers are independent contractors — not employees — because they have “virtually complete control of their cars, work schedules, and log-in locations” and can work for Uber's competitors.⁶⁸ This shift in position excludes Uber drivers from the scope of the National Labor Relations Act⁶⁹ (NLRA), which regulates the collective bargaining rights of employees.⁷⁰ Under the *Garmon*⁷¹ preemption doctrine, states may not intervene in such NLRA-regulated activities via statutory regulation⁷² unless the affected workers are exempt from the NLRA's coverage.⁷³ Therefore, by pronouncing that Uber drivers are independent contractors not covered by the NLRA, the NLRB has left states “free to regulate the union activity and labor relations”⁷⁴ of these drivers and similarly situated workers. In other words, California could have stepped in through A.B. 5 or its amendments to grant workers increased bargaining power and solidify the protections promised by the law. So far, it has not.⁷⁵

A.B. 5 envisions a step forward from traditional standards for worker classification, but its flaws limit its reach and effectiveness. The legal and practical consequences of A.B. 5 may occasion protracted legal and legislative battles,⁷⁶ regardless of the potential weakness of the arguments put forward by Uber and its ilk.⁷⁷ In the meantime, without an increase in worker bargaining power, it is uncertain if, when, and how A.B. 5 will bring about much-needed substantive protections for misclassified workers.

⁶⁸ Uber Techs., Inc., NLRB Advice Memorandum, No. 13-CA-163062, at 14 (Apr. 16, 2019). Compare *id.*, with Postmates, Inc., NLRB Advice Memorandum, No. 13-CA-163079, at 29 (Sept. 19, 2016) (reaching the opposite conclusion regarding employee status for Postmates couriers).

⁶⁹ 29 U.S.C. §§ 151–169 (2012).

⁷⁰ *Id.* §§ 157–159; see also Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 431 (1998).

⁷¹ San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

⁷² Befort, *supra* note 70, at 431–32.

⁷³ Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 384 (2007).

⁷⁴ *Id.*

⁷⁵ See, e.g., John Myers, *A Flood of Proposed Changes to California's AB 5 Awaits State Lawmakers*, L.A. TIMES (Feb. 28, 2020 5:00 AM), <https://www.latimes.com/california/story/2020-02-28/proposals-change-ab5-independent-contractors-labor-law-california> [<https://perma.cc/2YP4-M664>] (reporting on various efforts to revise scope of A.B. 5 since its passage).

⁷⁶ See, e.g., Colopy v. Uber Techs. Inc., No. 19-cv-06462, 2019 WL 6841218, at *4 (N.D. Cal. Dec. 16, 2019) (denying a preliminary injunction in a putative class action claiming that Uber misclassifies its drivers); Complaint for Violation of Federal and California Constitutional Rights, Declaratory, Injunctive, and Other Relief & Demand for Jury Trial at 2, *Olson v. California*, No. 19-cv-10956 (C.D. Cal. Dec. 30, 2019) (alleging that A.B. 5 violates the Fourteenth Amendment and “target[s] and stifle[s] workers and companies in the on-demand economy”).

⁷⁷ See, e.g., sources cited *supra* notes 50–52, 76.