

# Flexible Work Hours and Employee Status: The Truth About AB 5

*At work, we should all expect a safe and healthy workplace, to make enough to live and thrive, and to have a say over our working conditions. Laws regulating the workplace provide a basic foundation for our rights on the job, and make clear that employers have to follow the rules.*

*In California, legislation known as AB 5 (authored by Assemblywoman Lorena Gonzalez) would help ensure that this basic foundation of rights and protections applies to most workers across the state. AB 5 would make clear that most workers are employees covered by the many protections of workplace laws, rather than independent contractors, who have no such protections.*

## **Work Can Be Secure *and* Flexible**

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As the 2019 legislation known as AB 5, which would codify the “ABC test”<sup>1</sup> to determine employee status, makes its way through the California legislature, corporate interests have opposed the bill. Most recently, companies that are the face of the “gig economy” have claimed that if they are required to treat their workers as employees, as many would be under AB 5, those workers would *lose their flexibility to choose when to work*. Those claims are not supported by any reasonable analysis of the bill’s legal requirements; they are instead motivated by the companies’ desire to continue treating their workforce as independent contractors, which allows them to disavow responsibility for the workers who build their businesses. Many employees today, whether in the gig economy or not, already enjoy the flexibility that these companies say is impossible for them to extend to employees.

## **What’s in a Name? Independent Contractor v. Employee**

The difference between being an independent contractor or an employee is significant and has long-term implications. Being an employee means a worker can access the protections we all can and should expect on the job.

At the state level, employee status means basic protections for an employee, like knowing she’ll make at least the minimum wage, and being protected from discrimination and harassment on the job. She would get other benefits, if her employer offers them or is required to offer them, like sick leave or vacation time. She would be covered by unemployment insurance and workers’ comp if she got injured on the job. At the federal level, in addition to basic federal wage and anti-discrimination protections, she would also have the protected right to come together with her colleagues to discuss work conditions and to seek to improve them by bargaining with the employer or joining a union.

Complying with these rules is the employer's responsibility. Many companies prefer to call their workers independent contractors to avoid being accountable for these basic protections, and to evade payroll costs.<sup>2</sup> A true independent contractor is someone who runs her own separate business, sets her own rates, builds a customer base, and takes on the risk of business failure. Most workers are not true independent contractors. If a worker is called an independent contractor, as is the case for many workers for gig companies, she loses out on the workplace protections that apply to employees. These protections create the minimum foundation for what any person who works should expect from her job.

### **AB 5 Is a Building Block to a Better Workplace**

AB 5 builds upon a unanimous 2018 California Supreme Court decision, *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, which clarified that the simple and straightforward "ABC" test should be used to determine whether someone is an employee or independent contractor under California's wage orders. AB 5 offers clarity to workers and to employers by applying the ABC standard across the Labor Code and Unemployment Insurance Code, with a few exemptions.<sup>3</sup> Rather than a complicated multi-factor test that is difficult to apply, easy to manipulate by companies, and may produce inconsistent results depending on who is interpreting the factors, the ABC test presumes that a worker is an employee, unless the employer can show that the three prongs of the test do not apply.

Although much of the media attention on AB 5 has focused on the fact that it would mean many gig workers are employees, the legislation is much broader and applies to all sectors of work across California, including sectors that have long improperly treated their workers as independent contractors rather than employees, like construction, trucking, agriculture, and janitorial jobs.

### **Flexibility: It's a Choice, Not a Law**

Many gig companies claim that employee status and work flexibility are incompatible. That is not true, and it is a false choice to suggest a worker can have one but not the other. There is nothing about employee status that is inherently inflexible, and nothing required by any law or policy that would make it so.<sup>4</sup> Being an employee can come with flexible job hours if that's how the employer chooses to structure things, or if workers and their colleagues come to an agreement with their employer, for example, through a collective bargaining agreement.

In fact, a number of companies in the gig economy already treat their workers as employees,<sup>5</sup> while at the same time providing them with flexible work schedules and benefits. These include platform companies like the cleaning company Managed by Q and the personal management company Hello Alfred.<sup>6</sup> The scooter company Spin chose to hire employees to collect, charge, fix, and redeploy its scooters.<sup>7</sup> Another scooter company, Bird, has recently begun to reclassify its mechanics as employees.<sup>8</sup> Employee delivery drivers at the gig company Enjoy can select which days of the week they wish to work.<sup>9</sup> These companies prove that flexibility and employee status are perfectly compatible. All it takes is a company that cares not only about profits but its workers too.

## **Flexibility and Employee Status Are Legally Compatible**

Some companies and their supporters have tried to elevate their flexibility argument into a legal doctrine. They argue that under the law, having some flexibility in hours automatically converts workers into independent contractors. But that is not true, either. In a wide variety of contexts, courts have found that just because a worker has a flexible schedule doesn't mean she is somehow transformed into the operator of her own business—the true benchmark of independent contractor status.

Cake decorators, home researchers, nurses, couriers, and restaurant workers have all been found to be employees, despite the fact that they could choose their own schedules.<sup>10</sup> Laws don't force workers into choosing between having basic workplace protections and having flexibility; companies do.

There is nothing new about work that is done off-premises and at non-standard hours. Gig workers are the modern-day version of the “putting out” system developed for home-based work prior to the Industrial Revolution. As production moved from rural farms to the factory, work was assigned to people in their homes. While the substantive work may have shifted from knitting a hat to data processing, delivery, or homecare, with orders put out over a smartphone app, the parallels are clear. The solution is clear too, and timeless: minimum wage and overtime and health and safety laws were meant to cover and *do* cover workers who are paid on a piece rate and who work from their homes, or cars, or bicycles.

## **For Many, Gig Work Not So Flexible in Reality**

Not only is the companies' legal argument that employees can't have flexible schedules wrong, the reality is that “gig” work is not necessarily as flexible as the companies make it seem: workers must drive and deliver and run errands when consumers need them to. The peak demand hours for ride-hail drivers, for example, are between 10pm and 4am. If a gig worker needs money, those are the hours she must work.<sup>11</sup>

A further distinction between the rhetoric of the gig companies and the reality of gig work is that flexibility only really applies to some workers anyway. Someone who already has a stable income from another source may well have the freedom to choose whether to pick up a few extra hours on Saturday night. But someone who is relying on driving for Uber as her first or second job to meet basic needs does not have the luxury of just working when she wants to. And in fact, she will likely need to drive more and more just to keep up, as companies like Uber and Lyft continue to reduce driver pay to drive up their own profits.<sup>12</sup>

## **Conclusion**

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With the introduction of AB 5, California is in the spotlight. By passing this important legislation, the legislature will send a signal to others around the country that the birthplace of the modern-day gig economy will also be a leader in protecting workers' rights. In state after state, powerful and well-funded players have been very successful in securing outcomes that serve themselves, at the expense of workers and public coffers.<sup>13</sup> AB 5, and the promise of baseline protections for workers across the state, offers California lawmakers a chance to turn the tide and lead in a new direction.

Rather than continue to accede to gig companies' insistence that we adapt our laws and lower our standards to suit their business model, we should strive to raise standards for all work. To turn gig jobs—and all jobs—into good jobs, we must enforce existing laws, pursue strategies to raise wages, provide all workers with fair schedules, and ensure that paid sick days and paid family leave are available to all workers. We should be building an economy that works for all of us. ⑤

## Endnotes

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<sup>1</sup> Under the “ABC” test, businesses that seek to treat workers as independent contractors have to show that the workers: (A) are free from control and direction by the hiring company; (B) perform work outside the usual course of business of the hiring entity; and (C) are independently established in that trade, occupation, or business. More than half of the states already have the ABC test in their state unemployment insurance laws, and several states, including Massachusetts, New Jersey and Connecticut have adopted it for use under their wage and hour protections.

<sup>2</sup> Catherine Ruckelshaus and Ceilidh Gao, “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” National Employment Law Project, December 2017, <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/>.

<sup>3</sup> California Legislative Information website, text of AB 5 as of June 18, 2019, available at [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5).

<sup>4</sup> Rebecca Smith, “Flexibility in the Gig Economy,” National Employment Law Project, June 2016, <https://www.nelp.org/publication/flexibility-in-the-on-demand-economy/>.

<sup>5</sup> Alison Griswold, “Managed by Q’s “good jobs strategy” is paying off for workers—and the company,” Quartz, October 26, 2017, <https://qz.com/1112199/managed-by-q-services-jobs-profitable/>.

<sup>6</sup> The founder of gig company Managed by Q, which provides on-demand office management services using employees, explained, “There’s a false choice between flexibility and good jobs.” Managed by Q employees control their own schedules and receive training and benefits. See Maya Pinto, Rebecca Smith and Irene Tung, “Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It,” National Employment Law Project, March 2019, <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/>.

<sup>7</sup> Aarian Marshall, “Scooter Companies are Ditching Gig Workers for Real Employees,” Wired, March 7, 2019 <https://www.wired.com/story/spin-scooter-share-gig-economy-employees/?CNDID=54696786>

<sup>8</sup> *Id.*

<sup>9</sup> Ilana Semuels, “What Happens When Gig-Economy Workers Become Employees,” The Atlantic, Sep 14, 2018, <https://www.theatlantic.com/technology/archive/2018/09/gig-economy-independent-contractors/570307/>.

<sup>10</sup> Rebecca Smith, “Flexibility in the Gig Economy,” National Employment Law Project, June 2016, <https://www.nelp.org/publication/flexibility-in-the-on-demand-economy/>.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Faiz Siddiqui, “Uber and Lyft slashed wages. Now California drivers are protesting their IPOs,” Washington Post, March 26, 2019, [https://www.washingtonpost.com/technology/2019/03/26/uber-lyft-slashed-wages-now-california-drivers-are-protesting-their-ipos/?utm\\_term=.2bfad3dad45](https://www.washingtonpost.com/technology/2019/03/26/uber-lyft-slashed-wages-now-california-drivers-are-protesting-their-ipos/?utm_term=.2bfad3dad45)

<sup>13</sup> Maya Pinto, Rebecca Smith and Irene Tung, “Rights at Risk: Gig Companies’ Campaign to Upend Employment as We Know It,” National Employment Law Project, March 2019, <https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/>.