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The vast majority of California's independent contractors are still covered by the ABC test

Passage of AB 2257 caused only minor changes in coverage of the ABC test under AB 5

By Ken Jacobs, Enrique Lopezlira, and Vivian Vázquez

An update of "Estimating the Coverage of California's New AB 5 Law," by Sarah Thomason, Ken Jacobs, and Sharon Jan, November 2019.

In April 2018, the California State Supreme Court ruling in the *Dynamex*¹ case established a new legal standard, called the ABC test, for determining if a worker is an employee or an independent contractor for the purposes of California's wage and hour laws.² Under the ABC test, a worker is considered an employee and not an independent contractor unless the work performed a) is under the worker's control and not that of the business, b) is not part of the company's core business, and c) is part of the worker's independent profession.³ California Assembly Bill 5 (AB 5), signed into law in September 2019, codified the ABC test in state law and extended its use beyond the wage orders covered in the *Dynamex* case to unemployment insurance and the labor code, including workers compensation.

Under AB 5, workers are assumed to be employees unless all three conditions of the ABC test are met. However, the law does specifically exclude some job categories from the ABC test. Some occupations are exempt altogether from the ABC test; examples include doctors and lawyers. Other occupations *may* be excluded from the ABC test *if* certain strict conditions apply. For example, services provided by a freelance writer are excluded from the ABC test if there is a written contract specifying the rate of pay and intellectual property rates, along with other specified conditions.

Importantly, however, workers in occupations where the ABC test does not apply—either because the occupation is excluded entirely from the test, or because certain additional conditions are met—are *not* automatically classified as independent contractors. Rather, workers in these job categories are subject to the *Borello*⁴ test, a less strict standard for determining worker classification that had previously applied to all workers under California state law.⁵

In September 2020, Governor Newsom signed into law Assembly Bill 2257 (AB 2257) which revised the provisions of AB 5 by adding additional occupations to the list of those excluded, or potentially excluded, from the ABC test. These included additional types of services in referral agencies, additional professional services, and additional qualified exemptions when certain strict criteria are met. (See the technical appendix for a list of exemptions).

The lion's share of media attention surrounding AB 5 and AB 2257 has gone to the law's effects on on-demand labor platforms like Uber and Lyft. Transportation and delivery network company drivers were excluded from the law with the passage of Proposition 22 in November 2020.⁶ They are defined as independent contractors and are not subject to either the ABC test or *Borello*. Transportation and delivery drivers made up 93 percent of the on-demand labor platform workforce in 2021.⁷ However, these workers represent just a fraction of independent contractors, most of whom work across a diverse range of occupations such as janitors, hair stylists, and accountants.⁸

In this brief, we update our previous analysis of AB 5 using occupational employment data for California in order to estimate the percentage of independent contractors whose jobs are subject to the ABC test under AB 2257, the percentage whose jobs are subject to the ABC test except when strict conditions are met, and the percentage whose jobs are excluded from the ABC test entirely (and are subject to the *Borello* test instead). As explained below, our analysis is restricted to workers who are independent contractors at their main job. We find that after the revisions in AB 2257, the overwhelming majority of these workers are still in occupations covered by the ABC test and another large share are potentially covered by the ABC test. The small number of occupations where the ABC test does not apply are typically high paying.

Analysis

To estimate the applicability of the ABC test to independent contractors in California under AB 2257, we use data from the American Community Survey (ACS). Since this data source only captures information on the type of work that an individual does at the job where they work the most hours, our analysis is representative of those who do independent contracting as a main job, but leaves out the large number of workers who do such work for supplemental income. From a recent study by Collins et al., we know that a sizable number of individuals combine independent contract work with traditional W2 employment.⁹ The ACS data is nonetheless the best snapshot we are able to get of California's independent contractors, given the lack of publicly available data sources that include workers who engage in independent contracting for supplemental income.

For our analysis, we divide independent contractors in California into three categories based on whether or not the ABC test would be used to assess the appropriateness of their independent contractor status:

- 1. ABC test does not apply:** Workers in occupations that AB 2257 explicitly excludes from the ABC test, such as real estate agents, lawyers, and doctors. These workers would still be subject to the *Borello* test to determine correct classification.
- 2. ABC test applies except when strict criteria are met:** Workers in occupations that AB 2257 stipulates are subject to the ABC test except under certain strict and specific circumstances. For example, the ABC test applies to hairstylists and barbers except when a number of criteria are met, including that the worker sets their own rates, processes their own payments, sets their own hours, schedules their own clients, and has their own business license.
- 3. ABC test applies:** Workers in all other occupations.

As shown in Figure 1, we estimate that the ABC test applies to 67 percent of workers who are independent contractors at their main job. The ABC test applies, except when strict criteria are met, for 25 percent of the workers who are independent contractors at their main job. The ABC test does not apply to just 8 percent of workers who are independent contractors at their main job (See Technical Appendix for a detailed description of our methods).

In Figure 1, we also list the most common occupations among independent contractors in each of our three categories. Although we do not have reliable data on the earnings of independent contractors,¹⁰ we do know how much traditionally employed W2 workers in these occupations earn. Common occupations that the ABC test will not apply to, such as lawyers and doctors, typically earn high wages (median wage of \$48.86 for W2 workers). Those in the category where the ABC test will apply, such as retail workers and childcare workers, typically earn lower wages (median wage of \$23.62 for W2 workers). Two of the most common occupations that the ABC test will apply to—janitors and truck drivers—are also known to have high rates of misclassification.¹¹ Those in the category where the ABC test will apply unless strict criteria are met tend to be in middle-wage jobs, such as construction, sales, and graphic design (median wage of \$28.06 for W2 workers).

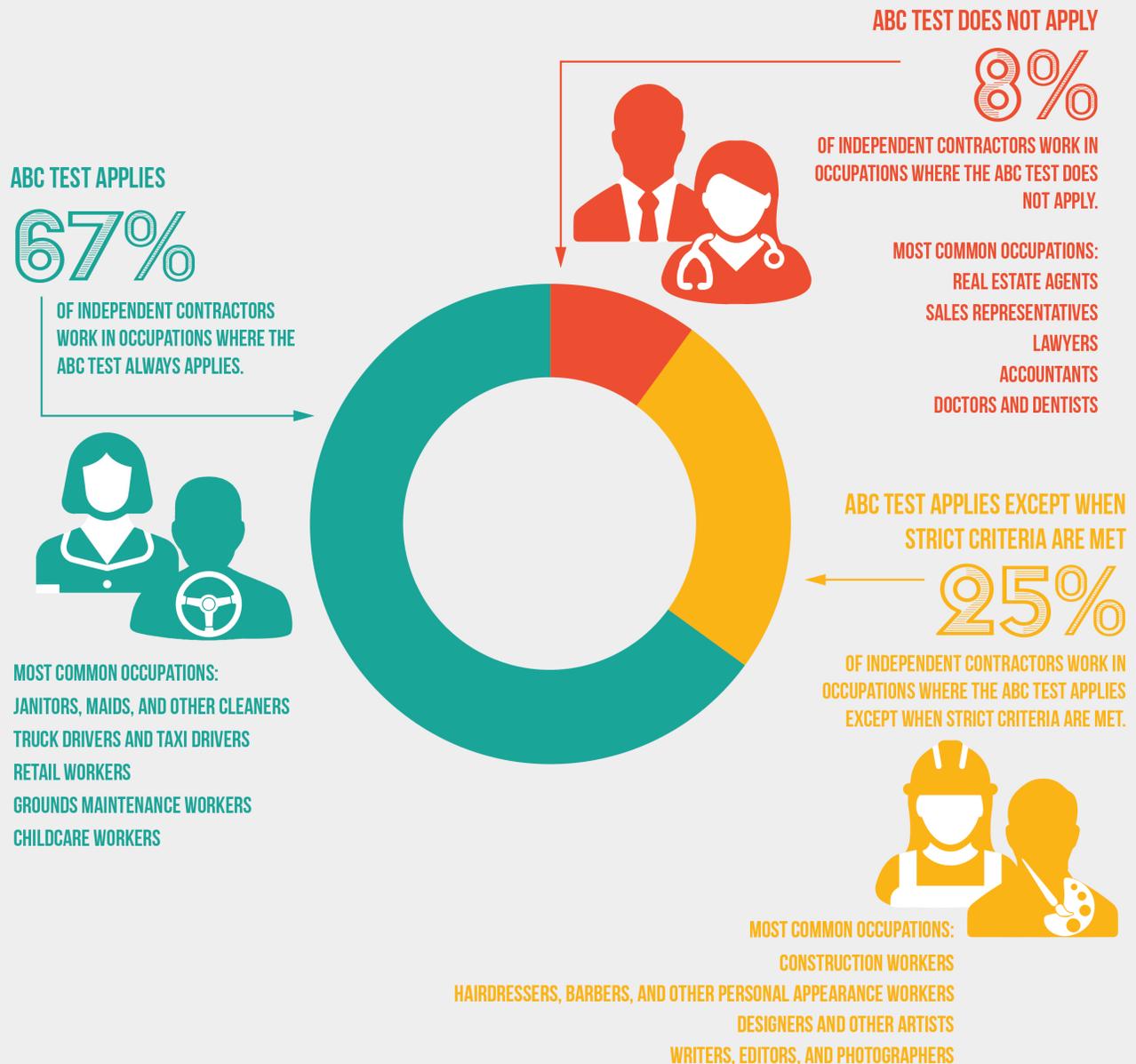
Compared to our original analysis of AB 5, we find very little change in the share of individuals who are independent contractors in their main jobs that are in occupations covered by the ABC test. Applying the original AB 5 exemptions to 2021 ACS data, we find that AB 2257 reduced the share of workers covered by the ABC test by 2 percentage points, and increased the share of workers in occupations covered by the ABC test unless strict criteria are met by 1 percentage point.

In conclusion, the vast majority of individuals who are independent contractors in their main jobs are in occupations that are covered by the ABC test under AB 2257. The typically high-paying occupations that were excluded from the test account for a small share of independent contractors.

Figure 1.

CALIFORNIA'S ABC TEST

HOW THE ABC TEST IS APPLIED TO CALIFORNIAN'S INDEPENDENT CONTRACTORS*
BASED ON AB 5 AND AB 2257



Source: Authors' analysis of American Community Survey 2021 data and AB 2257 legislation.

* Note: These estimates only include workers who are independent contractors at their main job and exclude the many workers who earn supplemental income as independent contractors in addition to working a traditional W2 job. The occupations listed are the most common among ACS respondents self-reporting as self-employed unincorporated at their main job.

Technical Appendix

We use the 2021 American Community Survey (ACS) and limit our analysis to 18-64 year olds who are (1) currently employed, (2) self-employed unincorporated at their main job, and (3) work in California.

In order to assign workers into our three categories (ABC test applies, ABC test applies except when strict criteria are met, and ABC test does not apply), we first compiled a list of occupations that are designated in AB 2257 as excluded from the ABC test or excluded under certain conditions. We then identified the occupation categories in the ACS data that most closely matched each occupation as described in the law (see below, “assignment of occupations to ABC test categories,” for a complete crosswalk of AB 2257 language and the ACS occupation categories that we used). Next, we assigned workers in the ACS data to one of the three categories based on their occupation. Finally, we calculated the proportion in each category to arrive at our estimates in Figure 1.

All independent contractors working in the construction industry are included in the “ABC applies except when strict criteria are met” category because AB 2257 excludes these workers only if a number of conditions are met, such as the worker being licensed as a contractor by the state.

Assignment of occupations to ABC test categories

The following tables describe how we assign workers into our three categories using Community Survey (ACS) data. Table 1 includes the list from AB 2257 of independent contractors that the ABC test will not apply to and the corresponding occupation or industry categories that we used to identify these workers in our ACS data. Table 2 includes the list from AB 2257 of independent contractors that the ABC test will not apply to unless strict criteria are met and the corresponding occupation or industry categories that we used to identify these workers in our ACS data. We include all other independent contractors in our “ABC test applies” category. Changes from AB 5 are in italics.

There are two limitations to this portion of our analysis. First, the occupations in our American Community Survey (ACS) data do not always match the occupations listed in AB 2257. When an occupation listed in AB 2257 is only a subset of the corresponding occupation category in our ACS data, we likely overstate somewhat the proportion of workers where the ABC test will not apply or the ABC test applies except when strict criteria are met. Second, there are some groups of workers that AB 2257 says are exempt from the ABC test that we are unable to identify in our ACS data (see Table 3). In these cases, we are likely underestimating the number of workers who the ABC test will not apply to.

To estimate the difference between the share of individuals who are independent contractors in their main jobs under AB 5 and the share under AB 2257, we applied the original AB 5 exemptions to the 2021 ACS data and calculated the shares of workers covered by the ABC test and the share of workers covered by the ABC test unless strict criteria are met. We then subtracted these shares from the shares calculated under the AB 2257 exemptions, and reported the percentage points difference.

Table 1. ABC test does not apply
(italicized text indicates changes from AB 5)

Text in AB 2257	ACS Occupation/Industry Category
<i>An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Landscape architect</i>	<i>Landscape architect</i>
<i>Person who provides underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries</i>	<i>Industry: Financial services and insurance Occupations: Risk manager</i>
<i>A home inspector, as defined in Section 7195 of the Business and Professions Code</i>	<i>Construction and building inspector</i>
A person or organization who is licensed by the Department of Insurance	Insurance sales agents
A physician and surgeon, dentist, podiatrist, psychologist, or veterinarian licensed by the State of California	Physicians and surgeons
	Dentists
	Podiatrists
	Psychologists
An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Lawyer	Lawyers, and judges, magistrates, and other judicial workers
	Judicial law clerks, lawyers, miscellaneous legal support workers
An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Architect	Architects, except naval

Table 1. ABC test does not apply
(italicized text indicates changes from AB 5)

Text in AB 2257	ACS Occupation/Industry Category
An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Engineer	Aerospace engineers
	Biomedical and agricultural engineers
	Chemical engineers
	Civil engineers
	Computer hardware engineers
	Electrical and electronics engineers
	Environmental engineers
	Industrial engineers, including health and safety
	Marine engineers and naval architects
	Materials engineers
	Mechanical engineers
	Petroleum, mining and geological engineers, including mining safety engineers
	Miscellaneous engineers including nuclear engineers
Architectural and engineering managers	
An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Private investigator	Private detectives and investigators
An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Accountant	Accountants and auditors
<i>An individual who holds an active license from the State of California and is practicing one of the following recognized professions: Landscape architect</i>	<i>Landscape architect</i>
A securities broker-dealer or investment adviser or their agents and representatives that are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or licensed by the State of California	Personal financial advisors
	Securities, commodities, and financial services sales agents
A commercial fisherman working on an American vessel (other conditions apply)	Fishing and hunting workers
Real estate licensee	Real estate brokers and sales agents

Table 2: ABC test applies except when strict criteria are met
(italicized text indicates changes from AB 5)

Text in AB 2257	ACS Occupation/Industry Category
A direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met	Sales representatives, services, all other
	Sales representatives, wholesale and manufacturing
	Models, demonstrators, and product promoters
	Marketing and sales managers
	Door-to-door sales workers, news and street vendors, and related workers
The relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry	Construction industry
Subcontractor providing construction trucking services for which a contractor’s license is not required provided that 1) subcontractor is a business entity (sole proprietorship, LLC, etc), 2) registered with Dept of Industrial Relations as a public works contractor, 3) utilizes its own employees to perform the construction trucking services, 4) negotiates and contracts with, and is compensated directly by the licensed contractor	Construction industry
“Professional services”: Marketing, provided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the contracted work.	Marketing and sales managers
	Market research analysts and marketing specialists
“Professional services”: Administrator of human resources, provided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.	Human resource workers
	Compensation, benefits, and job analysis specialists
	Training and development specialists
“Professional services”: Travel agent services (conditions apply)	Travel agent
“Professional services”: Graphic design	Designers
“Professional services”: Grant writer	Fundraisers
“Professional services”: Fine artist	Artists and related workers
“Professional services”: an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service	Tax examiners and collectors, and revenue agents
	Tax preparers

Table 2: ABC test applies except when strict criteria are met
(italicized text indicates changes from AB 5)

Text in AB 2257	ACS Occupation/Industry Category
<p><i>Services provided by any of the following: By a still photographer, photojournalist, videographer, or photo editor who works under a written contract that specifies the rate of pay and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity. This subclause is not applicable to a still photographer, photojournalist, videographer, or photo editor who works on motion pictures, which is inclusive of, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos.</i></p>	<p><i>Photographers</i></p> <p><i>Television, video, and film camera operators and editors</i></p>
<p><i>Freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist who works under a written contract that specifies the rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.</i></p>	<p><i>Proofreaders and copy markers</i></p>
	<p><i>Editors</i></p>
	<p><i>Technical writers</i></p> <p><i>Writers and authors</i></p>
<p><i>Interpreting services, defined as services provided by a certified or registered interpreter in a language with an available certification or registration through the Judicial Council of California, State Personnel Board, or any other agency or department in the State of California, or through a testing organization, agency, or educational institution approved or recognized by the state, or through the Registry of Interpreters for the Deaf, Certification Commission for Healthcare Interpreters, National Board of Certification for Medical Interpreters, International Association of Conference Interpreters, United States Department of State, or the Administrative Office of the United States Courts.</i></p>	<p><i>Interpreters and translators</i></p>
<p><i>A competition judge with a specialized skill set or expertise providing services for the purposes of determining the outcome of a competition or enforcing the rules of a competition. This expressly includes, but is not limited to, an amateur umpire or referee.</i></p>	<p><i>Umpires, referees, and other sports officials</i></p>

Table 2: ABC test applies except when strict criteria are met
(italicized text indicates changes from AB 5)

Text in AB 2257	ACS Occupation/Industry Category
<p><i>Youth sports coaching, defined by someone who develops and implements their own curriculum for an athletic program in which youth who are 18 years of age or younger predominantly participate and that is organized for the purposes of training for and engaging in athletic activity and competition.</i></p>	<p><i>Coaches and scouts</i></p>
<p><i>The following occupations in connection with creating, marketing, promoting or distributing sound recordings or musical compositions:</i></p> <ul style="list-style-type: none"> • <i>Recording artists</i> • <i>Musicians engaged in the creation of sound recordings</i> • <i>Vocalists</i> • <i>Songwriters, lyricists, composers and proofers</i> • <i>Managers of recording artists</i> • <i>Record producers and directors</i> • <i>Musical engineers</i> • <i>Photographers</i> • <i>Independent radio promoters</i> • <i>Any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions.</i> 	<p><i>Industry: Record production and distribution</i></p> <p><i>Occupations:</i></p> <ul style="list-style-type: none"> • <i>Musicians and singers</i> • <i>Music directors and composers</i> • <i>Agents and business managers of artists, performers, and athletes</i> • <i>Producers and directors</i> • <i>Broadcast sound and light technicians</i> • <i>Photographers</i> • <i>Public relations specialists</i>
<p><i>Services provided by an appraiser</i></p>	<p><i>Property appraisers and assessors</i></p>
<p><i>An individual providing services as a registered professional forester</i></p>	<p><i>Conservation scientists and foresters</i></p>
<p><i>Musician or musical group for the purpose of a single-engagement live performance event</i></p>	<p><i>Musicians and singers</i></p>
<p><i>“Professional Services”: Licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual: (I) sets their own rates, processes their own payments, and is paid directly by clients, (II) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services, (III) Has their own book of business and schedules their own appointments, (IV) Maintains their own business license for the services offered to clients, (V) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space. (VI) This subdivision shall become inoperative, with respect to licensed manicurists, on January 1, 2022.</i></p>	<p><i>Barbers</i></p> <hr/> <p><i>Hairdressers, hairstylists, and cosmetologists</i></p> <hr/> <p><i>Miscellaneous personal appearance workers</i></p>

Table 3: Additional groups of workers exempted from the ABC test that we were unable to identify in ACS data

(italicized text indicates changes from AB 5)

Payment processing agent through an independent sales organization

Repossession agencies

A bona fide business-to-business contracting relationship

Referral agency...is a business that provides clients with referrals for service providers to provide services under a contract.

Motor club holding certificate of authority

A manufactured housing salesperson

A newspaper distributor working under contract with a newspaper publisher, and a newspaper carrier working under contract either with a newspaper publisher or newspaper distributor.

An individual who is conducting an international exchange visitor program that maintains full official designation by the United States Department of State and compliance with federal regulations.

Data aggregator

Feedback aggregator

A specialized performer hired by a performing arts company or organization to teach a master class for no more than one week. "Master class" means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.

Digital content aggregator

Services provided by an individual as a content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media, who works under a written contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity, the individual does not primarily perform the work at the hiring entity's business location notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.

Endnotes

- 1 Dynamex Operations West Inc. v. Superior Court of Los Angeles, [\(2018\) 4 Cal. 5th 903](#) (Cal. Sup. Ct. April 30, 2018).
- 2 Chris M. Micheli, "California Adopts 'ABC Test' for Employee Classification," *The National Law Review*, September 19, 2019, <https://www.natlawreview.com/article/california-adopts-abc-test-employee-classification>.
- 3 Lorena Gonzalez Fletcher and Anthony Rendon, "Worker Status: Employees and Independent Contractors," Pub. L. No. AB-5 (2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.
- 4 S.G. Borello & Sons, Inc. v. Department of Industrial Relations, [\(1989\) 48 Cal. 3d 341](#) (Cal. Sup. Ct. March 23, 1989).
- 5 The *Borello* test for determining employee or independent contractor status primarily considers whether or not a worker has control over the work that they do, and may also consider eleven additional factors depending on the issues involved. See "Independent Contractors versus Employee," Labor Commissioner's Office, State of California Department of Industrial Relations, accessed November 1, 2019, https://www.dir.ca.gov/dlse/faq_independentcontractor.htm.
- 6 A California Appeals Court ruling in March 2023 upheld the main provisions of Proposition 22. Attorneys representing the Service Employees International Union (SEIU) filed a petition to the Supreme Court for review the following month.
- 7 Fiona Greig and Daniel M. Sullivan, "The Online Platform Economy through the Pandemic," JP Morgan Chase & Co., October 2021, <https://www.jpmorganchase.com/institute/research/labor-markets/online-platform-economy-through-the-pandemic>.
- 8 Annette Bernhardt and Sarah Thomason, "What Do We Know About Gig Work in California? An Analysis of Independent Contracting," UC Berkeley Labor Center, June 2017, <https://laborcenter.berkeley.edu/what-do-we-know-about-gig-work-in-california/>.
- 9 Brett Collins et al., "Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns," March 25, 2019, 72, <https://www.russellsage.org/reports/gig-work-replacing-traditional-employment-evidence-two-decades-tax-returns>
- 10 Although the ACS captures information on self-employment income, we do not consider it to be an accurate measure of earnings due to evidence of high levels of underreporting. See Bernhardt and Thomason, "What Do We Know About Gig Work in California?"
- 11 Ratna Sinroja, Sarah Thomason, and Ken Jacobs, "Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries," UC Berkeley Labor Center, March 11, 2019, <https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries/>.

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