
PRESENTATION

This thematic briefing analyzes the "App-Based Drivers as Contractors and Labor Policies Initiative", known as Proposition 22 (Proposition 22 or, hereinafter, P22), and explores the debate in California about the characterization of the existing legal bond between application drivers and delivery drivers and the platforms, such as Uber and Lyft. The P22 marks the controversy over definitions and types of employment on digital platforms, labor legislation and new work modalities, such as the independent contracting regime. In this document, we are interested in exploring the specifics of this debate and how regulatory agendas and discussions relate to Brazil, following the proposal of the Future of Work & Gig Economy study: regulatory issues on technology and social protection to dialogue with contexts and discussions in other countries that may contribute to the Brazilian debate. To this end, the text of Proposition 22, news, government reports and academic publications dealing with the theme were analyzed. Enjoy your reading!

Key findings

- 1) Legal definitions and indication of criteria for the autonomy of the *independent contractor*.
- 2) Emphasis on freedom of choice about when, how and for whom one works. However, nothing is said about the freedom of association.
- 3) Main topics covered in P22: legal characterization of the provider registered as an *independent contractor*, transparency rules, definition of guarantees and benefits, and provision for mechanisms to fight violence and harassment.
- 4) P22 creates nuances in relation to the health care subsidy owed to independent contractors for health care, according to the amount of engaged time.

INTRODUCTION

During the last decade, digital platform companies have not only brought about changes in the dynamics of work, but have also challenged the normative structures used to classify the employment relationship. In the United States, as well as in Brazil, employee status is an important classification to determine which workers are entitled to labor rights, such as minimum wages, limitation of working hours, rest breaks, among others. In these places, the legal categorization of different types of workers is necessary to identify labor rights and other benefits, such as social security, for example (CHERRY, 2021). However, the model of work on demand does not easily fit into the existing categories and standards. In the midst of intense debates, in 2020 the vote for the so-called “**Proposition 22**” in California, the richest and most populous state in the United States, which represents about 14.7% of GDP, is home to 12% of the country's population and holds, respectively, about 9% and 16% of the total runs of Uber and Lyft, two of the largest private passenger transportation platforms (TILT, 2020).

P22 was proposed as a counterpoint to the California Assembly Bill 5 - AB5) - for more details, see **Box 01**. It sought to define workers on digital transportation and delivery

platforms as “independent contractors”, not as employees, while establishing some rights for such workers and obligations for the platforms.

The main mobilizing parties for the approval of P22 were the companies Uber, Lyft, DoorDash, Instacart and Postmates, which invested significant resources and made this the most expensive legislative campaign in the history of the United States (HUSSAIN, 2020). The opposition to the P22 proposal was made mainly by labor groups and organizations, such as the American Federation of Labor and Congress of Industrial Organizations, United Food and Commercial Workers, Teamsters and UNITE HERE, which maintained that this initiative would prevent companies from fulfilling their obligations to provide benefits and minimum wages to workers (PAUL, 2020). There was an investment of about US \$ 200 million by the application companies for the approval of P22, while labor organizations spent around US \$ 11 million to defeat it (HUSSAIN, 2020).

On November 3, 2020, a referendum was held, which resulted in the approval of the P22 with 58.6% of the votes in favor of implementing this measure.

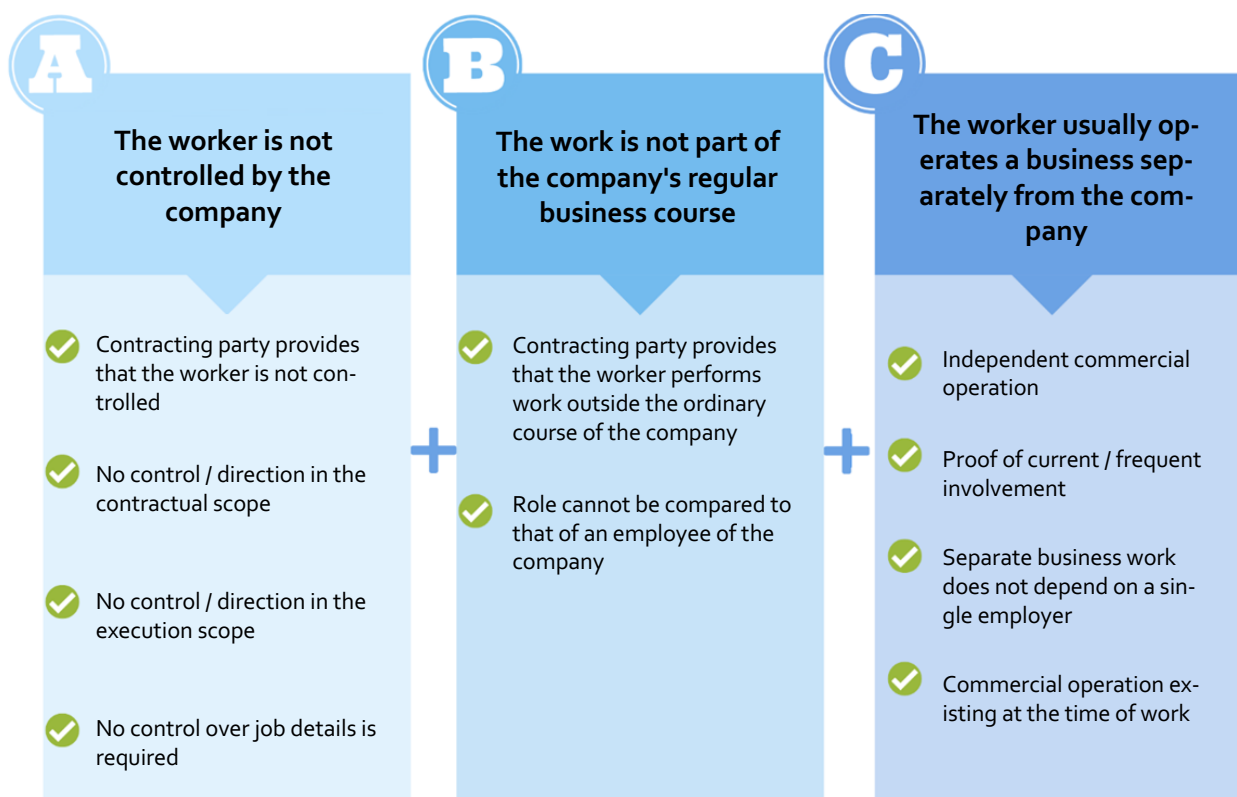
Box 1: AB5 and the ABC test

AB5's main objective was to guarantee a series of benefits for workers in the *gig economy*, such as earning overtime after a 40-hour workweek, payment of sick leave and unemployment insurance (HUSSAIN, 2020). In 2018, the California Supreme Court (Dynamex Operations W. Inc. v. Superior Court -2018) adopted the "ABC test" to determine whether someone is properly classified as an independent contractor / self-employed.) In September 2019, the Governor of California sanctioned AB5, adopting the "ABC test" for the entire state as of January 2020 as a way to correctly identify the classification of a self-employed worker (DIR, c2021).

It is important to highlight that to be considered a self-employed worker, all items of the "ABC test" must be met. In addition, it is worth mentioning that the test is not applicable to all workers, since some laws regulate certain labor relationships in a specific way (which is the case of P22), excluding some categories of this test. There is also the possibility that the test is not applied as the result of a court order.

Source: Own preparation

Figure 1: ABC test for AB5



Source: adapted from information from the California Department of Industrial Relations (DIR, c2021)

METHODOLOGY

The choice for the case of P22 and the debate in California on the regulation of work on digital platforms proved to be relevant to the research, since it represents a concrete case that deals with already approved, controversial legislation that marks the legal disputes surrounding the classification of providers (drivers and delivery drivers) as employees and benefit holders. To better understand the contours and developments of this discussion in both the world and in Brazil, researchers

worked with data and information collected in the databases of the Legislative Power of the state of California, and in literature review on the subject. Specifically, P22 was coded by two researchers from the team, using the Atlas.ti software, based on a research code book. The codifications were compared with the codifications of the Brazilian legislative texts presented in the previous thematic briefings. Some of the discussions in this analysis are presented below.

NOTES ON THE US LABOR LEGAL SYSTEM

Work regime in the USA and California

The American labor system differentiates between employee and independent contractor or self-employed. Employee is the worker who provides services that can be controlled, both in relation to what will be done and in relation to the way the service should be performed (IRS, 2021). The self-employed individual is the worker who provides services that can only be controlled, by the payer, with respect to the results of the work and not in the way the work will be carried out. Examples of self-employed workers are: doctors, dentists, lawyers, as long as they are not in a relationship controlled by an employer (IRS, 2020)

Competence to legislate on labor and state regulation

The United States Department of Labor indicates more than 180 federal labor laws. These regulations affect around 150 million workers and 10 million workplaces. Among the

matters covered by these laws, we can highlight: salaries and working hours (*The Fair Labor Standards Act- FLSA*), health and safety at work (*The Occupational Safety and Health Act- OSHA*), discrimination (*The Age Discrimination in Employment Act-ADEA/ The Equal Pay Act- EPA/ The Pregnancy Discrimination Act- PDA*) etc.

The application of these federal laws depends on criteria established by each of them. The *Fair Labor Standards Act* (FLSA), for instance, is a law that establishes minimum wages, overtime payments and minimum age parameters for the work. It defines its application from two perspectives: (i) business coverage: for businesses or organizations with at least two employees, provided that they have a sales or business volume of at least U\$ 500,000 or hospitals and companies that provide medical or nursing care for residents, schools, and government agencies; (ii) individual coverage: workers in interstate commerce (DOL, 2009).

In addition to the application of federal laws, depending on the scope of each of them, labor issues are also regulated by the states. California proves to be one of the most protective states in relation to workers, and it was elected in 2020 as the best state to work in the United States (OXFAN, 2020)¹. Among the rights guaranteed to employees by laws in California, we can highlight: minimum wage / hour of 13 dollars in companies with up to 25 employees and 14 dollars / hour in companies with 26 or more employees (while the

minimum wage established by the Fair Labor Standards Act is 7.25 dollars per hour), and overtime pay with an additional 50% in the case of work over 8 hours a day or 40 hours a week (DOL, 2021a); 30-minute break for meals, for work periods longer than 5 hours, except when the workday is completed in 6 hours or less and there is mutual consent between employer and employee (DOL, 2021b); at least fortnightly payments; among others (DOL, 2021c).

WHAT DOES PROPOSITION 22 SAY?

P22 uses legislative drafting techniques that are different from the ones we are used to in Brazil. The proposition starts, in its article 1, with a kind of contextualization, equivalent to the excerpts of *consideranda* or even to the justifications presented in the Brazilian

proposals to statutory law. Several passages highlight the inspiration in the ideals of "right to choose work" and "freedom to work autonomously", which figure as the proposition's statement of purpose.

Box 2: Freedom as one of the purposes of P22

"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, while preserving *access to* app-based rideshare and delivery services *that are beneficial to consumers, small businesses and the California economy*". (art. 1º, 7.449, e) [...] This chapter is necessary to protect their *freedom to work independently*, while providing these workers with new benefits and protections not available in current law." (art. 1º, 7449, e e f)

Source: Own preparation

¹The research took into consideration for the analysis the laws involving protection of employees, domestic workers and rural workers.

In addition to the right to choose to work as independent contractors and the right to flexibility to establish their own workday, as well as their own way of working, P22 also establishes as a statement of purpose: the obligation for platforms to offer protections and benefits to delivery drivers and drivers as well

as promoting public safety and the safety of consumers. Based on these purposes, P22 adopts the classification of independent contractors to characterize application drivers and delivery drivers, excluding the possibility of considering them as employees, as long as certain conditions are met.

Box 3: *Conditions to characterize the independent contractor*

Conditions to be met and characterize the independent contractor

- a) the network company **does not prescribe**, unilaterally, **specific dates, times of day or a minimum number of hours** during which the app-based driver must be logged into the application;
- 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 application**;
- c) the network company **does not restrict** the app-based driver from **performing rideshare services or delivery 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**.

Source: Own preparation

Once these conditions are met, the application driver or delivery driver will be considered an independent contractor and will have his/her activities ruled by P22, which establishes definitions for the expressions used, indicating what is meant by consumers, platforms, engaged time, etc. (cf. article 6); provides for obligations and rights for platforms and independent contractors; and responds to some concerns related to the consumption of services.

P22 initially provides for contractual transparency between the platform and the providers registered on it (cf. article 2), establishes a

minimum remuneration to be earned by them and rules for compensation for vehicle expenses (cf. article 3). In its article 4, it regulates the guarantee of benefits to independent contractors, which consist of subsidies for health care and insurance against accidents at work, accidental death, and other losses.

P22 also provides for protection of providers and consumers against discrimination and sexual harassment, as well as for public security (cf. article 5); indicates the need for a standard of working conditions in the different jurisdictions within California (cf. article 7); and disciplines the obligation for the

platform to present a report with an income statement from providers in accordance with the income earned for taxation purposes (cf. article 8).

Finally, provisions are presented on possible legislative changes to P22, its application and other legislative procedures.

HIGHLIGHTS

Categorization and legal definitions

P22 establishes guidelines on the freedom of workers on digital platforms, stipulating that said workers are considered to be independent contractors, despite what is established in

other legislation, such as, for example, the California Labor Code.

The law also establishes a variety of definitions that are important for understanding all legal provisions.

Box 4: Definitions presented in P22

Main definitions presented by P22

App-based driver: individual who is a delivery person (DNC) or a driver (TNC / TCP) and has freedoms guaranteed in accordance with Section 7451 of P22.

Delivery network company - DNC: business entity that maintains an online-enabled application or platform used to facilitate delivery services on demand within the state of California.

Transportation network company - TNC: organization, including, but not limited to, corporations, limited liability companies, partnerships, sole proprietor, or any other entity, operating in California, that provides pre-arranged transportation services using an online enabled application to connect passengers and drivers using a personal vehicle.

Charter-party carrier of passengers - TCP: any individual, company or other entity involved in providing a hired driver service when a rented motor vehicle is being operated by a hired driver, using an online-enabled application.

Engaged time: the period of time, as recorded in a network company's online-enabled application or platform, from when an app-based driver accepts a rideshare request or delivery request to when the app-based completes that a rideshare request or delivery request.

Earning period: a pay period, set by the network company, which should not exceed 14 consecutive calendar days.

Net earnings: includes all workers' earnings on platforms, in an earning period, as long as it complies with the standards established in P22: the amount does not include gratuities, tolls, cleaning fees, airport fees etc.; the amount may include incentives or other bonuses.

Source: own preparation

Guarantees and benefits

Unlike what happens in Brazil, where the competence to legislate on labor issues belongs to the Union, in California, work can be regulated by local (non-federal) laws. Considering that characteristic, P22 is concerned about the potential multiplicity of rules that can impact drivers and providers that cross different jurisdictions in California.

Thus, in order to maintain a **standard of working conditions**, P22 establishes that certain matters (such as, for example, health benefits, rights linked to the termination of the contract by the platform and insurance) are defined within the scope of the state of California (and not in cities or counties), subject to the local government adopting the laws necessary to punish the practice of misdemeanors and serious crimes or to enforce local laws and regulations.

Regarding **freedoms**, it establishes that the digital platform cannot: unilaterally define dates, times, and minimum time when the worker should be logged on the platform; require the worker to accept any specific service; prevent the worker from providing

services to other platforms; prevent the worker from performing other occupations.

Regarding **minimum wage**, it establishes that the digital platform must ensure that, for each earning period, the application-based worker is compensated with a minimum net earning. The applicable minimum wage is that determined by the state, which is mandatory for all sectors, or the one from the location where the passenger or item is picked up, if the minimum wage established there is higher. This minimum wage is applicable to all engaged time spent to complete the job.

In its article 4, P22 deals with two types of benefits that must be guaranteed to application delivery drivers and drivers: healthcare subsidy and loss and liability protection (accident insurance, compensation for medical expenses and other losses).

The **healthcare subsidy** is a benefit - based on the average contributions required by the Affordable Care Act (ACA)²² - which must be paid on a quarterly basis by the platforms to application delivery drivers and drivers according to their engaged time per week: (a) for an average of 25 hours or more per week of

²² The Affordable Care Act (ACA), also known as PPACA or "Obamacare", is the law that reformed the health system enacted in March 2010, which main objectives are: (i) to make affordable health insurance available to more people, through consumer subsidies that reduce costs for families with an income between 100% and 400% of the federal poverty level; (ii) expanding the Medicaid health program to cover all adults with an income below 138% of the federal poverty level; (iii) support innovative medical care delivery methods designed to reduce health care costs in general.

engagement time in the quarter: payment greater than or equal to 100% of the average contribution; (b) for an average of at least 15, but less than 25 hours per week of engaged time in the quarter, a payment greater than or equal to 50% of the average contribution. At the end of each period, the platform must provide drivers and delivery drivers with the following information: number of hours accumulated by the provider in the application during each earning period; and number of hours accumulated in the engaged time by the provider during the quarter.

With respect to **loss and liability protection**, no platform should operate in California for more than 90 days, unless it has, provides or makes available the following coverage: (a) **occupational accident insurance** for application drivers and delivery drivers to cover medical expenses and loss of income resulting from injuries incurred while the provider is online³ and (b) **insurance for accidental**

death (resulting from the period when the provider is online) for dependents.

Finally, P22 establishes obligations for platforms in relation to **third parties**, such as the determination that a DNC must have car insurance of at least one million dollars to compensate for injuries or losses of third parties during the engaged time by the providers when the vehicle is not covered by other insurance.

Transparency

Regarding the agreement and the termination clauses, P22 establishes that the digital platform and the worker must execute a written agreement before the driver is granted access to the company's network. The digital platform cannot terminate the agreement with the worker for a reason that is not described in the agreement. In addition, it establishes that the company must provide an appeal procedure for workers who have had their agreements terminated.

Box 5: Transparency and information in P22

These provisions regarding the **written agreement** and the **appeal process** in the event of agreement termination demonstrate a concern with issues related to **transparency and information**, although the law does not establish which procedures should be taken into account in the appeal.

Source: Own preparation

Violence and harassment

P22 addresses issues related to discrimination and public security. It establishes that **discriminatory conduct** is the refusal to hire,

termination of the agreement or disabling the digital platform based on race, color, ancestry, nationality, religion, age, physical or mental condition, sex, gender, medical condition,

³ Online means the moment when a driver or delivery driver is using a platform and can receive requests for shared transportation or delivery services from the network company, or during the engagement time.

genetic information, marital status, or military status. There is a simultaneous concern with the safety of workers and the safety of consumers. An example of this is the provision on the obligation for the digital platform to develop a **policy against sexual harassment**, which meets a series of requirements, such as the identification of behavior that is configured as sexual harassment; indication that the digital platform, as well as the laws, prohibit drivers, delivery drivers and customers from committing harassment; defining a channel for providers and customers to send complaints (the confidentiality of the information provided is guaranteed); impartial investigations; imposition of corrective actions; establishment of a guarantee of non-retaliation to providers and consumers who make or participate in a process of investigation of misconduct.

Another example is the provision that companies must provide workers with **safety training**. The training sessions should include: collision prevention and defensive driving techniques; identification of elements that cause collisions; recognition and reporting of sexual assault and misconduct; food safety information (for food delivery drivers). Training can be provided online (synchronously), by video or in person, depending on the choice of the company.

Finally, the provision that deals with the **limits to workers' hours** is also as a concern for both workers and consumers. On this issue, the law provides that the worker cannot be connected for more than 12 hours in any 24-hour period, unless he/she has already been disconnected for an uninterrupted period of 6 hours. If the worker works for more than 12 hours in a 24-hour period, he/she must be prohibited from returning to the digital platform

until he complies with the 6-hour uninterrupted interval.

There are also provisions that identify a more focused concern with consumers and the platform.

One of them is the one that deals with **criminal background checks**. P22 establishes that the digital platform, or a third party hired by it, can perform a criminal background check. The worker must consent for this check to be carried out and no other consent is necessary in cases where the platform performs continuous monitoring. P22 also establishes the cases in which the company cannot grant the worker with access to the digital platform, as well as the cases in which such access should be suspended. Although it is proposed to safeguard the safety of consumers, the device ends up discriminating against service providers discharged from the penitentiary system.

Another provision that demonstrates the concern of P22 with consumers is related to the **zero-tolerance policy**. Such policy requires the immediate suspension of the worker from accessing the service platform, when the company receives a report from its application (or any means made available by the company) about a suspected use of drugs and alcohol during service. After the suspension, the company must initiate a detailed investigation into the behavior. P22 further establishes that the company must suspend access to the platform for the consumer or worker that carries out the zero-tolerance policy claim knowing that it is an unfounded claim.

Finally, we can also quote the provision that deals with the **classification of fraudulent conduct**. P22 states that the person who fraudulently impersonates an application-

based worker commits a misdemeanor punishable by imprisonment for up to six months or a fine of up to ten thousand dollars (or

both). These punishments, however, do not prevent other processes based on other legislation.

Box 6: *Concerns with workers and consumers in P22*

Concerns with workers and consumers:

- (i) policy against sexual harassment;
- (ii) security training;
- (iii) rest time.

Concerns with consumers:

- (i) criminal background check;
- (ii) zero tolerance policy;
- (iii) fraudulent conduct.

Source: Own preparation

Figure 2: Main highlights of Proposition 22



Source: Own preparation

FINAL COMMENTS

- P22 (article 2, 7451) establishes criteria to characterize independent contractor autonomy, differently from what occurs in Brazil. Although there may be a discussion about such criteria, it is a more objective parameter to establish the independence of the contractor proposed in P22. In Brazilian law, the delimitation between autonomy and subordination is still blurred.
- P22 is based on freedoms - such as the choice of working hours, for example - but it does not expressly address some freedoms, such as union freedom.
- P22 creates a third way to categorize the existing legal relationship between drivers, delivery drivers and platforms, with a view to offer flexibility to providers along with a set of rights.
- P22 is limited to the most traditionally known categories in the gig economy - drivers and delivery drivers - and does not advance more broadly in the topic.
- Considering the engaged time over a week, P22 creates nuances in relation to the healthcare subsidy owed by companies to independent contractors. Thus, depending on the engaged time on the platform, there will be particularities in the mentioned subsidy.
- Although this is not a Brazilian concern with regard to labor legislation (since the competence to legislate on the issue is federal), California is concerned with maintaining a standard of work in its various jurisdictions (Article 7). It is a provision that can serve as an inspiration to think about the regulation of complex aspects of platforms that base their services exclusively on the Internet, also called crowdwork (BERG et al, 2018), although P22 itself does not apply to crowdwork, but to geographically located platforms. Internet-based platforms involve people from different parts of the world providing their services to individuals (people or companies) located in different places. In those cases where jurisdictions and geographical limits are crossed, questions arise such as: which is the competent jurisdiction to settle any dispute? In which country should such activities be taxed? To which country do the social security contributions go? Among other questions still unanswered. Thus, although to a lesser extent - as it concerns only jurisdictions within the state of California - P22 inserts into the debate on platform work the concern with interjurisdictional service (although, still within the same country).

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