

Nov 6 2020

Gig Economy Regulation Healthcare

3 Shifts Edition (Nov 6 2020): California's Prop 22 & Prop 24, New H-1B visa rules, Health insurers expose negotiated rates

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1. California's Prop 22 & Prop 24 set a new tone for the gig economy and data privacy

- **This week, two major 2020 ballot propositions were passed in California – a state which has at times served as a bellwether for regulation in other US states and at the federal level.** Policymakers and industry executives have been watching [Proposition 22](#) (which classifies app-based drivers as independent contractors) and [Proposition 24](#) (which largely strengthens consumer privacy protections) closely. Their passing promises to set the tone for related future regulation across the US, with implications for a range of industries such as mobility, automotive, grocery, technology, ecommerce, advertising and publishing.
- **California voters passed Prop 22 with 58% of the vote** (as of this writing). Prop 22 effectively exempts “app-based rideshare and delivery companies” from California’s [AB-5](#) law. AB-5, which took effect in January of this year, had threatened to force Uber, Lyft, Instacart, DoorDash, and Postmates to classify their drivers as employees entitled to associated benefits. **The passing of Prop 22 means the gig-economy players can maintain their contractor-based model, while formalizing new driver benefits** such as: 120% guarantee tied to the applicable minimum wage (based on “engaged time”), healthcare subsidies for drivers working 15+ hours per week (representing 50-100% of the

average employer contribution required under the Affordable Care Act), per-mile compensation for vehicle expenses, and accident insurance.

- **The passing of Prop 22 is a resounding victory for Uber, Lyft, Instacart, Doordash, and Postmates**, who collectively spent a record \$200M campaigning for the initiative. For these gig-economy players, AB-5 (and other regulations like it) posed an existential threat to their business model. In Aug 2020, Uber and Lyft narrowly avoided a suspension of service in California after a judge's order to convert their drivers to employees was stayed. The WSJ later reported that Uber was considering downsizing its California operations to just the San Francisco Bay Area and Los Angeles if Prop 22 failed. **With Prop 22's passing, the return on the gig-economy players' investment could be substantial** – one UC Berkeley study estimated Uber and Lyft together save \$100M+ annually on unemployment insurance taxes by classifying their 525K+ drivers as contractors.
- **California voters also passed Prop 24 with 56% in favor** (as of this writing). Prop 24, also called the California Privacy Rights Act (CPRA), **elaborates on the consumer privacy protections mandated by the California Consumer Privacy Act (CCPA) that went into effect on Jan 1 2020**. The original CCPA requires companies that meet certain requirements and are doing business in California to notify consumers about personal data collection and provide certain consumer rights (such as the right to know what is being collected, opt out of personal data being sold, request deletion, and not be discriminated against for exercising the above rights).
- **The new CPRA takes it a step further, giving consumers the right to limit use of certain sensitive data** (e.g. race, health data, geolocation, sexual orientation) **and restrict sharing** (not just "selling") **of their personal data between companies**. It also **triples penalties for violations related to children under 16**, and **establishes the California Privacy Protection Agency (CPPA) with a \$10M annual budget for enforcement** (rather than leaving it to the resource-constrained California Attorney General). Prop 24, however, has its critics, who have pointed to certain concessions to industry. Examples of concessions include allowing companies to disadvantage consumers who opt out (e.g. loyalty clubs can withhold discounts) and exceptions for credit-reporting agencies and data gathered from "widely distributed media."
- **While the full impact of the initiatives remains to be seen, we can expect them to influence future legislation**. Prop 22 will likely dampen enthusiasm for legislation similar to AB-5 in other US states, potentially redirecting the energy towards strengthening benefits and protections for contractors. Prop 24, on the other hand, will likely inform federal privacy legislation (which in concept has bipartisan support), with the CCPA and CPRA serving as a blueprint in some respects.

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- Jan 10 2020: Uber & the gig economy are facing headwinds
- Dec 30 2019: The CA privacy law effective Jan 1 will set the tone for US regulation

2. New H-1B visa rules make hiring foreign workers more expensive

- Last week, the **US Department of Homeland Security (DHS)** introduced a **proposal to change the allocation system for H-1B visas** (which permit foreign workers in “specialty occupations” to work for US firms) **from a randomized lottery system to one that prioritizes the highest-salary jobs**. The government determines 4 wage levels for each occupation within a US region and requires companies to pay H-1B employees at or above the wage level aligned with their experience. **The proposed rule would make it almost impossible for workers in the lowest-wage band (i.e. entry level) to get one of the 85,000 H-1B visas allowed each year**. The administration intends for the rule, currently in a 30-day comment period, to be complete before the end of President Trump’s term.
- **The recent proposal comes on the heels of two rules announced in early Oct 2020 overhauling the H-1B program**. One-third of H-1B applications are expected to be disqualified under these October rules, though current visa holders won’t be impacted right away. **The first rule, which was published as an interim final rule and took effect on Oct 8, raised the wage floor significantly for foreign workers**. It increased the wage floor for entry-level workers to the 45th percentile (from the 17th) and for highest-skilled workers to the 95th percentile (from the 67th) for a given profession. In many cases, wages increased by \$40K-\$50K at each level. In San Francisco, for instance, an entry-level programmer on an H-1B would be paid a minimum of \$112K (vs. \$78K). Under the rule, there are 18,000+ professions with a wage floor of \$208,000, even at lower skill levels.
- The **second rule**, also published as an interim final rule and scheduled to take effect Dec 7, has several implications. **It narrows what qualifies as a “specialty occupation” and requires foreign workers to have a college degree specific to the given role** (vs. a more general college-degree mandate or experience-based qualification). **Workers hired by outsourcing firms (e.g. Infosys, Accenture) to work on-site at another company will also be more heavily scrutinized and be granted only 1-year visas instead of the typical 3 years** – increasing the application costs for employers.
- **The stated goals of the current US administration – which has not been friendly to foreign worker programs – are to prioritize American workers and provide upward pressure on wages**. (The administration notably had issued a temporary ban on foreign workers coming to the US on H-1B and other employment-based visas in Jun 2020 amid the pandemic, though a judge later blocked enforcement.) Supporters have argued that the changes would mean that some foreign workers would be paid more fairly.
- Opponents of the rules, in turn, cite the unrealistic wage levels, constraints on firms’ ability to recruit top talent, and damage to US innovation and competitiveness. For businesses that rely on foreign skilled-workers for key roles, the H-1B changes are a significant threat

to the way they do business. **Legal challenges are underway, including a recent amicus brief from 46 companies – including Apple, Google, Amazon, and Facebook.** The accelerated pathway used by the US administration makes the Oct 2020 rules in particular more likely to be struck down. The tenuous position of the acting DHS secretary – who has been ruled by a judge to be -serving illegally – could be another point of vulnerability in a court case.

- **It's not clear whether Joe Biden – who has indicated support for raising wages for H-1B workers – would keep or reverse the changes if he wins the presidency.** In addition to legal challenges, companies are also considering options such as permanent remote work, shifting headcount away from the US, and establishing new facilities in other countries. Canada may be a beneficiary of the new policies, with recruits from US universities sent to satellite offices there. If the rules are sustained, companies will have to make significant longer-run adjustments to how they hire and train, with a heavy emphasis on internal skills development.

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3. US health insurers (and hospitals) are forced to publicize their negotiated rates

- **The Trump administration recently finalized a rule that requires private health insurers to publicize the prices they negotiate with providers.** The administration's stated goal is to increase transparency for consumers and lower healthcare expenses. It comes on the heels of a similar rule finalized in Nov 2019 requiring the other side of the table – hospitals – to publish their own rates (rates negotiated with insurers as well as discounted out-of-pocket rates).
- The new requirements for insurers will be rolled out in stages. **Insurers will have to post online 3 publicly available data files of “in-network provider negotiated rates, historical out-of-network allowed amounts, and drug pricing information” by Jan 1 2022.** The expectation is that the private sector will begin to develop consumer applications (e.g. price-comparison and provider-search tools) based on this data. (Hospitals, according

to the rule passed last year, will similarly have to post their negotiated rates and out-of-pocket prices for 300 services in a publicly available data file by Jan 1 2021.)

- Insurers will also have to **provide consumers with an online shopping tool with both negotiated prices and a real-time, personalized estimate of out-of-pocket costs for 500 of the “most shoppable” healthcare services by Jan 1 2023**. All remaining services are required to be included by Jan 1 2024. The rule gives this access to about 200M Americans with employer-provided or individually-purchased insurance.
- **Both hospitals and insurers are pushing back, arguing that the rules diminish their negotiating power, have the potential to confuse consumers and put their privacy at risk, and could even have the effect of increasing prices.** Higher prices could stem, for instance, from reduced incentives to lower rates, hospitals with lower reimbursement rates seeking to match higher rates, and consumers opting for more expensive services if they believe higher prices mean higher quality. A lower court has upheld the rule for hospitals, and the case is currently in appeals. Appellate judges have not yet ruled but have been skeptical of the hospital industry’s arguments. More legal challenges are expected from industry groups and insurers, who face a higher compliance burden than hospitals.
- **These rules represent a dramatic change to the healthcare system in the US, where pricing of services has often been opaque.** As the Blue Cross Blue Shield Association (BCBSA) has said, “The sheer volume of data health plans would be obligated to disclose is staggering.” **We can expect to see a surge of consumer applications that tap into this new data to provide greater insight and help consumers select healthcare services.** Over time, with the increase in transparency, we will also likely see **greater convergence of prices, and perhaps less fragmentation in the healthcare system based on negotiated agreements**. With this convergence, both hospitals and payers will shift more of their attention to other bases of competition – such as the patient experience.

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