

WORKER (MIS)CLASSIFICATION IN THE SHARING ECONOMY: SQUARE PEGS TRYING TO FIT IN ROUND HOLES¹

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Abstract

How is it that the world's largest taxi service claims it is not a transportation company? How can an iconic worldwide package delivery company argue that it is not in the package delivery business? These are just two idiosyncrasies of the modern economy in which micro-entrepreneurial contractors using their own resources carry out the fundamental operations of enterprises.

Businesses and courts have long struggled trying to determine whether certain workers are employees or independent contractors. Originally, the focus was on whether the employer should be held *liable to third parties* for injuries arising from the employer's workers—it controlled the actions of the workers; it should therefore be responsible for those actions. More recently, however, the focus has been on whether the employer should be *responsible to the worker* for unemployment insurance, workers' compensation, tax responsibilities and compensation benefits, and other liabilities associated with employees. In this latter analysis, while the focus has been on the economic reality of the employment relationship—i.e., whether the independent contractor is truly economically independent—control is still a critical factor. If the employer controls the worker, how can the worker truly be independent?

Part of the control factor in the economic reality test is the extent to which the worker is dependent upon the employer for his or her livelihood, under the argument that the more dependent the worker is the less independent he or she actually is. With the rise of the “sharing economy” where individuals are connected through online intermediaries with potential customers needing a task performed, a room to rent, or a ride to the airport, the workers are much less dependent on the intermediary employer. As such, the tests used to classify the workers—employees or independent contractors—which still fundamentally focus on control, are failing. There is still some control exercised by the employer, but less worker dependence on that employer. This paper argues that the nature of work exemplified by the sharing economy requires the classification tests adjust to focus not on the dependence of the workers on the employer, but the dependence of the employer on the workers. If the enterprise arranging all of these individualized tasks and services is dependent on the service providers for its existence, then those service providers should be considered employees of the enterprise.

I. Introduction

Businesses and courts have long struggled trying to determine whether certain workers are employees or independent contractors. As discussed in this paper, the focus was originally on whether the employer should be held liable to third parties for injuries arising from the

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¹ Paraphrasing District Court Judge Chhabria in *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2015 WL 1062407, at 12 (N.D. Cal. Mar. 11, 2015), referring to the difficulty jurors will face in trying to determine whether Lyft drivers are employees or independent contractors.

employer's workers—it controlled the actions of the workers; it should therefore be responsible for those actions. More recently, however, the focus has been on whether the employer should be responsible to the worker for the types of protections offered by labor and employment laws, such as unemployment insurance, workers' compensation protection, tax responsibilities and compensation benefits, and other liabilities associated with employees. In this latter analysis, while the focus has been on the economic reality of the employment relationship—i.e., whether the independent contractor is truly economically independent—control is still a critical factor. If the employer controls the worker, how can the worker truly be independent?

This paper, in Part II, first provides an overview of an emerging business model, the “sharing economy,” in which individuals are connected through online intermediaries with potential customers needing a task performed, a room to rent, or a ride to the airport. The courts, and the businesses, are currently struggling to determine whether these service providers—these “Taskers” and drivers—should be classified as employees or independent contractors for purposes of labor and employment laws. Part III of this paper initially tracks the historical development of the tests used by courts to determine whether a worker should be classified as an employee or independent contractor. Part III then analyzes a series of cases involving FedEx's ground package delivery service to exemplify the difficulties—and particularly the inconsistencies—the courts have had classifying these drivers. Part III next demonstrates how the classification tests, particularly the economic reality test, are failing when applied to new, sharing economy enterprises—specifically, drivers for Uber and Lyft.

Part IV addresses the shortcomings of the classification tests in light of today's economy. The control factor in the economic reality test focuses on the extent to which the worker is dependent upon the employer for his or her livelihood, under the argument that the more dependent the worker is the less independent he or she is. However, with the rise of the sharing economy, workers are much less dependent on the intermediary employer. Part III demonstrates that the tests used to classify the workers—employees or independent contractors—which still fundamentally focus on control, are failing. There is still some control exercised by the employer, but less worker dependence on that employer. Part IV argues that the nature of work exemplified by the sharing economy requires the classification tests adjust to focus not on the dependence of the workers on the employer, but the dependence of the employer on the workers. If the enterprise arranging all of these individualized tasks and services is dependent on the service providers for its existence, then those service providers should be considered employees of the enterprise.

II. Working in the Sharing Economy

In the always connected, app-driven U.S. economy of the early twenty-first century, an online business model has taken root: individuals with underutilized assets—whether they be time, a particular skill, a vehicle, household goods, a spare bedroom, or even home cooked meals—are connected with other individuals or businesses in need of those assets. This has given rise to companies such as Uber, Lyft, TaskRabbit, and Airbnb, just to name a few.² The general

² See Geoffrey A. Fowler, *There's an Uber for Everything Now*, WALL ST. J. (May 5, 2015, 1:09 PM), <http://www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789> (“Washio is for having someone do your laundry, Sprig and SpoonRocket cook your dinner and Shyp will mail things out so you don't have to brave the post office. Zeel delivers a massage therapist (complete with table). Heal sends a doctor on a house call, while Saucey will rush over alcohol. . . . Dufl will pack your suitcase and Eaze will reup a medical marijuana supply.”).

press has provided a variety of anecdotes describing life as a micro-entrepreneur in the “sharing economy”—i.e., “an independent contractor who earns money by providing her skills, time or property to consumers in search of a lift, a room to sleep in, a dry-cleaning pickup, a chef, an organizer of closets.”³

In a broader sense, the sharing economy is part of a “collaborative consumption” trend, where sharing is viewed as a profitable alternative to owning.⁴ Sharing endeavors include services such as Zipcar⁵ and Freecycle, the latter a nonprofit that encourages giving away rather than throwing away unwanted items.⁶ The philosophical underpinning of the sharing economy is that a sustainable economy cannot grow continuously; “it must now *regenerate* the economic and ecological abundance necessary for everyone to thrive again.”⁷

It is suggested technology combined with the severe economic recession in the latter part of the last decade spurred the growth of profit-based, rather than philanthropic, sharing business models—financial stress forced many households to put idle assets to greater use, even if the asset was a person or spare bedroom.⁸

³ Natasha Singer, *Check App. Accept Job. Repeat.*, N.Y. TIMES, Aug. 17, 2014, at BU1 (describing a person trying to earn an average of \$25 per hour running errands, driving people in her personal car, and doing odd jobs; describing these workers also as “less microentrepreneurs than microearners. . . often work[ing] seven-day weeks, trying to assemble a living wage from a series of one-off gigs”); see also Mickey Rapkin, *Uber Cab Confessions*, GQ (Mar. 2014), <http://www.gq.com/news-politics/newsmakers/201403/uber-cab-confessions> (describing an Uber driver who is in essence a taxi driver, but with his own car); Alyson Shontell, *My Nightmare Experience as a TaskRabbit Drone*, BUSINESS INSIDER (Dec. 11, 2007, 3:43 PM), <http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12> (describing a “TaskRabbit” who earns up to \$3,000 per month but has sometimes performed strenuous labor twelve to fifteen hours in a day for only \$80); *All Eyes on the Sharing Economy*, THE ECONOMIST, Mar. 9, 2013, at 14, available at <http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items> (describing an Airbnb host who found her apartment trashed and her valuables stolen after a rental). The sharing economy can also pose risks for its customers. See Ron Lieber, *Dog Bites Airbnb Guest. Who Pays?*, N.Y. TIMES, Apr. 11, 2015, at B1 (describing how an Airbnb customer was bitten by his host’s dog); Veronica Rocha, *Uber Driver Accused of Kidnapping Clubgoer, Taking Her to Motel*, L.A. TIMES (June 3, 2014, 3:50 PM), <http://www.latimes.com/local/lanow/la-me-ln-uber-driver-kidnapping-hotel-20140603-story.html>.

⁴ See Cait Poyner Lamberton & Randall L. Rose, *When Is Ours Better Than Mine? A Framework for Understanding and Altering Participation in Commercial Sharing Systems*, 76 J. MKTG., no. 4, 2012, at 109 (defining “‘commercial sharing programs’ as marketer-managed systems that provide customers with the opportunity to enjoy product benefits without ownership”).

⁵ See Russell Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, 67 J. BUS. RES. 1595, 1597 (2014) (noting Zipcar as an example of “pseudo-sharing” because it is really more of a short-term car rental company than a car-sharing service).

⁶ See FREECYCLE.ORG, <https://www.freecycle.org/> (last visited May 1, 2015); see also Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 3 (2012) (listing a variety of sharing economy activities).

⁷ Kassan & Orsi, *supra* note 6 (emphasis in original); see also Harald Heinrichs, *Sharing Economy: A Potential New Pathway to Sustainability*, 22 GAIA: ECOLOGICAL PERSP. SCI. & SOC’Y 228, 229 (2013) (“The concept and practice of a ‘sharing economy’ and ‘collaborative consumption’ suggest making use of market intelligence to foster a more collaborative and sustainable society.”; noting as prominent examples “bike- and car-sharing schemes as well as web-based peer-to-peer platforms covering a broad range of activities from renting rooms to sharing gadgets and swapping clothes”).

⁸ See Steve Henn, *What’s Mine is Yours (for a Price) in the Sharing Economy*, NPR (Nov. 13, 2013, 3:16 AM), <http://www.npr.org/blogs/alltechconsidered/2013/11/13/244860511/whats-mine-is-yours-for-a-price-in-the-sharing-economy> (reporting particularly on the growth of Airbnb, an online company that serves as an exchange for renting out one’s home or spare bedroom to travelers); Raj Kapoor, *Lessons From The Sharing Economy*, TECHCRUNCH (Aug. 30, 2014), <http://techcrunch.com/2014/08/30/critical-lessons-from-the-sharing-economy/> (stating the consumer peer-to-peer rental market is worth \$26 billion; noting that companies such as Airbnb, Uber, and Lyft are

The internet makes it cheaper and easier than ever to aggregate supply and demand. Smartphones with maps and satellite positioning can find a nearby room to rent or car to borrow. Online social networks and recommendation systems help establish trust; internet payment systems can handle the billing. All this lets millions of total strangers rent things to each other. The result is known variously as “collaborative consumption”, the “asset-light lifestyle”, the “collaborative economy”, “peer economy”, “access economy” or “sharing economy”.⁹

The Internet has become the conduit for large-scale sharing among weakly connected participants in project-specific or ad hoc contexts.¹⁰ Quite simply, “[t]hanks to smartphones and cloud computing, it’s easier than ever to connect people who need a job done with people looking to take on some extra work and monetize their spare time.”¹¹

However, the growth of the sharing economy can also be viewed as an expansion of “precarious employment” and the transfer of risk to workers.¹² According to one survey, one-third of U.S. workers perform some freelance work.¹³ In light of the sharing economy, one commentator paints a fairly dystopian scenario:

each valued in the tens of billions of dollars); Pui-Wing Tam & Michael J. de la Merced, *Uber Fund-Raising Points to \$50 Billion Valuation*, N.Y. TIMES, May 9, 2015, at B2.

⁹ *All Eyes on the Sharing Economy*, *supra* note 3 (noting also “many peer-to-peer rental firms were founded between 2008 and 2010, in the aftermath of the global financial crisis”); *see also* Denise Cheng, *Is Sharing Really Caring? A Nuanced Introduction to the Peer Economy 2* (2014), available at

<http://static.opensocietyfoundations.org/misc/future-of-work/the-sharing-economy.pdf> (describing peer-to-peer marketplaces and the “peer economy” as online marketplaces that enable people to monetize skills and assets within their possession, catalyzed by ever-increasing internet access and falling equipment costs); Adam Davidson, *What Hollywood Can Teach Us About the Future of Work*, N.Y. TIMES MAG., May, 10, 2015, at MM18 (referring to this trend as the “gig economy,” described as “designed to take care of extremely short-term tasks, manageable by one person, typically in less than a day”).

¹⁰ Yochai Benkler, Essay, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 278 (2004); *see also* Belk, *supra* note 5, at 1595 (noting that while “[s]haring is a phenomenon as old as humankind, . . . collaborative consumption and the ‘sharing economy’ are phenomena born of the Internet age”).

¹¹ Boris Wertz, *Why There Won’t Be an Uber in Every Industry*, FORTUNE (May 11, 2015, 8:35 AM), <http://fortune.com/2015/05/11/why-there-wont-be-an-uber-in-every-industry/>.

¹² *See* Edward T. Walker, *Beyond the Rhetoric of the “Sharing Economy,”* 14 CONTEXTS, no. 1, 2015, at 15, 16 (noting the sharing economy label elides the distinction between paid work and uncompensated volunteering); Wertz, *supra* note 11 (mentioning the fear that the “Uberification” of our economy will turn every good full-time job into a “flex-time gig”).

¹³ FREELANCERS UNION & ELANCE/ODESK, *FREELANCING IN AMERICA: A NATIONAL SURVEY OF THE NEW WORKFORCE* (2014), available at https://fuweb-storage-prod.s3.amazonaws.com/content/filer_public/7c/45/7c457488-0740-4bc4-ae45-0aa60daac531/freelancinginamerica_report.pdf (differentiating freelancers as independent contractors, moonlighters, diversified workers, temporary workers, and freelance business owners). Hall and Krueger report, however:

Although the U.S. labor market has undergone significant changes in the last few decades, with a dramatic trend toward rising inequality and stagnant wage growth for large segments of the workforce, an objective look at the data reveals little evidence that a rise in contingent or alternative work arrangements has played an important role in driving these momentous labor market shifts.

Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* 3 (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), available at <http://arks.princeton.edu/ark:/88435/dsp010z708z67d>. Hall and Krueger note that claims that contingent workers represent a much larger share of the workforce generally count part-time workers as contingent workers, even though they typically are employed in a traditional employment relationship. *Id.* at 4. They also note that workers in the sharing economy are predominately independent contractors and that independent contractors represented 7.4

Task Rabbit is more than a hip, Web-based temp agency. It's the reserve army of the unemployed made flesh. What's diabolically brilliant and emblematic about the company is that prospective errand-runners bid against one another for jobs. To get an assignment, an aspiring Rabbit offers to do the chore for less money than he or she thinks other prospective Rabbits are bidding. That's what makes it a metaphor for the new economy, a dystopia where regular careers are vanishing, every worker is a freelancer, every labor transaction is a one-night stand, and we collude with one another to cut our wages.¹⁴

In fact, "sharing" companies such as Uber insist they are merely intermediaries:

Uber offers information and a means to obtain transportation services offered by third party transportation providers, drivers or vehicle operators (the "**Transportation Provider**"). . . .

. . . .

Uber shall procure reasonable efforts to bring you into contact with a Transportation Provider in order to obtain transportation services, subject to the availability of Transportation Providers in or around your location at the moment of your request for transportation services.

For the avoidance of doubt: Uber itself does not provide transportation services, and Uber is not a transportation carrier. It is up to the Transportation Provider to offer transportation services, which may be requested through the use of the Application and/or the Service. Uber only acts as intermediary between you and the Transportation Provider. The provision of the transportation services by the Transportation Provider to you is therefore subject to the agreement (to be) entered into between you and the Transportation Provider. Uber shall never be a party to such agreement.¹⁵

And Uber disclaims any liability associated with the transportation services it facilitates:

The quality of the transportation services requested through the use of the Application or the Service is entirely the responsibility of the Transportation Provider who ultimately provides such transportation services to you. Uber under no circumstance accepts liability in connection with and/or arising from the transportation services provided by the Transportation Provider or any acts, actions, behavior, conduct, and/or negligence on the part of the Transportation Provider. Any complaints about the transportation services provided by the Transportation Provider should therefore be submitted to the Transportation Provider.¹⁶

TaskRabbit similarly disclaims any responsibility towards the services provided by "Taskers" (sometimes referred to as "Users") and the company's own service— a communications platform which enables the connection between Clients and Taskers:

The Service is a platform for enabling connections between Users for the fulfillment of Tasks, but Company [i.e., Task Rabbit] is not responsible for the

percent of the workforce in 2005. *Id.* at 5. Hall and Krueger conclude: "The size of the sharing economy, which is undoubtedly growing as a result of technological advances, is too new to be precisely measured. But workers in the sharing economy are largely a subset of those who are independent contractors and the self-employed." *Id.* at 6.

¹⁴ Robert Kuttner, *The Task Rabbit Economy*, 24 AM. PROSPECT, no. 5, Sept.-Oct. 2013, at 46, 46.

¹⁵ *User Terms*, UBER (Dec. 8, 2014), <https://www.uber.com/legal/ind/terms> (emphasis in original).

¹⁶ *Id.*

performance of Users, nor does it have control over the quality, timing, legality, failure to provide, or any other aspect whatsoever of Tasks Clients, [*sic*] nor of the integrity, responsibility or any of the actions or omissions whatsoever of any Users. Company does not have control over the quality, timing or legality of Tasks delivered by its Taskers. Company makes no representations about the suitability, reliability, timeliness, or accuracy of the Tasks requested and provided by Users identified through the Service whether in public, private, or offline interactions.¹⁷

Some commentators have noted concerns over the lack of consumer protection in this sharing economy;¹⁸ for example, “outrageous” Uber charges.¹⁹ Wisconsin recently enacted legislation regulating ridesharing services, imposing minimum requirements across the state for licensure, fare disclosure, nondiscrimination, driver background checks, and insurance coverage.²⁰

But what protections are there for the micro-entrepreneurs? While the sharing economy provides workers opportunities to take their economic fates into their own hands, the service providers/intermediaries are also shifting risks to those workers—in the form of income instability (traditionally protected by unemployment insurance and minimum wage laws), capital expenditures (for example, Lyft drivers must use a 2000-year-model or newer car²¹), as well as protections provided by workers’ compensation and general labor laws.²²

III. “Traditional” and Modern Independent Contractor (Mis)Classifications

Labor law in the United States focuses on the worker as employee. The Civil Rights Act of 1964 (Title VII),²³ the Americans with Disabilities Act (ADA),²⁴ the Family and Medical Leave Act (FMLA),²⁵ the Fair Labor Standards Act (FLSA),²⁶ the National Labor Relations Act (NLRA),²⁷ and state unemployment and workers’ compensation acts all limit their respective applications to employees.²⁸ The statutes, however, generally define “employee” in a circular

¹⁷ *TaskRabbit Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> (last updated Apr. 28, 2015).

¹⁸ See, e.g., Lieber, *supra* note 3 (describing how an Airbnb customer was bitten by his host’s dog); Rocha, *supra* note 3 (reporting an Uber driver accused of kidnapping a passenger and taking her to a motel).

¹⁹ Uber uses dynamic pricing at busy times, and last Halloween appears to have been an exceptionally busy evening. See Kent Erdahl, *Uber Charges Denver Man \$539 for 18-mile Halloween Ride*, FOX31 DEN. (Nov. 1, 2014, 9:27 PM), <http://kdvr.com/2014/11/01/how-to-avoid-getting-burned-by-uber/>; Caroline Moss, *26-Year-Old Successfully Crowd Funds To Pay For Her \$362 Halloween Uber Ride*, BUS. INSIDER (Nov. 2, 2014, 10:39 AM), <http://www.businessinsider.com/women-raises-362-to-pay-for-uber-ride-2014-11> (reporting on a woman incurring a \$362 Uber charge for a 20-minute ride Halloween evening).

²⁰ 2015 Wis. Act 16 (2015-2016 Wis. Legis.).

²¹ See *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2015 WL 1062407, at *10 (N.D. Cal. Mar. 11, 2015).

²² Cf. Catherine Rampell, *The Dark Side of a “Sharing Economy,”* WASH. POST, Jan. 27, 2015, at A17.

²³ Pub. L. No. 88-352, 78 Stat. 241, 253, 255 (1964) (codified as amended at 42 U.S.C. § 2000e (2012)).

²⁴ Pub. L. No. 101-336, 104 Stat. 327, 337 (1990) (codified as amended at 42 U.S.C. §§ 12111 – 12117 (2012)).

²⁵ Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601 – 2654 (2012)).

²⁶ Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201 – 219 (2012)).

²⁷ Pub. L. No. 74-198, ch.372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151 – 169 (2012)).

²⁸ See, e.g., Title VII, 42 U.S.C. § 2000e(b) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees”); ADA, 42 U.S.C. § 12111(5)(A) (defining employer as same); FMLA, 29 U.S.C. § 2611(2)(A) (defining “eligible employee”); FLSA, 29 U.S.C. §§ 206(a) (requiring employers to “pay to each of his employees” minimum wages); NLRA, 29 U.S.C. § 157 (granting employees the right to self-organize); CAL. LABOR CODE § 3557 (West 2011) (regarding workers’ compensation coverage, “Any person

fashion—as someone employed by the employer²⁹—leaving it to the courts to determine whether a worker is an employee eligible for protection or an ineligible independent contractor.³⁰ “The result has been continued wasteful litigation of the employee status issue, manipulation of working relations by employers seeking to avoid employment regulations, and never-ending uncertainty about the status of the growing number of workers who toil in the gray area between ‘employee’ and ‘independent contractor.’”³¹

Courts have a long history of analyzing the employee/independent contractor dichotomy from the perspective of the common law of agency, which focuses on the employer’s/principal’s potential vicarious liability to third parties arising from the acts of its “servant” through the doctrine of *respondeat superior*.³² The common law multi-factor test for determining whether a worker (servant) is an employee or independent contractor is reflected in § 220(2) of the *Restatement (Second) of Agency*,³³ which focuses, first, on the extent of control the employer exercises over the details of the work.³⁴ The “right of control” emphasis predates modern labor law, serving as the foundation for whether an injured third party could hold the employer liable

rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”); *Subcontracting Concepts, Inc. v. Comm’r of Div. of Unemployment Assistance*, 19 N.E.3d 464 (Mass. App. Ct. 2014) (determining whether worker was an employee, eligible for unemployment compensation benefits, or independent contractor and hence ineligible); *Peidong Jia v. Unemployment Comp. Bd. of Review*, 55 A.3d 545 (Pa. Commw. Ct. 2012) (determining same); *Global Hawk Ins. Co. v. Le*, 225 Cal. App. 4th 593, 604, 170 Cal. Rptr. 3d 403, 410 (Cal. Ct. App. 2014) (“An independent contractor is not eligible for worker’s compensation.”); *Hubbard v. Henry*, 231 S.W.3d 124 (Ky. 2007) (holding same).

²⁹ See, e.g., Title VII, 42 U.S.C. § 2000e(f); ADA, 42 U.S.C. § 12111(4); FMLA, 29 U.S.C. § 2611(2)(A); FLSA, 42 U.S.C. § 12111(4); see also CAL. LABOR CODE § 3551 (West 2011) (defining employee, with respect to workers’ compensation, as every person in the service of an employer). But see NLRA, 29 U.S.C. § 152(3) (defining “employee” to “include any employee”). See also Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 295 (2001) (“Employment laws . . . are frequently baffling in defining who is an ‘employee’ or what constitutes ‘employment.’”).

³⁰ See Carlson, *supra* note 29, at 298 (“The real work of identifying ‘employees’ and their employment relationships has always been in the courts.”).

³¹ *Id.* at 301.

³² See generally RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01, Reporter’s Notes, at 11-12 (Council Draft No. 10, 2013).

³³ In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant;

and

- (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

³⁴ See generally *id.*, cmt. e., at 487-88. See also RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. f.(1)., at 26 (2006) (“An essential element of agency is the principal’s right to control the agent’s actions.”).

for a tort committed by its worker. Liability rested on the employer for actually controlling the act that caused the injury or from failing to properly supervise the work.³⁵

Carlson argues that “[c]ourts were frequently inclined to give added weight to factors other than control when the effect was to extend protection to needy workers rather than to impose tort liability on employers.”³⁶ For example, the multi-factor test also considers whether the services were delivered as part of an independent business or were integrated into the principal’s business.³⁷ In 1944, the U.S. Supreme Court considered whether Los Angeles-area “newsboys” were employees for purposes of the NLRA.³⁸ The newsboys had attempted to organize but the various newspapers for which they worked refused to bargain collectively, arguing the newsboys were independent contractors, not employees.³⁹ The Court expressly recognized the difficulty in determining whether a worker is an employee or independent contractor: “Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”⁴⁰ Relying upon the “facts involved in the economic relationship” between the workers and the employers,⁴¹ the Supreme Court deferred to the National Labor Relations Board’s (Board) determination that the newsboys were employees subject to protection under the NLRA:

In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher’s benefit.⁴²

As courts repeatedly note when applying multi-factor tests to determine whether a worker is an employee or independent contractor, no one of the factors is dispositive; rather the court must consider the totality of circumstances.⁴³

Due to the costs and risks associated with hiring employees, businesses have sought to instead employ independent contractors.⁴⁴ In response, through 2014, twenty-three states have

³⁵ See Carlson, *supra* note 29, at 304.

³⁶ *Id.* at 311.

³⁷ RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01, Reporter’s Notes, at 12 (Council Draft No. 10, 2013).

³⁸ NLRB v. Hearst Publ’ns, 322 U.S. 111 (1944).

³⁹ *Id.* at 114, 120.

⁴⁰ *Id.* at 121.

⁴¹ See *id.* at 129.

⁴² *Id.* at 131. In response to the *Hearst* decision, Congress amended the NLRA to expressly exclude independent contractors from the definition of employee under the Act, requiring the Board and the courts to apply general agency principles in distinguishing between employees and independent contractors (at least insofar as applying the NLRA). NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968).

⁴³ See, e.g., Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir.1988); *In re FedEx Ground Package Sys.*, 734 F. Supp. 2d 557, 588 (N.D. Ind. 2010); Cotter v. Lyft, Inc., No. 13–cv–04065–VC, 2015 WL 1062407, at *7 (N.D. Cal. Mar. 11, 2015); O’Connor v. Uber Technologies, Inc., No. C–13–3826 EMC, 2015 WL 1069092, at *5-6 (N.D. Cal. Mar. 11, 2015).

⁴⁴ See 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, (2015) (noting that by misclassifying employees as independent contractors employers can avoid employee-related liabilities and tax and benefit contribution requirements); RICHARD J. REIBSTEIN ET AL., THE 2015 WHITE PAPER ON INDEPENDENT

considered and eleven states have enacted “misclassification” statutes to statutorily determine whether an employee is misclassified as an independent contractor, though many of the laws are specific to an industry, such as health care, or a particular labor concern, such as workers’ or unemployment compensation.⁴⁵ Massachusetts provides a good example of a comprehensive misclassification statute, focusing on the level of control exercised by the employer, whether the work performed is outside the employer’s normal business, and whether the worker is customarily engaged in an independently established trade or occupation.⁴⁶ Fundamentally, it provides that a person performing any service *is presumed to be an employee unless*:

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (2) the service is performed outside the usual course of the business of the employer; and,
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.⁴⁷

In addition, as discussed below, most states have also created multi-factor tests to determine whether a worker is an employee protected by the state’s various labor laws.⁴⁸ Finally, depending on which test a court uses, there may be an additional emphasis on the entrepreneurial control the worker exercises over his or her work.⁴⁹

Employees do not provide their services as an independent business. In many cases, their employer exercises a degree of control over the details of how their work is to be done that precludes any ability to make entrepreneurial decisions in their own interest. . . . [I]ndividuals who retain entrepreneurial control can seek to increase their personal economic returns not simply by working harder but also by working at their discretion for other customers, by hiring assistants, and by deploying or substituting for labor their own equipment or capital. Such individuals have been treated differently by employment laws on the ground that their economic position often differs from that of employees who lack such control. Thus, *individuals who lack entrepreneurial control normally*

CONTRACTOR MISCLASSIFICATION: HOW COMPANIES CAN MINIMIZE THE RISKS 1 (2015), *available at* http://www.pepperlaw.com/pdfs/ICMisclassification_MinimizeRisk_04_2015.pdf (asserting “[t]he use and misuse of independent contractors has increased dramatically over the last two decades”).

⁴⁵ See *2014 Employee Classification Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES (Dec. 12, 2014), <http://www.ncsl.org/research/labor-and-employment/2014-employee-classification-legislation.aspx>; see also Deknatel & Hoff-Downing, *supra* note 44, at 55 n.11 (listing state misclassification statutes enacted since 2012).

⁴⁶ MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1) – (3) (West 2014).

⁴⁷ *Id.* (emphasis added); see also *Cotter v. Lyft, Inc.*, No. 13–cv–04065–VC, 2015 WL 1062407, *8 (N.D. Cal. Mar. 11, 2015) (noting the presumption in favor of employee status under California law). This basic three-step formulation is sometimes referred to as the “ABC test.” Deknatel & Hoff-Downing, *supra* note 44, at 65.

⁴⁸ The Internal Revenue Service also uses its own test to determine whether a worker is an employee or independent contractor that focuses on right to control and the working relationship, including its financial aspects. See INTERNAL REVENUE SERV., PUB. 15-A, EMPLOYER’S SUPPLEMENTAL TAX GUIDE 7 (2015); *Independent Contractor (Self-Employed) or Employee?*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee> (last visited May 1, 2015).

⁴⁹ “An individual renders services as an independent businessperson when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to service other customers.” RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01(2) (Council Draft No. 10, 2013).

are employees, even if their work is not physically controlled by their employers.⁵⁰

A. The FedEx Misclassification Cases

Recent misclassification cases involving drivers for FedEx's ground package delivery service exemplify the complexity and inconsistency of worker classification for an interstate enterprise. In the mid-2000s, drivers for FedEx's ground package delivery service began filing lawsuits against FedEx claiming they were employees misclassified as independent contractors. All of the drivers had entered into an Operating Agreement that classified them as independent contractors, and that further stated, "[n]o officer, agent or employee of FedEx Ground has the authority to direct the contractor as to the manner or means employed to achieve such objectives and results."⁵¹ Applying Kansas law, the District Court for the Northern District for Indiana ruled the drivers were properly classified as independent contractors, noting "that no single factor is dispositive when determining employment status."⁵² It ruled "the totality of circumstances requires a finding of independent contractor status."⁵³ Particularly persuasive were the facts that the Operating Agreement did not provide FedEx with the right to control the drivers' means and methods of work or the manner in which they complete their contractual obligations, nor could FedEx drivers be terminated without cause before the expiration of their contract term.⁵⁴ The court elaborated:

FedEx has retained oversight and supervision over its drivers, but [it] . . . provides general instructions that it expects drivers to follow, not requirements on how to perform daily tasks. FedEx reviews drivers' work to check their progress or address problems, but its right to control is limited to offering suggestions and best practices, not mandatory courses of action. *FedEx's retained control is limited to the results of the drivers' work, not how the drivers' achieve those results.* . . . FedEx doesn't set the order or sequence of the work or even require that services be provided personally by the contractors. Many general instructions set forth by FedEx are based on customer demands. FedEx's requirement that drivers meet these customer demands involves the results of the drivers' work. FedEx contractors can hire helpers or replacement drivers to perform their work and they can even sell their routes to other qualified drivers. The evidence, therefore, leads to one reasonable inference, *i.e.*, the plaintiffs are independent contractors.⁵⁵

In addition:

Contractors [i.e., FedEx drivers] have the ability to hire others to complete their work, which gives them more freedom in running their business. Contractors have a proprietary interest in their routes and can sell them to another qualified driver. *If they become multiple area contractors, they can increase their entrepreneurial opportunities and ability to earn profits.* Contractors are responsible for acquiring

⁵⁰ *Id.*, cmt. e., at 5 (emphasis added).

⁵¹ *In re FedEx Ground Package Sys.*, 734 F. Supp. 2d 557, 561-62 (N.D. Ind. 2010) (emphasis in original) (internal quotation marks omitted).

⁵² *Id.* at 588.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis added).

a vehicle and can use the vehicles for other commercial purposes. Finally, contractors aren't terminable at will; FedEx can only terminate for breach of the Operating Agreement after several layers of review by FedEx management, and contractors can assert claims of wrongful termination through arbitration.⁵⁶

A large number of the misclassification actions were then consolidated in the Northern Indiana District Court,⁵⁷ which held that FedEx drivers were independent contractors in twenty-three states⁵⁸ and employees in three states.⁵⁹ Throughout its state-by-state analysis, the court incorporated its “Kansas Decision” reasoning that “the right to control factor is considered as just one among the other factors.”⁶⁰ In the three states the court determined drivers were employees, the conclusions rested on specific state statutes: in Kentucky, its wage payment statute that reshapes the control question;⁶¹ in Nevada, its worker’s compensation statute, which provides that an independent contractor is a statutory employee if the worker is in the same business as the employer;⁶² and in New Hampshire, its statute that essentially requires that workers classified as independent contractors must hold themselves out as in business for themselves.⁶³

The Northern Indiana consolidated cases were not the last word on the subject however. The original “Kansas Decision” was appealed to the Seventh Circuit Court of Appeals, which certified the issue of whether the FedEx drivers were employees or independent contractors under Kansas’s Wage Payment Act (KWPA)⁶⁴ to the Kansas Supreme Court, concluding the Kansas court was in a far better position to settle the issue.⁶⁵ And the Kansas Supreme Court did settle the issue, holding the drivers are employees rather than independent contractors,⁶⁶ noting that while the question of whether FedEx’s delivery drivers are employees for purposes of the KWPA is simple, the “answer defies such simplicity.”⁶⁷

As noted by the Kansas Supreme Court, a goal of the KWPA “was to protect Kansas employees who were not then covered by the Fair Labor Standards Act (FLSA) minimum wage requirements, or the National Labor Relations Board.”⁶⁸ While noting that Kansas courts have “long emphasized the right to control test when determining a worker’s status,”⁶⁹ the court also noted that in promulgating regulations to enforce the KWPA, the Kansas Secretary of Labor deferred to the U.S. Department of Labor’s definition of independent contractor for purposes of the FLSA.⁷⁰ However, the Kansas Supreme Court found no relevant federal regulations defining

⁵⁶ *Id.* at 601 (emphasis added).

⁵⁷ *In re FedEx Ground Package Sys. Inc., Emp’t Practices Litig.*, 758 F. Supp. 2d 638 (2010).

⁵⁸ Alabama, Arizona, Arkansas, California, Florida, Georgia, Indiana, Louisiana, Maryland, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia, Wisconsin. *See id.*, Appendix: Summary of Dispositions. There were multiple actions in many of the states. While the court made a definitive ruling that the drivers were independent contractors under state statute or common law in the states listed above, it also remanded many individual actions for further consideration or for removal from the centralized docket.

⁵⁹ Kentucky, Nevada, and New Hampshire. *See id.*, Appendix: Summary of Dispositions.

⁶⁰ *Id.* at 653.

⁶¹ *Id.* at 685 (citing 803 KY. ADMIN. REGS. 1:005 (2007), implementing KY. REV. STAT. ANN. ch. 337 (West 2012)).

⁶² *Id.* at 694 (citing NEV. REV. STAT. ANN. § 616B.603(1)(b) (West 2009)).

⁶³ *Id.* at 698-99 (citing N.H. REV. STAT. ANN. § 275:4(II)(e) (2012)).

⁶⁴ KAN. STAT. ANN. §§ 44-312 – 327 (West 2004).

⁶⁵ *Craig v. FedEx Ground Package System, Inc.*, 686 F.3d 423, 429 (7th Cir. 2012).

⁶⁶ *Craig v. FedEx Ground Package System, Inc.*, 335 P.3d 66 (Kan. 2014).

⁶⁷ *Id.* at 72.

⁶⁸ *Id.* at 73.

⁶⁹ *Id.* at 74.

⁷⁰ *Id.* at 74-75.

independent contractor for purposes of the FLSA; instead courts have considered the economic realities of the employment relationship when determining whether the individual is an employee or independent contractor under the FLSA.⁷¹ “The ‘economic realities’ test seeks to look past technical, common-law concepts of the master and servant relationship to determine whether, as a matter of economic reality, a worker is dependent on a given employer.”⁷² In other words, is the worker economically dependent on the employer’s business or is the worker truly in business for him or herself?⁷³

In applying the economic reality test, courts consider:

(1) the degree of control exerted by the alleged employer over the worker; (2) the worker’s opportunity for profit or loss; (3) the worker’s investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer’s business.⁷⁴

The Kansas Supreme Court noted that several of the economic reality factors are also considered under Kansas’s common law right to control test for determining a worker’s status.⁷⁵ It ultimately concluded that Kansas’s twenty-factor common law test was the appropriate test to determine whether a worker is an employee or independent contractor for purposes of the KWPA.⁷⁶ Although other courts have emphasized entrepreneurialism,⁷⁷ the Kansas Supreme Court placed particular emphasis on a company’s right to control the worker,⁷⁸ concluding:

Viewing the factors as a whole leads to the conclusion that FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing. Even where the factors should point us toward finding that the drivers are independent businesspersons, FedEx’s control and micromanaging undermine the benefit that a driver should be able to reap from that arrangement. For instance, the ability to make more money than a delivery driver who is an employee is diminished, if not destroyed, by FedEx’s control over the number of deliveries a driver can make, as well as essentially dictating the driver’s required expenditures for vehicles, tools, equipment, and clothing. Moreover, one would reasonably expect that independent businesspersons could decide for themselves the amount of work they “reasonably can handle on any given day,” yet FedEx makes that decision for them and sets a maximum number of stops for each driver.⁷⁹

⁷¹ *Id.* at 75 (citing *Lumry v. State*, 307 P.3d 232, 240 (Kan. Ct. App. 2013)).

⁷² *Id.* (quoting *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 506 (10th Cir. 2012)) (internal quotation marks omitted).

⁷³ *Id.* (citing *Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir.1998); *Doty v. Elias*, 733 F.2d 720, 722-23 (10th Cir.1984)).

⁷⁴ *Id.* (quoting *Barlow*, 703 F.3d at 506) (internal quotation marks omitted).

⁷⁵ *See id.* at 75-76 (listing twenty factors, the first of which is degree of control exercised by the employer).

⁷⁶ *Id.* at 76 (“This test includes economic reality considerations, while maintaining the primary focus on an employer’s right to control.”).

⁷⁷ *Id.* at 80 (referencing *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (holding drivers are independent contractors)).

⁷⁸ *Id.*

⁷⁹ *Id.* at 92 (citation omitted). The Kansas Supreme Court was asked to also consider whether multiple-route drivers we employees or independent contractors. The court concluded the result is the same whether a driver is responsible for one route or multiple routes with other drivers. *Id.* at 93 (“[T]he employer/employee relationship between FedEx and a full-time delivery driver with respect to the assigned service area is not terminated or altered when the driver acquires an additional route for which he or she is not the driver.”).

At least one other court has found the FedEx drivers to be independent contractors rather than employees. In *FedEx Home Delivery v. NLRB*,⁸⁰ FedEx appealed the National Labor Relations Board's determination that FedEx committed an unfair labor practice in violation of the NLRA by refusing to recognize a union organized by drivers. The D.C. Circuit Court of Appeals held that the NLRA was not applicable because FedEx drivers were independent contractors pursuant to common law agency.⁸¹

Other courts, however, have ruled the FedEx drivers are employees. In *Wells v. FedEx Ground Package System, Inc.*, the District Court for the Eastern District of Missouri concluded "FedEx had the right to control and did control the means and manner of Plaintiffs' work to such an extent that they were employees of FedEx and not independent contractors."⁸² Similarly, in *Estrada v. FedEx Ground Package System, Inc.*, based primarily on the right to control, a California Court of Appeal held drivers were employees rather than independent contractors.⁸³ In 2014, the Tenth Circuit Court of Appeals ruled FedEx drivers are employees in two separate cases: *Alexander v. FedEx Ground Packages System, Inc.*,⁸⁴ and *Slayman v. FedEx Ground Package System, Inc.*⁸⁵ To complicate the analysis, the District Court for the District of Massachusetts initially ruled that FedEx drivers were employees under Massachusetts's independent contractor classification statute.⁸⁶ The court later reversed itself,⁸⁷ however, concluding the Federal Aviation Administration Authorization Act preempts Massachusetts's independent contractor classification statute.⁸⁸ And in *Anfinson v. FedEx Ground Package System*,⁸⁹ FedEx drivers brought suit under the Washington Minimum Wage Act⁹⁰ claiming a right to overtime pay. A jury concluded the drivers were independent contractors under a hybrid instruction, focusing the inquiry on FedEx's right to control in light of economic-dependence factors.⁹¹ The Washington Court of Appeals reversed, holding the jury instruction erroneous and prejudicial.⁹² The Washington Supreme Court affirmed the appeals court's ruling and remanded the matter for retrial utilizing the economic reality test.⁹³

B. The Uber and Lyft Misclassification Cases

⁸⁰ 563 F.3d 492 (applying the common law agency factors expressed in RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958); see *supra* note 33).

⁸¹ *FedEx v. NLRB*, 563 F.3d at 504.

⁸² 979 F. Supp. 2d 1006, 1024 (E.D. Mo. 2013).

⁸³ 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327 (2007) (applying CAL. LABOR CODE § 2802 (West 2011) (requiring employers to reimburse employees for work-related expenses)).

⁸⁴ 765 F.3d 981, 988 (9th Cir. 2014) (applying California's right-to-control test).

⁸⁵ 765 F.3d 1033 (9th Cir. 2014) (applying Oregon's right-to-control and economic reality tests).

⁸⁶ *Schwann v. FedEx Ground Package Sys.*, No. 11-11094-RGS, 2013 WL 3353776, at *5 (D. Mass. July 3, 2013) (applying MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014)).

⁸⁷ *Schwann v. FedEx Ground Package Sys.*, No. 11-11094-RGS, 2015 WL 501512 (D. Mass. Feb. 5, 2015).

⁸⁸ *Id.* at *1 (applying *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 14 (1st Cir. 2014)). The Federal Aviation Administration Authorization Act, Pub. Law No. 104-88, Title I, § 103, 109 Stat. 899 (1995) (codified as amended at 49 U.S.C. § 14501 (2012)), preempts state actions to regulate price, route, or service of any motor carrier with respect to the transportation of property. *Id.* § 14501(c)(1).

⁸⁹ 281 P.3d 289 (Wash. 2012).

⁹⁰ WASH. REV. CODE ANN. §§ 49.46.005 – 920 (2013).

⁹¹ *Anfinson*, 281 P.3d at 292.

⁹² *Id.* at 293.

⁹³ *Id.* at 299 ("The relevant inquiry is whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.") (internal quotation marks omitted).

In 2013, Uber and Lyft drivers filed putative class action lawsuits against Uber⁹⁴ and Lyft,⁹⁵ respectively, alleging violations of the California Labor Code.⁹⁶ In the case against Lyft, Judge Chhabria described the paradox faced by micro-entrepreneurs and employers alike in the shared economy:

At first glance, Lyft drivers don't seem much like employees. We generally understand an employee to be someone who works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all his income from that one employer (or perhaps two employers). Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities. A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little extra income.

But Lyft drivers don't seem much like independent contractors either. We generally understand an independent contractor to be someone with a special skill (and with the bargaining power to negotiate a rate for the use of that skill), who serves multiple clients, performing discrete tasks for limited periods, while exercising great discretion over the way the work is actually done. Traditionally, an independent contractor is someone a principal might have found in the Yellow Pages to perform a task that the principal or the principal's own employees were unable to perform—*often something tangential to the day-to-day operations of the principal's business*. Lyft drivers use no special skill when they give rides. Their work is central, not tangential, to Lyft's business. Lyft might not control when the drivers work, but it has a great deal of power over how they actually do their work, including the power to fire them if they don't meet Lyft's specifications about how to give rides. And some Lyft drivers no doubt treat their work as a full-time job—their livelihood may depend solely or primarily on weekly payments from Lyft, even while they lack any power to negotiate their rate of pay. Indeed, this type of Lyft driver—the driver who gives “Lyfts” 50 hours a week and relies on the income to feed his family—looks very much like the kind of worker the California Legislature has always intended to protect as an “employee.”⁹⁷

⁹⁴ O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC, 2015 WL 1069092 (N.D. Cal. Mar. 11, 2015).

⁹⁵ Cotter v. Lyft, Inc., No. 13-cv-04065-VC, 2015 WL 1062407 (N.D. Cal. Mar. 11, 2015).

⁹⁶ In both cases, the drivers sought classification as employees generally under California's Labor Code. *See, e.g., O'Connor*, 2015 WL 1069092, at *1 (“Plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code, such as a requirement that an employer pass on the entire amount of any gratuity ‘that is paid, given to, or left for an employee by a patron.’”) (quoting CAL. LAB. CODE § 351 (West 2011)); *Cotter*, 2015 WL 1062407, at *5 (“Whether a worker is classified as an employee or an independent contractor has great consequences. California law gives many benefits and protections to employees; independent contractors get virtually none. Employees are generally entitled to, among other things, minimum wage and overtime pay, CAL. LAB. CODE § 1194, meal and rest breaks, CAL. LAB. CODE § 226.7, reimbursement for work-related expenses, CAL. LAB. CODE § 2802, workers' compensation, CAL. LAB. CODE § 3700, and employer contributions to unemployment insurance. CAL. UNEMP. INS. CODE § 976. Employers are also required under the California Unemployment Insurance Code to withhold and remit to the state their employees' state income tax payments. CAL. UNEMP. INS. CODE § 13020.”).

⁹⁷ *Cotter*, 2015 WL 1062407, at *1 (emphasis added); *see also* Hall & Krueger, *supra* note 13, at 2 (“[M]ost driver-partners do not turn to Uber out of desperation or because they face an absence of other opportunities in the job market . . . but rather because the nature of the work, the flexibility, and the compensation appeals [*sic*] to them.”).

While recognizing that right to control is the principal test for employee/independent contractor classification,⁹⁸ the court in the Lyft case noted that a finding of employee status does not require that the company retain the right to control every last detail; employee status may still exist even where a certain amount of freedom is inherent in the work.⁹⁹

Although Lyft drivers enjoy great flexibility in when and how often to work, once they do accept ride requests, Lyft retains a good deal of control over how they proceed. Lyft instructed the plaintiffs (in the “Rules of the Road” section of the driver guide and later in the FAQs on its website) not to do a number of things—not to talk on the phone with a passenger present, not to pick up non-Lyft passengers, not to have anyone else in the car, not to request tips, not to smoke or to allow the car to smell like smoke, and not to ask for a passenger’s contact information. Lyft also affirmatively instructed the plaintiffs to do a number of things—to wash and vacuum the car once a week, to greet passengers with a smile and a fist-bump, to ask passengers what type of music they’d like to hear, to offer passengers a cell phone charge, and to use the route given by a GPS navigation system if the passenger does not have a preference.

Lyft insists these are suggestions, with no real consequence for a driver who ignores them. But most are written as commands or prohibitions, not suggestions.¹⁰⁰

The court in the Lyft case also reviewed two recent California Court of Appeal cases that the court believed were closely analogous. In *JKH Enterprises, Inc. v. Department of Industrial Relations*,¹⁰¹ the appeals court upheld the Department’s classification of “special” delivery drives as employees for purposes of the state’s workers’ compensation statute. As summarized by the district court in the Lyft case, the *JKH* drivers:

(1) were not required to work either at all or on any particular schedule, but instead called in to a JKH dispatcher to say they were available to accept packages for delivery; (2) were free to decline to perform a particular delivery when contacted by the dispatcher, even if they had made themselves available; (3) chose their own driving routes; (4) took time off whenever they wanted and did not need permission to do so; (5) used their own vehicles (which did not bear any JKH marking or logo) to make the deliveries and paid for their own gas, maintenance, and insurance; (6) did not wear uniforms or badges that evidenced their affiliation or relationship with JKH; (7) performed delivery services for other companies; (8) were not supervised by JKH; (9) earned their money by splitting the fee that JKH charged its customers for each delivery; and (10) filled out application forms acknowledging their status as independent contractor.¹⁰²

⁹⁸ *Cotter*, 2015 WL 1062407, at *6. Both courts acknowledged there are additional, secondary factors that must also be considered in the total mix. *See id.* at *7; *O’Connor*, 2015 WL 1069092, at *5-6.

⁹⁹ *Cotter*, 2015 WL 1062407, at *7.

¹⁰⁰ *Id.* at *9-10 (internal citation omitted) (noting that Lyft reserves the right to penalize (or even terminate) drivers who do not follow its rules).

¹⁰¹ 142 Cal. App. 4th 1046, 48 Cal. Rptr. 3d 563 (Cal. Ct. App. 2006).

¹⁰² *Cotter*, 2015 WL 1062407, at *11 (citing *JKH*, 142 Cal. App. 4th at 1050-52, 48 Cal. Rptr. 3d at 568-70).

And *Air Couriers International v. Employment Development Department*¹⁰³ again held that delivery drivers were employees rather than independent contractors. As summarized by the district court in the Lyft case, the *Air Couriers* drivers (referenced by the employer’s successor in interest, Sonic):

(1) decided when and how long to work; (2) worked other jobs while driving for Sonic; (3) were not required to accept every job, but instead rejected jobs for a variety of reasons and were not required to give reasons for doing so; (4) did not suffer repercussions for rejecting jobs; (5) were paid by the job, and were able to negotiate higher rates on some jobs for a variety of reasons; (6) supplied their own vehicles, supplies, and equipment when delivering for Sonic; (7) were not required to wear uniforms; and (8) received no formal training.¹⁰⁴

As noted by the California Court of Appeal in *JKH*, when determining the employment relationship for purposes of workers’ compensation, the concern is not an employer’s liability for injuries *caused* by an employee to third parties, but rather injuries *suffered* by an employee that should be insured by the employer.¹⁰⁵ This argument, according to California courts, supports a broad definition of employment with a presumption that anyone providing services to another is an employee.¹⁰⁶ *Air Couriers* involved state taxes rather than workers’ compensation. *Air Couriers* therefore argued that *Borello*, the California Supreme Court case relied upon in *JKH*, was inapplicable. However, the California Court of Appeal in *Air Couriers* concluded that *Borello* could still be relied upon to provide the proper legal standard for determine whether a worker is an employee or independent contractor for purposes of applying state statutes.¹⁰⁷

Returning to the case involving Lyft, the district court, noting that “the most important factor for discerning the relationship under California law, namely, the right of control, tends to cut the other way[.]”¹⁰⁸ ultimately concluded that even if the underlying facts were not in dispute, the question must go to a jury because reasonable people could differ on whether a worker is an employee or an independent contractor based on those same undisputed facts.¹⁰⁹

The court in the Uber case applied a *prima facie* analysis for determining whether a worker is an employee or independent contractor under California law: “once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a *prima facie* case that the relationship was one of employer/employee[.]”¹¹⁰ the burden then shifts to the employer to prove the presumed employee is actually an independent contractor.¹¹¹ The pertinent question to determine whether an employer can rebut a *prima facie* showing of

¹⁰³ 150 Cal. App. 4th 923, 59 Cal. Rptr. 3d 37 (Cal. Ct. App. 2007). The court in the Uber case also cited *JKH* and *Air Couriers* for the argument that “freedom to choose one’s days and hours of work does not in itself preclude a finding of an employment relationship.” *O’Connor*, 2015 WL 1069092, at *14.

¹⁰⁴ *Cotter*, 2015 WL 1062407, at *11 (citing *Air Couriers*, 150 Cal. App. 4th at 926-28, 59 Cal. Rptr. 3d at 38-39).

¹⁰⁵ *JKH*, 142 Cal. App. 4th at 1063, 48 Cal. Rptr. 3d at 578 (citing *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 405 (Cal. 1989)).

¹⁰⁶ *Id.* (citing *Borello*, 769 P.2d at 406); *see also infra* text accompanying note 110 for a further discussion of this presumption.

¹⁰⁷ *See Air Couriers*, 150 Cal. App. 4th at 936-37, 59 Cal. Rptr. 3d at 46.

¹⁰⁸ *Cotter*, 2015 WL 1062407, at *10.

¹⁰⁹ *See id.* at *8.

¹¹⁰ *O’Connor*, 2015 WL 1069092, at *4 (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)) (internal citation marks omitted).

¹¹¹ *Id.*

employment is “not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise.”¹¹²

Fundamental to the first element of a *prima facie* case is whether the drivers actually provide a service to Uber:

Uber argues that the presumption of employment does not apply here because Plaintiffs provide it no service. The central premise of this argument is Uber’s contention that it is not a “transportation company,” but instead is a pure “technology company” that merely generates “leads” for its transportation providers through its software. Using this semantic framing, Uber argues that Plaintiffs are simply its customers who buy dispatches that may or may not result in actual rides. In fact, Uber notes that its terms of service with riders specifically state that Uber is under no obligation to actually provide riders with rides at all. Thus, Uber passes itself off as merely a technological intermediary between potential riders and potential drivers.¹¹³

The court considered this argument “fatally flawed in numerous respects,”¹¹⁴ viewing Uber’s self-definition as a mere “technology company” to focus exclusively on the mechanics of its platform rather than on the substance of what Uber actually *does*.¹¹⁵ More importantly, the court considered the drivers to perform a service for Uber because “Uber simply would not be a viable business entity without its drivers.”¹¹⁶

¹¹² *Id.* (quoting *Ayala v. Antelope Valley Newspapers Inc.*, 327 P.3d 165, 172 (Cal. 2014)) (internal quotation marks omitted) (emphasis in original).

¹¹³ *Id.* at *6; *see also supra*, text accompanying note 15.

¹¹⁴ *O’Connor*, 2015 WL 1069092, at *6.

¹¹⁵ *Id.* (“Uber . . . sells rides. Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs, John Deere is a ‘technology company’ because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a ‘technology company’ because it uses modern irrigation techniques to grow its sugar cane.”).

¹¹⁶ *Id.* at *7; Lyft had also asserted that it was not an employer because the drivers provided services only for their riders, not for Lyft:

Under this theory, Lyft drivers perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay. But that is obviously wrong. Lyft concerns itself with far more than simply connecting random users of its platform. It markets itself to customers as an on-demand ride service, and it actively seeks out those customers. It gives drivers detailed instructions about how to conduct themselves. Notably, Lyft’s own drivers’ guide and FAQs state that drivers are “driving for Lyft.” Therefore, the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one.

Cotter, 2015 WL 1062407, at *9 (internal citations omitted) (citing *Yellow Cab v. Workers’ Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 437, 226 Cal. App. 3d 1288, 1293 (1991) (holding taxi drivers employees for workers’ compensation purposes; “Contrary to Yellow’s portrayal here, the essence of its enterprise was not merely leasing vehicles. It did not simply collect rent, but cultivated the passenger market by soliciting riders, processing requests for service through a dispatching system, distinctively painting and marking the cabs, and concerning itself with various matters unrelated to the lessor-lessee relationship[, such as service and courtesy].”) (internal quotation marks omitted)); *see also Schwann v. FedEx Ground Package Sys.*, No. 11–11094–RGS, 2013 WL 3353776, at *5 (D. Mass. July 3, 2013) (finding “beyond cavil that the pick-up and delivery drivers are essential to FedEx’s business”; “FedEx cannot assert that it does not provide delivery services by simply refusing to recognize its delivery drivers as employees.”), *rev’d*, No. 11–11094–RGS, 2015 WL 501512 (D. Mass. Feb. 5, 2015) (holding Federal Aviation Administration Authorization Act preempts Massachusetts’s independent contractor classification statute, MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014), upon which the court’s earlier decision was based).

Uber argued that it did not control its drivers to the extent they should be classified as employees. Similar to *JKH's* and *Air Couriers'* drivers, Uber argued its drivers can work as much or as little as they like (as long as they give at least one ride every 180 days or every 30 days, depending on the program they sign up for), they never have to accept any leads generated by Uber, and they can completely control how to give any rides they do accept.¹¹⁷ The plaintiffs pointed out, however, that Uber's Driver Handbook states that it expects drivers to accept all ride requests and that it will investigate and possibly terminate drivers who are rejecting too many trips.¹¹⁸ The court considered the control issue to be "very much in dispute."¹¹⁹

Uber also argued there was insufficient monitoring of the drivers to warrant their classification as employees,¹²⁰ relying on *Alexander v. FedEx Ground Package System, Inc.*,¹²¹ which held that FedEx drivers were employees, in part, because management representatives accompanied the drivers in ride-alongs at least four times a year.¹²² Uber claimed that it never conducts any performance inspections or ride-alongs.¹²³ The court found this argument unpersuasive, noting that Uber drivers are actually monitored by Uber customers during every ride through a ratings system that Uber uses to determine whether to fire a driver.¹²⁴ In the court's view, this gave Uber tremendous control over the manner and means of its drivers' performance, for, unlike in *Alexander* where drivers knew they would be monitored four times per year, Uber drivers "are potentially observable at all times."¹²⁵

If the quarterly monitoring in *Alexander* was sufficiently pervasive to weigh in favor of finding FedEx's drivers were employees as a matter of law, a reasonable jury could conclude that Uber's more persistent performance monitoring similarly weighs in favor of finding that Uber drivers are Uber's employees under California law.¹²⁶

Having concluded the Uber drivers made a presumptive showing they were employees providing a service to Uber, the court held it was a mixed question of law and fact to be decided by a jury as to whether the drivers were actually independent contractors rather than employees.¹²⁷

As the discussion in this part has demonstrated, control remains an essential factor in determining whether a worker is an employee or independent contractor. However, the primary shift in analysis has been from control equating to responsibility for harm caused to innocent third parties by the worker—the traditional agency law test—to control belying the true entrepreneurial nature of the worker's independent status—the economic reality test. In other

¹¹⁷ See *O'Connor*, 2015 WL 1069092, at *13.

¹¹⁸ See *id.*

¹¹⁹ *Id.* The court also noted "that Uber seeks to control . . . details right down to whether drivers 'have an umbrella in [their] car for clients to be dry until they get in your car or after they get out.'" *Id.*

¹²⁰ See *id.* at *14.

¹²¹ 765 F.3d 981 (9th Cir. 2014).

¹²² *O'Connor*, 2015 WL 1069092, at *14 (citing *Alexander*, 765 F.3d at 985).

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan ed. & trans., Vintage Books 1979) (1977) ("[A] 'state of conscious and permanent visibility . . . assures the automatic functioning of power.'")). Foucault described the Panopticon architecture in which prison cells encircle a central tower, allowing guards in the tower to view the interior of any cell at any time, though the prisoners never know when they were being observed. FOUCAULT, *supra*.

¹²⁶ *O'Connor*, 2015 WL 1069092, at *14.

¹²⁷ *Id.* at *10-12.

words, if the employer controls how the worker performs and the worker’s “business” is substantially dependent upon its relationship with the employer,¹²⁸ then the worker is in reality more of an employee than independent contractor.

IV. Reversing the Dependency in the Employment Relationship to Classify Independent Contractors

Businesses have long found hiring independent contractors to be economically efficient. It makes no sense for, say, a computer services firm to hire an employee just to create an occasional marketing brochure; just as it makes much more sense to outsource its payroll management. In the classic sense, independent contractors possess a skill outside the core competencies of the hiring company that is needed only for a limited purpose and duration. Independent contractors have traditionally provided occasional skills tangential to the hiring party’s business. But businesses have found hiring independent contractors to be economically efficient even when the workers’ skills are directly related to the hiring company’s core competencies and are needed not only continuously, but also required for the business to exist.¹²⁹ Therein lies the conundrum,¹³⁰ as the latter workers act more like employees but are classified as independent contractors.

This has led to fairly absurd results, such as FedEx claiming it is not in the package delivery service and Uber and Lyft claiming they do not provide transportation services,¹³¹ and Microsoft hiring “permatemps” for years on end.¹³² But is it different in the sharing economy, where micro-entrepreneurs bid on short-term jobs through intermediaries and may perform work arranged by different companies—Uber or TaskRabbit—in the same day,¹³³ or who are supplementing incoming from other part- or full-time jobs?¹³⁴

The ultimate issue is who is dependent upon whom? Courts and commentators have argued that if the worker is dependent on the employer, how can it be a truly *independent* contractor?¹³⁵ But the majority of Task Rabbit “Taskers” and Uber drivers, unlike FedEx drivers,

¹²⁸ “Employer” is used here generically—an employer may employ employees as well as independent contractors.

¹²⁹ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 44 (2014) (describing generally the trend of hiring independent contractors arising from firms hiring employees to focus on competencies demanded by capital markets (i.e., profit maximization) while shedding (to independent contractors) more and more of the actual work done by the enterprise); see also *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1189 (9th Cir. 1996), *rev’d in part*, 120 F.3d 1006 (9th Cir. 1997) (en banc) (“Large corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits.”).

¹³⁰ See Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311, 311 (2014) (“The task of differentiating an employee from an independent contractor has been the cause of some angst for generations.”)

¹³¹ See *supra* notes 113-116 and accompanying text. These were not the first companies to make such a claim. See, e.g., *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552-53 (1914) (rejecting coal mining company’s claim it was “not in the business of coal mining at all, in so far as it uses . . . miners, but is only engaged in letting out contracts to independent contractors”).

¹³² See *Vizcaino*, 97 F.3d at 1190 (describing how Microsoft had fully integrated temporary workers into its workforce).

¹³³ See Singer, *supra* note 3.

¹³⁴ See, e.g. Hall & Krueger, *supra* note 13, at 10 (reporting that approximately two-thirds of Uber drivers have another full- or part-time job).

¹³⁵ Marc Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555, 601 (1989) (“Whether such workers are called dependent contractors, employee-like persons, or uncontrolled employees, the

appear to be the antithesis of dependent workers—relatively few are solely economically dependent on one “employer.” But they can still be vulnerable and the goal of labor and employment laws is to protect vulnerable workers.¹³⁶

Public policy, reflected through various employment and labor laws, recognizes that employees should be afforded some levels of protection—e.g., from discrimination, income insecurity, workplace injuries, etc.¹³⁷ As noted above, most statutory definitions of employee are essentially meaningless,¹³⁸ while misclassification and labor statutes create a rebuttable presumption a worker is an employee if he or she provides services to the employer.¹³⁹ But the courts continually have to fall back on their multi-factor tests, consistent only in their most heavily weighted factor—the right to control. But the right to control factor is still problematic, as the cases discussed in the paper demonstrate.¹⁴⁰ Fundamentally, we are using a twentieth-century test to classify workers in the twenty-first-century economy.¹⁴¹ And that test is failing, considering, as illustrated in Part III above, that when faced with almost identical undisputed facts, courts reach inconsistent conclusions or are forced to defer to juries.

Conversely, enterprises such as TaskRabbit, Uber, Lyft, and other similar sharing economy ventures, are wholly dependent upon their workers.¹⁴² Whether the work performed by the classified independent contractor is central to the business of the employer has always been a factor in the traditional agency analysis, the economic reality test, and in misclassification

rationale underlying this class of legislation is obviously that, even absent traditional looking-over-the-shoulder physical control, certain categories of quasi-entrepreneurial workers are economically so dependent on the entities for which they work that they are effectively precluded from competing as capital accumulators.”) (footnote omitted); Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 130 (1997) (“[W]orker[s] of true entrepreneurial status . . . who are truly independent readily can sever the business relationship and take their services and equipment elsewhere when faced with unfair or arbitrary treatment, or unfavorable working conditions. They usually have contracts with more than one company, or contract with one company on a full-time basis for short durations, and consequently are not dependent on a single employer in the same all-or-nothing fashion as traditional employees who tend to work on a full-time basis for an indefinite term.”) (footnote omitted) (quoted by *Cotter v. Lyft, Inc.*, No. 13–cv–04065–VC, 2015 WL 1062407, at *6 (N.D. Cal. Mar. 11, 2015)); see also *In re FedEx Ground Package System, Inc.*, 734 F. Supp. 2d 557, 585 (N.D. Ind. 2010) (applying Kansas law) (noting additional factors relevant to independent contractor classification, including whether the worker’s business is independent in nature).

¹³⁶ See Bernt, *supra* note 130, at 330-35 (discussing the “purposive” approach to labor law); Matthew T. Bodie, *Participating as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 722 (2013) (arguing that while some workers may not meet traditional classifications as employees, they should still be included in protections targeted to vulnerable workers); see also *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 406 (Cal. 1989) (“[D]etermining whether a person rendering service to another is an ‘employee’ or an excluded ‘independent contractor’ must be applied with deference to the purposes of the protective legislation.”).

¹³⁷ See generally, Bernt, *supra* note 130, at 335-37 (discussing the purposes underlying labor law); Carlson, *supra* note 29, at 306 (discussing employee wage protections given the rise of impersonal industrialization).

¹³⁸ See *supra* note 29 and accompanying text.

¹³⁹ See *supra* notes 46-47 & 110 and accompanying text.

¹⁴⁰ The right to control factor has a history of posing challenges. See, e.g., Joan T.A. Gabel and Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 304-06 (2002) (discussing the difficulties of applying right-to-control to remote employees).

¹⁴¹ Cf. *Cotter v. Lyft, Inc.*, No. 13–cv–04065–VC, 2015 WL 1062407, at *12 (N.D. Cal. Mar. 11, 2015) (“The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem.”).

¹⁴² See *O’Connor v. Uber Technologies, Inc.*, No. C–13–3826 EMC, 2015 WL 1069092, at *7 (N.D. Cal. Mar. 11, 2015) (“Uber simply would not be a viable business entity without its drivers.”).

statutes—but always secondary to right to control.¹⁴³ Nevada has actually made it one of two primary considerations to determine whether a worker is an employee or independent contractor for workers’ compensation purposes—a person is not an employer if it enters into a contract with an independent enterprise and it is not in the same business as the independent enterprise.¹⁴⁴ Unfortunately, the first half of this test still incorporates, by implication, the right to control test.¹⁴⁵

If flexible, short-term-gig workers are to be protected against the normative protections afforded employees then the focus of the classification test will have to change with the times. These workers are not necessarily dependent upon their “employers,” but those employers are certainly dependent upon their workers. In exchange for creating the foundation for a thriving enterprise, it could certainly be argued these workers deserve the same protections afforded “typical” employees.

Carlson argues the best response to the classification difficulties is to rethink the use of employee status for determining statutory coverage.¹⁴⁶ Alternatively, the focus could instead shift to the level of dependence by the enterprise on the services provided by its workforce. If a worker’s services are central to the business of the firm—a package delivery driver for a package delivery firm; a driver for a transportation service firm; a worker performing tasks for a firm that exists to provide Taskers for customers—then that worker should be considered an “employee” for purposes of statutory protections.

V. Conclusion

This paper has focused on worker classification within a new business model in which internet-based intermediaries match service providers with customers. Reviewing past tests used to classify workers as employees or independent contractors, including the recent FedEx ground package delivery system cases, and particularly more recent cases involving Uber and Lyft drivers, this paper has shown these tests are failing to achieve any sort of consistency or guidance.

As discussed in this paper, the control factor in the economic reality test focuses on the extent to which the worker is dependent upon the employer for his or her livelihood, under the argument that the more dependent the worker is the less independent he or she is. However, with the rise of the sharing economy, workers are much less dependent on the intermediary employer, yet the employer still exercises a significant (at least according to some courts) degree of control. This paper has argued that the nature of work exemplified by the sharing economy requires a classification test that focuses not on the dependence of the workers on the employer, but the

¹⁴³ See, e.g., *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (listing one factor as whether or not the work is a part of the regular business of the principal); *McCubbin through McCubbin v. Walker*, 886 P.2d 790, 794 (Kan. 1994) (noting one factor as whether the work is part of the regular business of the employer); MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(2) (West 2014) (considering whether the service performed by the worker is outside the usual course of the business of the employer); RESTATEMENT (SECOND) OF AGENCY § 220(2)(h) (1958) (considering whether or not the work is a part of the regular business of the employer).

¹⁴⁴ NEV. REV. STAT. ANN. § 616B.603(1) (West 2009), *applied, In re FedEx Ground Package Sys. Inc., Emp’t Practices Litig.*, 758 F. Supp. 2d 638, 694 (2010) (holding FedEx drivers to be employees due to the language in this statute).

¹⁴⁵ See *supra* note 135 and accompanying text.

¹⁴⁶ Carlson, *supra* note 29, at 356-57 (suggesting, for example, that payroll and withholding laws should be based on the amount of compensation).

dependence of the employer on the workers. If the enterprise arranging all of these individualized tasks and services is dependent on the service providers for its existence, then those service providers should be considered employees of the enterprise.