# REDEFINING "EMPLOYEE" TO PROVIDE WORKER PROTECTIONS WITHIN A FLEXIBLE WORKFORCE

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## Introduction

There are certainly many reasons why a firm may subcontract out work: for example, certain expertise and equipment may be needed for only a short duration.[1] No one would question that a restaurant that hires a local plumbing company to unclog its drains is hiring an independent contractor. But what about the restaurant's wait staff—can they also be independent contractors? It is perhaps no exaggeration to say that "[e]mployers' treatment of workers as nonemployees to avoid compliance with mandatory labor standards has become a worldwide epidemic."[2] It is those workers who are in an ambiguous employment relationship[3] that force the question, "what is an employee?"[4] This is an important question to resolve since the application of many worker protection laws depends on the worker being classified as an employee.[5]

This paper begins, in Part I, by providing a short overview of current U.S. employment practices, highlighting the rising demand for a flexible workforce. Part II examines the evolution of how courts came to differentiate employees from independent contractors. The examination reveals that originally, the purpose of analysis was whether to impose liability on the employer[6] for the acts of its worker rather than determine whether the worker deserved workplace-related legal protections. Also examined in Part II are the various tests developed by courts over time to determine employment status—i.e., employee or independent contractor? Part III discusses the shortcomings of these tests, particularly in light of modern workplace practices. Part IV recommends a change—specifically, that rather than apply outmoded, convoluted multipart tests to classify a worker as an employee or independent contractor on an absolute basis, the laws should recognize that many workers who perform services central to the employer's business may do so for variable durations with flexible, sometimes self-determined, schedules, and sometimes with the opportunity to also work for other employers. These workers deserve workplace protections just as much as "traditional" employees.

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[1] *Cf.* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 99 (2014).

[2] Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 983 (1999); *see also* WEIL, *supra* note 1, at 100 (noting that subcontracting has spread into new sectors and deepened within those where it was traditionally applied).

[3] *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) ("At first glance, Lyft drivers don't seem much like employees. . . . But Lyft drivers don't seem much like independent contractors either."). Lyft, like Uber, provides an online application (an "app") through which passengers are matched with drivers available to transport those passengers in their (the drivers') personal vehicles. *See id.* at 1070.

[4] *See* 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, 297 (2001).

[5] *Cf. id.*; *see infra* note 24 and accompanying text.

[6] Though some courts may refer to an "alleged" employer when attempting to determine whether a worker is an employee or independent contractor, "employer" is used generically throughout this paper to refer to a firm that employs a worker, regardless of whether that worker could be classified as an employee or independent contractor.

## I. It Didn't Start with Uber

At the forefront of the "Uberization" of the economy[7] is the question of whether Uber's freelance drivers are independent contractors or, in reality, employees.[8] A number of recent business models, inspired by Uber, have been based on a contingent workforce.[9] But the app-based "gig" economy may be more hype than reality. "Across a variety of on-demand apps, prices are rising, service is declining, business models are shifting, and in some cases, companies are closing down."[10] Workforce dynamics may be driven more from longer-term economic changes rather than through a recent surge in the so-called sharing economy.[11] For example, a study at the Mercatus Center at George Mason University based on IRS data concluded that a recent increase in nontraditional employment was not caused by sharing-economy firms; rather, the rise of sharing-economy firms is a response to a stagnant traditional labor sector and a product of the growing independent workforce.[12]

Sociologist Arne Kalleberg describes the post-World War II conditions that gave rise to what he describes as precarious work: neoliberal globalization, technological advances, union decline and deregulation, the accelerated ascendancy of business, and the rise in service industries coupled with the decline in manufacturing jobs.[13] These factors all helped cause employers to seek greater flexibility in their relations with workers, leading to an erosion of full-

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[7] *See, e.g.*, Brian M. Carney, *Let's Uberize the Entire Economy*, FORBES (Oct. 27, 2014, 5:23 PM), www.forbes.com/sites/realspin/2014/10/27/lets-uberize-the-entire-economy/; Matthew Faustman, *The Rise of the "Uberized Economy" and What It Means for Business*, TNW, http://thenextweb.com/entrepreneur/2014/05/18/rise-uberized-economy-means-business/ (last visited May 11, 2016).

[8] *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015); Henry Ross, *Ridesharing's House of Cards:* O'Connor v. Uber Technologies, Inc. *and the Viability of Uber's Labor Model in Washington*, 90 WASH. L. REV. 1431 (2015). Uber settled *O'Connor* and another similar case for a potential $100 million, leaving its drivers still classified as independent contractors. *See Growing and Growing Up*, UBER NEWSROOM (Apr. 21, 2016), https://newsroom.uber.com/growing-and-growing-up/.

[9] Josh Zumbrun, *The Entire Online Gig Economy Might Be Mostly Uber*, WALL ST. J. (Mar. 28, 2016, 1:52 PM), http://blogs.wsj.com/economics/2016/03/28/the-entire-online-gig-economy-might-be-mostly-uber/ ("One of the most-hyped changes to the U.S. labor market has been 'the rise of Uber and its ilk'—companies that use smartphone apps to connect workers to gig jobs. The most prominent example of this phenomenon is, of course, Uber, the ride-hailing service that allows people to summon drivers with an app and pay by the ride. Other startups are attempting to bring this business model to a wide range of industries.").

[10] Farhad Manjoo, *The Uber Model, It Turns Out, Doesn't Translate*, N.Y. TIMES (Mar. 23, 2016), http://www.nytimes.com/2016/03/24/technology/the-uber-model-it-turns-out-doesnt-translate.html; *see also* Zumbrun, *supra* note 9 (noting "that about 1% of U.S. adults were earning income from online platforms, but the majority were earning money with sites like Airbnb and Etsy, where the primary activity is renting housing or selling products, rather than directly selling their own labor").

[11] *See* Christopher Koopman et al., *Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 531 (2015) (noting there is no precise definition of the "sharing economy" and describing it as "any marketplace that brings together distributed networks of individuals to share or exchange otherwise underutilized assets").

[12] ELI DOURADO & CHRISTOPHER KOOPMAN, EVALUATING THE GROWTH OF THE 1099 WORKFORCE 1 (Dec. 2015), http://mercatus.org/sites/default/files/Evaluating-Growth-1099-Dourado-MOP.pdf

[13] Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2–3 (2009). Kalleberg defines precarious work as "employment that is uncertain, unpredictable, and risky from the point of view of the worker." *Id.* at 2.

time work for a particular employer at its place of work.[14] Since the 1970s there has been a general decline in the average length of time people remain employed with a particular employer, an increase in long-term unemployment, growth in perceived job insecurity, growth of nonstandard work arrangements and contingent work, and an increase in risk-shifting from employer to employee.[15] Kalleberg concludes that "[p]recarious work has contributed to greater economic inequality, insecurity, and instability."[16] Commentators suggest that a principal motivation for shifting to temporary, part-time, and contingent work forces, besides lowering labor costs, is to insulate core employees from economic fluctuations by using peripheral workers to buffer or absorb economic fluctuations.[17] Ultimately though, it is argued, firms cannot resist the substantial cost savings associated with a peripheral workforce.[18]

Avoiding the "burden" of hiring employees to perform the essential functions of the business is not a new phenomenon, and stretching the concept of independent contractor has appeared somewhat irresistible to a number of companies in various industries. In 1914, Judge Learned Hand was confronted with a coal company that had no miners; it instead hired independent contractors to mine its coal.[19] This is eerily prescient of Uber's claim that it is not a "transportation service."[20] In a 1991 hearing, the House of Representatives characterized "the abuse of the contractor system" as "rampant."[21] And in a March 2016 study, Lawrence Katz and

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[14] *Id.* at 3; *see also* ERIN HATTON, THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPS IN POSTWAR AMERICA 2 (2011) ("By the turn of the twenty-first century, . . . it became acceptable to talk about workers—*all* workers, from the highly skilled to the day laborer—as costly sources of rigidity in an economy that required flexibility."); Brad DeLong, *The Jobless Recovery Has Begun*, THE WEEK (July 20, 2009), http://www.theweek.com/articles/503493/jobless-recovery-begun (suggesting that the recovery from the 2009 recession would be "jobless" because firms think that their workers are much more disposable).

[15] Kalleberg, *supra* note 13, at 6–8.

[16] *Id.* at 8.

[17] *See* BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 45 (1988).

[18] *Cf. id.* at 45–46; *see also* James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1015 (1941) ("As the financial burdens imposed on the employer grow heavier, there is a temptation to avoid them by fashioning contracts transforming employer-employee relationships by legal guises into those of vendor-vendee, lessor-lessee, or independent contractor.") (footnotes omitted).

[19] *See* Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552 (2nd Cir. 1914) ("The company [argues it] is . . . not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors. . . .").

[20] *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) ("In this litigation, Uber bills itself as a 'technology company,' not a 'transportation company,' and describes the software it provides as a 'lead generation platform' that can be used to connect 'businesses that provide transportation' with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as 'transportation providers.'") (citations omitted).

[21] *Exploiting Workers by Misclassifying Them as Independent Contractors: Before the Emp't & Hous. Subcomm. of the Comm. on Gov't Operations*, 102d Cong. 2 (1991) [hereinafter *Exploiting Workers by Misclassifying Them as Independent Contractors*] (statement of Rep. Tom Lantos, Chairman, H.R. Subcomm. on Emp't & Hous.); *see also Contractor Games: Misclassifying Employees and Independent Contractors: Twenty-Ninth Rep. by the Comm. on Gov't Operations*, 102d Cong. 2 (1992) (statement of Rep. John Conyers, Jr., Chairman, H.R. Comm. on Gov't Operations) (noting that while the construction industry appears to be most widely affected, "[p]roblems caused by misclassifying workers as independent contractors rather than employees arise in all parts of the country and in many occupations and industries").

Alan Krueger found that the percentage of workers engaged in alternative work arrangements—including independent contractors—rose from 10.1 in February 2005 to 15.8 in late 2015,[22] surmising "*that all of the net employment growth in the U.S. economy from 2005 to 2015 appears to have occurred in alternative work arrangements*."[23]

Labor laws—such as antidiscrimination, fair labor standards and labor relations, family and medical leave, and state workers' and unemployment compensation—focus on protecting employees.[24] No parallel laws protect workers who are not classified as employees, namely independent contractors.[25] Obviously, most workers would prefer to receive legal workplace protections and most employers would prefer to avoid their associated costs. As such, we find ourselves in a continuous struggle to determine just which workers are independent contractors and which, in fact, are actually employees subject to labor law protections. Unfortunately, there is no easy solution to this struggle.[26]

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[22] Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015 (Mar. 29, 2016) (unpublished manuscript), http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf.

[23] *Id*. at 7 (alteration in original).

[24] *See, e.g.*, 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2012) (Title VII of the Civil Rights Act of 1964); *id.* § 12111(5)(A) (2012) (Americans with Disabilities Act); 29 U.S.C. § 206(a) (2012) (Fair Labor Standards Act); *id.* §§ 152(3), 157 (2012) (National Labor Relations Act); *id*. § 2611(2)(A) (2012) (Family and Medical Leave Act); CAL. LAB. CODE § 3357 (2011) (regarding workers' compensation coverage: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."); Global Hawk Ins. Co. v. Le, 170 Cal. Rptr. 3d 403, 410 (Cal. Ct. App. 2014) ("An independent contractor is not eligible for workers' compensation."); Hubbard v. Henry, 231 S.W.3d 124, 128–29 (Ky. 2007) (holding employees, but not independent contractors, are eligible for unemployment compensation); Subcontracting Concepts, Inc. v. Comm'r of the Div. of Unemployment Assistance, 19 N.E.3d 464, 467 (Mass. App. Ct. 2014) (holding same); Peidong Jia v. Unemployment Comp. Bd. of Review, 55 A.3d 545, 548 (Pa. Commw. Ct. 2012) (holding same).

[25] *See Exploiting Workers by Misclassifying Them as Independent Contractors*, *supra* note 21, at 2 (noting that independent contractors are not protected by Occupational Safety and Health, minimum wage and hour, antidiscrimination, and collective bargain laws; "When an employer switches a worker from employee to contractor status, he is in effect cutting him or her adrift, depriving the worker of essential, congressionally-mandated support.").

[26] For example, with respect to determining just who is an employee under various labor and worker welfare laws, see Edwin R. Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 153 (1949) ("Unfortunately, the significance of the problem is matched by the difficulty of its solution. There is a growing field of borderline cases in which the accepted tests simply do not offer a clear-cut answer. Many relationships are like the swoose, which had unmistakable characteristics of both the swan and the goose. Neither the courts nor the legislatures have yet devised a yardstick equal to the task of unerringly separating the swans from the geese and at the same time cataloguing their hybrid offspring with any degree of uniformity."). *See also* NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944) ("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. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.") (footnote omitted). This remains just as true today. *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

## II. Evolution of the Legal Concept of Independent Contractor

Employer control and injury to a third party caused by a worker are central themes associated with the development of the laws related to independent contractors. As stated by the U.S. Supreme Court in a 1909 decision:

> [T]he master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant, in his negligent conduct, represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. . . . [However, t]he master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.
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> . . . [W]e must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.[27]

This focus on a servant's acts while under the control of a master made independent contractor classification an agency law decision.[28] The point of the analysis is to determine whether the master should be held liable for the acts of its worker resulting in harm to a third party.[29]

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[27] Standard Oil Co. v. Anderson, 212 U.S. 215, 221–22 (1909) (noting also "we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking"); *see also* R.R. Co. v. Hanning, 82 U.S. 649, 657 (1872) ("The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible.") (footnote omitted); Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'") (paraphrasing *Hanning*, 82 U.S. at 657). In *Singer Mfg*., the Supreme Court concluded that Singer's sales agent, Corbett, was a servant:

> Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating, not only what business he shall do, but the manner in which he shall do it, and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

*Id.; see also* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 984–87 (9th Cir. 2014) (noting, while determining drivers were employees rather than independent contractors, that drivers had to comply with a number of FedEx-imposed restrictions on routes, van design and usage, as well as grooming and dress standards).

[28] *See* RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) ("An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."); *id*. cmt. b ("The word 'servant' is used in contrast with 'independent contractor'. . . . The word 'servant' is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons."). "Servant" and "employee" are generally considered to have equivalent meanings. *See id*. cmt. d; *see also id.* § 220 (defining who is a servant; listing ten factors to consider when trying to determine whether a worker is a servant or independent contract, the first of which is the extent of control exercised by the master over the details of the work).

[29] *See, e.g.,* Casement v. Brown, 148 U.S. 615 (1893) (concluding that railroad companies were not liable to a steamship operator for damages caused to steamship by underwater pillars of a railroad bridge under construction because the contractor constructing the pillars, though under the supervision of, was not controlled by, the railroad companies). "The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished." *Id.* at 622 ("The contract was not to do such work as the engineers should direct, but to furnish suitable material, and construct certain specified and described piers, subject to the daily approval of the

However, this agency law classification, with its underlying focus on transferring liability for acts of the worker onto the master, is applied even when the focus is on worker rights and protections versus liability to third parties. This is perhaps because the master/servant dichotomy was used in early cases even though it was the worker, rather than a third party, that suffered the harm. For example, in 1883, Marcella Doyle, a widow with six children, leased a house in Colorado owned by the Union Pacific Railway Company to live in and board railroad employees, with the railroad deducting the boarding expenses from the employees' paychecks to help ensure payment to Ms. Doyle.[30] Doyle sued Union Pacific after a snowslide overwhelmed the house, injuring Ms. Doyle and killing her six children.[31] The U.S. Supreme Court first had to determine whether the relationship between Ms. Doyle and Union Pacific was one of master/servant or landlord/tenant.[32] The Court concluded Ms. Doyle was a tenant because Union Pacific "was not interested, in a legal sense, in the management of the boarding house; did not receive the board money, pay the expenses, take the profits, or suffer the losses."[33] Further, "the company could not call upon her for any account, nor could she demand payment from the company for any services rendered by her in carrying on the boarding house."[34]

In a later case, William Turner worked for the Chicago, Rock Island, & Pacific Railway Company under two contracts dated 1910 and 1911.[35] Turner, who was essentially responsible for handling all coal at the company's rail yard in Enid, Oklahoma, and paid on the basis of coal used by the company, was killed in the yard by a train exceeding the yard's speed limit.[36] Considering Turner more than "a mere shoveler of coal[,]"[37] the U.S. Supreme Court considered the contract between the parties to not be one of "a servant submitting to subordination[,]" but one of capable of independent action.[38] In particular, the Court found that the "railroad company. . . did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done."[39]

As states began enacting worker protection laws, including workers' and unemployment compensation legislation, disputes arose as to whether injured workers were employees, covered

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companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared."); *see also* Recent Cases, *Agency—Servant or Independent Contractor*, 11 TEX. L. REV. 541, 542 (1933) (citing *Casement* for the proposition that "[t]he employer may have the right to approve or disapprove the work as performed daily, and the worker will still be an independent contractor").

[30] Doyle v. Union Pac. Ry. Co., 147 U.S. 413, 414 (1893).

[31] *Id.*

[32] *Id.* at 422.

[33] *Id.*

[34] *Id.* (noting further that the "fact that the company agreed to aid her in collecting what might be due to her from time to time by the boarders, by withholding moneys out of the wages payable to them by the railroad company, did not convert Mrs. Doyle into a servant of the company").

[35] Chi., Rock Island, & Pac. Ry. Co. v. Bond, 240 U.S. 449, 451 (1916).

[36] *Id.* at 451–54.

[37] *Id.* at 456.

[38] *Id.*

[39] *Id.*

by the laws, or exempt independent contractors.[40] Fundamentally, courts use the "control" test expressed in Restatement (Second) of Agency, § 220(2): "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. . . ."[41]

While the common law agency-based control test is by far the most common test employed to determine whether a worker is an employee or an independent contractor, it can certainly become complex. For example, in California, the control test is augmented by five additional, interrelated factors:

> (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.[42]

While the control test generally takes center stage, there are additional, multifactor tests used depending on the law being applied. For example, some commentators have identified an "ABC" test used in some states that considers: (1) [of course,] control; (2) whether the services performed are part of the usual business of the employer or performed away from the employer's business location; and (3) whether the worker is customarily engaged in an independent trade,

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[40] *See, e.g.*, NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 n.22 (1944) (comparing state court determinations of employment classification for of purposes workers' and unemployment compensation). *See generally* Don W. Sears, *A Reappraisal of the Employment Status in Social Legislation*, 23 ROCKY MNTN. L. REV. 392 (1951) (reviewing tests used by courts in defining "employee" for purposes of various labor and employments laws); Wolfe, *supra* note 18 (examining employer/independent contractor classifications under various state workplace legislation).

[41] *See, e.g.*, Lancaster Symphony Orchestra v. NLRB, Nos. 14–1247, 14–1272, 2016 WL 1566689, at *2 (D.C. Cir. Apr. 19, 2016) (noting that when determining whether workers are employees or independent contractors under the National Labor Relations Act (NLRA), the National Labor Relations Board (NLRB) must resolve the question by reference to common law agency, namely Restatement (Second) of Agency, § 220); Azad v. United States, 388 F.2d 74, 76 (1968) ("The authorities seem to be in general agreement that an employer's right to control the manner in which the work is performed is an important if not the master test to be considered in determining the existence of an employer-employee relationship.") (citing, *inter alia*, RESTATEMENT (SECOND) OF AGENCY, § 220 (1958)); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1149 (9th Cir. 2015) ("[T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.") (internal quotation marks omitted) (applying CAL. LAB. CODE §351 (2011)); S.G. Borello & Sons v. Dep't Indus. Relations, 769 P.2d 399, 405 (Cal. 1989) ("Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting 'employees.' Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional 'control' test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover.") (addressing workers' compensation coverage). Additional factors considered under the common law agency classification scheme are: whether or not the one employed is engaged in a distinct occupation or business; whether the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the person is employed; the method of payment, whether by the time or by the job; whether or not the work is a part of the regular business of the employer; whether or not the parties believe they are creating the relation of master and servant; and whether the principal is or is not in business. RESTATEMENT (SECOND) OF AGENCY, § 220(2)(b)–(j).

[42] *O'Connor*, 82 F. Supp. 3d at 1139 (quoting *Borello*, 769 P.2d at 407).

occupation, business, or profession.[43] The Internal Revenue Service has developed its own test. While it is based on three fundamental categories—behavioral control, financial control, and the relationship of the parties—its first factor relates to whether the employer directs where, when, or how the work is done.[44] And the Supreme Court has applied a multifactor common law test, again, beginning with control, when determining whether the creator of a copyrighted work was an employee or independent contractor for purposes of the Copyright Act.[45]

Finally, the recent Restatement on Employment Law uses the control factor to first determine whether a worker is an employee or independent contractor,[46] but adds a dimension of economic independence in its classification scheme:[47]

> An individual renders services as an independent businessperson and not as an employee 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 provide service to other customers.[48]

As demonstrated above, all classifications schemes begin with the control test. From there, though, courts diverge on a large variety of "secondary" factors to also be considered. Three key, and interrelated, extensions of the control test include considerations of the economic reality of the relationship, the economic dependence of the worker on the employer, and the degree to which the work offers the worker entrepreneurial opportunities.

### A. Economic Reality

In the early 1940s, "newsboys" (i.e., news vendors) formed a union certified by the National Labor Relations Board (NLRB).[49] However, the local newspaper publishers refused to recognize the union, claiming the news vendors were independent contractors, not employees;[50] the central issue before the Supreme Court.[51] Since the Wagner Act (i.e., the National Labor Relations Act) did not define employee, the Court ultimately demurred to the NLRB's decision.[52] Here, the NLRB had determined the news vendors were employees: they worked

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[43] *See* Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 84–85 (2013); Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 109 (2009-2010).

[44] *See* Pivateau, *supra* note 43, at 85–89; Moran, *supra* note 43, at 109–13; INTERNAL REVENUE SERV., PUB. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 7–10 (2016).

[45] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

[46] RESTATEMENT OF EMPLOYMENT LAW, § 1.01(a)(3) (2014) ("[A]n individual renders services as an employee of an employer if. . . the employer controls the manner and means by which the individual renders services. . . .").

[47] For example, § 1.01(a)(3) considers a worker an employee if "the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson." *Id.*

[48] *Id.* § 1.01(b).

[49] *See In re* Stockholders Publ'g Co., 36 N.L.R.B. 285 (1941); NLRB v. Hearst Publ'ns, 322 U.S. 111, 114 (1944).

[50] *See Hearst*, 322 U.S. at 114.

[51] *See id*. at 120.

[52] *Id.* at 130–31 ("Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory

continuously and regularly for the publishers, who dictated their prices, fixed their markets, and controlled their supply of papers; the vendors' hours of work and efforts on the job were supervised and sometimes prescribed by the publishers; and much the vendors' sales equipment and advertising materials were furnished by the publishers with the intent they be used for the publishers' benefit.[53]

The Supreme Court recognized that the common law analysis, namely the "control test" under Restatement (Second) of Agency § 220, was being used on a case-by-case basis to determine employee/independent contractor status, particularly when applicable statutes did not define "employee."[54] But they had some trepidation in strictly applying the control test,[55] and instead considered, in light of the statute being applied, the economic realities of the working relationship.[56] Already at this time, the distinction between employee and independent contractor was not an easy one to make.[57] In fact, the Supreme Court concluded there was no simplicity or uniformity resulting from the application of common-law standards.[58]

The Supreme Court continued to use its "economic reality" test is subsequent cases to determine whether workers were employees or independent contractors for purposes of other federal laws. In *United States v. Silk*, the respondent sold coal at retail in Topeka, Kanas, employing as independent contractors unloaders, who unloaded coal from rail cars at an agreed

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term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has warrant in the record and a reasonable basis in law.") (citations omitted) (internal quotation marks omitted).

[53] *Id.* at 131. "The record sustains the Board's findings and there is ample basis in the law for its conclusion." *Id.* at 132.

[54] *Id.* & n.19.

[55] *Id.* n.19 ("The so-called 'control test' with which common-law judges have wrestled to secure precise and ready applications did not escape the difficulties encountered in borderland cases by its reformulation in the Restatement of the Law of Agency § 220. That even at the common law the control test and the complex of incidents evolved in applying it to distinguish an 'employee' from an 'independent contractor,' for purposes of vicarious liability in tort, did not necessarily have the same significance in other contexts. . . .").

[56] "The Act's . . . applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Id.* at 129; *see also* Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 884 (1995) (noting that in *Hearst*, "where the 'economic facts' of two parties' relationship brought them within the purpose of the Act, the parties would be considered employer and employee even if the traditional 'right of control' test would classify the parties as principal and independent contractor").

[57] *See Hearst*, 322 U.S. at 121 ("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. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.") (footnote omitted).

[58] *Id.* at 122. Congress reacted to the *Hearst* decision by amending the NLRA to expressly exempt independent contractors from coverage under the Act. Labor Management Relations Act of 1947, 80 Pub. L. No. 101, § 2(3), 61 Stat. 136, 137–38 (1947) (codified as amended at 29 U.S.C. § 152(3) (2012)); *see* Moran, *supra* note 43, at 114–15. As Moran notes, "[w]ith this legislative overruling of the *Hearst* standard, it is no longer simple to distinguish an independent contractor from an employee under the Act." *Id.* at 115.

price per ton, and drivers, who delivered coal in trucks they owned at a uniform price per ton.[59] In determining whether the unloaders and drivers were employees for purposes of the Social Security Act,[60] the Supreme Court stated it would follow the same rule it applied in *Hearst*.[61] However, the Court expanded upon its economic reality perspective: "The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete."[62] The Court concluded the unloaders were employees under the Act because they "had no opportunity to gain or lose except from the work of their hands and . . . simple tools" (picks and shovels) and they worked "in the course of the employer's trade or business."[63] In contrast, the Court concluded the drivers were indeed independent contractors because they were essentially independent businesses that owned their own trucks, hired their own workers, and could work for different or additional employers.[64]

In a companion case, *Rutherford Food Corporation v. McComb*,[65] the Supreme Court had to decide whether slaughterhouse meat boners were employees for purposes of the Fair Labor Standards Act. The Supreme Court upheld the appeals court's decision that the workers were employees misclassified as independent contractors, stating "that the determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity."[66]

Going forward, though, federal courts tended to shy away from the economic realities factor and move again back towards control.[67] Perhaps that is because, as one commentator has pointed out, "all invocations of 'economic reality' face a serious conceptual problem, regardless of whether they are part of an agency analysis or are freestanding. Having faced the economic

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[59] 331 U.S. 704, 706 (1947).

[60] *Id.* at 705; Social Security Act, Pub. L. No. 74-271, tits. VIII & IX, 49 Stat. 620, 636, 639 (1935) (codified as amended at 42 U.S.C. §§ 1001–1013, 1101–1111 (2012)).

[61] *Silk*, 331 U.S. at 713–14.

[62] *Id.* at 716.

[63] *Id.* at 717–18.

[64] *Id.* at 718. This was by no means a unanimous decision: Four justices dissented in part: three justices agreed with the principles stated by the majority but believed all the workers should have been classified as independent contractors (*id.* at 719 (Black, J., Douglas, J., & Murphy, J., dissenting in part)); one Justice concurred with respect to the unloaders but disagreed with the decision concerning the drivers (*id.* at 719–22, Rutledge, J., dissenting in part)).

[65] 331 U.S. 722 (1947).

[66] *Id.* at 730 ("[T]he workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughter-house to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.").

[67] *See* Teple, *supra* note 26, at 156 (noting the lack of uniformity by federal courts in applying the economic reality test and a move back towards control).

realities, we still need to know how to decide whether they indicate an employment relationship or not."[68]

### B. Economic Dependence

One factor used to determine the economic reality of the working relationship is the worker's economic dependence upon the employer: "To determine whether an individual falls into the category of covered 'employee' or exempted 'independent contractor,' courts look to the 'economic reality' of the relationship between the alleged employee and alleged employer and whether that relationship demonstrates *dependence*."[69] Courts have developed a multifactor test that is similar to and overlaps the agency control test factors.[70] Ultimately, though, "[i]t is *dependence* that indicates employee status."[71] For example, in *Scantland v. Jeffry Knight, Inc.*, the Eleventh Circuit Court of Appeals concluded that technicians who installed and repaired cable, Internet, and digital phone services were employees—and not independent contractors—for purposes of the Fair Labor Standards Act.[72] Using an economic dependence lens, the court considered the degree to which the employer controlled the manner in which the work was performed;[73] the workers' opportunities for profit or loss;[74] the worker's investment in equipment or materials;[75] special skills required;[76] permanency and duration of the working

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[68] Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 25 A.B.A. J. LAB. & EMP. L. 279, 286 (2011).

[69] Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013) (applying Fair Labor Standards Act) (emphasis added).

[70] The economic reality test looks at: (1) the nature and degree of the employer's control as to the manner in which the work is to be performed; (2) the worker's opportunity for profit or loss depending upon the worker's managerial skill; (3) the worker's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; and (6) the extent to which the service rendered is an integral part of the employer's business. *Id.* at 1312. Note that only factor (2), opportunity for profit or loss depending on the worker's managerial skill, is not included in the multifactor control test enunciated in Restatement (Second) of Agency § 220(2); *see also infra* Part II.C (discussing entrepreneurial opportunity, which focuses on opportunity for gain or loss). The first five factors are derived from *Usery v. Pilgrim Equip. Co*., 527 F.2d 1308 (5th Cir. 1976), and the sixth from *Silk*, 331 U.S. at 729. *See Scantland*, 721 F.3d at 1312 n.2.

[71] *Usery*, 527 F.2d at 1311 (emphasis added).

[72] *Scantland*, 721 F.3d at 1319.

[73] *Id.* at 1315 ("In sum, Knight controlled what jobs plaintiffs did, how much they were paid, how many hours they worked, how many days they worked, their daily work schedule, whether they could work for others, whether they could earn additional income from customers, and closely monitored the quality of their work. Plaintiffs could not bid for jobs or negotiate the prices for jobs. Their ability to hire and manage others was illusory. This alleged control strongly suggests that the plaintiffs were economically dependent upon Knight.").

[74] *Id.* at 1316–17 (finding the "minimal" opportunity for profit or loss suggested economic dependence).

[75] *Id.* at 1317–18 (concluding that although the workers had to supply their own vehicles and specialty tools, the fact that the workers usually purchased the tools through the employer minimally detracted from the workers' dependence).

[76] *Id.* at 1318 (finding the workers highly skilled, a factor weighing in favor of independent contractor status).

relationship;[77] and the extent to which the services rendered were an integral part of the employer's business.[78]

### C. Entrepreneurial Opportunity

In addition to considering the common law agency control test, for purposes of determining whether a worker is an employee or independent contract for purposes of the NLRA, the NLRB and courts also consider whether the worker has a "significant entrepreneurial opportunity for gain or loss."[79] This does not mean courts have abandoned the control test; this is merely a new factor utilized when the common law factors cut both ways.[80] Therefore, where drivers owned their own trucks, could hire their own employees, use their trucks during non-business hours, were paid by the job, and received no employee benefits, they were properly classified as independent contractors.[81] Conversely, where taxi drivers could only respond to dispatches from one particular company and their vehicle leases mandated that they operate their taxis in a manner that protected the goodwill of the company with its customers, the Ninth Circuit Court of Appeals concluded the drivers did not have "the entrepreneurial freedom to develop their own business interests like true independent contractors."[82]

The "entrepreneurial opportunity" test has been applied outside of NLRB actions. For example, the U.S. District Court for the District of Nevada recently included the entrepreneurial opportunity test in determining whether a taxi driver was an employee for purposes of the Americans with Disabilities Act.[83]

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[77] *Id.*1318–19 (concluding there was a substantial permanence of relationship based primarily on multi-year contract terms).

[78] *Id*. at 1319 (finding the workers played an integral role in the employer's business).

[79] Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002) (quoting *In re* Corp. Express Delivery Sys., 332 N.L.R.B. 1522, at *1 (2000) (internal quotation marks omitted). In the legal realm, the concept of entrepreneurial opportunity appears to originate in antitrust law: the purpose of the antitrust laws was to expand the range of consumer choice and entrepreneurial opportunity. *See* Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 384 (1965).

[80] *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) (noting the NLRB adopted this approach when determining whether workers were employees for purposes of the NLRA). The NLRB itself was basing this approach on a Comment within the Restatement (Second) of Agency:

> Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.

RESTATEMENT (SECOND) OF AGENCY, § 220(1) cmt. d (1958); *see FedEx Home Delivery*, 563 F.3d at 497.

[81] *See* C.C. E., Inc. v. NLRB, 60 F.3d 855, 858–60 (D.C. Cir. 1995). *Compare with* Kroblin Refrigerated Xpress, Inc. v. United States, No. C 76–2027, 1978 WL 4599 (N.D. Iowa Oct. 25, 1978) (holding that itinerant men, called chasers or gypsies, who congregated at terminals and were paid varying amounts by drivers to unload unprocessed carcasses hung on books, known as swinging meat, were not employees, regardless of the lack of entrepreneurial opportunity).

[82] NLRB v. Friendly Cab Co, 512 F.3d 1090, 1098 (10th Cir. 2008).

[83] Doud v. Yellow Cab of Reno, Inc., 96 F. Supp. 3d 1076, 1092 (D. Nev. 2015) ("The ability to operate an independent business and develop entrepreneurial opportunities is 'significant in any analysis of whether an individual is an "employee" or an "independent contractor" under the common law agency test.'") (quoting *Friendly*

But exactly how entrepreneurial are Uber drivers, FedEx home package delivery drivers, or a hotel maid?[84] Entrepreneurs have traditionally been viewed as innovative risk-takers who are able to identify entrepreneurial opportunities that others do not see.[85] No offense to FedEx small package delivery drivers, but just how much innovation is required to create value through their entrepreneurial opportunity?[86] And to what extent does the typical worker seek to take on risk?

## III. Critiques of Current Employee/Independent Contractor Classifications

As one commentator has noted, "The legal tests to determine worker status are confusing, yield inconsistent results, and are not suited to the evolving employment relationship."[87] The control test, in and of itself, does not rectify economic inequality.[88] As noted previously, workers are suffering greater job insecurity and income inequalities as employers seek more flexibility,[89] leaving economic outcomes uncertain and shifting downside risk onto the worker.[90] And we should not expect much from substituting one vague, multi-factor test with another.[91]

As intimated earlier, the agency-law control test originated for a different purpose for which it is predominantly used—holding employers vicariously liable to third parties for torts committed by their workers versus determining whether workers are employees or independent contractors for purposes of worker protection laws. *O'Connor v. Uber Technologies, Inc*.[92] is a prime example of this misfit. One can easily identify the lack of control exercised by Uber in *O'Connor*: drivers worked only when they wanted, for as long as they wanted, and could easily

512 F.3d at 1098). *But see* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 993 (9th Cir. 2014) ("There is no indication that California has replaced its longstanding right-to-control test with the new entrepreneurial-opportunities test. . . . Instead, California cases indicate that entrepreneurial opportunities do not undermine a finding of employee status.").

[84] *See* Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html; Lalita Vempati, *The Independent Contractor Hired by Your Hotel Is Now Your Employee. How Did that Happen?*, DCR BLOG (Jan. 20, 2015), http://blog.dcrworkforce.com/independent-contractor-hired-hotel-employee-how-happen ("The hospitality industry is emerging as the poster child for unintentional misclassification of workers as independent contractors.").

[85] *See* Viktor Mayer-Schönberger, *Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship*, 6 I/S: J. L. & POL'Y FOR INFO. SOC'Y 153, 170–73 (2010); *see also* Pivateau, *supra* note 43, at 100–01 (noting that while there is no precise definition of entrepreneurship, there are some common associated concepts: fulfilling wants and needs through innovation, responding to opportunities, and creating value).

[86] *See Alexander*, 765 F.3d 981, 984–87 (9th Cir. 2014) (noting, while determining drivers were employees rather than independent contractors, that drivers had to comply with a number of FedEx-imposed restrictions on routes, van design and usage, as well as grooming and dress standards).

[87] Pivateau, *supra* note 43, at 68; *see also* United States v. Silk, 331 U.S. 704 (1947) (reflecting agreement upon what standard to apply but resulting in three different conclusions among the majority and dissenters); *supra* note 64.

[88] Zatz, *supra* note 68, at 282.

[89] *See supra* Part I.

[90] *Cf.* Zatz, *supra* note 68, at 282–83.

[91] *Id.* at 286.

[92] 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

work for, as well as drive for, anyone else.[93] Despite the *O'Connor* court's statement that "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired[,]"[94] it also looked at multiple factors, particularly that because the drivers provide a service to Uber they are presumptively its employees—"Uber simply would not be a viable business entity without its drivers."[95] In a similar case, *Cotter v. Lyft, Inc.*, the court again focused on the control test, though softened it extensively:

> The company need not exercise its full right of control for a worker to be deemed an employee. "'It is not a question of interference, or non-interference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work; but a question of the right to act, as distinguished from the act itself or the failure to act.'"[96]

The control test, and its derivations, are simply (pun intended) difficult to apply.[97] For example, in a case considering the economic dependence of the workers, the District Court for the Southern District of Florida concluded that even though control by the employer and lack of opportunity for profit or loss favored a classification of employee, there was a material issue of fact as to whether the plaintiff was an employee or independent contractor since other factors favored independent contractor status.[98]

As to the Lyft drivers in *Cotter*:

> It would be difficult to rule as a matter of law that the plaintiffs were independent contractors when the most important factor for discerning the relationship under California law, namely, the right of control, tends to cut the other way. But even beyond that, the "secondary" factors cut in both directions. Several tend to support Lyft's position. . . . Other factors tend to support the [drivers'] position.[99]

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[93] *See id.* at 1141; *see also* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) ("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.").

[94] *O'Connor*, 82 F. Supp. 3d at 1148–49.

[95] *Id.* at 1141–42.

[96] *Cotter*, 60 F. Supp. 3d at 1075 (quoting Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 172 (Cal. 2014) (quoting Hillen v. Indus. Acc. Comm'n, 199 Cal. 577, 250 P. 570, 571 (1926))); *cf.* Casement v. Brown, 148 U.S. 615, 622 (1893) (noting that even with close, daily supervision, a worker can still be an independent contractor).

[97] *See, e.g.*, Jeffrey M. Hirsch, *Employee or Entrepreneur*, 68 WASH. & LEE L. REV. 353, 353 (2011) ("[T]he struggle to distinguish employees from independent contractors and other nonemployees has been lengthy and confused.").

[98] Zouai v. Evans, No. 14-23936-CIV-MORENO, 2015 WL 4768293, at *4 (S.D. Fla. Aug. 12, 2015) (finding, in particular, that the tasks performed by the worker were not integral to the employer's business).

[99] *Cotter*, 60 F. Supp. 3d at 1079.

At least the *Cotter* court recognized that the traditional control test is not very helpful in addressing twenty-first-century workplace dynamics:[100]

> Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this.[101]

Finally, it should also be pointed out that litigation is not necessarily a final solution to classification disputes. As noted earlier, Uber settled the California litigation over whether its drivers are employees or independent contractors.[102] Under the terms of the settlement, Uber drivers remain classified as independent contractors,[103] removing the decision from a jury. But the named plaintiff in the principal litigation being settled, Douglas O'Connor, has filed a declaration opposing the settlement, asserting he feels "utterly betrayed and sold-out by an unjust settlement result that only benefits Uber."[104]

## IV. Recommendations for Change

In exploring ways to improve the current employee/independent contractor classification scheme, some commentators have focused their analysis on the control factor itself. For example, Wolfe has argued the focus should be on where the right of control as to method of performance really lies.[105] His approach turns ultimately, though, on whether the worker is engaged in an independently established trade or business—if the answer is yes, then the worker is an independent contractor unless the employer definitely exercises control over the manner and means of performance; if no, then the worker is most likely an employee.[106]

Other commentators, like some courts, emphasize economic dependence when defining "employment."[107] "[I]nvoking economic dependence plausibly promotes more expansive findings of employment simply by emphasizing the reasons for coverage rather than the reasons for limiting it; in this regard, requiring the presence of (enough) economic dependence is simply the flip side of requiring the absence of (enough) entrepreneurial opportunities."[108] The Dunlop Commission report also argues that workers who are economically dependent on their employer

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[100] *Id.* at 1081 ("As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem.").

[101] *Id.* at 1081–82.

[102] *See Growing and Growing Up*, *supra* note 8.

[103] *See id.*

[104] Declaration of Douglas O'Connor Objecting to Proposed *O'Connor* Class Action Settlement, O'Connor v. Uber Techs., Inc., No. 3:13-cv-03826-EMC (N.D. Cal. May 16, 2016), https://consumermediallc.files.wordpress.com/2016/05/oconnor_declaration_uber_lawsuit.pdf.

[105] Wolfe, *supra* note 18, at 1035.

[106] *Id.*

[107] *See* Zatz, *supra* note 68, at 284.

[108] *Id.* at 287.

are employees.[109] The flip side to this argument is that the more economically independent the worker, the more likely he or she is an independent contractor: "Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients—i.e., if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like."[110] The problem is just how economically dependent, or, conversely, economically independent, must a worker be before we can settle on the appropriate classification.[111] For example, a truly independent electrician may have worked for a number of builders over the years, but has lately worked for just one, perhaps because of supply, price, working conditions, or a combination of all three. The electrician is free to work for any builder he or she may choose and is free from control over how the work is performed, but may, at one point in time, appear economically dependent upon a certain builder. That alone should not transform the electrician from independent contractor to employee.

Another commentator has suggested multiple factors, applied after a presumption the worker is an employee unless it can be shown the worker was free from control, *and* the services performed by the worker were outside the usual services performed by the employer, *and* the worker is customarily engaged in an independently established trade, occupation, profession or business.[112] This rebuttable presumption is similar to the approach taken by California courts: "'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.'"[113]

Griffin Pivateau argues that entrepreneurship is an important signal of independence, which, he argues, is ultimately the question the courts are trying to determine.[114] His classification scheme focuses on what he identifies as the dimensions of entrepreneurship: process, behavior, and outcome.[115] He further elaborates that process is encompassed by innovation; behavior encompassed by risk; and outcome encompassed by results.[116] Pivateau's classification scheme therefore focuses on the opportunity for innovation on the part of the worker: that truly independent contractors would have the freedom to create or modify their own work processes.[117] Second, with respect to behavior and risk, Pivateau argues that there must be a level of uncertainty in the relationship between the parties: uncertainty of duration, uncertainty

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[109] U.S. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 66 (1994), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

[110] *Id.*

[111] *Cf.* Zatz, *supra* note 68, at 286.

[112] Don W. Sears, *A Reappraisal of the Employment Status in Social Legislation*, 23 ROCKY MNTN. L. REV. 392, 414 (1951).

[113] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (quoting Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010)).

[114] Pivateau, *supra* note 43, at 107.

[115] *Id.* at 103.

[116] *See id.*

[117] *Id.* at 103–05.

as to success or failure, and uncertainty as to profit or loss.[118] Finally, there must be a market outcome: i.e., there must be an opportunity for the worker to succeed and make a profit.[119] Here, Pivateau would place upon the employers the burden of demonstrating the presence of actual opportunity rather than just theoretical opportunity.[120]

Pivateau offers a scheme that expands upon the entrepreneurial opportunity offshoot of the employee/independent contract control test. His test would certainly not just pay lip service to the concept of an entrepreneurial opportunity. But how effective would it be in those ambiguous cases that have caused the courts so much consternation? Pivateau's scheme, as will all other classification schemes, keep us locked in a binary solution—the worker either is or is not an employee and, hence, workplace protection laws either do or do not apply.

If the ultimate goal is to ensure workplace protection laws cover deserving workers, then perhaps the focus should turn away from trying to classify simply whether a worker is an employee or independent contractor. The "ambiguous" cases usually involve a working relationship in which the employer may control the means of work to some extent, the worker is performing services central to the employer's business, the duration is either long-lasting or of indefinite duration, and the worker may or may not have the opportunity to concurrently work for other employers. It seems the most practical solution in this case is not simply to try to classify the worker, but change the laws so that this type of worker is protected against discrimination, provided legislatively-mandated leave, paid overtime, assisted in the event of a work-related injury, allowed to organize, and have available unemployment compensation in the event of job loss.[121] The trade-off is more cost for the employers but arguably less insecurity and income inequality for the millions of workers who find themselves in "nontraditional" working relationships.

In the meantime, one suggested solution, though with an eye toward discouraging employers from precluding unionization, is to examine the work structure itself, but this cannot occur as long as employers have the power to force workers to accept work structures in which they are not employees.[122] The solution here may be a freelancer's union or guild. For example, Uber has agreed to recognize an Independent Drivers Guild, a group under the International Association of Machinists.[123] Through the Guild, drivers can regularly meet with Uber's management and appeal deactivations, but the drivers cannot bargain collectively.[124] And while the Freelancers Union, with more than 200,000 members, also cannot bargain collectively on behalf of its members, it does provide health insurance.[125] Of course, guilds and freelancer unions can only address some of the protections lacking in the gig economy.

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[118] *Id.* at 105.

[119] *Id.* at 106.

[120] *Id.*

[121] *See* Carlson, *supra* note 4, at 368 ("Employment laws should not be only for 'employees' only.").

[122] *See* Zatz, *supra* note 68, at 289.

[123] *See* Johana Bhuiyan, *Uber Just Agreed to Let a Labor Union Represent Its Drivers in New York*, RECODE (May 10, 2016, 12:42 PM), http://www.recode.net/2016/5/10/11649804/uber-drivers-labor-union-independent-contractors.

[124] *See id.*

[125] *See* Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES (Mar. 23, 2016), http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html;

## Conclusion

This paper has shown that over the years, employers continually seek to maintain a flexible and lower-cost workforce by attempting to classify their workers as independent contractors rather than employees. Unfortunately, this means fewer and fewer workers are afforded legal workplace protections. At the same time, courts have struggled applying tests to determine whether workers should be classified as employees rather than independent contractors. These complex, multifactor tests, however, rest upon a foundation used to determine whether employers should be held vicariously liable for the torts of their workers, not on whether workers should be the beneficiaries of workplace protection laws. This paper argued that rather than focus on classifying a worker solely as either an employee or independent contractor, the concept of "employee" should be redefined to incorporate those workers who are somewhere in between—not highly controlled by the employer, but providing essential services on a flexible basis, which describes a large number of workers in the U.S. who are denied protection from workplace laws.