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# UBER DRIVERS: A DISPUTED EMPLOYMENT RELATIONSHIP IN LIGHT OF THE SHARING ECONOMY

NICHOLAS L. DEBRUYNE\*

## INTRODUCTION

The American workplace was traditionally dominated by large, vertical enterprises where employment relationships were easy to define.<sup>1</sup> Employees typically worked for one employer, and stable workforces fostered long-term employment relationships.<sup>2</sup> Beginning around 1980, however, new technological advancements shaped by the sharing economy<sup>3</sup> became increasingly popular and have since impacted corporate practices.<sup>4</sup> Unlike the traditional American workforce, modern enterprises are hiring independent contractors where workers are subcontracted for limited purposes or periods of time.<sup>5</sup> The rationale behind the sharing economy is simple: consumers can conveniently exchange goods and services for lower transactional costs.<sup>6</sup> As a result, modern businesses are pressured to outsource their means of production to global markets,<sup>7</sup> thereby transforming the American workforce into a horizontal enterprise. By steadily changing the way employers engage in employment relationships, the sharing economy has stirred an ongoing debate in the realm of employment classification.

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1. Kenneth G. Dau-Schmidt, *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, 64 EMORY L.J. 1583, 1585 (2015).

2. *Id.*

3. "A sharing economy is an economic model in which individuals are able to borrow or rent assets owned by someone else. The sharing economy model is most likely to be used when the price of a particular asset is high and the asset is not fully utilized all the time." *Sharing Economy*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sharing-economy.asp> (last visited Feb. 27, 2016).

4. Dau-Schmidt, *supra* note 1, at 1586.

5. See Mark Berger, *The Contingent Employee Benefits Program*, 32 IND. L. REV. 301, 303 (1999).

6. Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413, 416–17 (2015).

7. See Dau-Schmidt, *supra* note 1, at 1586.

Critics claim that the sharing economy allows employers to lower business expenses by classifying their workers as independent contractors, rather than employees, thereby dodging various employment regulations and protections.<sup>8</sup> The Internal Revenue Code (“IRC”), for example, requires employers to withhold taxes (income, Medicare, and Social Security) and pay employment taxes (federal unemployment insurance, Medicare, and Social Security) on behalf of employees; however, no such requirements apply to independent contractors.<sup>9</sup> Moreover, employees are entitled to collective bargaining rights under the National Labor Relations Act (“NLRA”),<sup>10</sup> as well as minimum wages under the Fair Labor Standards Act (“FLSA”).<sup>11</sup> The NLRA and the FLSA do not extend to independent contractors. Comparably, only employees are protected from racial discrimination under Title VII of the Civil Rights Act,<sup>12</sup> age discrimination under the Age Discrimination in Employment Act (“ADEA”),<sup>13</sup> and most recently, disability discrimination under the Americans with Disabilities Act (“ADA”).<sup>14</sup> Unlike employees, independent contractors are not entitled to paid leave under the Family and Medical Leave Act (“FMLA”) or payments under the Social Security Act.<sup>15</sup> Independent contractors are also not entitled to workers’ compensation<sup>16</sup> and cannot benefit from employee retirement plans.<sup>17</sup> As a result of the low regulatory costs associated with hiring independent contractors, the sharing economy has continued to push the boundaries of interpreting employment relationships.<sup>18</sup>

Given the amount of regulations that apply to employees and not independent contractors, an employer can suffer severe consequences for misclassifying its workers. A successful challenge to an employer’s classification, for example, may obligate the employer to pay back all related employment taxes, including federal (and state) unemployment

8. Ethan Katsh & Orna Rabinovich-Einy, *Tech. & Dispute Systems Design: Lessons from the “Sharing Economy”*, DISP. RESOL. MAG., Winter 2015, at 8, 13.

9. Myra H. Barron, *Who’s an Independent Contractor? Who’s an Employee?*, 14 LAB. LAW. 457, 457 (1999).

10. 29 U.S.C. § 157 (2012).

11. *Id.* § 206(a).

12. 42 U.S.C. § 2000e-2(a) (2012), *invalidated by* Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); *see* Barron, *supra* note 9, at 457.

13. 29 U.S.C. § 623(a) (2012); *see* Barron, *supra* note 9, at 457.

14. 42 U.S.C. § 12112 (2012); *see* Barron, *supra* note 9, at 457.

15. Barron, *supra* note 9, at 457.

16. *Id.*

17. *See* 29 U.S.C. § 1002 (2012).

18. *See* Ranchordás, *supra* note 6, at 417.

taxes, federal (and state) income taxes, and unemployment taxes.<sup>19</sup> Further, an employer who fails to provide workers' compensation insurance to its lawful employees may be obligated to pay all of the insurance premiums that should have been paid throughout the applicable period.<sup>20</sup> These payback obligations also extend to other miscellaneous benefits, such as health insurance coverage or premiums, sick pay, and various types of employment stock options.<sup>21</sup> These contributions cause retroactive participation on behalf of the employer, which negatively impacts employers' plans for future growth.<sup>22</sup>

The federal government has an interest in worker misclassification for several reasons. First, employers generally withhold federal payroll taxes only from employees, meaning the federal government could not collect federal taxes on an employee who is misclassified as an independent contractor.<sup>23</sup> Contrary to employees, independent contractors carry the burden of filing federal payroll taxes, such as social security taxes and unemployment taxes, making it more difficult for the IRS to enforce strict regulatory compliance.<sup>24</sup> As a result of worker misclassification, the IRS estimates that the federal government loses approximately \$3.3 billion per year in tax revenue.<sup>25</sup> Second, the U.S. Department of Labor ("DOL") is interested in worker misclassification because the enterprises that fail to comply with FLSA's wage requirements reap an unfair financial advantage over other law-abiding enterprises.<sup>26</sup> In 2010, the DOL's Wage and Hour Division took measures to combat these misclassifications and recovered nearly \$4 million in minimum wage and overtime violations—nearly a four hundred percent increase from the collections in 2008.<sup>27</sup>

Despite the government's attempts to minimize worker misclassification in the American workforce, the sharing economy has caused many contingent employment relationships to proliferate within the

19. Barron, *supra* note 9, at 463.

20. Christopher Reilly, Raymond W. Bertrand & Brit K. Seifert, *Preserving Independent Contractor Status in an Increasingly Hostile Environment*, ACC DOCKET, Apr. 2011, at 34, 38.

21. *Id.*

22. *Id.*

23. Robert C. Nagle, *Employers Facing Increased Scrutiny over Worker Classification*, 20 No. 9 PA. EMP. L. LETTER 1, 1 (June 2010).

24. *Id.*

25. Debbie Whittle Durban, *Independent Contractor or Employee? Getting It Wrong Can Be Costly*, S.C. LAW., Jan. 2010, at 36, 41.

26. Nagle, *supra* note 23.

27. 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, 62 (2015).

ride-sharing industry. Ride-sharing companies such as Uber Technologies, Inc. (“Uber”) have revolutionized the private transportation market,<sup>28</sup> “whereby people without commercial licenses use their own personal vehicles to provide rides to strangers for a fee.”<sup>29</sup> Uber has a substantial financial motivation to classify its drivers as independent contractors because doing so frees Uber from financing workers’ compensation premiums, payroll taxes, and employee benefit programs.<sup>30</sup> Others argue that Uber should not be able to escape such direct liabilities.<sup>31</sup> Although Uber continues to stand as the world’s largest ride-sharing company in the transportation industry, the question of whether Uber drivers should be classified as employees or independent contractors remains unresolved.

Part I of this Comment briefly discusses Uber’s corporate infrastructure and how it relates to the sharing economy. Part I then raises the issue of whether Uber drivers should be classified as employees or independent contractors by analyzing the case of *O’Connor v. Uber Technologies, Inc.*<sup>32</sup> Part II examines the three different tests federal courts have considered when determining whether a worker should be classified as an employee or an independent contractor. Part III applies each test to Uber drivers and evaluates the competing arguments for employee and independent contractor statuses. Finally, Part IV explains why Uber drivers should be classified as independent contractors under a slightly modified economic realities test.

## I. UBER TECHNOLOGIES, INC.

### A. *The Rise of Uber Technologies, Inc.*

Uber is an international transportation network company<sup>33</sup> based out of San Francisco, California.<sup>34</sup> In 2009, Travis Kalanick and Garrett Camp struck gold when they developed a smartphone app that allowed customers to submit a trip request to a private driver at the press of a

28. Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1097 (2015).

29. *Id.* at 1101–02.

30. See Durban, *supra* note 25, at 38.

31. See *O’Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (order denying motion for summary judgment).

32. *Id.*

33. Davis, *supra* note 28, at 1103 (“Transportation network companies (“TNC”) enable ride-sharing transactions between drivers and customers.”).

34. Douglas MacMillan, *Uber*, WALL ST. J.: THE BILLION DOLLAR STARTUP CLUB (July 2015), <http://graphics.wsj.com/billion-dollar-club/?co=Uber>.

button.<sup>35</sup> The business plan for this private transportation service was simple: Uber would pocket twenty-five percent of the revenue, leaving Uber drivers the difference.<sup>36</sup> By October 2010, Uber secured a \$1.25 million funding round from Napster and First Round Capital.<sup>37</sup> It was also at this time that Uber received a Cease and Desist Order from the San Francisco Metro Transit Authority & the Public Utilities Commission of California for operating like a cab company without the proper licensing.<sup>38</sup> In response, Uber continued expansion and merely shortened its name to sidestep the appearance of marketing itself as a taxicab business.<sup>39</sup> In February 2011, Uber closed an \$11 million funding round, which valued the company at \$60 million.<sup>40</sup>

By May 2011, Uber expanded nationally to New York City, providing over 81,000 rides per day since the initial expansion.<sup>41</sup> Uber continued to expand over the next six months to other national metropolitan areas, including: Boston, Seattle, Chicago, and Washington, D.C.<sup>42</sup> After only eighteen months of operations, Uber announced that it had secured \$32 million in funding provided by Shervin Pishavar's Menlo Ventures, Amazon's CEO Jeff Bezos, and Goldman Sachs.<sup>43</sup> By the end of 2011, Uber expanded internationally to Paris, France.<sup>44</sup>

The next landmark came several months later after Uber announced its secret: a low-cost "UberX" project that used hybrid vehi-

35. *Id.*

36. See *UberX Basics*, UBER, <http://www.uberpartnerschicago.com/uberx-basics/> (last visited Oct. 5, 2016).

37. Nathan McAlone, *Here's How Uber Got Its Start and Grew to Become the Most Valuable Startup in the World*, BUS. INSIDER: TECH (Sept. 13, 2015, 8:00 AM), <http://www.businessinsider.com/history-of-uber-and-its-rise-to-become-the-most-valuable-startup-in-the-world-2015-9>.

38. Julian Chokkattu & Jordan Crook, *A Brief History of Uber*, TECHCRUNCH (Aug. 14, 2014), <http://techcrunch.com/gallery/a-brief-history-of-uber/>.

39. See Lora Kolodny, *Ubercab, Now Just Uber, Shares Cease & Desist Orders*, TECHCRUNCH (Oct. 25, 2010), <http://techcrunch.com/2010/10/25/ubercab-now-just-uber-shares-cease-and-desist-orders/>.

40. Miguel Helft, *These Are the Venture Firms Celebrating Uber's Massive \$18B Valuation*, FORTUNE (June 6, 2014), <http://fortune.com/2014/06/06/these-are-the-venture-firms-celebrating-ubers-massive-17b-valuation/>.

41. See McAlone, *supra* note 37.

42. See Chokkattu & Crook, *supra* note 38.

43. Alexia Tsotsis, *Uber Gets \$32M from Menlo Ventures, Jeff Bezos & Goldman Sachs*, TECHCRUNCH (Dec. 7, 2011), <http://techcrunch.com/2011/12/07/uber-announces-32-million-in-funding/>.

44. See *We're Going Global with Big Funding*, UBER: NEWSROOM (Dec. 7, 2011), <https://newsroom.uber.com/france/were-going-global-with-big-funding/>.

cles.<sup>45</sup> This service offered a thirty-five percent savings over the original Lincoln Town Cars by expanding Uber's fleet to Priuses and Cadillac Escalades.<sup>46</sup> Uber drivers continued to offer door-to-door service for their customers, but UberX made ride-sharing far more convenient and cheaper than taking a taxi.<sup>47</sup> By 2013, Uber dominated the private transportation market, leaving competitors like Lyft and Sidecar in its shadow.<sup>48</sup> Uber soon closed a Series C funding round from Google Ventures, which valued the company at \$3.76 billion.<sup>49</sup> By July 2014, Uber had expanded to India, Africa, and China.<sup>50</sup>

Uber soon extended its services within the transportation community. By January 2015, Uber launched UberCARGO in Hong Kong, a moving service that provides users an easy way to cover logistical needs without the costly delivery arrangements.<sup>51</sup> Uber then launched UberEATS in April 2015, an on-demand food-delivery service where drivers deliver meals to customers' locations in four pilot cities: Los Angeles, Barcelona, Chicago, and New York City.<sup>52</sup> Most recently, UberRUSH debuted in Chicago, New York, and San Francisco.<sup>53</sup> UberRUSH provides an on-demand delivery service between business owners and their customers, allowing consumers to get what they want, when they want it.<sup>54</sup>

Uber has quickly expanded to more than 300 cities in fifty-eight countries around the world.<sup>55</sup> Uber is now privately valued at over \$62 billion,<sup>56</sup> surpassing Facebook Inc.'s private record in January 2011.<sup>57</sup>

45. Chokkattu & Crook, *supra* note 38.

46. McAlone, *supra* note 37.

47. See UBER, <http://www.uber.com> (last visited Oct. 5, 2015).

48. MacMillan, *supra* note 34.

49. McAlone, *supra* note 37.

50. *Id.*

51. See Sam, *UberCARGO: A Reliable Ride for Your Items*, UBER: NEWSROOM (Jan. 7, 2015), <http://newsroom.uber.com/hong-kong/2015/01/a-ride-for-your-goods-introducing-ubercargo/>.

52. McAlone, *supra* note 37.

53. Jason Droege, *UberRUSH – Now Open for Business in Chicago, NYC, & SF*, UBER: NEWSROOM (Oct. 14, 2015), <https://newsroom.uber.com/rush-open-for-business/>.

54. See *id.*

55. Travis, *Five Years and 311 Cities Later*, UBER: NEWSROOM (June 1, 2015), <https://newsroom.uber.com/five-years-and-311-cities-later/>.

56. See Alex Konrad, *Uber Raises \$3.5 Billion from Saudi Sovereign Wealth Fund, Keeps \$62.5 Billion Valuation*, FORBES (June 1, 2016, 5:12 PM), <http://www.forbes.com/sites/alexkonrad/2016/06/01/uber-raises-3-5-billion-from-saudi-sovereign-fund-at-62-5-billion-valuation/#7abbf94741d4>.

57. MacMillan, *supra* note 34.

Under recent valuations, Uber has become the most valuable privately held company in the world.<sup>58</sup>

*B. O'Connor v. Uber Technologies, Inc.*

In *O'Connor v. Uber Technologies, Inc.*,<sup>59</sup> the U.S. District Court for the Northern District of California recently considered whether Uber drivers should be classified as independent contractors under California law.<sup>60</sup> The plaintiffs, Douglas O'Connor and Thomas Colopy, filed a class action lawsuit on behalf of a proposed nationwide class of Uber drivers, claiming that they were Uber employees and, therefore, were eligible for statutory protections under the California Labor Code.<sup>61</sup> The plaintiffs relied on state labor provisions that prevented employers from withholding all tips and gratuities from their employees.<sup>62</sup> Uber moved for summary judgment, asserting that the plaintiffs were independent contractors and, therefore, were not entitled to such protections.<sup>63</sup> The district court evaluated both arguments based on California's two-part employment classification test.<sup>64</sup>

First, under California law, the employee must establish a prima facie case of an employer-employee relationship, which is accomplished once a plaintiff presents evidence that he rendered services for an employer.<sup>65</sup> This is a fairly easy standard to meet under California law. "As the Supreme Court of California has held . . . the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary."<sup>66</sup> Uber rebutted that it was a technology company, not a transportation company, which generated "leads" for drivers through its software.<sup>67</sup> In other words, Uber drivers were simply customers who purchase dispatches from Uber that may or may

58. Sara Ashley O'Brien, *Uber Raising Another \$1 Billion*, CNN: MONEY (Oct. 26, 2015, 6:03 PM), <http://money.cnn.com/2015/10/26/technology/uber-another-1-billion/index.html>.

59. 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (order denying motion for summary judgment).

60. *Id.* at 1135.

61. *Id.*

62. *Id.* (citing CAL. LAB. CODE § 351 (West 2016)).

63. *See O'Connor*, 82 F. Supp. 3d at 1135.

64. *See id.* at 1138 (citing *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010)).

65. *Narayan*, 616 F.3d at 900.

66. *O'Connor*, 82 F. Supp. 3d at 1138 (quoting *Narayan*, 616 F.3d at 900).

67. *Id.* at 1137.



not result in actual rides.<sup>68</sup> The following contractual provision taken from Uber's Terms and Conditions clause supported Uber's assertion:

[Uber's] Services constitute a technology platform that enables users of Uber's mobile applications or websites provided as part of the Services . . . to arrange and schedule transportation and/or logistics services with third party providers . . . Unless otherwise agreed by Uber in a separate written agreement with you, the Services are made available solely for your personal, noncommercial use. YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER.<sup>69</sup>

Based on this theory, Uber drivers do not receive tips or gratuities for providing transportation services; rather, drivers are compensated in "fares" for driving on their own schedule.<sup>70</sup>

The judge denied Uber's argument, ruling that Uber drivers performed a beneficial service on Uber's behalf.<sup>71</sup> By focusing on the substance of what Uber actually did, the court held that "Uber [was] most certainly a transportation company, albeit a technologically sophisticated one."<sup>72</sup> The court reasoned that Uber did not sell its technological software in ways consistent with normal distributors.<sup>73</sup> Contrary to other technological distributors, Uber advertised and marketed its platform as "Everyone's Private Driver,"<sup>74</sup> which suggested that Uber was in fact a transportation company. Even more fundamentally, the court reasoned that it was obvious Uber drivers provided a service because Uber would not be a viable business without the use of its drivers.<sup>75</sup> Subsequently, the court held that the plaintiffs effectively established a presumptive employer-employee relationship.<sup>76</sup>

Following the first part of California's employment classification test, where an employee establishes a prima facie case for an employer-employee relationship, the burden shifts to the employer to prove

68. *Id.* at 1141.

69. *Terms and Conditions*, UBER, <https://www.uber.com/legal/usa/terms> (last updated Jan. 2, 2016).

70. *O'Connor*, 82 F. Supp. 3d at 1136; *see Drive*, UBER, <https://www.uber.com/drive/> (last visited Oct. 5, 2016).

71. *O'Connor*, 82 F. Supp. 3d at 1145.

72. *Id.* at 1141.

73. *Id.* at 1137.

74. Uber, *Short Description*, FACEBOOK, [https://www.facebook.com/UberMY/info?tab=page\\_info](https://www.facebook.com/UberMY/info?tab=page_info) (last visited Oct. 5, 2016).

75. *O'Connor*, 82 F. Supp. 3d at 1142.

76. *Id.* at 1145.

that the employee was in fact an independent contractor.<sup>77</sup> Accordingly, the burden shifted to Uber to disprove an employment relationship.<sup>78</sup> The court noted that Uber could only overcome this standard “if all facts and evidentiary inferences material to the employee/independent contractor determination [were] undisputed, and a reasonable jury viewing those undisputed facts and inferences could reach but one conclusion.”<sup>79</sup> Nonetheless, the judge conclusively denied Uber’s motion for summary judgment because he could not reach a verdict on the following matters: first, whether Uber could fire its drivers at will; next, whether Uber significantly controlled the manner and means of its transportation providers; and finally, whether Uber controlled its drivers’ hours.<sup>80</sup> The judge then set aside five weeks for a trial that was set to commence on June 20, 2016.<sup>81</sup>

Shortly before the *O’Connor* trial was scheduled to commence, Uber entered into a \$100 million class-action settlement with the plaintiffs.<sup>82</sup> Under this settlement agreement, Uber agreed to pay the plaintiffs \$84 million, plus an additional \$16 million if both Uber went public and its valuation increased one-and-a-half times from Uber’s most recent valuation.<sup>83</sup> The agreement stipulated that Uber drivers were to receive payment contingent on filing a claim form, where the expenses would be allocated based on the number of miles driven for Uber.<sup>84</sup> Assuming a 100% claim rate, this would translate to an average distribution of \$25 to \$1950 per each California certified class member and an average distribution of \$10 to \$836 per each California non-certified class member.<sup>85</sup> The parties expected a 40% claim rate, however, thereby increasing the monetary amount paid to each claimant.<sup>86</sup> Uber also agreed to implement several forms of non-monetary relief, including (1) publishing a deactivation policy that explains the circumstances under which drivers would be deactivated from using the ride-

77. *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).

78. *O’Connor*, 82 F. Supp. 3d at 1145.

79. *Id.* at 1148.

80. *Id.* at 1148–53.

81. See Lauren Weber, *Uber Drivers to Have Their Day in Court*, WALL ST. J., Nov. 5, 2015, <http://www.wsj.com/articles/uber-drivers-to-have-their-day-in-court-1446744124>.

82. Travis Kalanick, *Growing and Growing Up*, UBER NEWSROOM (Apr. 21, 2016), <https://newsroom.uber.com/growing-and-growing-up/>.

83. *O’Connor v. Uber Technologies, Inc.*, No. 13-cv-03826-EMC, 2016 WL 4398271, at \*7 (N.D. Cal. Aug. 18, 2016) (order denying plaintiffs’ motion for preliminary approval); see *id.*

84. *Id.* at \*7.

85. *Id.* at \*8.

86. *Id.*

sharing application;<sup>87</sup> (2) providing drivers with more information about their individual ratings such as how each driver compares with their peers;<sup>88</sup> and (3) making a good-faith effort to clarify its tipping policy to riders.<sup>89</sup>

Nevertheless, the U.S. District judge rejected Uber's settlement agreement, ruling that the settlement was not fair, adequate, nor reasonable for Uber drivers.<sup>90</sup> As an initial matter, the court did not consider the \$16 million supplemental payment, contingent on the success of Uber's initial public offer as part of the settlement, because Uber failed to present information indicating the likelihood of this contingency being triggered.<sup>91</sup> The judge noted that the remaining \$84 million represented a "substantial discount" on the full value of driver claims.<sup>92</sup> Moreover, the court reasoned that the non-monetary procedures did not alleviate the substantial control that Uber continued to exercise over its drivers.<sup>93</sup> Consequently, the legal classification of Uber drivers remains in limbo and still has not been resolved.

## II. JUDICIALLY CREATED TESTS FOR DEFINING EMPLOYMENT STATUS

No single factor defines the status of an employment relationship. Instead, federal courts have primarily relied on three factor-based tests in determining whether a worker should be classified as an employee or independent contractor. These tests are drawn from a variety of sources such as statutes, rules, regulations, case law, policies, rulings, and the like.<sup>94</sup> The first test, otherwise known as "the right-to-control" test, applies under the Internal Revenue Code ("IRC"), the NLRA, and the common law of agency.<sup>95</sup> The second test, otherwise known as the "economic realities" test, applies under the FLSA.<sup>96</sup> Finally, the United States Court of Appeals for the D.C. Circuit has recently

87. Kalanick, *supra* note 82. See also *O'Connor*, 2016 WL 4398271, at \*8; *Driver Deactivation Policy - US ONLY*, UBER, <https://www.uber.com/legal/deactivation-policy/us-en/> (last visited Oct. 5, 2016).

88. Kalanick, *supra* note 82. See also *O'Connor*, 2016 WL 4398271, at \*9; *Driver Deactivation Policy - US ONLY*, *supra* note 87.

89. *O'Connor*, 2016 WL 4398271, at \*10.

90. *Id.* at \*34.

91. *Id.* at \*22-23.

92. *Id.* at \*24.

93. *Id.* at \*24-25.

94. Barron, *supra* note 9, at 458.

95. See Glenn A. Hegar, Jr., *Adhesion Contracts, Debt, Low Returns & Frustration-Can America's Independent Contractor Farmer Overcome the Odds?*, 22 *HAMLIN L. REV.* 213, 217-18 (1998).

96. Barron, *supra* note 9, at 458.

adopted an “entrepreneurial opportunities” test, which has received support from the Third Restatement of Employment Law.<sup>97</sup> This section analyzes all three employment classification tests: the right-to-control test, the economic realities test, and the entrepreneurial opportunities test.

### A. *The Right-to-Control Test*

The traditional common law right-to-control test, sometimes referred to as the common law agency test or the master-servant test, focuses on the employer’s right to control.<sup>98</sup> Specifically, it is the “element of control that distinguishes the employer-employee relationship from the independent contractor relationship.”<sup>99</sup> Workers are more likely to be classified as employees if their employer exercises more control.<sup>100</sup> Conversely, workers are more likely to be classified as independent contractors if their employer exercises very little control.<sup>101</sup> The rationale for the courts’ use of this test is that employers should be held accountable for their workers’ actions when employers exercise significant control over their workers.<sup>102</sup>

The employers’ right to control, however, is not determinative of an employment relationship.<sup>103</sup> Indeed, it is but one factor that courts considered under the traditional common law analysis. Taken from the Second Restatement of Agency, courts traditionally relied on the following ten factors to determine the proper classification of a master-servant relationship:<sup>104</sup> (1) the amount of control an employer or principal, by way of agreement, exercises over the details of the work; (2) whether the service provider is engaged in a particular business; (3) whether the type of occupation is generally conducted under supervision by an employer or specialist; (4) whether the service provider supplies the instrumentalities, tools, and the place of where the work is conducted; (5) whether the services rendered by the worker are an

97. See Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 688 (2013).

98. Barron, *supra* note 9, at 458; see Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 81 (1984).

99. Patricia Davidson, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 207 (1984).

100. Barron, *supra* note 9, at 458.

101. *Id.* at 458–59.

102. *Id.* at 459.

103. See Davidson, *supra* note 99, at 208–09.

104. Barron, *supra* note 9, at 459.

integral part of the employer's business operations; (6) whether the parties have intended to create an employer-employee relationship; (7) whether the employer is in business; (8) the skill required in the particular occupation; (9) the length of time for which the service provider is employed; and (10) the method of payment.<sup>105</sup> If the courts held that a master-servant relationship existed, then the master would be liable for its servant's tortious misconduct.<sup>106</sup> Similar to the traditional application of the right-to-control test, "[c]ontemporary cases apply these same traditional *common law* factors, although they talk about *employees* rather than *servants*, and *employers* rather than *masters*."<sup>107</sup> While great deference and consideration is given to all ten factors in determining employment classifications, the employer's right to control remains the most crucial determinant of an employer-employee relationship under the traditional, common law analysis.<sup>108</sup>

### *B. The Economic Realities Test*

The economic realities test emerged after many courts began to reject the traditional common law test as being too narrow and overly restrictive in regards to labor statute interpretation.<sup>109</sup> The FLSA, for example, defines "employee" to include "any individual employed by an employer," yet expansively defines "employ" to mean "suffer or permit to work."<sup>110</sup> Hence, the definition of "employ," under the FLSA, extends the meaning of "employee" to protect those who may not qualify as such under the strict application of the traditional right-to-control test.<sup>111</sup> Situations may arise, for example, where a worker suffers at his employer's expense, even though the employer exercises a relatively minimal right of control. Therefore, courts began analyzing two principles in an employment relationship: the balance of power, and whether the alleged employee was subject to unlawful discrimination.<sup>112</sup>

105. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

106. *See id.* ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.")

107. Barron, *supra* note 9, at 459.

108. *See* Dowd, *supra* note 98, at 80.

109. *See* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. Rev. 239, 248 (1997).

110. 29 U.S.C. § 203(e), (g) (2012).

111. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

112. Dowd, *supra* note 98, at 102.

Under the economic realities test, a service provider is classified as an employee if he is economically dependent upon his employer for continued employment.<sup>113</sup> Economic dependence is measured by considering several factors in the employment relationship, many of which are found in the common law test. In applying this test, courts generally consider the following factors:

(1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business.<sup>114</sup>

Although the employer's right to control is the most important factor for employment classification,<sup>115</sup> consulting secondary indicia of a service relationship has allowed authorities to sidestep the traditional common law standard.

The economic realities test is generally applied in cases brought under the FLSA, the ADEA, and the Family and Medical Leave Act.<sup>116</sup> Courts have progressively abandoned the control factor as irrelevant for employee identification purposes and have, instead, scrutinized the "reality" of the worker's dependence upon his respective employer.<sup>117</sup> "Such dependence is often manifested through the economic weakness of the workers, and the focus on economic reality is meant to cut through formalistic trappings to get at the heart of the relationship."<sup>118</sup> Nevertheless, in seeking to determine the economic reality of the nature of the working relationship, courts look at all the circumstances surrounding the employment relationship.<sup>119</sup> This broadens the scope of the economic realities test, resulting in a greater likelihood that workers will be classified as employees rather than independent contractors when compared to the common law test.<sup>120</sup>

113. Durban, *supra* note 25, at 41.

114. *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (quoting *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985)).

115. *S. G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 48 Cal. 3d 341, 350 (1989).

116. Durban, *supra* note 25, at 38.

117. *See* Bodie, *supra* note 97, at 684–87.

118. *Id.* at 686–87.

119. *See* Howard McCoach, *Applying Title VII to Partners: One Step Beyond*, 20 RUTGERS L. J. 741, 747 (1989).

120. Durban, *supra* note 25, at 41.

In *Secretary of Labor v. Lauritzen*,<sup>121</sup> for example, the Seventh Circuit held that migrant agricultural workers were classified as employees because they depended “on the [employer’s] land, crops, agricultural expertise, equipment, and marketing skills.”<sup>122</sup> In that case, the Secretary of Labor brought an action against Lauritzen Farms, a pickle farm, alleging that the defendant had violated the FLSA’s minimum wage requirements and child labor provisions by classifying its migrant farm workers as independent contractors.<sup>123</sup> The pickle growers provided the migrant workers with direct support, such as occasional supervision, free housing, and all necessary equipment to complete the harvest—i.e., pails, sacks, company trucks, and grading stations.<sup>124</sup> The pickle growers gave the migrant families fifty percent of the harvest profits, and also offered the migrants a bonus to encourage the workers to stay throughout the harvesting season.<sup>125</sup> Based on these circumstances, the court noted that were it not for the pickle growers, the migrant families would be forced to work for an alternative farm, indicating that the migrants were dependent on the growers for employment.<sup>126</sup> The Seventh Circuit noted that it was not necessary for workers to be unable to find alternative employment in order to be classified as employees rather than independent contractors.<sup>127</sup>

State courts have also applied the economic realities test in favor of employee classification. In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,<sup>128</sup> the Supreme Court of California similarly held that agricultural laborers engaged in harvesting cucumbers were not independent contractors.<sup>129</sup> These particular harvesters, however, were distinguishable from the pickle growers in *Lauritzen* in several ways. First, the harvesters signed a contractual agreement, deeming themselves as independent contractors.<sup>130</sup> Second, the harvesters supplied their own tools and transportation to and from the farm; and lastly, the harvesters performed their duties free from direct supervision.<sup>131</sup> Despite these differences, the court classified the migrant

121. 835 F.2d 1529 (7th Cir. 1987).

122. *Id.* at 1538.

123. *Id.* at 1531–32.

124. *Id.* at 1533.

125. *Id.* at 1532.

126. *Id.* at 1538.

127. *Lauritzen*, 835 F.2d at 1538.

128. 48 Cal. 3d 341 (1989).

129. *Id.* at 360.

130. *Id.* at 347.

131. *Id.* at 346–47.

workers as employees based on the compelling indicia of employment.<sup>132</sup> Specifically, Borello owned the farm and was primarily responsible for supplying, cultivating, and pricing the crop throughout its entire growing cycle.<sup>133</sup> By the same token, the court held that direct supervision over the laborers was unnecessary because harvesting crops involved simple manual labor that required no peculiar skill.<sup>134</sup> Though the harvesters' work was seasonal in nature, the court considered it permanent in the agricultural process.<sup>135</sup> "Indeed, Richard Borello testified that he has a permanent relationship with the individual harvesters, in that many of the migrant families return year after year."<sup>136</sup> Under these circumstances, the court held that it would not assume that the harvesters would voluntarily waive their employee protections pursuant to an employment contract, thereby classifying the harvesters as employees.

### C. The Entrepreneurial Opportunity Test

The United States Court of Appeals for the D.C. Circuit has adopted a new test for determining employment classification: the entrepreneurial opportunity test. This test was first hinted at in *Corporate Express Delivery Systems v. NLRB*.<sup>137</sup> There, the National Labor Relations Board filed a claim against Corporate Express Delivery Systems, and alleged the company was in violation of the NLRA for firing employees because they engaged in union activity.<sup>138</sup> Notably, the NLRA prevents employers from interfering with its employees' efforts to form a union, but the Act offers no such protection to independent contractors.<sup>139</sup> Corporate Express argued that it was not in violation of the NLRA because its operators were independent contractors.<sup>140</sup> Instead of focusing on an employer's right to control, the D.C. Circuit held that a worker's entrepreneurial opportunity for gain or loss better captured

132. *Id.* at 358–60.

133. *Id.* at 356 (citing *Donovan v. Gillmor*, 535 F. Supp. 154, 161 (N.D. Ohio 1982)).

134. *Borello*, 48 Cal. 3d at 356.

135. *Id.* at 357.

136. *Id.*

137. 292 F.3d 777, 780 (D.C. Cir. 2002).

138. *Id.* at 778.

139. 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations . . .").

140. *Corp. Express Delivery Sys.*, 292 F.3d at 779.



the distinction between an employee and an independent contractor.<sup>141</sup> The court supported its holding by use of an analogy:

The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur—that is, takes economic risks and has the corresponding opportunity to profit from working smarter, not just harder.<sup>142</sup>

The D.C. Circuit never expressly stated that it was supplementing the traditional common law test. Rather, the court simply acknowledged its preference for a worker's entrepreneurial opportunity over an employer's right to control when evaluating the status of an employment relationship.<sup>143</sup>

Other courts have also hinted at the development of the entrepreneurial opportunity test. In *NLRB v. Friendly Cab Co., Inc.*,<sup>144</sup> for example, the Ninth Circuit addressed whether taxicab drivers for Friendly Cab Company possessed "entrepreneurial freedom to develop their own business interests like true independent contractors."<sup>145</sup> There, the East Bay Taxi Drivers Association (Union) filed a claim against the National Labor Relations Board, alleging that Friendly Cab Company violated the NLRA by refusing to let its taxi drivers participate in collective bargaining.<sup>146</sup> Similar to the allegations made in *Corporate Express Delivery Systems*, Friendly Cab maintained that its taxicab drivers were independent contractors and, therefore, were excluded from the NLRA's protections.<sup>147</sup> Moreover, Friendly Cab Company prohibited its drivers from pursuing any outside business opportunities.<sup>148</sup> The taxicab drivers had to comply with Friendly Cab Company's Policy Manual and its Standard Operating Procedures, including the following provision:

141. *Id.* at 780 (citing *In re Corp. Express Delivery Sys. & Teamsters Local 886*, 332 NLRB 1522 (2000)).

142. *Corp. Express Delivery Sys.*, 292 F.3d at 780.

143. *Id.*

144. 512 F.3d 1090 (9th Cir. 2008).

145. *Id.* at 1098.

146. *Id.* at 1095.

147. *Id.* at 1093.

148. *Id.* at 1094.

All calls for service must be conducted over company provided communications system and telephone number. No private or individual business cards or phone numbers are allowed for distribution to customers as these constitute an interference in company business and a form of competition not permitted while working under the lease.<sup>149</sup>

The Ninth Circuit held that the taxi drivers were considered employees and placed “particular significance on Friendly’s requirement that its drivers may not engage in any entrepreneurial opportunities.”<sup>150</sup>

One year later, in *FedEx Home Delivery v. NLRB*,<sup>151</sup> the United States Court of Appeals for the D.C. Circuit confirmed that the entrepreneurial opportunities test was a proper standard for evaluating employment relationships.<sup>152</sup> There, the court addressed whether FedEx drivers who delivered packages were defined as employees under the NLRA.<sup>153</sup> This case arose after the International Brotherhood of Teamsters, Local Union 25, filed two petitions with the NLRB seeking a union representation election on behalf of the FedEx delivery drivers.<sup>154</sup> FedEx asserted that its delivery drivers were independent contractors, not statutory employees, and therefore were statutorily excluded from the mandated provisions under the NLRA.<sup>155</sup> The D.C. Circuit held that FedEx did not partake in an unfair labor practice in refusing to bargain with the union, classifying the FedEx drivers as independent contractors.<sup>156</sup>

As opposed to the traditional common law right-to-control analysis, the court reached its decision based on the FedEx drivers’ “significant entrepreneurial opportunity for gain or loss.”<sup>157</sup> Following this approach, the court highlighted that drivers had the freedom to use their own vehicle for personal ventures, were free to operate their vehicle on multiple routes, and were free to hire additional drivers without FedEx’s permission.<sup>158</sup> Although the FedEx drivers were required to adhere to certain uniform and vehicle standards, the court

149. *Id.*

150. *Friendly Cab Co.*, 512 F.3d at 1097.

151. 563 F.3d 492 (D.C. Cir. 2009).

152. *Id.* at 497.

153. *Id.* at 495.

154. *Id.*

155. *Id.*

156. *Id.* at 504.

157. *Id.* at 503 (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)).

158. *FedEx Home Delivery*, 563 F.3d at 498, 504.

held that those elements of control reflected the differences in the type of service the contractors provided, not the differences in the employment relationship.<sup>159</sup> Notably, the court retained the common law factors as a useful guide for analytical purposes, but rejected the standing of the employer's right to control. Moreover, the court's holding suggests that an independent contractor classification will result based on the slightest discovery of a worker's entrepreneurial opportunity.

### III. SHOULD UBER DRIVERS BE CLASSIFIED AS EMPLOYEES OR INDEPENDENT CONTRACTORS?

In *O'Connor v. Uber Technologies, Inc.*,<sup>160</sup> the U.S. District Court for the Northern District of California acknowledged the challenges of classifying Uber drivers as either employees or independent contractors.<sup>161</sup> Arguably, the sharing economy has contributed to this issue by causing several of the employment classification factors to become outdated, resulting in regulatory uncertainty and lack of transparency.<sup>162</sup> The judicial system has also contributed to this issue by not considering other, more suitable, factors when analyzing contemporary employment classification disputes. Some of these additional considerations may include whether: (1) the proportion of income is shared or distributed by both parties; (2) the worker finances equipment maintenance and repair; and (3) alternatives are available to both parties.

Although these factors could be easily be added to any of the employment classification tests, the judicial system has not expressly recognized these factors in determining employment relationships. As a result, courts are faced with balancing the interest of stimulating modern innovation verses the need to protect individuals from potential economic harms.<sup>163</sup> In light of these challenges, this section analyzes how Uber drivers should be classified under the three tests of employment classification: the right-to-control test, the economic realities test, and the entrepreneurial opportunities test. This section also evaluates the competing arguments for employee and independent contractor statuses under each classification test.

159. *Id.* at 501.

160. 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (order denying motion for summary judgment).

161. *Id.* at 1153.

162. See Ranchordás, *supra* note 6, at 423.

163. See *id.* at 420.

### A. *The Right-to-Control Test*

The relevant scrutiny under the right-to-control test “is not how much control [an employer] *exercises*, but how much control the [employer] retains the *right* to exercise.”<sup>164</sup> Control is therefore the measure of an employer’s ability to exercise its authority, regardless of whether its ability has been exercised. Under this test, Uber exercises control over its drivers in three ways: (1) Uber controls whether a driver can be terminated; (2) Uber controls the selection and qualification of its drivers; and (3) Uber controls the amount of revenue it earns from its drivers and riders. Based on these factors, Uber drivers should be classified as employees under the right-to-control test.

First, Uber exercises significant control over terminating its drivers. This is perhaps the strongest control factor because it provides Uber the means to directly cease its drivers’ services.<sup>165</sup> Uber will immediately terminate a driver who either: (1) disrespects a client; (2) gets in a physical altercation with a client; (3) sexually harasses a client; (4) receives a major driving violation with a client in the car (e.g., ticket for reckless driving); (5) drives under the influence; (6) engages in malicious client solicitation; (7) allows a third party to drive the vehicle; (8) makes a trip request from a client’s Uber account; or (9) drives with a revoked, expired or missing document.<sup>166</sup> Although these actions represent the most serious offenses an Uber driver can make while working, there are other practices that Uber drivers must consider in order to avoid employment termination.

An Uber driver can also be terminated if any “major” or “minor” quality issues have been reported about the user’s experience.<sup>167</sup> Uber takes major issues very seriously and will take immediate action if reported more than once in every 180 trips.<sup>168</sup> Major quality issues include: (1) arguing with a client; (2) making a client wait unnecessarily; (3) refusing to drive a client to the desired destination; (4) talking on the phone or texting while driving; (5) major vehicle maintenance issues; (6) passive client solicitation, such as handing out business

164. *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 172 (Cal. 2014).

165. *See S. G. Borello & Sons, Inc. v. Dep’t of Indus. Rel.*, 48 Cal. 3d 341, 351 (1989) (citing *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 949 (1970)).

166. Declaration of Shannon Liss-Riordan in Support of Plaintiffs’ Opposition to Def. Uber Tech. Inc.’s Motion for Summary Judgment Ex. 13 at 8, *O’Connor v. Uber Tech. Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (order denying motion for summary judgment) (No. 3:13-CV-03826) [hereinafter Declaration of Liss-Riordan 13].

167. *Id.*

168. *Id.*

cards or branding equipment in the backseat; and (7) accepting cash from a client.<sup>169</sup> Moreover, Uber may terminate a driver if more than one minor issue has been reported about a user's experience in every forty-five trips.<sup>170</sup> Some of the minor issues include: (1) dress code infractions or hygiene issues; (2) losing an iPhone or other Uber equipment; (3) picking up the wrong client because the driver failed to verify the client's name; (4) not responding to a client or Uber phone call; and (5) demonstrating a lack of city knowledge.<sup>171</sup> Uber can also take action against a driver if he calls clients too frequently before a trip, irritates clients during a trip by simply talking too much, or drives with a non-Uber passenger aboard.<sup>172</sup>

As if the number of ways that Uber drivers can be terminated is not exhaustive enough, Uber will also terminate those "who are in the bottom 5% of all Uber drivers and not performing up to [Uber's] highest standards."<sup>173</sup> Uber is able to identify the bottom five percent of Uber drivers because both riders and drivers rate their experience at the end of every trip.<sup>174</sup> Uber then reviews this feedback to ensure its drivers are improving upon the Uber experience they deliver.<sup>175</sup>

Second, Uber has control over the selection and qualification of its drivers. All driver-partners wanting to use the Uber platform are required to undergo an extensive background check.<sup>176</sup> In addition to being at least twenty-one years old, Uber drivers must retain a personal driver's license and vehicle registration.<sup>177</sup> In addition, drivers must complete Uber's application process, which includes a city knowledge exam and personal interview.<sup>178</sup> Assuming the Uber driver passes both the background check and personal interview, the driver must further

169. *Id.*

170. *Id.*

171. *Id.*

172. Declaration of Liss-Riordan 13, *supra* note 166, at 8.

173. Declaration of Shannon Liss-Riordan in Support of Plaintiffs' Opposition to Def. Uber Tech. Inc.'s Motion for Summary Judgment Ex. 29 at 2, *O'Connor v. Uber Tech. Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (order denying motion for summary judgment) (No. 3:13-CV-03826) [hereinafter Declaration of Liss-Riordan 29].

174. See Nairi, *Feedback is a Two-Way Street*, UBER: NEWSROOM (Apr. 23, 2014), <https://newsroom.uber.com/feedback-is-a-2-way-street/ride/>; *Rider Safety*, UBER, <https://www.uber.com/ride/safety/> (last visited Oct. 5, 2016).

175. See Declaration of Liss-Riordan 29, *supra* note 173, at 2.

176. See Joe Sullivan, *Details on Safety*, UBER: NEWSROOM, <https://newsroom.uber.com/details-on-safety/> (last updated May 12, 2016).

177. *Driving Jobs vs Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited Oct. 5, 2016).

178. *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015) (order denying motion for summary judgment).

comply with numerous vehicle requirements.<sup>179</sup> Uber's vehicle standards vary widely depending on the city a driver chooses; however, an Uber driver must drive a vehicle made in the year 2001 or newer in order to be eligible for employment.<sup>180</sup>

Third, Uber exercises significant control over the amount of revenue it earns from its drivers and riders. Specifically, Uber bills its riders directly for the entire fare charged—a fare that is fixed by Uber without any input from its drivers.<sup>181</sup> In the event that there is a higher demand of riders than Uber drivers on the road, Uber also controls the “surge price”<sup>182</sup> to counterbalance the supply and demand of Uber requests.<sup>183</sup> “Surge pricing usually kicks in on busy holidays like Halloween and New Years as well as for big city special events such as sporting events or concerts.”<sup>184</sup> Uber also charges its users a Safe Ride Fee: a fee that supports the operation of the UberX platform, including a background check process, incident response, and other operational costs.<sup>185</sup> Moreover, Uber assumes the responsibility of setting fixed additional charges such as tolls, airport surcharges, and cleaning fees.<sup>186</sup>

Despite these considerations, opponents may argue that Uber's business model is distinguishable from an employer-employee relationship under the traditional common law right-to-control test. For example, Uber drivers can freely choose their own work schedule and work as many hours as they want, provided that Uber drivers work at least one day every six months.<sup>187</sup> Uber drivers also have the freedom

179. See *Driving Jobs vs Driving with Uber*, *supra* note 177.

180. *Uber Driver Partner—Full Time Independent Contractor*, UBER: NEWSROOM (Mar. 28, 2014), <https://newsroom.uber.com/drive-with-uber-earn-cash-with-your-car-4-3-4-3/>.

181. See *O'Connor*, 82 F. Supp. 3d at 1142.

182. Dan Kedmey, *This Is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), <http://time.com/3633469/uber-surge-pricing/> (“Uber's pricing algorithm automatically detects situations of high demand and low supply and hikes the price in increments, depending on the scale of the shortage. [Surge] prices are supposed to make drivers more likely to bite, putting more Uber cars on the road when they're most needed.”).

183. See *What is Surge Pricing?*, UBER: HELP, <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdce119> (last visited Oct. 5, 2016).

184. Declaration of Shannon Liss-Riordan in Support of Plaintiffs' Opposition to Def. Uber Tech. Inc.'s Motion for Summary Judgment at Ex. 14 at 2, *O'Connor v. Uber Tech. Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (order denying motion for summary judgment) (No. 3:13-CV-03826) [hereinafter Declaration of Liss-Riordan 14].

185. See *Booking Fee*, UBER, <https://help.uber.com/h/a4274769-9096-424e-a3d8-4bdc0fa87fc8> (last visited Sept. 26, 2016).

186. See *Do Riders Pay Tolls or Surcharges*, UBER: HELP, <https://help.uber.com/h/776390a5-b197-412a-98c4-011c85799dc1> (last visited Sept. 26, 2016).

187. See *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015) (order denying motion for summary judgment).

to work for Uber solely at their convenience, whereas employees commonly adhere to a regimented work schedule. Moreover, Uber drivers provide their own service vehicle and enjoy the luxury of choosing whether to accept a rider's trip request. This is crucial during times when an Uber rider requests a long-distance trip that may not be suitable to the Uber driver, although Uber expects its drivers to accommodate riders no matter where they want to travel.<sup>188</sup> Finally, Uber's website suggests that both parties arguably intend to create an independent contractor relationship, stipulating that drivers can "earn great money as an independent contractor."<sup>189</sup>

Nevertheless, Uber drivers should be classified as employees under the right-to-control test for one reason: Uber retains *some* degree of control over its drivers at *all* times.<sup>190</sup> This is because the right-to-control test measures how much control the employer retains the right to exercise, not how much control the employer chooses to exercise.<sup>191</sup> Prior to employment, Uber controls the selection process and qualification standards for all of its drivers, such as background checks, vehicle model, vehicle year, etc. Uber drivers must too maintain a high level of professionalism once employed, such as driving a clean vehicle and greeting clients dressed in professional business attire.<sup>192</sup> Uber vehicles must also be free of aesthetic issues.<sup>193</sup> Finally, Uber controls the revenue it earns from its drivers and retains the ability to terminate its drivers.

### B. The Economic Realities Test

Under the economic realities test, an employee is defined as someone who is economically dependent on its employer for continued employment.<sup>194</sup> The purpose of this test is to protect those who primarily look to their employer for both financial security and well-

188. Declaration of Liss-Riordan 14, *supra* note 184, at 4 (during these circumstances, Uber asks that its drivers politely help their riders understand the reason for why the driver cannot accommodate such a long journey).

189. *Uber Needs Partners Like You*, UBER, <https://get.uber.com/cl/faq/> (last visited Feb. 20, 2015).

190. *See, e.g., Ayala v. Antelope Valley Newspapers Inc.*, 327 P.3d 165, 172 (Cal. 2014) ("Significantly, what matters under the common law is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise.").

191. *Id.*

192. Declaration of Liss-Riordan 13, *supra* note 166, at 3.

193. *Id.* at 8.

194. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *see Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

being.<sup>195</sup> Unlike the traditional common law right-to-control analysis, Uber drivers should be classified as independent contractors under the economic realities test for several reasons: (1) Uber drivers have a significant opportunity for profit based on their managerial skill; (2) Uber drivers invest a significant amount of capital for employment; and (3) Uber drivers are not involved in a permanent working relationship.

First, Uber drivers have a significant opportunity for profit based on their managerial skill. Opponents may argue that, outside of racing down the Indianapolis Motor Speedway, driving a car is a relatively straightforward task that requires little expertise. After all, how talented does an Uber driver have to be in order to accept a rider's trip request at the press of a button? Nevertheless, Uber drivers can skillfully increase their profits by choosing to work when there is a surge price on rides. Coupled with a strong familiarity of any particular geographical area, Uber drivers can be competitively compensated amongst other drivers for identifying the areas where there is a higher demand for Uber services. Contrary to the Uber driver who possesses these managerial skills, the inexperienced Uber driver may unknowingly work during times when there is not a surge charge and in areas where there is no demand.

Second, the fact that Uber drivers invest a significant amount of capital weighs in favor of an independent contractor relationship. Not only are Uber drivers required to provide their own vehicle, Uber drivers are also required to finance certain transactions in order to retain employment. In Chicago, for example, Uber drivers are required to finance the costs of servicing their vehicle by a certified auto mechanic on an annual basis.<sup>196</sup> Opponents may argue that Uber provides its riders with the most critical tool of the business—an iPhone with the Uber application. Nevertheless, this is an optional service that is financed by the Uber driver, as the driver is responsible for paying a weekly fee to cover the iPhone's data costs.<sup>197</sup>

Third, Uber drivers are not involved in a permanent working relationship. Unlike the agricultural laborers in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, Uber drivers are not seasonal

195. Barron, *supra* note 9, at 460.

196. *Getting Started*, UBER, <http://www.uberpartnerschicago.com/vehicle-inspections/> (last visited Feb. 20, 2016).

197. *Device Fees and Deposits*, UBER: HELP, <https://help.uber.com/h/709e4c55-2319-4338-af2b-a8fc12a60e25> (last visited Oct. 5, 2016).



workers who return to work for Uber on a routine basis. Rather, Uber drivers have great discretion in structuring their work schedules, having the ability to decide when and where they want to work. The freedom to create a desired work schedule as an Uber driver has undoubtedly become one of Uber's most appealing aspects. One ad on Uber's website reads: "Need something outside the 9 to 5? As an independent contractor with Uber, you've got freedom and flexibility to drive whenever you have time."<sup>198</sup> Another ad similarly reads: "This is a perfect driving opportunity for independent contractors."<sup>199</sup> These advertisements not only illustrate that Uber drivers are engaged in a nonpermanent working relationship, but also suggest that Uber applicants are fully aware of their independent contractor classification.

Nevertheless, critics may assert that the fifth factor under the economic realities test—the permanence of the working relationship<sup>200</sup>—actually supports classifying Uber drivers as employees rather than independent contractors. Although Uber advertises that its drivers are engaged in a nonpermanent working relationship, some drivers rely on Uber for permanent employment. Opponents may also suggest that the last factor under the economic realities test—whether the services rendered are a crucial part of the employer's business operations<sup>201</sup>—weighs against classifying Uber drivers as independent contractors. After all, Uber's business plan is primarily funded by taxing drivers a substantive twenty-five percent of their profits,<sup>202</sup> which suggests that Uber drivers are a crucial part of Uber's business as a whole.

Nevertheless, the sharing economy has caused both factors to be outdated for employment classification purposes. The permanence factor is outdated because the sharing economy, by definition, encourages employers to essentially lease workers for limited purposes or periods of time.<sup>203</sup> Although Uber drivers may rely upon Uber for permanent employment, the judicial system must recognize that Uber drivers are rational thinkers who understand the dynamics of their own working relationship. Moreover, it would be unduly burdensome for the judicial system to address an overwhelming number of lawsuits

198. *Uber Needs Partners Like You*, *supra* note 189.

199. *Uber Driver Partner—Full Time Independent Contractor*, *supra* note 180.

200. *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985).

201. *Id.*

202. *UberX Basics*, *supra* note 36.

203. *Berger*, *supra* note 5, at 303.

pertaining to whether Uber drivers permanently rely on Uber for employment classification purposes.

Similarly, the application of the latter factor is no longer significant when contrasted with other businesses in the sharing economy. Arguably, *any* service rendered by a worker will have some impact on its employer's business operations. This is because employers hire workers—whether employees or independent contractors—for the purpose of providing business services. If courts were to continue using this factor as part of any economic reality analysis, every employment classification case would weigh in favor of an employer-employee relationship. Therefore, this factor is outmoded and should not be considered under the economic realities test.

### C. The Entrepreneurial Opportunity Test

While all of the considerations of the traditional common law right-to-control analysis remain in play, recall that the entrepreneurial opportunity test minimizes an employer's right to control by emphasizing entrepreneurialism.<sup>204</sup> As evidenced by the holding in *FedEx Home Delivery*,<sup>205</sup> this results in an independent contractor classification based on the slightest discovery of a worker's entrepreneurial opportunity.<sup>206</sup> In other words, "[t]here is no inquiry into the quality or limitations on the potential entrepreneurialism; instead, the only consideration is whether the entrepreneurial opportunity provides the possibility of gain, no matter what size, and no matter how dependent the worker is on the employer."<sup>207</sup> Following this approach, Uber drivers should be classified as independent contractors.

All of the factors that support an independent contractor classification under the entrepreneurial opportunity test have already been addressed under the previous tests—the right-to-control test and the economic realities test. For example, Uber drivers have the opportunity to significantly increase their profits by choosing to work when there is a surge price in areas with the highest demand for Uber drivers. Similar to the FedEx drivers that were classified as independent contractors in *FedEx Home Delivery*, Uber drivers also must purchase

204. See Jeffrey E. Dilger, *Pay No Attention to the Man Behind the Curtain: Control as a Nonfactor in Employee Status Determinations Under FedEx Home Delivery v. NLRB*, 26 A.B.A. J. LAB. & EMP. L. 123, 140 (2010).

205. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009).

206. Dilger, *supra* note 204, at 140.

207. *Id.* at 141.

their service vehicle, allowing drivers to use their vehicle for both business and personal purposes. Although the D.C. Circuit did not engage in any inquiry as to the quality of the entrepreneurial opportunity gained from owning a service vehicle, the court held that ownership of equipment weighed in favor of an independent contractor relationship.<sup>208</sup> Finally, Uber applicants must sign a contractual agreement that specifies the status of their independent contractor relationship.<sup>209</sup>

Opponents may argue that Uber's business is distinguishable from an independent contractor relationship. For example, Uber requires: (1) driver conformance to a certain dress code and grooming standards;<sup>210</sup> (2) vehicles of a particular year and within a specific size range;<sup>211</sup> and (3) vehicles to display Uber's "U" logo in a way that complies with certain ordinances.<sup>212</sup> Uber mandates that all drivers have some form of driving insurance, although the type of insurance depends on what type of vehicle the Uber driver owns.<sup>213</sup> Moreover, Uber provides incentive pay to its drivers and is responsible for setting fixed additional charges in limited instances.<sup>214</sup>

Nevertheless, these considerations viewed from an entrepreneurial perspective simply reflect the differences in the type of service Uber drivers provide, not the differences in their employment relationship. Similar to the court's holding in *FedEx Home Delivery*, "constraints imposed by customer demands and government regulations do not determine the employment relationship."<sup>215</sup> In part, this is because the law controls Uber drivers, not Uber. Likewise, "an incentive system designed 'to ensure that the drivers' overall performance meets the company standards' . . . is fully consistent with an independent contractor relationship."<sup>216</sup> Although critics may argue that Uber drivers perform a function that is a regular and essential part of Uber's business operations, this factor is not determinative of an employer-employee relationship. As previously referenced under the economic

208. *FedEx Home Delivery*, 563 F.3d at 498.

209. Although this factor is unrelated to entrepreneurialism, this goes to both parties' intent. *See, e.g., C.C. E., Inc. v. NLRB*, 60 F.3d 855, 858-59 (D.C. Cir. 1995).

210. Declaration of Liss-Riordan 13, *supra* note 166, at 2.

211. *Driving Jobs vs Driving with Uber*, *supra* note 177.

212. *UberX Basics*, *supra* note 36.

213. *See Nairi, Insurance for Ridesharing with Uber*, UBER: NEWSROOM (Feb. 10, 2014), <https://newsroom.uber.com/insurance-for-uberx-with-ridesharing/>.

214. *See Do Riders Pay Tolls or Surcharges?*, *supra* note 186.

215. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009).

216. *Id.* at 502 (quoting *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995)).

realities analysis, this factor is outmoded and should not be considered by the courts.

#### IV. CONCLUSION

The right-to-control test, the economic realities test, and the entrepreneurial opportunity test all provide a solid foundation for analyzing employment relationships. Based on these tests, how should Uber drivers be classified for employment classification purposes? Considering that the Uber drivers' class-action lawsuit will be governed by California's traditional economic realities test, Uber drivers should be classified as independent contractors.

The traditional economic realities test will, however, continue to create significant challenges for courts in light of the sharing economy.<sup>217</sup> Arguably, the sharing economy has caused two factors to become outmoded for employment classification purposes: (1) whether a worker's services are an integral part of the employer's business operations; and (2) whether a worker is engaged in a permanent working relationship. The former factor is outmoded because employers hire all workers—whether employees or independent contractors—for the purpose of providing business services, which weighs in favor of an employer-employee relationship. The latter factor is outmoded because the sharing economy, by definition, encourages employers to lease workers for limited purposes or periods of time.<sup>218</sup> Therefore, the legislature should address these concerns and enact new factors that serve as a better representation of the sharing economy. Some of these additional considerations may include whether: (1) the proportion of income is shared or distributed by both parties; (2) the worker finances equipment maintenance and repair; and (3) alternatives are available to both parties. Until the sharing economy has been considered, Uber and its fleet of more than 160,000 Uber drivers<sup>219</sup> will have to wait for a jury to decide the fate of their employment relationship.

217. See *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (order denying motion for summary judgment).

218. Berger, *supra* note 5, at 303.

219. Brian Solomon, *The Numbers Behind Uber's Exploding Driver Force*, FORBES (May 1, 2015, 12:27 PM), <http://www.forbes.com/sites/briansolomon/2015/05/01/the-numbers-behind-ubers-exploding-driver-force/#53f5ea4c4901>.