

# Michigan Telecommunications and Technology Law Review

---

Volume 22 | Issue 2

---


2016

## A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy

Jennifer Pinsof

*University of Michigan Law School*

Follow this and additional works at: <http://repository.law.umich.edu/mttlr>

 Part of the [Common Law Commons](#), [Labor and Employment Law Commons](#), [Science and Technology Law Commons](#), and the [Transportation Law Commons](#)

---

### Recommended Citation

Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341 (2016).

Available at: <http://repository.law.umich.edu/mttlr/vol22/iss2/6>

This Note is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Telecommunications and Technology Law Review by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# A NEW TAKE ON AN OLD PROBLEM: EMPLOYEE MISCLASSIFICATION IN THE MODERN GIG-ECONOMY

*Jennifer Pinsof\**

Cite as: Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. \_\_\_\_ (2016).

*This manuscript may be accessed online at [repository.law.umich.edu](http://repository.law.umich.edu).*

## ABSTRACT

*For decades, U.S. labor and employment law has used a binary employment classification system, labeling workers as either employees or independent contractors. Employees are granted a variety of legal protections, while independent contractors are not. However, the explosion of the gig-economy—which connects consumers with underutilized resources—has produced a growing number of workers who do not seem to fit into either category. Though far from traditional employees, gig-workers bear little resemblance to independent contractors. Forced to choose, however, most gig-economy companies label their workers as independent contractors, depriving them of many basic worker-protections. Gig-workers have turned to the courts, hoping to secure employee protections, and judges have struggled to apply outdated multi-factor tests to resolve these disputes. Using Uber drivers as a model for workers in the gig-economy, this note argues that such workers are properly classified as employees under the common-law control test, the prevailing legal standard today. However, because of outdated factors and widespread confusion regarding the current employment classification system, reform is necessary. The ABC Test, primarily used in state unemployment-insurance cases, offers the best alternative. The ABC Test limits the number of factors for courts to apply, eliminates the most manipulable and outdated factors, and adds a presumption in favor of employee status. Reforming the classification system in this way will ensure that the law treats gig-economy workers, a growing portion of the modern workforce, as employees with the support of necessary benefits and protections.*

---

\* J.D., University of Michigan, 2017 (expected); B.A., Government, Cornell University, 2012. Special thank you to Professor Rebecca Eisenberg, Professor Nina Mendelson, and the students in the Scholarship Seminar for your valuable contributions and encouragement. I also thank Professor Michael Bloom, without whom I never would have had the opportunity to write this note, and Alex Hartzband for his valuable insights on labor law. Finally, I am grateful for the editorial support of the MTTLR notes editors.

INTRODUCTION .....	342
I. BACKGROUND ON WORKER CLASSIFICATION .....	344
A. <i>What is an Employee? What is an Independent Contractor? Why does it Matter?</i> .....	345
B. <i>The Common Law Control Test and the Need for Reform</i> .....	347
II. PROBLEMS WITH THE CURRENT CLASSIFICATION SYSTEM .....	349
A. <i>Rampant Misclassification</i> .....	349
1. Confusion and Ambiguity in the Law .....	349
2. Employers' Economic Motivations .....	351
B. <i>The Rise of the Gig-Worker</i> .....	352
C. <i>The Effects of a Growing Number of Independent Contractors</i> .....	353
III. COURTS APPLYING THE COMMON LAW CONTROL TEST SHOULD CLASSIFY GIG-WORKERS AS EMPLOYEES .....	354
A. <i>Control &amp; Supervision</i> .....	355
B. <i>Integration</i> .....	358
C. <i>Skill Level</i> .....	360
D. <i>Continuing Relationship</i> .....	361
E. <i>Tools</i> .....	361
F. <i>Location</i> .....	363
G. <i>Method of Payment</i> .....	364
H. <i>Intent</i> .....	364
I. <i>Employment by More than One Company</i> .....	365
J. <i>Type of Business</i> .....	366
IV. A GUIDE TO LEGISLATIVE REFORM .....	367
A. <i>Presumption of Employment</i> .....	367
B. <i>Limited Number of Factors</i> .....	368
C. <i>A Single Test</i> .....	368
D. <i>A Lesson from the States: the ABC Test</i> .....	369
V. CONCLUSION .....	370
VI. APPENDIX .....	372

## INTRODUCTION

In 1914, the Lehigh Valley Coal Company (“Lehigh”) argued before Judge Learned Hand that, despite its name, it was “not in the business of coal mining at all.”<sup>1</sup> Instead, Lehigh claimed simply to own mines and sell the extracted product—actual mining was contracted out to independent laborers.<sup>2</sup> Under this arrangement, Lehigh gave miners access to company mines and would later purchase the coal these workers acquired.<sup>3</sup> Thus, Lehigh argued, it owed no duty to these workers, who were not employees, and therefore not protected by the workers’ compensation statute at issue in the

1. *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914).

2. 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, 312 (2001).

3. *Lehigh Valley Coal*, 218 F. at 552.

case.<sup>4</sup> The argument that a mine-owning, coal-selling company is “not in the business of coal mining at all” seems farfetched—perhaps even ridiculous. Judge Hand certainly thought so when he ruled for the plaintiff, stating it would be “absurd to class[ify] such a miner as an independent contractor”<sup>5</sup> given that miners alone “carr[y] on the company’s only business.”<sup>6</sup>

Today, more than a century later, companies continue to make similar claims. Uber Technologies, Inc. (“Uber”), a company that allows consumers to hail rides using an online mobile application, provides a recent example. In response to various suits brought by Uber drivers challenging their independent contractor status, the tech start-up has raised uncannily similar arguments to those Lehigh brought before Judge Hand over 100 years ago. For example, in a case brought before the California Labor Commissioner’s Office in June 2015, Uber argued it was not a transportation company at all, but rather “a neutral technological platform designed simply to enable [independent] drivers and passengers to transact the business of transportation.”<sup>7</sup>

Cases like these two, where the court is asked to determine whether workers are contractors or employees, are no rare breed in American jurisprudence. For over 100 years, America has classified workers into these two categories, yet the law continuously fails to do so in a uniform, predictable, and purposeful way. Despite this legal confusion, the line between an employee and an independent contractor is crucial, since the distinction often determines whether labor and employment statutes cover individuals.<sup>8</sup> Thus, scholars, courts, and legislatures alike have strived to clarify and reform the binary worker classification system, largely to no avail.<sup>9</sup>

While employment classification is an old legal conundrum, the rise of the “gig-economy” is now pushing America’s broken system to the forefront of policymakers’ and courts’ agendas with new force. The gig-economy, also known as the sharing, on-demand, or platform economy, is comprised of companies that typically use technology to connect consumers with un-

---

4. See Carlson, *supra* note 2, at 312 n.78 (“The exact nature of the statute is unclear. The claim was for injuries suffered in an accident at the mine, and Judge Hand refers only once to the underlying statute, without citation.”).

5. *Lehigh Valley Coal*, 218 F. at 552.

6. *Id.* at 553.

7. *Berwick v. Uber Techs. Inc.*, Case No. 11-46739 EK, Cal. Labor Comm’n (June 3, 2015).

8. For an extensive list of labor and employment laws that apply to “employees” and not independent contractors, see Appendix.

9. See Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 317 (2011) (“It is hardly novel to argue that the current legal regime for determining coverage under the NLRA, as well as other remedial labor and employment statutes, urgently requires legislative reform.”).

derutilized resources.<sup>10</sup> Gig-economy companies, such as Uber, Airbnb, and thredUP, connect non-owners interested in accessing these resources—here, cars, spare bedrooms, and old clothes respectively—with owners willing to allow access for a small fee. The explosion of such companies has produced a growing number of gig-workers who do not seem to fit into either of the binary worker categories—though far from traditional employees, they also bear little resemblance to independent, small-business-operating contractors.<sup>11</sup> Thus, the need for employment classification reform becomes ever more pressing.

This note argues that members of the gig-economy are properly classified as employees rather than contractors under the current legal standard. However, it further contends that because of outdated factors and widespread confusion regarding the complexity of various standards, reform to the employment classification system is necessary. Reforming the test will ensure that gig-economy workers, a growing portion of the workforce, will fall more clearly into the employee category and gain the necessary benefits and protections that come with such a classification. Part I outlines the employment classification system and its origins. Part II details how the rampant culture of employee misclassification and the rise of the gig-economy each contribute to the increasing number of workers classified as independent contractors—and suggests this is problematic in a society that predicates worker protections on employment status. Part III focuses on the common law control test, which determines worker classification under several federal and state labor and employment statutes. Using Uber drivers as a model for workers in the gig-economy, it suggests that gig-workers are properly classified as employees under the common law test. Part IV suggests possible improvements to the employment classification system that will help clarify the law and secure protections for workers in the gig-economy.

## I. BACKGROUND ON WORKER CLASSIFICATION

Almost since its inception, America has classified its workers into legal categories.<sup>12</sup> Even before the Industrial Revolution, the “master-servant” relationship required clear delineation, as certain rights and responsibilities were tied to this arrangement.<sup>13</sup> For example, according to Blackstone’s Commentaries, the law surrounding master-servant relationships dictated the rate and method of payment and grounds for termination.<sup>14</sup> Additionally, the

---

10. Joseph Shuford, Note, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: the Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. 301, 302 (2015).

11. *Id.* at 302-03.

12. See Carlson, *supra* note 2, at 302 (“Even the pre-industrial world had some need for classification.”).

13. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*410-20.

14. See *id.*

question of a master's vicarious liability turned on whether his worker was classified as a "servant."<sup>15</sup>

Today, America's binary classification system sorts workers into two categories: employee or independent contractor.<sup>16</sup> A worker's status as an employee or independent contractor has far-reaching effects on that worker's legal rights and responsibilities.<sup>17</sup> Yet, despite the importance of the employee/contractor distinction and the fact that the distinction has been around for so long, these classifications remain ill-defined by both legislatures and courts. Though this definitional problem appears in many contexts and across statutes, this note will focus on the question of who qualifies as an employee for the purpose of providing workers' benefits and protections, as these are at the heart of the legal battles taking place in courts today.

A. *What is an Employee? What is an Independent Contractor?*  
*Why does it Matter?*

The term "employee" appears in a wide range of statutes and common-law rules, and "may very well have a different meaning in each of these contexts."<sup>18</sup> Many labor and employment statutes that provide benefits and protections contingent upon employment status provide little guidance for determining who qualifies as an employee. The Fair Labor Standards Act ("FLSA"), for example, provides a circular definition of an employee as "any individual employed by an employer,"<sup>19</sup> while the National Labor Relations Act ("NLRA") defines it as "any person acting as an agent of an employer."<sup>20</sup> According to the U.S. General Accounting Office ("GAO"), "[w]orkers who must follow instructions on when, where, and how to work are more likely to be viewed as employees."<sup>21</sup> The clearest example of the traditional employee is someone who works for one employer, onsite, on a fixed schedule, for a consistent period of time, and is compensated in wages.<sup>22</sup>

The term "independent contractor" is just as poorly defined, and many labor and employment statutes do not attempt to define independent contrac-

---

15. See *id.*

16. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker 7"* (The Hamilton Project, Discussion Paper No. 2015-10, 2015).

17. For an extensive list of labor and employment laws that apply to employees and not independent contractors, see Appendix.

18. Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 *COMP. LAB. L. & POL'Y J.* 7, 18 (1999).

19. 29 U.S.C. § 203(e)(1) (2015).

20. 29 U.S.C. § 152(3) (2015).

21. U.S. GOV'T ACCOUNTABILITY OFFICE TESTIMONY, GAO/T-GGD-94-194 *TAX ADMINISTRATION: IMPROVING INDEPENDENT CONTRACTOR COMPLIANCE WITH TAX LAWS 2* (1994).

22. See the common law test for an employee, Part I.B.

tor at all. Instead, these statutes simply assign the term to people who do not fit the definition of an employee, making it a catch-all category for the historically small group of workers whose jobs fall outside the traditional employment model. Though lacking a formal definition, there are certain characteristics that many independent contractors have shared throughout history. In feudal society, independent contractors could serve numerous clients simultaneously, and unlike servants, they were not devoted to a single master.<sup>23</sup> Likewise, modern independent contractors today enjoy more flexibility than do traditional employees. Just as feudal independent contractors were, practically speaking, their own masters, modern independent contractors are their own bosses; they can choose where they work, when they work, for whom they work, and for what rate of pay they work.<sup>24</sup>

However, while this increased flexibility can be extremely valuable, it comes at a cost. An emblematic independent contractor is one who works without supervision performing a task that falls outside the employers' usual course of business.<sup>25</sup> As such, contractors are generally viewed as self-employed workers providing a particular service—or are sometimes even considered individual small businesses.<sup>26</sup> This means that contractors are responsible for several legal and financial obligations that traditional employees need not consider. For example, independent contractors must pay their own payroll taxes directly to the government, including income taxes and their share of social security.<sup>27</sup> They must provide for their own benefits packages, including disability and health insurance.<sup>28</sup> Independent contractors must also take responsibility to ensure their own job security and sustainable income.<sup>29</sup>

However, the most substantial cost to being an independent contractor is that they are carved out of most labor and employment statutes. Among the benefits that these statutes bestow on employees (but not contractors) are antidiscrimination, wage and hour, and family and medical leave protec-

---

23. See Carlson, *supra* note 2, at 303 (“Not[ ] all workers were ‘servants’ . . . [T]he term ‘independent contractor’ appears to have been associated in early times with the idea of an ‘independent calling’ or a distinct occupation, and early sources suggest that the person in question was not devoted to a single master but was free to serve several clients simultaneously or in seriatim.”).

24. Noah Lang, *Manifesto for a Modern Worker Class: The On-Demand Contractor*, LINKEDIN: PULSE (June 18, 2015), <https://www.linkedin.com/pulse/manifesto-modern-worker-class-on-demand-contractor-noah-lang>.

25. See Brian Muse, *Lawsuits Challenge Classification of Uber Drivers as Independent Contractors*, JDSUPRA BUSINESS ADVISOR (June 3, 2015), <http://www.jdsupra.com/legalnews/lawsuits-challenge-classification-of-96447/>.

26. U.S. GOV'T ACCOUNTABILITY OFFICE TESTIMONY, *supra* note 21, at 2 n.1 (“In fact, independent contractors are small businesses.”).

27. *Id.* at 3.

28. *Id.*

29. *Id.*

tions,<sup>30</sup> unemployment insurance and workers' compensation programs,<sup>31</sup> and the right to unionize.<sup>32</sup> With all of these legal rights riding on a worker's employment status, it is difficult to understate the importance of a clear and consistent way to distinguish between employees and contractors that accurately reflects the modern economy.

### B. *The Common Law Control Test and the Need for Reform*

The common law control test was the first legal standard to emerge to determine which workers fell into which category.<sup>33</sup> It consists of ten factors: control, supervision, integration, skill level, continuing relationship, tools and location, method of payment, intent, employment by more than one company, and type of business.<sup>34</sup> No single factor is dispositive. Courts evaluate each of the ten factors with an eye towards determining which party generally has control over the work process: if the employer controls, the worker is deemed an employee, and if the worker controls, he is deemed an independent contractor.<sup>35</sup>

The common law control test is rooted in traditional agency law. Courts developed the test primarily to resolve liability disputes between workers

---

30. 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, 54-55 (2015).

31. *Id.*

32. See Jenna Amato Moran, Note, *Independent Contractor or Employee?: Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 122 (2010) (“[E]mployees are guaranteed their right to bargain collectively . . . Workers in a contingent arrangement, such as independent contractors, do not enjoy these same benefits.”).

33. Worker classification is relevant under many statutes, and various tests are used to determine classification under such statutes. This note focuses on the traditional common law control test, which applies to the many federal statutes today and is the test on which all others are based. The IRS uses a derivation of the common law control test for the purpose of determining employment tax obligations under the Federal income tax law. It also employs the test to determine who is eligible for social security benefits and unemployment insurance under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) respectively. Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. 5 (Jan. 2002). Furthermore, the common law test is used for employment determinations made under the National Labor Relations Act (NLRA), the Immigration Reform and Control Act (IRCA), and the Employee Retirement Income Security Act (ERISA). *Id.* The Supreme Court has also held it should be used for any federal statutes that do not explicitly define the term employee. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992). Finally, several state courts use variations of the common law control test to determine employment status under state labor and employment statutes. For example, in *O'Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015), an upcoming class action case against Uber alleging misclassification of its drivers, the Northern District of California will apply the *Borello* test. This test applies eight of the ten common law factors and mentions the remaining two as additional factors for consideration. See *O'Connor*, 82 F. Supp. 3d at 1139.

34. Muhl, *supra* note 33, at 7.

35. *Id.* at 5.



and employers.<sup>36</sup> Considering its origin, the test's focus on *control* makes perfect sense; to determine whether an employer was liable for the torts of a worker, we would want to know how much control the employer asserted over the working conditions of the employee. Masters tightly controlling and supervising their servants were liable to third parties for their workers' mistakes. (After all, they were in charge of the working environment, owned the tools used, directed the tasks at hand, and ultimately had the final say.) In contrast, independent contractors—free from such supervision—remained liable for their own actions.

The common law control test that courts use today is remarkably unchanged from its original formulation, despite the fact that employment relationships have evolved dramatically since the rule's inception. First, the Industrial Revolution brought about the decline of feudal society and the master-servant model.<sup>37</sup> Later, in response to the Great Depression, the New Deal emerged—further altering employment and labor laws to address new concerns facing the modern-day workforce. The New Deal-era labor statutes used the employee/independent contractor distinction—and, implicitly, the common law control test—to define the scope of their coverage. Congress has continued to rely on this distinction in labor statutes throughout the twentieth century. The National Labor Relations Act, Fair Labor Standards Act, Employee Retirement Security Act (“ERISA”), and American’s with Disabilities Act (“ADA”) are just a few statutes that cover workers classified as employees, but not those classified as contractors.<sup>38</sup>

As a result, today many worker benefits and protections hinge on employment status. And although the common law control test emerged before worker protection laws even existed, the test serves to categorize workers under many of these laws. Though some of these statutes have articulated new tests to determine employment status, each of these tests closely reflects the original common law test, sharing several of the same factors and considerations.<sup>39</sup> While the common law control test and the employee/contrac-

---

36. See Carlson, *supra* note 2, at 314-15 (“Initially . . . worker status was truly important only in the event of the occasional accident for which the employer might be held liable. Indeed, the first significant and authoritative statement addressing the problem of worker status, contained in the Restatement (First) of Agency of 1933, distinguished ‘servants’ from ‘independent contractors’ for purposes of respondeat superior liability.”).

37. *Id.* at 303 (“Little of Blackstone’s simple portrait of master-servant relations survived into the industrial revolution, especially in America . . . The Industrial Revolution, with its accompanying explosion of new occupations and ways of organizing work, shattered this simplicity.”).

38. See Jost, *supra* note 9, at 313 n.3. The National Labor Relations Act (NLRA), Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), Employee Retirement Security Act (ERISA), and Americans with Disabilities Act (ADA) are just a few statutes that cover workers classified as employees, but not those classified as contractors.

39. The most common legal tests used to determine whether a worker is an employee or independent contractor include the common law right to control test, the economic realities test, the Internal Revenue Service twenty-factor test, and the ABC Test.

tor distinction may have been adequate to define the scope of labor laws in the twentieth century, they cannot be so easily adapted to twenty-first century employment relationships. The reasons for this are explored in the next section.

## II. PROBLEMS WITH THE CURRENT CLASSIFICATION SYSTEM

A relic of past battles, some of which are no longer relevant, America's employment classification system is in great need of reform. The following section outlines two problems with our current classification system—a culture of misclassification and the rise of workers falling outside of the traditional binary scheme. Both lead to an increasing proportion of workers classified as independent contractors under federal and state statutes.

### A. Rampant Misclassification

Misclassification, or the improper classification of workers as independent contractors instead of employees, greatly contributes to the growing number of people identified as contractors today, both in the United States and abroad. In 2000, a study commissioned by the U.S. Department of Labor (“DOL”) concluded that “nearly a third of all employers misclassified some employees as contractors.”<sup>40</sup> In 2005, the DOL estimated that over ten percent of private sector workers were misclassified.<sup>41</sup> While worker misclassification has been especially prevalent in the construction, trucking, and housekeeping industries, it is present in some form in nearly all sectors.<sup>42</sup> Two related factors drive this phenomenon: ambiguity in the law and employers' economic motivations.

#### 1. Confusion and Ambiguity in the Law

The confusing, ambiguous legal tests for employment classification lead employers to misclassify workers both intentionally and unintentionally.<sup>43</sup> One source of confusion and ambiguity in the current legal framework is the existence of multiple legal standards for determining whether a worker is an

---

40. Caroline Fredrickson, *Is Your Uber Driver an Independent Contractor or an Employee? It Makes a Difference*, L.A. TIMES (June 5, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-fredrickson-are-uber-drivers-independent-contractors-or-employees-20150605-story.html>.

41. *Id.*

42. James Surowiecki, *Gigs with Benefits*, THE NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>.

43. STAFF OF J. COMM ON TAXATION, 110TH CONG., *Present Law and Background Relating to Worker Classification for Federal Tax Purposes* 8 (May 2, 2007) (“A major source of the confusion regarding classification of a worker as an employee or an independent contractor is that present law requires an examination of a variety of factors that often do not result in a clear answer. . . . [I]n close cases the law creates a significant gray area that leads to complexity, with the potential for inadvertent errors and abuse.”), <http://www.irs.gov/pub/irs-utl/x-26-07.pdf>.

employee or independent contractor. Among the standards currently in use are the traditional common law control test,<sup>44</sup> the economic realities test,<sup>45</sup> the Internal Revenue Service (“IRS”) twenty-factor test,<sup>46</sup> and the ABC Test.<sup>47</sup> Courts, government agencies, and state legislatures use these different legal tests to classify workers depending on the agency, jurisdiction, or statute at issue. The IRS, for example, employs a different test than the DOL,<sup>48</sup> and the DOL itself employs numerous tests based on which federal law it is enforcing.<sup>49</sup>

On top of the sheer number of balancing-tests is the fact that each test consists of multiple factors, ranging from as few as three<sup>50</sup> to as many as twenty,<sup>51</sup> that must be considered to determine employee status. The varying and often excessive number of factors raises additional ambiguity and confusion for courts, juries, employers, and workers alike. This problem has not gone unnoticed by Congress. In 2007, a report by the Joint Committee on

---

44. See Karen R. Hamed, et al., *Creating A Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 100 (2010) (“The ‘right to control’ looks at the control the employer has over the employee but not over an independent contractor, focusing on the employer’s right to direct the means of production. The common law ‘right to control’ test is used by courts to determine employee status in various types of cases, including employment discrimination and benefits cases, tax cases, and tort (wrongful act) liability cases. This approach to classification stems from the agency law definition of employee, and relies on a thorough investigation of the facts of each case. This test generally gives employers more latitude to classify workers as independent contractors than do other legal approaches.”).

45. See Moran, *supra* note 32, at 116-17 (The economic realities test “examines whether the worker is not only under the control of the employer . . . but is also economically dependent on the employer. The analysis is [commonly] based on six factors: (1) the extent of the individual’s investment in the equipment and facilities; (2) the individual’s opportunity for profit or loss; (3) the degree of control exercised by others over the individual’s work; (4) the importance of the services to the alleged employer’s business (i.e., whether the service performed is an integral part of the business); (5) the permanency of the relationship between the work and the employer; and, (6) the skill required of the individual in performing the work.”).

46. See STAFF OF J. COMM ON TAXATION, *supra* note 43 (“In 1987, based on an examination of cases and rulings, the [IRS] developed a list of 20 factors that may be examined in determining whether an employer-employee relationship exists. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed; factors other than the listed 20 factors may also be relevant.”).

47. See Deknatel & Hoff-Downing, *supra* note 30, at 65 (The ABC Test is “a simplified version of the common law ‘right to control’ factors with a presumption of employment surmountable only by satisfying a three-prong assessment . . . The three factors as laid out in the Massachusetts and other state statutes are: (A) that ‘the individual is free from direction and control,’ applicable both ‘under his contract for the performance of service and in fact,’ (B) that ‘the service is performed outside the usual course of business of the employer,’ and (C) that the ‘individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.’ ” (citing MASS. GEN. LAWS ch. 149, § 148B(a)(1)-(3) (2016)).

48. See Moran, *supra* note 32, at 108.

49. *Id.* at 107-08.

50. ABC Test.

51. Traditional IRS Test.

Taxation pointed to some of the predominant issues with multi-factor tests, specifically in the employment classification context. The report stated:

Under the common-law test, some of the relevant factors may support employee status, while some may indicate independent contractor status, and there are no rules for the weight that any particular factor is given. In addition, some of the relevant factors involve an examination of objective facts, while others involve an examination of subjective facts or an examination of a combination of objective and subjective facts.<sup>52</sup>

Under such a system, reasonable people may differ as to the correct classification of an individual when given a certain set of facts. For example, an employer acting in good faith may reasonably classify his workers as contractors, but an IRS agent or judge may reach the opposite conclusion by weighing factors differently.<sup>53</sup> Employers and workers therefore lack meaningful notice, since they cannot predict the assessment of a judge or agency in any meaningful way.<sup>54</sup>

Another problem with the multi-factor approach is that despite legislatures' attempts to update the factors to prevent misclassification,<sup>55</sup> the continuous modernization of the economy makes many factors increasingly less relevant and more manipulable. For example, given the increase in popularity of telecommuting, or working remotely, the location of the work factor is outdated and easily manipulated in favor of independent contractor status.<sup>56</sup> The existence of multiple standards and numerous, outdated factors results in an unpredictable, overly complex classification system that leaves a growing number of workers unprotected.

## 2. Employers' Economic Motivations

Employers' economic considerations also lead to an increase in the number of workers misclassified as independent contractors, even when such a relationship does not exist.<sup>57</sup> Misclassification is often motivated by incen-

---

52. See STAFF OF J. COMM ON TAXATION, *supra* note 43, at 8.

53. *Id.*

54. *Id.*

55. See, e.g., Deknatel & Hoff-Downing, *supra* note 30, at 58 ("Twenty-two states have passed one or more statutes between 2004 and 2012 to alter their prior requirements for designating independent contractors or to alter the enforcement structure or penalties used against employers who fail to do so correctly.").

56. See *infra* Parts III.F and III.G.

57. Employers in competitive industries have particularly strong economic incentives to misclassify employees as contractors in order to obtain competitive advantages over their competitors. This in turn challenges competitors to make similar moves to avoid an unfair playing field both at home and abroad. See DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2015-1, APPLICATION OF THE FAIR LABOR STANDARDS ACT'S "SUFFER OR PERMIT" STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRAC-

tives to minimize the cost of labor and limit employer liability.<sup>58</sup> When employers classify employees as independent contractors, they avoid the costs of payroll taxes, minimum wage, and overtime; the risks of employment discrimination law; the need to bargain with unions; and the burden of providing unemployment insurance, workers' compensation, or family and medical leave.<sup>59</sup> As a result of these savings, independent contractors are estimated to cost twenty to thirty percent less per worker.<sup>60</sup> To take advantage of these potential cost savings, employers have used various tactics to label workers as independent, for example by manipulating subtle semantic distinctions, exploiting subcontracting structures, or registering workers as independent business entities.<sup>61</sup> They often get away with these tactics by capitalizing on the ambiguity in the law discussed above.<sup>62</sup>

### B. *The Rise of the Gig-Worker*

The growing number of workers classified as independent contractors reflects more than rampant misclassification. The rise of the non-traditional workforce has led to an increase in workers falling outside the traditional employee model—while far from the emblematic nine-to-five employee, gig-workers are not independent business owners either. Though government studies are limited and reflect older data, the most recent GAO study estimated that the non-traditional workforce, broadly defined, comprised 35.3 percent of all employed workers in 2006, and 40.4 percent in 2010.<sup>63</sup> This is a significant increase from a 1999 DOL study, which found that alternative work arrangements comprised only 9.3 percent of America's workforce.<sup>64</sup> Since they are not employees under the statutory definitions in most labor statutes, the majority of these workers are labeled as independent contractors.

---

TORS at 1 (2015) [hereinafter DOL INTERPRETATION]; see also Jost, *supra* note 9, at 315; see also Deknatel & Hoff-Downing, *supra* note 30, at 55 (explaining that businesses following the rules must compete with those “taking unfair advantages to their bottom line by skirting taxes.”).

58. See Moran, *supra* note 32, at 106.

59. See Carlson, *supra* note 2, at 337; see also Deknatel & Hoff-Downing, *supra* note 30, at 53.

60. See Steven Greenhouse, *U.S. Cracks Down on “Contractors” as a Tax Dodge*, N.Y. TIMES (Feb. 18, 2010), [http://www.nytimes.com/2010/02/18/business/18workers.html?page-wanted=all&\\_r=0](http://www.nytimes.com/2010/02/18/business/18workers.html?page-wanted=all&_r=0) (quoting Ohio Attorney General Richard Cordray's estimate).

61. Deknatel & Hoff-Downing, *supra* note 30, at 53.

62. See *supra* Part II.A.1.

63. The GAO defines “non-traditional workforce” as “workers [who] do not have standard work arrangements—permanent jobs with a traditional employer-employee relationship.” U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 4 (2015), <http://www.gao.gov/assets/670/669766.pdf>.

64. U.S. DEP'T OF LABOR, FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY 9 (1999), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1066&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1066&context=key_workplace).

As a growing part of the workforce holds non-traditional forms of employment, fewer and fewer people are protected by the labor and employment statutes that have protected workers for decades. Congress enacted laws like the FLSA under the assumption that most of the workforce would be traditional employees; independent contractor status was not intended to apply to a significant portion of the population. Classifying all gig-economy workers as contractors will result in an increasing number of workers left unprotected by labor and employment laws.

### C. *The Effects of a Growing Number of Independent Contractors*

The rise of independent contractors presents several complications for a society that predicates worker protections on employee status. Independent contractors are not entitled to minimum wage, overtime compensation, unemployment insurance, disability insurance, health insurance, workers' compensation, and other benefits that help secure their health, safety, and wellbeing.<sup>65</sup> They have no social safety net to fall back on.<sup>66</sup> To make matters worse, many workers classified as contractors fail to purchase these forms of insurance individually, as they do not identify as self-employed.<sup>67</sup> The growing number of gig-economy workers, and consequently uninsured workers, creates systemic problems for the country at large.

Another significant harm of expanding the independent contractor category is decreased government tax revenue.<sup>68</sup> When employees are misclassified as independent contractors, unemployment insurance funds, payroll taxes, and workers' compensation funds go unpaid.<sup>69</sup> A series of government studies reveal the sizeable economic impact of misclassification. For exam-

---

65. See Fredrickson, *supra* note 40 ("The societal consequences [of misclassification] are significant, allowing the circumvention of protections that guarantee workers a decent wage, maternity leave, protections from harassment and discrimination — the kinds of things President Obama has characterized as 'basic needs,' not bonuses: 'They should be part of our bottom line as a society.'"); U.S. GOV'T ACCOUNTABILITY OFFICE TESTIMONY, *supra* note 21, at 3 ("Independent contractors themselves must provide for any benefit packages, such as life and health insurance, they choose to obtain.").

66. Hamza Shaban, *Senator Warner Calls For New Policy To Address On Demand Economy*, BUZZFEED (June 4, 2015), <http://www.buzzfeed.com/hamzashaban/on-demand-economy-collides-with-presidential-politics-in-war#.ge4m0xy5Y> (In the words of Senator Mark Warner, uninsured gig-workers "may be doing extraordinarily well — until they're not, and then there is nothing to catch them until they end up, candidly, back on the taxpayer's dime.").

67. Jacquelyn Smith, *Self-Employment Rates Are Down Since the Recession, but May be on the Rise Again Soon*, FORBES (Feb. 6, 2014), <http://www.forbes.com/sites/jacquelyn-smith/2014/02/06/self-employment-has-declined-since-the-recession-but-it-may-be-on-the-rise-again-soon/#498983fa7e56> (stating that only 6.6% of reported jobs were self-employed).

68. See DOL INTERPRETATION, *supra* note 57.

69. See Deknatel & Hoff-Downing, *supra* note 30, at 55; see also A.B.A., *Employee Misclassification Can Lead to Big Penalties for Employers*, A.B.A. E-NEWSLETTER (July 2011), <https://www.americanbar.org/newsletter/publications/youraba/201107article05.html> ("A 2009 study by the treasury inspector general estimated that misclassification costs the

ple, the New York Department of Labor's Unemployment Insurance Division audits from 2002 through 2005 revealed an average of over 175 million dollars per year in underreported taxes to the state's unemployment insurance fund.<sup>70</sup> In addition, the Colorado Department of Labor and Employment estimated a 167 million dollar loss in income tax revenues annually due to misclassification.<sup>71</sup> The lack of tax revenue has two causes. First, employers avoid paying unemployment taxes and a portion of social security taxes by classifying workers as independent contractors.<sup>72</sup> Second, workers classified as independent contractors often do not recognize themselves as self-employed and thus fail to pay the full amount of their federal tax contributions themselves.<sup>73</sup> It is also more difficult for independent contractors to successfully pay their taxes, as tax collection is more effective at the organization level rather than at the individual level.<sup>74</sup>

### III. COURTS APPLYING THE COMMON LAW CONTROL TEST SHOULD CLASSIFY GIG-WORKERS AS EMPLOYEES

The many shortcomings of the antiquated worker classification system used in America today demonstrate a serious need for legislative reform. Meanwhile, gig-economy workers have already turned to the courts in search of employee status, and judges must work within the current legal

---

United States \$54 billion in underpayment of employment taxes and \$15 billion in unpaid FICA and unemployment taxes.") (emphasis in original).

70. Linda H. Donahue, James Ryan Lamare & Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, CORNELL UNIVERSITY, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS (Feb. 2007), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports>.

71. COLO. DEP'T OF LABOR AND EMP'T, 09-1310, *Misclassification of Employees as Independent Contractors*, ANN. COMPLIANCE REP. 11 (June 2, 2011), [https://www.carpenters.org/Libraries/Documents\\_PDFs/Colorado\\_Annual\\_Compliance\\_Report\\_6-11.sflb.ashx](https://www.carpenters.org/Libraries/Documents_PDFs/Colorado_Annual_Compliance_Report_6-11.sflb.ashx).

72. U.S. GOV'T ACCOUNTABILITY OFFICE TESTIMONY, *supra* note 21, at 2-3 ("For workers classified as employees, the employer must withhold and deposit income and social security taxes from employee wages. The employer is also required to pay unemployment taxes and a share of social security taxes . . . In contrast, independent contractors—not the employer—have to take responsibility for their taxes, benefits, and income and job security.").

73. *Id.* at 1-4 ("Independent contractors tend to have lower tax compliance than employees . . . IRS studies since the 1970s have consistently documented a difference in tax compliance between employees and self-employed workers such as independent contractors. Employees historically reported almost all of their wage income. Conversely, IRS has found that independent contractors, in the mid-1970s, reported 74 percent of their business income. . . An IRS study of independent contractors who should have been classified as employees found that they only reported 62 percent of their income for 1984.' IRS' most recent compliance results. . . continued to show a large difference in compliance rates . . .").

74. *Id.* at 8-9 ("IRS and tax researchers generally agree that these compliance differences can be explained by 'opportunity.' Being subjected to income tax withholding (unlike independent contractors), employees have little opportunity to underreport income and escape detection. Withholding provides employees with a gradual and systematic way to pay their taxes. It also facilitates IRS tax collection by consolidating and filtering periodic tax payments from millions of employees through their employers.").

framework to resolve these disputes.<sup>75</sup> Using Uber drivers as a model for workers in the gig-economy, this section will analyze how courts should think about the employment status of these workers under each factor of the common law control test.<sup>76</sup> Unless and until legal reform occurs, courts should classify Uber drivers and similarly situated workers in the gig-economy as employees under this test.

### A. Control & Supervision

The first factor of the common law control test is known as “the right to control.”<sup>77</sup> Typically, if a worker is found to assert control over the details of his work, he is labeled as an independent contractor under this factor. Conversely, if the employer asserts control over the details of the work, then the worker is classified as an employee. A second, related factor of the common law test is supervision, which classifies workers as employees when they are directly supervised by their employers, and which classifies workers as independent contractors when they are not directly supervised. These two factors in particular are so intertwined that they will be analyzed together.

In response to numerous cases brought against Uber regarding the classification of its workers,<sup>78</sup> Uber claims it does not exercise control over or supervise its drivers and thus drivers should be classified as independent contractors under these two factors.<sup>79</sup> Uber drivers do not work onsite and are not directly overseen by managers. Uber’s recruitment website even boasts the tagline: “NO OFFICE, NO BOSS”<sup>80</sup> and emphasizes its drivers’

---

75. Uber is currently facing employment classification litigation in California, Florida and Massachusetts.

76. Again, although a multitude of statutes make classification of workers relevant and deploy numerous standards, this paper focuses on the traditional common law control test, which applies to many federal statutes today and is the test on which all others are based. *See infra* note 33.

77. The control factor is included in all iterations of the common law control test as well as the economic realities test and the ABC test.

78. Kristen V. Brown, *Uber is Facing a Staggering Number of Lawsuits*, FUSION (Jan. 25, 2016), <http://fusion.net/story/257423/everyone-is-suing-uber/> (reporting that in 2015, 50 lawsuits were filed against Uber in U.S. federal courts.); *see, e.g., O’Connor*, 82 F. Supp. 3d 1133; *Berwick v. Uber Techs. Inc.*, Case No. 11-46739 EK, Cal. Labor Comm’n (June 3, 2015).

79. Defendant’s Motion for Summary Judgment, *O’Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015) (According to Uber’s Motion for Summary Judgment in the *O’Connor* case, the company has “no control over how [workers] conduc[t] their independent businesses, including when and whether to log into the Uber App, what hours to work, where to seek passengers, whether to use other lead generation services simultaneously with the Uber App or their own marketing to locate customers, what car to drive, or what clothing to wear.”).

80. UBER, <https://get.uber.com/cl/drtv/> (last visited Apr. 15, 2016).



freedom to set their own schedules.<sup>81</sup> As long as drivers give at least one ride every 180 days (if on the uberX platform) or every 30 days (if on the Uber-Black platform), they can freely activate Uber's application and begin driving customers.<sup>82</sup> Additionally, Uber claims that drivers can decide whether or not to accept "leads"—or passengers in need of a ride—as they wish and without penalty.<sup>83</sup> Given the contractor-like flexibility that Uber allows its drivers, Uber argues that the control and supervision factors weigh in favor of independent contractor status.<sup>84</sup> However, Uber's claim that it possesses minimal control over its drivers and allows them to operate without supervision is highly questionable, for several reasons.

First, Uber exercises control over its drivers by imposing standards of conduct. For example, the Onboarding Script, written in the language of command, instructs drivers to "make sure [they] are dressed professionally;" "make sure the radio is off or on soft jazz or NPR;" and "make sure to open the door for [the] client."<sup>85</sup> While Uber claims these are merely suggestions, the company's ability to fire drivers for violating these "suggestions" indicates otherwise.<sup>86</sup>

Furthermore, plaintiffs in the *O'Connor* class action suit contest Uber's claim that drivers can reject leads as they see fit. As evidence, they point to the Uber Driver Handbook—a book of instructions given to drivers upon hire, which expressly states: "We expect on-duty drivers to accept all [ride] requests."<sup>87</sup> In addition, the plaintiffs cite to specific emails in which Uber managers suggest a low acceptance rate is grounds for driver termination.<sup>88</sup> It seems drivers are free to reject rides, but in doing so they may be risking their jobs.

Second, Uber asserts control and supervision by monitoring workers through Uber's rating systems. Many workers today work offsite, as technology enables a growing number of employees to telecommute.<sup>89</sup> However, as

---

81. *Id.* ("[Y]ou've got freedom and flexibility to drive whenever you have time. Set your own schedule, so you can be there for all of life's most important moments . . . Uber gives you the freedom to get behind the wheel when it makes sense for you.")

82. *O'Connor*, 82 F. Supp. 3d at 1149.

83. *Id.*

84. Defendant's Motion for Summary Judgment, *O'Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015) ("Plaintiffs admitted at deposition that Defendant has never required them to log in to the Uber App at any particular time or for any amount of time, has never set their work schedules, has never threatened to deactivate their accounts for failure to adhere to a particular schedule, and has never required them to accept any particular trip request received via the Uber App.")

85. *O'Connor*, 82 F. Supp. 3d at 1149 (citing Onboarding Script at 3-6).

86. *Id.*

87. *Id.*

88. *See id.*

89. *See Latest Telecommuting Statistics*, GLOBALWORKPLACEANALYTICS.COM (Jan. 2016), <http://globalworkplaceanalytics.com/telecommuting-statistics> ("50% of the US workforce holds a job that is compatible with at least partial telework and approximately 20-25% of

technology progresses and the economy modernizes, there are new forms of control and supervision that a court or jury must recognize. Though Uber and other gig-economy companies do not directly supervise their employees in the traditional sense, the rise of customer rating systems provides a modern alternative for monitoring workers. Companies can now police their workforce indirectly through ratings systems based on customer input. When Judge Edward Chen denied Uber's motion for summary judgment in the *O'Connor* case, he explained how Uber's rating system is far more than just a customer feedback tool—it is a monitoring system that provides Uber with an “arguably tremendous amount of control over the ‘manner and means’ of its drivers’ performance.”<sup>90</sup> Quoting from Foucault's *Discipline and Punish*, Judge Chen explained that this “state of conscious and permanent visibility assures the automatic functioning of power.”<sup>91</sup> While it is certainly true that Uber does not conduct performance inspections or have managers ride along with drivers, the company still monitors the quality of its drivers during each and every ride through customer ratings.<sup>92</sup> Moreover, many official Uber documents explicitly state that the company monitors customer ratings and feedback and considers such information sufficient grounds for driver discipline or even termination.<sup>93</sup> This is certainly a pervasive means of asserting control and supervision over Uber's workforce.

Lastly, Uber has the right to terminate its employees at will, and courts often find an employer's ability to fire at will to be strong evidence of the right to control.<sup>94</sup> Though Uber claims it can only terminate drivers “with notice or upon the other party's material breach” of employment contracts,<sup>95</sup> the actual text of these contracts allows Uber to fire drivers for any reason, at

---

the workforce teleworks at some frequency . . . Fortune 1000 companies around the globe are entirely revamping their space around the fact that employees are already mobile. Studies repeatedly show they are not at their desk 50-60% of the time . . . Regular work-at-home, among the non-self-employed population, has grown by 103% since 2005.”); see also Kenneth Rapoza, *One In Five Americans Work From Home, Numbers Seen Rising Over 60%*, FORBES (Feb. 18, 2013), <http://www.forbes.com/sites/kenrapoza/2013/02/18/one-in-five-americans-work-from-home-numbers-seen-rising-over-60> (“[S]ome 30 million [Americans] work from a home office at least once a week. And that number is expected to increase by 63% in the next five years . . .”).

90. *O'Connor*, 82 F. Supp. 3d at 1152.

91. *Id.*

92. Josh Dzieza, *The Rating Game*, THE VERGE (Oct. 28, 2015), <http://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden> (“The rating systems used by these companies have turned customers into unwitting and sometimes unwittingly ruthless middle managers. . . . They represent a new level of monitoring, far more pervasive than any watchful boss.”).

93. *O'Connor*, 82 F. Supp. 3d at 1151.

94. See *Ayala v. Antelope Valley Newspapers*, 327 P.3d 165, 171 (Cal. 2014); see also *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (explaining that the right to terminate at will, without cause, is “[s]trong evidence in support of an employment relationship.”).

95. *O'Connor*, 82 F. Supp. 3d at 1148.

any time.<sup>96</sup> The company regularly terminates accounts when drivers fail to meet Uber's standards, and several sources demonstrate that drivers must maintain a rating of 4.5 out of five stars to avoid risk of termination.<sup>97</sup>

By imposing standards of conduct, monitoring workers through ratings systems, and maintaining the ability to fire employees at will, it is clear that Uber asserts extensive control and supervision over its employees. Thus, these two factors weigh in favor of Uber drivers gaining employee status.

### B. *Integration*

Another factor considered by the common law control test is integration, which asks whether the service provided by the worker is an integral part of the employer's business, or in other words, whether the business is conceivable without them.<sup>98</sup> When a worker engages in the regular work of his employer, courts will more likely classify him as an employee.<sup>99</sup> In contrast, an independent contractor's work is less likely to be an integral part of the employer's business, as contractors are often hired to provide some specialized, peripheral skill that the employer's business is not adequately equipped to perform. For example, a plumber offers a special service outside the employer's usual course of business; he is therefore not integral to the employer's business and is correctly classified as an independent contractor.

To rebut the seemingly obvious conclusion that Uber is in the business of transportation—and that its drivers are integral to its business—the company characterizes itself as a software technology company.<sup>100</sup> Uber distinguishes its drivers' work—transportation—from its primary business “of developing mobile lead generation and payment processing software.”<sup>101</sup> The company owns no vehicles and claims it employs no drivers; rather, it develops and licenses proprietary technology.<sup>102</sup> Thus, by claiming it is a

---

96. *Id.* (“Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App . . .”).

97. *Id.* at 1143 (referencing Docket No. 223–29 at 2 (“We will be deactivating Uber accounts regularly of drivers who are in the bottom 5% of all Uber drivers and not performing up to the highest standards. . . . We believe that the removal of underperforming drivers will lead to more opportunities for our best drivers.”); Docket No. 238–2 (spreadsheet listing terminated driver accounts and reasons for termination); Docket No. 238–3 (email from “Uber SF Community Manager” instructing fellow Uber employer to “[g]et rid of this guy. We need to make some serious cuts of guys below 4.5”); Docket No. 238–5 (email terminating underperforming Uber driver because business was “slower than normal and we have too many drivers. . . . [so] we have to look for accounts to deactivate”)).

98. Muhl, *supra* note 33, at 8–9.

99. *See generally*, Carlson, *supra* note 2, at 348–49.

100. *See* Muse, *supra* note 25.

101. Defendant's Motion for Summary Judgment, *O'Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015).

102. Other members of the sharing-economy make similar claims; they are simply technology platforms allowing excess resources to be efficiently put to use. *See infra* note 104.

*broker* of transportation services, not a *provider* of such services, Uber argues that the integration factor swings in its favor.<sup>103</sup>

However, precedent reveals that attempts to evade the integration factor using semantic distinctions do not stand up in court.<sup>104</sup> As we saw in *Lehigh*, Judge Hand found that coal-miners were integral, given that the coal-mining business was inconceivable without them.<sup>105</sup> Similarly, courts have held that cake decorators are “obviously integral” to the business of selling cakes,<sup>106</sup> and that “[i]t does not take much of a record to demonstrate that pickling the pickles is a necessary and integral part of the pickle business.”<sup>107</sup> Following suit, Judge Chen was skeptical of Uber’s argument in his memorandum, denying Uber’s motion for summary judgment in the current California class action. Judge Chen explained:

Uber’s self-definition as a mere “technology company” focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides.<sup>108</sup>

Judge Chen is well justified in seeing through Uber’s arguments. Prior to the *O’Connor* litigation, Uber regularly promoted itself as a provider of transportation services, referring to itself as an “On-Demand Car Service” and “Everyone’s Private Driver.” Previously, Uber’s CEO wrote on its official blog: “We are Uber and we’re rolling out a *transportation system* in a city near you,”<sup>109</sup> and another company document states “Uber provides the best *transportation service* in San Francisco.”<sup>110</sup> Such documents are no longer in use by the company, for obvious reasons, but they nonetheless demonstrate

103. Defendant’s Motion for Summary Judgment, *O’Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015).

104. See Deknatel & Hoff-Downing, *supra* note 30, at 100 (“[D]espite some employers’ attempts to re-characterize the nature of their businesses, courts have been unwilling to draw such stringent lines in defining a business’s purpose and have rejected an employer’s attempt to limit and distinguish its business from the services that many of its workers perform.”); see also *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (“Lyft tepidly asserts . . . [it] merely furnish[es] a platform that allows drivers and riders to connect . . . But that is obviously wrong.”).

105. *Lehigh Valley Coal*, 218 F. at 552 (“By him alone is carried on the company’s only business; [the miner] is their ‘hand,’ if any one is.”).

106. *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989).

107. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1537-38 (7th Cir. 1987).

108. *O’Connor*, 82 F. Supp. 3d at 1141.

109. *Id.* at 1137.

110. *Id.*

that before framing its current litigation arguments, Uber understood itself to be in the business of transportation.

Finally, Uber drivers' role is integral to Uber's business because the company would not be able to function without them. Uber does not earn revenue by selling its software products; it earns revenue by taking a cut of its drivers' fares.<sup>111</sup> As Judge Chen pointedly observed, "Uber *only* makes money if its drivers actually transport passengers."<sup>112</sup> Uber drivers therefore provide an indispensable and integral service to Uber—a service that is the very business of the company. As such, the integration factor weighs in favor of employee status.

### C. Skill Level

Another factor of the common law control test is the worker's degree of skill. A worker whose job requires the use of a simple or commonly held skill set is more likely classified as an employee, whereas a worker with a highly specialized skill set is more likely classified as an independent contractor.<sup>113</sup> Indeed, one could imagine that a less skilled worker would require greater supervision, while a highly or uniquely skilled worker would require less—since such workers are usually hired to provide a service that is outside the scope of an employer's typical business. An employer would have a difficult time supervising or asserting control over a uniquely skilled worker, as the employer would likely be unfamiliar with the worker's craft.

In its motion for summary judgment in the *O'Conner* case, Uber cited *Sahinovic v. Consol. Delivery & Logistics*, a case in which delivery drivers challenged their independent contractor status.<sup>114</sup> As the court explained, "the primary skills [of the plaintiff workers] involve[d] driving and delivery."<sup>115</sup> In *Sahinovic*, the court concluded that the skill factor "is neutral or slightly favors a finding that Plaintiffs are [independent contractors]."<sup>116</sup> However, *Sahinovic* provides only one example and goes against an overwhelming majority of court precedent. More commonly, courts consider drivers to be unskilled workers and thus employees.<sup>117</sup> In fact, in a recent decision against Uber's biggest competitor, Lyft, Inc., Judge Chhabria ex-

---

111. *Id.* at 1144.

112. *Id.* (emphasis in original).

113. Muhl, *supra* note 33, at 8.

114. *Sahinovic v. Consol. Delivery & Logistics*, No. C 02-4966 SBA, 2004 WL 5833528 (N.D. Cal. Sept. 14, 2004).

115. *Id.* at 7.

116. *Id.*

117. *See, e.g., Alexander v. FedEx*, 765 F.3d 981, 995 (9th Cir. 2014) (holding that the skill factor favored employee status because FedEx drivers "need no experience to get the job in the first place and [the] only required skill is the ability to drive."); *see also, JKH Enters. v. Dep't of Indus. Relations*, 48 Cal. Rptr. 3d 563, 580 (Ct. App. 2006) ("[T]he functions performed by the drivers, pick-up and delivery of papers or packages and driving in between, did not require a high degree of skill."); *see also FedEx Home Delivery*, 361 N.L.R.B. No. 55, 19

plained, “driving for Lyft requires no special skill—something we expect independent contractors to have.”<sup>118</sup> In light of this precedent and the simple fact that driving does not seem to require a high degree of skill, this factor weighs in favor of employee status.

#### D. *Continuing Relationship*

Another factor of the common law control test is the duration of the business relationship between employer and worker. The idea behind this factor is that independent contractors are frequently involved in short-term engagements, whereas employment relationships tend to be long term.

Uber argues that its workers can walk away from their relationship with the company at any time—as Uber contracts contain mutual termination provisions and parties are only compensated on a per trip basis.<sup>119</sup> Recent studies confirm that drivers do indeed walk away—quite often in fact. Uber’s data shows that eleven percent of its new drivers stop driving within a month, and about half are gone within a year.<sup>120</sup> Based on these statistics, this factor might seem to favor contractor status, however recent precedent suggests otherwise.

In a factually similar 2014 case on the employment status of FedEx delivery drivers, the National Labor Relations Board (“NLRB”) found that despite the ability to terminate their relationship with FedEx at any time, drivers “have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.”<sup>121</sup> Thus, the NLRB found that this factor favored employment status. Similarly, Uber drivers enter into a permanent relationship that may continue as long as both parties find it beneficial. They do not enter separate agreements per task or individual job like a typical independent contractor would. There is no end date in the contract they sign. Therefore, in light of the recent precedent, this factor favors employee status.

#### E. *Tools*

The common law control test also considers which party provides the tools and materials needed to perform the work. In general, if a worker uses tools provided by his employer, he is classified as an employee. On the other hand, if a worker provides his own tools and instrumentalities and is respon-

---

(2014) (“Drivers are not required to have any special training or skills . . . The skill factor thus weighs in favor of employee status.”).

118. *Cotter*, 60 F. Supp. 3d at 1080.

119. Defendant’s Motion for Summary Judgment, *O’Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015).

120. Ellen Huet, *Uber’s Ever-Renewing Workforce: One-Fourth Of Its Current U.S. Drivers Joined Last Month*, *FORBES* (Jan. 22, 2015, 4:14 PM), <http://www.forbes.com/sites/ellenhuet/2015/01/22/uber-study-workforce/#1923e4641244>.

121. *FedEx Home Delivery*, 361 N.L.R.B. at 19.

sible for their maintenance, he is more likely an independent contractor. Uber drivers must provide and maintain their own vehicles, and are responsible for obtaining insurance, license and registration, and often a GPS device. Accordingly, this factor seems to favor independent contractor status.

However, relevant precedent shows that this factor either slightly favors independent contractor status, or is entirely neutral. First, Uber asserts control over the vehicles driven by requiring they meet a series of specifications. To ensure compliance, each Uber vehicle must undergo an inspection by the company.<sup>122</sup> In the *FedEx* case, the NLRB explained, “the significance of vehicle ownership is undercut considerably . . . by the fact that [a company] plays a primary role in dictating vehicle specifications.”<sup>123</sup>

Secondly, Uber recently started a program that assists in the car purchasing process.<sup>124</sup> Those buying a car to drive for Uber receive special discounts and financing options, and Uber partners with specific lenders to cover those with low credit.<sup>125</sup> The program automatically deducts car payments from drivers’ weekly earnings, so they pay less upfront.<sup>126</sup> Courts have found that such “involv[ment] in the purchasing process” where an employer “provid[es] funds and recommend[s] vendors” for vehicles cuts against the independent ownership of the vehicles.<sup>127</sup>

Third, Uber’s claim that it does not provide drivers with any tools is simply false. If they do not own a smartphone, Uber leases its drivers iPhones to run the Uber app. When ruling on this factor, courts have considered it relevant that drivers obtain other equipment (besides their car) from an employer.<sup>128</sup> And as the court stated in *O’Conner*, a smart phone running the Uber app is not just “other equipment,” but a “the critical tool of the business.”<sup>129</sup>

Lastly, courts have repeatedly and explicitly stated that car ownership is not dispositive when determining employment status. For example, the NLRB found that FedEx delivery drivers, despite being required to own their own vehicle, were in fact employees of FedEx.<sup>130</sup> Numerous other cases in California have similarly found that drivers are employees despite the fact that they own their own vehicles.<sup>131</sup> Courts sometimes defend these

---

122. Though specifications vary by city, cars typically must be a 2000 model or newer, be covered by insurance, have four doors and minimum cosmetic damage, and undergo inspection. See UBER, <https://www.uber.com/driver-jobs> (last visited Apr. 3, 2016).

123. *FedEx Home Delivery*, 361 N.L.R.B. at 19.

124. See UBER, <https://get.uber.com/cl/financing> (last visited Apr. 15, 2016).

125. *Id.*

126. *Id.*

127. *Estrada v. FedEx Ground Package System, Inc.*, 64 Cal. Rptr. 3d 327, 334 (2007).

128. *Alexander*, 765 F.3d at 995.

129. *O’Conner*, 82 F. Supp. 3d at 1136.

130. *FedEx Home Delivery*, 361 N.L.R.B. at 19.

131. See, e.g., *Alexander*, 765 F.3d 981; *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 409 (Cal. 1989); *Estrada*, 64 Cal. Rptr. 3d at 331; *Air Couriers*

decisions by explaining that these vehicles are typically used for purposes outside of work.<sup>132</sup>

Considering the amount of control Uber has over the vehicles driven, the company's involvement in the purchasing process, and the fact that Uber provides some instrumentalities to its drivers, it is unlikely courts would put much weight on the fact that Uber drivers must use their own cars.

#### F. Location

Courts also consider physical location as a factor under the common law control test.<sup>133</sup> Typically, if a worker works onsite he is more likely classified as an employee, whereas if a worker primarily works outside his employer's place of business, he is more likely an independent contractor. The location factor is grounded in the fact that, at least traditionally, an employer enjoyed increased control and supervision over those working onsite.

Because Uber drivers do not work onsite, this factor favors independent contractor status. However, the physical location factor is absent or under-emphasized in many recent judicial inquiries using the common law control test.<sup>134</sup> This is likely because the factor is growing outdated in the modern economy, and is no longer a good indicator of employee status.

With the rise of new and better communication technologies, telecommuting has become increasingly common. According to Forbes (citing statistics from a Telework Research Network study), "some 30 million [Americans] work from a home office at least once a week" and "that number is expected to increase by 63 percent in the next five years."<sup>135</sup> As telecommuting becomes more frequent, the justifications for tying employee status to a worker's physical location become weaker and weaker. In a world where some thirty million Americans work from home, it is questionable whether location should be used to determine which workers are protected by labor and employment laws. For this reason, many statutory tests for distinguishing contractors and employees (such as the economic realities test and most versions of the ABC test) have already eliminated location as a factor. The common law test should do the same.

---

Intern. v. Employment Dev. Dep't., 59 Cal. Rptr. 3d 37, 47 (2007); *JKH Enters.*, 48 Cal. Rptr. 3d at 569; *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 269 Cal. Rptr. 647, 654 (1990).

132. See *Cotter*, 60 F. Supp. 3d at 1080; see also *Gonzalez v. Workers' Comp. Appeals Bd.*, 46 Cal. App. 4th 1584 (1996) (noting that a car used by a worker "frequently serves also as a family all-purpose vehicle").

133. Location and tools are usually considered one factor at common law, but they require separate consideration. See Muhl, *supra* note 33.

134. See, e.g., *Alexander*, 765 F.3d 981; see also *Cotter*, 60 F. Supp. 3d at 1080.

135. Rapoza, *supra* note 89.



### G. Method of Payment

The method of payment factor is “nearly as old as the control test itself,” as early wage legislation based coverage on the distinction between hourly wages and other forms of payment, like salary.<sup>136</sup> Under this factor, workers paid on a per-task basis are likely independent contractors, while workers paid on an hourly wage or salary are likely employees.<sup>137</sup> Since Uber pays its drivers on a per-trip basis, this factor seems to favor independent contractor status.

However, the fact that Uber asserts control in determining the method of payment to its drivers skews this factor in favor of employee status. First, Uber sets the fare amount unilaterally, without any input from its drivers. Uber also solely determines the fee it takes from the total fare, and has increased its cut in some cities from twenty percent to as high as thirty percent without negotiation or input from the drivers.<sup>138</sup> In a traditional contractor-employer relationship, payment per task may have been common, but it was also usually the result of a negotiation between the parties involved—who possessed relatively equal bargaining power. Today, Uber drivers have no control over what rates their customers are charged or even what percentage of the fare they receive from their trips. In the *FedEx* case, the NLRB found that given the fact that “FedEx establishes and controls drivers’ rates of compensation, which are generally nonnegotiable . . . the method of payment factor weighs in favor of employee status.”<sup>139</sup> In line with this reasoning, the method of payment factor actually favors employee status for Uber drivers.

### H. Intent

Courts also consider the intent of both parties when assessing the employment relationship under the common law test. They look to the terms of the employment agreement (if one exists) for evidence of the parties’ intent. If there is a signed contract stating the parties’ intent to enter into an independent contractor or employee relationship, it is considered significant evidence of that status.<sup>140</sup> Uber’s contracts with its drivers explicitly state that both parties intend for drivers to be considered independent contractors<sup>141</sup>

136. See Carlson, *supra* note 2 at 346.

137. See *e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989); see also Locations, Inc. v. Hawaii Dep’t. of Labor, 900 P.2d 784, 789 (Haw. 1995); Sherard v. Smith, 778 S.W.2d 546, 548 (Tex. App. 1989); see also RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) cmt. j (1958); Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (Factor twelve sets forth that “[p]ayment by the hour, week, or month generally points to an employer-employee relationship . . .”).

138. Huet, *supra* note 120.

139. See *e.g.*, *FedEx Home Delivery*, 361 N.L.R.B. at 19 (Finding that since “FedEx establishes and controls drivers’ rates of compensation, which are generally nonnegotiable . . . the method of payment factor weighs in favor of employee status.”).

140. See *Arnold v. Mut. of Omaha Ins.*, 202 Cal. App. 4th 580, 584-85 (2011).

141. *O’Connor*, 82 F. Supp. 3d at 1136.

and that the Uber contract “is not an employment agreement or employment relationship.”<sup>142</sup>

Although this factor weighs in favor of independent contractor status, recent court cases have found this factor non-dispositive.<sup>143</sup> This is likely because employers can easily manipulate contract language to include a statement of intent in order to create the appearance of an independent contractor relationship on paper to avoid employment laws.<sup>144</sup> This is especially troublesome in light of the fact that there may be unequal bargaining power between workers and employers. For this reason, courts usually look beyond contractual wording and examine the circumstances to determine the actual nature of the relationship.<sup>145</sup> The parties’ beliefs regarding legal status are “not controlling if as a matter of law a different relationship exists.”<sup>146</sup> Relative bargaining power is also considered. In the *FedEx* case, for example, the NLRB recognized the inability of FedEx drivers to negotiate over the terms of their contract—particularly the terms classifying them as independent contractors.<sup>147</sup> Thus, the NLRB found the intent factor “inconclusive.”<sup>148</sup>

Because intent is so easily manipulated by employers, both the economic realities test and the ABC test no longer include this factor. The common law control test should be similarly reformed. Nevertheless, given the lack of bargaining power the typical Uber driver possesses, the NLRB’s ruling in *FedEx* should control—which would mean that the intent factor should be deemed inconclusive.

### I. *Employment by More than One Company*

An additional factor of the common law control test asks whether the worker provides services to more than one employer. Traditional employees usually work for one employer at a time, while independent contractors often perform services for multiple employers. This factor is predominately used to determine whether a worker is in business for himself.

Uber claims that its drivers “may use the Uber App as much or as little as they like, while continuing to service their regular clients or passengers

---

142. *Id.* (referencing Addendum at 7; Service Agreement at 9).

143. *See e.g., Alexander*, 765 F.3d at 997 (“[P]arties own perception of their relationship is not dispositive.”); *see also JKH Enters.*, 48 Cal. Rptr. 3d at 580.

144. *See Deknatel & Hoff-Downing, supra* note 30, at 98 (“[E]mployers attempting to evade independent contractor laws may use the independent contractor agreement as evidence that the worker is an independent contractor, even if the arrangement in practice functions differently than the employer’s carefully selected language suggests.”).

145. *See, e.g., W. Ports Transp., Inc. v. Emp’t Sec. Dep’t.*, 41 P.3d 510, 516 (Wash. Ct. App. 2002) (“Contractual language, such as a provision describing drivers as independent contractors, is not dispositive; instead, the court considers all the facts related to the work situation.”).

146. *Grant v. Woods*, 71 Cal. App. 3d 647, 654 (Ct. App. 1977).

147. *See FedEx Home Delivery*, 361 N.L.R.B. at 19.

148. *Id.*

acquired from any other source — including from competing services like Sidecar and Lyft and, in some instances, through street hails and taxi dispatch services.”<sup>149</sup> This is perhaps the most convincing case Uber makes in favor of independent contractor status for its drivers, as many drivers do indeed work simultaneously for Lyft, Sidecar, and other companies that directly compete with Uber.

However, while drivers are allowed to work for Uber competitors, Uber does place restrictions on a driver who chooses to do so. For example, the Uber driver Handbook forbids drivers from answering customer inquiries about booking future rides outside of the platform.<sup>150</sup> Even “passive client solicitation” such as handing out business cards or branded equipment for another company, is considered a major issue which Uber “takes very seriously.”<sup>151</sup>

Regardless, the goal of this factor is to determine whether a worker is in business for himself. As the NLRB found with FedEx delivery drivers, Uber drivers seem to have effectively no control over any important business decisions. Like FedEx, Uber “has total command over its business strategy . . . recruitment, and the prices charged to customers” and Uber “unilaterally drafts, promulgates, and changes the terms of its Agreements with drivers.”<sup>152</sup> Under this arrangement, Uber drivers cannot effectively operate as independent business owners. They are not free to advertise their services, set their own prices, or negotiate with clients. For these reasons, courts could easily find, as the NLRB did in *FedEx*, that drivers “do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor.” Thus, they are better classified as employees, regardless of their ability to drive for multiple platforms.

### J. Type of Business

The type of business factor asks whether the worker is engaged in a business or occupation distinct from the employer. This factor is typically applied either to determine whether the worker works for another employer (covered by employment by more than one company) or whether the worker is engaged in the same type of business as the employer (covered by integration). Thus, a separate analysis is redundant to that in Parts III.B and III.I.

---

149. Defendant’s Motion for Summary Judgment, *O’Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015).

150. *O’Connor*, 82 F. Supp. 3d at 1142 (citing Handbook at 7) (explaining that such solicitation is categorized as a “Zero Tolerance” occurrence that “may result in immediate suspension from the Uber network.”).

151. *Id.*

152. *FedEx Home Delivery*, 361 N.L.R.B. at 19.

#### IV. A GUIDE TO LEGISLATIVE REFORM

As the analysis in Part III demonstrates, almost all of the common law control test factors weigh in favor of classifying Uber drivers (and similarly situated gig-economy workers) as employees. But despite this conclusion, the problem remains that several factors of the control test are outdated and easily manipulable. Such factors, combined with the rampant culture of worker misclassification and the rise of the gig-economy, contribute to a growing number of workers classified as independent contractors.

This section recommends three ways to improve our worker classification system and increase the number of protected workers. First, courts should adopt a new test that includes a presumption of employment; second, the number of factors in the new test should be limited; and third, the new test should override all the various other tests and apply uniformly to all federal statutes that concern employee benefits and protections. The ABC test, currently used by nearly two-thirds of the states,<sup>153</sup> incorporates a presumption of employment, uses only three factors, and has the potential for uniform application across statutes. Therefore, it can serve as a model for the federal government.

##### A. *Presumption of Employment*

In many states today—including nearly every state employing the ABC test<sup>154</sup>—the default presumption is that a worker is an employee rather than an independent contractor. This presumption should be incorporated into the common law control test for several reasons.

First, a presumption of employee status would, in aggregate, increase the number of workers covered by labor and employment statutes. As discussed in Part II, there are several practical and policy-oriented reasons to support this outcome, such as maximizing the number of workers receiving employee benefits, protections, and insurance, and increasing government tax revenue.

Second, a presumption favoring employee status could curtail misclassification. Forcing employers to carry the burden of proving independent contractor status would make it more difficult for them to improperly classify workers as contractors in order to increase profits. If used uniformly across statutes, the presumption also clarifies the law and puts employers on notice of how to appropriately comply.

---

153. Howard Sokol & Edward C. Frischling, *New York's Fair Play Act Changes Rules of the Road for the Commercial Goods Transportation Industry*, HOLLAND & KNIGHT ALERT (Jan. 31, 2014), <https://www.hklaw.com/publications/New-Yorks-Fair-Play-Act-Changes-Rules-of-the-Road-for-the-Commercial-Goods-Transportation-Industry-01-31-2014/>.

154. See Deknatel & Hoff-Downing, *supra* note 30, at 71 (“An initial presumption of employee status has been more implemented than any other form or feature of the ABC test: only two states, Kansas and Maine, chose to omit an explicit or implicit . . . presumption of employee status . . .”).

Third, a presumption towards employee status places the burden of proof on the party with more resources. This matters because, if and when a worker is able to recognize his own misclassification, going to court is often the only way to establish employee status and eligibility for legal protections.<sup>155</sup> But for many misclassified employees, the expense and time required for litigation effectively blocks off that avenue for redress. Conversely, when workers are misclassified as employees (a much rarer occurrence, given the economic benefits of contractor status), an employer typically has better knowledge of the law and greater resources available to seek redress than an employee. In sum, a presumption in favor of the party with less knowledge and resources (the individual worker) levels the playing field and allows meritorious cases to be effectively litigated.

### B. *Limited Number of Factors*

Employment relationships exist in infinite varieties, so no bright-line rule will apply neatly in all circumstances. This likely explains why legislatures have almost exclusively used multi-factor tests to determine worker status, despite the many flaws associated with such tests.<sup>156</sup>

The new test should be limited to three or four core factors, since tests that include more than four factors tend to increase confusion, over-mechanical application, and subjectivity.<sup>157</sup> Reducing the number of factors makes the test clearer and more concise, thus providing proper notice and curtailing misclassification. The reformed legal standard should also eliminate the outdated and manipulable factors such as method of payment, location, and intent. Proper classification will result when factors are limited to those that are relevant and reflective of the modern economy.

### C. *A Single Test*

Unionization rights, employee benefits, and wage and hour laws each fall under different federal statutes, meaning different legal tests are used to determine whether a worker is an employee for the purpose of each of these protections.<sup>158</sup> The theory behind the multitude of standards is that each applicable statute serves distinct purposes, so employment is defined differently for each. Perhaps this statutory purpose argument makes sense when discussing employment in very different contexts—such as employment sta-

---

155. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-859T, EMPLOYEE MISCLASSIFICATION: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 7 (2007), <http://www.gao.gov/new.items/d07859t.pdf>.

156. See *supra* Part II.A.1.

157. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1646 (Dec. 2006) (further explaining that “multifactor tests of ten or even eight factors appear to ask too much of the judge’s ability simultaneously to weigh competing concerns and may simply result in the stampeding of less significant factors”).

158. See Appendix for details.

tus for tax purposes versus employment status for intellectual property protection—but the variation in legal standards amongst statutes that provide worker protections and benefits is both confusing and unnecessary.

The nuances in statutory purpose among labor and employment statutes are not significant enough to justify the current piecemeal approach. Whether the primary purpose of the statute is “to aid the unprotected, unorganized and lowest paid of the nation’s working population,”<sup>159</sup> or “to prevent injury to. . . employees,”<sup>160</sup> or “to promote the stability and economic security of [working] families,”<sup>161</sup> most labor and employment laws are united by one underlying goal—the protection of workers. By focusing on this common goal, one comprehensive standard could exist for categorizing employees for the purpose of providing workers’ rights of all kinds. Eliminating multiple standards will decrease confusion, manipulation, and misclassification.

#### D. A Lesson from the States: the ABC Test

The ABC test, currently used by nearly two-thirds of the states,<sup>162</sup> provides a model for the federal government. The test is a simplified version of the common law control test, and has come to dominate employment classification reform across states.<sup>163</sup> According to Deknatel & Hoff-Downing’s assessment, “[t]he ABC test, coupled with a presumption of employee status . . . has been the clearly favored test of state legislatures.”<sup>164</sup>

First, the ABC test includes a presumption of employment and thus affords broad enough coverage to counteract the forces leading to the overclassification of independent contractors.<sup>165</sup> Second, the ABC test provides a model for a succinct federal test, limited to the following three factors:

1. whether the worker is free from control or direction in the performance of the work;
2. whether the work is done outside the usual course of the firm’s business; and

---

159. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n. 18 (1945) (citing legislative debates on the purpose of the Fair Labor Standards Act).

160. 29 CFR § 1910.147(a)(3)(i) (2016).

161. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

162. Sokol & Frischling, *supra* note 153.

163. See Deknatel & Hoff-Downing, *supra* note 30, at 66 (“In the eight years from 2004 to 2012, sixteen states. . . have transformed the legal requirements to be an independent contractor. All of these states except two have implemented ABC tests or related formulations.”).

164. *Id.* at 67.

165. See Harned et al., *supra* note 44, at 102 (explaining that the ABC test’s presumption “mak[es] it more difficult for unscrupulous employers to misclassify employees as independent contractors to avoid legal obligations.”).

3. whether the worker is customarily engaged in an independent trade, occupation, profession, or business.<sup>166</sup>

The ABC test eliminates the most manipulable factors, such as intent, location, and method of payment.

Third, the ABC test has the potential for uniform application across statutes and can operate as the single standard for defining an employee for the purpose of providing workers benefits and protections. As Deknatel & Hoff-Downing suggest, the ABC test is most effective “when applied uniformly to all workers and universally across all employment statutes.”<sup>167</sup> Though the ABC test is currently used primarily for purposes of state unemployment insurance,<sup>168</sup> many states apply it for other purposes as well. For example, though Maine’s ABC test specifically applies to its workers’ compensation and unemployment insurance statutes, “the state made its laws consistent with preexisting standards in other statutes, creating a matching standard across all laws.”<sup>169</sup>

Critics, such as Professor Buscaglia, claim that the ABC factors “are only deceptively simple and in application are ‘neither clearer nor easier’ than the common law right to control factors that they typically replace.”<sup>170</sup> However, by limiting the legal inquiry to three core factors and adding a presumption in favor of employee status, the ABC Test offers a better alternative to the manipulable, increasingly outdated standards currently used under federal labor and employment law—most notably, the control test.

## V. CONCLUSION

This note details the outdated employment classification system, addressing problems such as ambiguity in the law and rampant misclassification, and the new challenges posed by the growing number of gig-economy workers. These combined forces contribute to a growing number of workers classified as independent contractors—a problematic trajectory in a society that predicates worker protections on employment status. Gig-economy workers have turned to courts in the hopes of securing employee protections, requiring judges to navigate and apply confusing and ambiguous multi-factor tests to resolve these disputes. Benefits and protections for this growing number of workers cannot rise or fall on such outdated tests. Legislative reform is essential, and the ABC Test offers the best alternative to the ma-

---

166. *Id.*

167. Deknatel & Hoff-Downing, *supra* note 30, at 53; *see also id.* at 73 (“The advantages of a uniformly and universally applicable law are clear: if a worker is an independent contractor under one statute and an employee under another, compliance is expensive and complex for employers, enforcement becomes inefficient, and workers are hampered from asserting their eligibility for benefits and protections.”).

168. *See* Harned et al., *supra* note 44, at 102

169. Deknatel & Hoff-Downing, *supra* note 30, at 73.

170. *Id.* at 63.

nipulable, increasingly outdated standards currently used under federal labor and employment law (most notably, the common law control test). However, until such legal reform occurs, courts should classify Uber drivers and similarly situated gig-economy workers as employees under the common law control test. A realistic, modern assessment of the current factors, recent legal precedent, and the need for a safe and secure workforce demands it.



**VI. APPENDIX.**  
**WORKER PROTECTIONS/BENEFITS PROVIDED TO EMPLOYEES**  
**& NOT INDEPENDENT CONTRACTORS**

Protections	Act(s)	Test
Minimum Wage	Fair Labor Standards Act (FLSA)	Economic Realities
Overtime Pay	Fair Labor Standards Act (FLSA)	Economic Realities
Youth Employment Standards	Fair Labor Standards Act (FLSA)	Economic Realities
Workplace Health and Safety	Occupational Safety and Health Act (OSHA)	Hybrid
Retirement Plans, Benefits & Savings (including Social Security, Pensions, Life and Disability Insurance)	Employee Retirement Security Act (ERISA)	Common Law Control Test
Health Plans & Benefits	Employee Retirement Security Act (ERISA)	Common Law Control Test
Right to Unionize/Collective Bargaining	National Labor Relations Act (NLRA)	Common Law Control Test
Disability Resources	American's with Disabilities Act (ADA)	Hybrid
Equal Employment Opportunity/Protection from Discrimination	Title VII of the Civil Rights Act	Economic Realities
	Pregnancy Discrimination Act	
	Equal Pay Act (EPA)	Economic Realities
	Rehabilitation Act	
	Age Discrimination in Employment Act (ADEA)	Hybrid
	Title I of the Americans with Disabilities Act (ADA)	Hybrid
	Genetic Information Nondiscrimination Act (GINA)	Hybrid
Leave Benefits	Family and Medical Leave Act (FMLA)	Economic Realities
Termination Protections	Worker Adjustment and Retraining Notification Act (WARN) (early warning of impending layoffs or plant closings)	Hybrid

Protections	Act(s)	Test
	Occupational Safety and Health Act (OSHA)(whistleblower protections)	Hybrid
	Family Medical Leave Act (protection from termination due to medical leave)	Economic Realities
Veterans Benefits	Uniformed Services Employment and Reemployment Rights Act (USERRA)	Hybrid
Personal Privacy <sup>1</sup>	Employee Polygraph Protection Act (EPPA) (protects employees against polygraph testing)	Economic Realities
	Consumer Credit Protection Act (CCPA) (protects employees against certain background checks)	Hybrid
	American Disabilities Act (ADA) (protects employees against medical testing)	Hybrid
Workers Compensation	Laws by State	Multiple Variations
State Unemployment Insurance	Laws by State	Variations of ABC Test and Common Law Control Test
Federal Unemployment Insurance	Federal Unemployment Tax Law (FUTA)	Common Law Control Test
Social Security Benefits	Federal Insurance Contributions Act (FICA)	Common Law Control Test
	Immigration Reform and Control Act (IRCA)	Common Law Control Test