

SHARING ECONOMY MISCLASSIFICATION: EMPLOYEES AND INDEPENDENT CONTRACTORS IN TRANSPORTATION NETWORK COMPANIES

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Business activity and consumer participation in the economy have changed drastically with the rise of the Internet and mobile phone applications. One area that reflects this change is the “sharing economy,” which refers to the use of peer-to-peer networks to gain temporary access to products and services on an as-needed basis.¹ In turn, the sharing economy has birthed a now-popular business model in which “an online intermediary [or platform] . . . acts as a market for [peer-to-peer] services and . . . facilitates exchanges by lowering transaction costs.”² For example, a transportation network company (TNC) is a type of sharing economy company that makes ride-sharing more convenient by connecting drivers with potential passengers. A TNC generates revenue by charging users a fee for its matchmaking service.

There are two central ideas behind the sharing economy: reduction of transaction costs and efficient allocation of resources.³ With lower transaction costs due to communication technology and standardized methods of exchange, owners are more willing to provide their under-

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1. See Kurt Matzler et al., *Adapting to the Sharing Economy*, 56 MIT SLOAN MGMT. REV. 71, 71–72 (2015).

2. Vanessa Katz, Note, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1070 (2015); see also Chris J. Martin, *The Sharing Economy: A Pathway to Sustainability or a Nightmarish Form of Neoliberal Capitalism?*, 121 ECOLOGICAL ECON. 149, 158 (2016) (concluding that the sharing economy is “framed” mainly in terms of “economic opportunity”).

3. See Matzler, *supra* note 1, at 72 (asserting that “[t]he central conceit of collaborative consumption is simple: Obtain value from untapped potential residing in goods that are not entirely exploited by their owners”); Katz, *supra* note 2, at 1075; *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<https://perma.cc/292R-368D>] (noting that “technology has reduced transaction costs, making sharing assets cheaper and easier than ever—and therefore possible on a much larger scale”).

utilized assets to platform participants.⁴ Users on both sides of a sharing platform benefit from this transaction—“[o]wners make money from underused assets . . . [and] [r]enters . . . pay less than they would if they bought the item themselves[] or turned to a traditional provider such as a hotel or car-hire firm.”⁵ In this regard, the sharing economy represents “a societal shift to an access model rather than an ownership model.”⁶

Proper regulatory controls of sharing platforms are crucial as these platforms rapidly expand and influence many aspects of daily life. Yet, the legal and regulatory frameworks which purport to govern sharing economy platforms have not kept pace with the changing marketplace.⁷ Among the most challenging legal issues presented by this societal shift is whether certain sharing platform workers should be classified as employees or independent contractors.

This Note focuses on the worker classification issue as presented by TNC drivers. Part I defines TNCs and their surrounding regulatory framework and describes the business model of Uber Technologies, Inc. (“Uber”), the most prominent TNC. Part II examines the difference between employees and independent contractors by tracing the development of the distinction and by describing the current legal test for worker classification. Part III demonstrates how courts apply the worker classification test in practice. First, it analyzes worker classification cases in the context of businesses models analogous to that of a TNC. Next, it discusses the pending misclassification suits against two TNCs, Uber and its main competitor, Lyft, Inc. (“Lyft”). Part IV draws the conclusion that a jury is likely to find, based on the current legal classification test, that the class of Uber drivers certified for trial are Uber’s employees. However, this Note argues that such a blanket classification is inappropriate and will have a significant impact on other sharing economy companies—both in litigation and day-to-day business. Part IV closes by advocating that a new

4. See Katz, *supra* note 2, at 1075; Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 416–17 (2015) (observing that “consumers will share goods when transaction costs related to the coordination of economic activities within specific communities are low”).

5. *The Rise of the Sharing Economy*, *supra* note 3.

6. Katz, *supra* note 2, at 1068 n.9; see also Ranchordás, *supra* note 4, at 474 (concluding that “[t]he basic idea of the sharing economy is to own less and have access to more”); *The Rise of the Sharing Economy*, *supra* note 3 (emphasizing that “access trumps ownership”).

7. See Bill Donovan et. al., *Are Workers in the Sharing Economy Independent Contractors or Employees? The Answer Is, It Depends*, INSIDE COUNSEL (June 30, 2015), <http://www.insidecounsel.com/2015/06/30/are-workers-in-the-sharing-economy-independent-con> [<https://perma.cc/458H-ESFZ>].

method of employment classification is needed to account for the complex working relationships in the sharing economy and by exploring possible alternatives.

I. TRANSPORTATION NETWORK COMPANIES

Under California law, a TNC is “an organization . . . that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.”⁸ Essentially, “TNCs provide transportation services analogous to common carriers” through the use of a digital platform.⁹ TNCs are prototypical sharing economy companies: they use online platforms to reduce transaction costs and efficiently allocate resources.

Because of safety concerns, many states have passed legislation designed to regulate TNCs. Generally, such legislation defines the term “TNC,” dictates insurance requirements, provides for driver and vehicle background checks, requires regular vehicle safety inspections, mandates “clear communication” to the rider of her fare, prohibits drivers from taking “hail[ed]” rides, and requires TNC drivers to clearly display the trademark of the TNC service they are providing.¹⁰

To illustrate how a TNC operates in practice, this Note considers the business model of Uber.¹¹ It is important to understand Uber’s operations

8. CAL. PUB. UTIL. CODE § 5431 (West 2015). Other states’ statutory definitions have fallen in line with the California description. For example, the proposed New York definition is nearly identical. *See* S.4108, 2015–2016, Reg. Sess. (N.Y. 2015). Illinois defines a TNC as an organization that “uses a digital network or software application service to connect passengers to transportation . . . between points chosen by the passenger and prearranged with a TNC driver.” 625 ILL. COMP. STAT. ANN. 57/5 (LEXIS through 2015 Pub. Act 098-1173). And while Washington, D.C., legislation refers to TNCs as “[p]rivate vehicle-for-hire compan[ies],” the definition is similar to those previously discussed: “an organization . . . that uses digital dispatch to connect passengers to a network of private vehicle-for-hire operators.” D.C. CODE § 50-301.03(16B) (2016).

9. Katz, *supra* note 2, at 1077.

10. *See* Doug Shinkle, *Riding by the Rules*, STATE LEGISLATURE MAGAZINE (Dec. 1, 2014), <http://www.ncsl.org/research/transportation/riding-by-the-rules.aspx> [<https://perma.cc/4CXQ-29VT>]; CAL. PUB. UTILS. COMM’N, BASIC INFORMATION FOR TRANSPORTATION NETWORK COMPANIES AND APPLICANTS 4 (2015) (requiring TNC vehicles to “display consistent trade dress”); *see generally* PORTLAND DEP’T OF TRANSP., TRANSPORTATION NETWORK COMPANIES REGULATIONS REVIEW & REPORT (2015) (aggregating the regulatory requirements imposed on TNCs by a number of jurisdictions).

11. Other examples include Lyft, SideCar, Summon, Haxi, and Wingz. However, this Note will focus on Uber because of its dominance in the market. *See* Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco* 7 (Univ. of Cal. Transp. Ctr., Working Paper No. UCTC-FR

from two perspectives—that of the consumer or platform user and that of the market viewing Uber as a business entity.

In order to utilize Uber's service, a user downloads the Uber mobile application and creates a profile, which includes the user's name and credit card information. When that user needs a ride, she opens the application and selects one of Uber's multiple service offerings.¹² The application screen displays a map of the user's surrounding area and depicts Uber-associated vehicles near the user. The user enters her location into the application and "requests" a ride. "The app then alerts the [user] when a car has been confirmed, and shows the driver's name and license plate number while also displaying the driver's route and estimated time of arrival."¹³ The user may input her destination into the application, which Uber's software will relay to the driver with accompanying directions. At the end of the ride, Uber automatically charges the user's fare to her credit card in a cashless exchange. Both the user and driver then rate each other on a scale of one to five stars through the application, with more stars representing better feedback. The purpose of this rating system is to incentivize good behavior.¹⁴

From the perspective of the market, Uber positions itself simply as a technology platform that matches car-owning drivers with people who need rides.¹⁵ Yet, within its role as matchmaker, Uber controls much of the ride

-2014-08, 2014), <http://www.uctc.net/research/papers/UCTC-FR-2014-08.pdf> [<https://perma.cc/G8AQ-JBKN>] (illustrating Uber's dominant market share).

12. Basically, different types of vehicles at different price points.

13. See Mary Beth Quirk, *How Do Uber and Lyft Work and Why Should I Even Care?*, CONSUMERIST (Sept. 18, 2014), <http://consumerist.com/2014/09/18/how-do-uber-and-lyft-work-and-why-should-i-even-care/> [<https://perma.cc/VH3P-JJCH>].

14. Quirk, *supra* note 13. This rating system will likely have a significant impact in determining the employment classification of Uber drivers. See *infra* Section IV.A.2. Note also that the drivers, who are also technically platform users, have a good deal of freedom in their work—they determine their own hours, drive their own vehicles, and can choose to accept or decline user ride requests.

15. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015). However, Uber has also referred to itself as a transportation company in the context of advertising campaigns, touting itself as an "On-Demand Car Service" that acts as "Everyone's Private Driver." *Id.* Such statements lend support to the position that Uber more closely resembles a traditional common carrier rather than a technology company. Indeed, the court in *O'Connor* found that Uber was "certainly a transportation company" based on the "substance of what Uber actually *does* (i.e., enable [sic] customers to book and receive rides)." *Id.* at 1141.

transaction.¹⁶ First, Uber vets the persons (and their vehicles)¹⁷ that apply to be drivers on the Uber mobile application. These vetting mechanisms are quite stringent. For instance, Uber requires that drivers use an approved vehicle model that is no more than ten years old; Uber prohibits drivers from subcontracting their Uber Devices (a smartphone Uber provides to the driver that allows the driver to receive passengers) without Uber's express approval; and Uber mandates that drivers complete a city knowledge exam and personal interview.¹⁸ Second, Uber unilaterally sets fare rates based on its own formulas and takes a cut of the total fare paid to the driver—generally, twenty percent.¹⁹ This allows for a cashless exchange where the user pays Uber directly through the application, and Uber in turn remits a fixed amount of the fare to the driver.²⁰ Additionally, Uber unilaterally introduces “surge pricing” when customer demand is high. Customers are notified of the increased price, which Uber utilizes as “a way to incentivize more drivers to get on the streets to accommodate all [of its] customers.”²¹ Third, Uber regularly monitors driver data, particularly data related to rider ratings, rider feedback, and drivers' ride acceptance rates. Such control makes it difficult for Uber to style itself as a mere intermediary in the transaction.

With a twenty percent cut of each fare, Uber is able to cover its expenses, which remain minimal because it classifies its drivers as independent contractors rather than employees.²² Because of this classification, Uber is not legally required to provide its drivers with car repair expense

16. See Aswath Damodaran, *A Disruptive Cab Ride to Riches: The Uber Payoff*, FORBES (June 10, 2014), <http://www.forbes.com/sites/aswathdamodaran/2014/06/10/a-disruptive-cab-ride-to-riches-the-uber-payoff> [<https://perma.cc/AJP9-MD88>] (observing that much of Uber's value comes from “the screening that it does of the drivers/cars” and “its pricing/payment system”).

17. See *id.* Note that Uber drivers are required to provide their own vehicles. See *O'Connor v. Uber Techs., Inc.*, 2015 U.S. Dist. LEXIS 116482, at *91 (N.D. Cal. Sept. 1, 2015).

18. See Order of the Labor Commissioner of the State of California at 2–4, *Berwick v. Uber Techs., Inc.*, Case No. 11-46739 (Cal. Super. Ct. June 16, 2015) (quoting such vetting mechanisms from an Uber-driver contract); *O'Connor*, 82 F. Supp. 3d at 1136.

19. See *O'Connor*, 82 F. Supp. 3d at 1137.

20. See *Quirk*, *supra* note 13; *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at *62–63.

21. *Quirk*, *supra* note 13; see also *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at *63–65 (clarifying that it is “Uber that sets the price” for both “normal fares” and “surge pricing”).

22. See Damodaran, *supra* note 16 (characterizing Uber's business model as “low-cost”).

reimbursement, a minimum wage, overtime pay, health insurance, and a variety of other benefits.²³

II. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

Employment law provides a number of safeguards to workers classified as employees that are not provided to workers classified as independent contractors.²⁴ For instance, California Labor Code Section 510 provides that employees must be compensated extra for overtime work.²⁵ The Labor Code, however, does not contain any analogous protections for independent contractors. This is but one example of how a worker's legal classification has a significant impact on her overall well-being and on her employer's obligations to her. An employee is generally one who "works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all of his income from that one employer."²⁶ On the other hand, an independent contractor typically has the bargaining power "to negotiate a rate for the use of [a special] skill."²⁷ An independent contractor also "serves multiple clients, perform[s] discrete tasks for limited periods, [and] exercis[es] great discretion over the way the work is actually done."²⁸

Consistent with the definitions above, the distinction mainly operates today to equalize the bargaining disadvantage that employees face as compared to independent contractors. Put another way, the distinction is meant to protect workers. The law originally drew the distinction for the discrete purpose of cabining tort liability for worker negligence. But in transitioning between these worker classification goals—from tort liability to bargaining power equalization or worker protection—courts retained the

23. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015). Uber drivers are actually contracted by Uber's wholly owned subsidiary, Raiser, LLC, though this distinction is irrelevant for the purposes of this Note.

24. Several federal and state laws apply only to employers whose workers are employees, but not to employers whose workers are independent contractors. For example, several provisions of the Internal Revenue Code, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the National Labor Relations Act, the Social Security Act, the Family and Medical Leave Act, and the Employment Retirement and Income Security Act only apply to employees. See Myra H. Barron, *Who's An Independent Contractor? Who's An Employee?*, 14 LAB. LAW. 457, 457–59 (1999). Importantly, the Fair Labor Standards Act, along with analogous state law statutes, "requires minimum and overtime wages be paid to employees but not to independent contractors." *Id.* at 457.

25. See CAL. LAB. CODE § 510 (West 2000).

26. *Cotter*, 60 F. Supp. 3d at 1069.

27. *Id.*

28. *Id.*

same common law test for distinguishing employees from independent contractors. The underpinnings of this transition shed light on how workers are classified in practice today. More importantly, a study of this historical development reveals that the courts developing the common law test could not have anticipated the complex working relationships in the sharing economy. This, in turn, highlights the need to revise the classification test.

This Part examines the development of the common law employment classification test, focusing on its adaptation from tort liability to worker protection and the Supreme Court's failed attempt to broaden the scope of the classification test. It then describes the details of the modern common law classification test, focusing on California's approach.

A. THE HISTORICAL DEVELOPMENT OF THE COMMON LAW
DISTINCTION BETWEEN EMPLOYEES AND INDEPENDENT
CONTRACTORS

At common law, the legal principle of respondeat superior held employers liable for the negligence of their employees, but not for the negligence of their independent contractors. In the mid-nineteenth century, courts developed what came to be known as the "control test" to classify workers for such respondeat superior purposes. However, during the New Deal Era, courts imported the control test to classify workers under labor legislation designed to remedy bargaining inequality and to protect workers. The Supreme Court attempted to expand the scope of the control test to account for this wholly distinct classification purpose. But Congress rejected a broader approach and statutorily mandated a return to the traditional common law consideration of control. As a result, the common law control test remains the dominant test of worker classification today. Because the courts developed the classification test for respondeat superior liability and not for worker protection, classification outcomes are sometimes out of sync with real-world employment relationships, a problem only exacerbated by the sharing economy.

1. *Between the Nineteenth and Twentieth Centuries, the Primary Purpose of Worker Classification Transitioned from Negligence to Worker Protection*

The common-law distinction between employees and independent contractors originally arose in the mid-nineteenth century to determine whether an employer should be liable for the tortious conduct of her

workers.²⁹ At that time, the employer-employee relationship was known as that of master and servant.³⁰ Under the doctrine of respondeat superior, courts could hold a master vicariously liable for the conduct of her servants.³¹ The rationale for such liability was that, since she had control over her servant, the master was positioned to minimize the harm caused by the servant in carrying out the master's work.³² By contrast, the master was not positioned to minimize the harm caused by her independent contractors, who had expertise and autonomy in their own work decisions. Accordingly, courts defined the master-servant (or employer-employee) relationship in terms of the master's right of control over a worker. Under the so-called "control test," the more control a master exercised over a worker's performance, the more likely a court would label that worker a servant.³³ Beyond the respondeat superior liability question, though, "worker[]" status was of limited consequence in the largely unregulated working world of the nineteenth century.³⁴

Twentieth century industrialization made employment relationships more complex and impersonal than the traditional master-servant relationship. As a result, employees required statutory protections "as a check against the bargaining advantage employers [had] over [them]—particularly unskilled, lower-wage employees—and the corresponding ability employers would otherwise have [had] to dictate the terms and

29. See SAMUEL ESTREICHER & GILLIAN LESTER, *EMPLOYMENT LAW* 17 (2008); Myra H. Barron, *supra* note 24, at 458–59; 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, 304 (2001); Gerald M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189–90 (1939); Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76, 77 (1945).

30. Stevens, *supra* note 29, at 189.

31. *See id.*

32. Liability could thus materialize from a master's actually controlling a worker's negligent activity, from a master's failure to adequately supervise a worker, or even from a master's "careless[] select[ion] [of a] negligent worker." *See* Carlson, *supra* note 29, at 302–04 (noting that "the label 'master-servant' connoted a relationship of very broad authority and control for one party and general subservience for the other").

33. *See* Stevens, *supra* note 29, at 189–94 (tracing the development of the control test); Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurs, and Empowerment*, 34 N. ILL. U. L. REV. 67, 79 (2013) (summarizing the development of the control test). The Supreme Court adopted the control test in *Singer Mfg. Co. v. Rahn*, 132 U.S. 518 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'").

34. Carlson, *supra* note 29, at 305.

conditions of the work.”³⁵ Independent contractors, by contrast, were presumably in a “far more advantageous position” with respect to bargaining power since they could “readily . . . sever [a] business relationship” when faced with unfair treatment or working conditions.³⁶ New Deal legislation addressed this inequality in bargaining power by providing employees with numerous benefits and protections.

Thus, New Deal legislation “dramatically” increased the consequences of worker status.³⁷ The distinction became more relevant for determining whether a worker fell within the scope of protective labor legislation than for its original purpose of determining respondeat superior liability.³⁸ Despite the change in the purposes and consequences of worker classification—from tort liability to worker protection—courts imported the nineteenth-century control test into twentieth-century classification questions. But the increasing complexity of employment relationships also made it difficult to determine the requisite level of control to establish an employment relationship.³⁹ As a result, courts began to consider additional factors to account for the multitude of working relationships that existed.⁴⁰

35. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015); *see also* *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 127 (1944) (internal quotation marks omitted) (discussing the “[i]nequality of bargaining power in controversies over wages, hours and working conditions” that employees face when “dealing with an employer”).

36. *Cotter*, 60 F. Supp. 3d at 1074 (quoting Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 130 (1997)).

37. Carlson, *supra* note 29, at 315.

38. *See id.* at 310; ESTREICHER & LESTER, *supra* note 29, at 17 (“The control test was developed at common law not for the purpose of determining whether individuals fall within the scope of protective labor legislation, but rather for the distinct purpose of determining [tort liability].”); Barron, *supra* note 24, at 459 (noting that while “[t]he control test was devised to establish employer tort liability . . . it has been extended to other areas of the law”).

39. *See* Carlson, *supra* note 29, at 305 (“A highly skilled worker, for example, might be beyond much control by his employer . . . simply because the employer lacks the knowledge that makes the worker a professional.”).

40. *See* Carlson, *supra* note 29, at 310–11 (noting that “[c]ourts were frequently inclined to give added weight to factors other than control when the effect was to extend protection to needy workers rather than to impose tort liability on employers”); *see also* RESTATEMENT (FIRST) OF AGENCY § 220 (1933).

2. *Congress Rejected the Supreme Court's Attempt to Expand the Scope of the Common Law Test and Statutorily Mandated a Return to the Traditional Consideration of Control*

To address the complexity in more modern employment relationships, the Supreme Court attempted to broaden the control test and take a more expansive view of the term “employee” by using additional factors in the consideration of employment status. This broader test, formulated in a series of decisions interpreting New Deal legislation, came to be known as the “economic realities” or “statutory purpose” test.⁴¹ In *National Labor Relations Board v. Hearst Publications*, the Court refused to “import wholesale the traditional common-law” control test in interpreting the term “employee” under the National Labor Relations Act (NLRA).⁴² Instead, the Court found that the term “employee” must be construed in light of the “history, terms and purposes of the” NLRA—“to encourage collective bargaining and to remedy the individual worker’s inequality of bargaining power.”⁴³ Since the workers at issue were “subject, as a matter of economic fact, to the evils the statute was designed to eradicate,” the Court concluded that they were employees for the purposes of the NLRA despite their “technical legal classification.”⁴⁴ The Court revisited the economic realities approach three years later in *United States v. Silk* and in *Rutherford Food Corp. v. McComb*.⁴⁵

Congress, however, did not approve of the more expansive economic realities test and mandated a return to the traditional control test through a

41. See Carlson, *supra* note 29, at 317–20; ESTREICHER & LESTER, *supra* note 29, at 21–23. This test, though, was not a complete departure from common law principles. The Court remained committed to the distinction between employees and independent contractors. It only sought to institute a “modern, policy-oriented method for explaining [that] distinction.” Carlson, *supra* note 29, at 319.

42. NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 124–25 (1944).

43. *Id.* at 124–26.

44. *Id.* at 127–28, stating:

[W]hen the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.

45. See generally *United States v. Silk*, 331 U.S. 704 (1947) (using the economic realities test to interpret the term “employee” under the Social Security Act); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (using the economic realities test to interpret the term “employee” under the Fair Labor Standards Act).

number of statutory amendments.⁴⁶ Since this congressional directive, the Court has found that when “Congress has used the term ‘employee’ without defining it . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”⁴⁷ Thus, the common law test, with its primary focus on the employer’s control, remains the dominant test for worker classification.⁴⁸

B. ARTICULATING THE MODERNIZED CONTROL TEST

Section 220 of the Restatement (Second) of Agency is “routinely cited as the embodiment of the modernized common law rule.”⁴⁹ Its primary focus is the putative employer’s right of control, but it also considers a number of non-exclusive factors in determining whether an employment

46. Congress amended the NLRA and its legislative history to underscore its desire that the common law test be used. *See* 29 U.S.C. § 152(3) (2012 & Supp. II 2015) (“The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor . . .”); H.R. REP. NO. 80-245, at 18 (1947) (disapproving of *Hearst* explicitly). Congress expressly incorporated the common law definition into the Social Security Act. *See* 26 U.S.C. § 3121(d) (2012 & Supp. II 2015) (defining employee as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”); *see also* ESTREICHER & LESTER, *supra* note 29, at 21. However, Congress never made an analogous amendment to the FLSA, leaving *Rutherford* intact for determining employment status under the FLSA. *See* Carlson, *supra* note 29, at 325–26; ESTREICHER & LESTER, *supra* note 29, at 21–22.

47. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989). There, the Court identified as the primary consideration in the common law control test “the hiring party’s right to control the manner and means by which the [job] is accomplished.” *Id.* at 751–52; *see also* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (affirming the view in *Reid* that, absent express statutory authorization to the contrary, the common law control test is the correct test for analyzing employment classification).

48. *See Darden*, 503 U.S. at 322–23; Barron, *supra* note 24, at 458–60 (noting that the control test governs employment determinations under the Internal Revenue Code, a key federal law governing the employment relationship). States generally use the common law control test as well. *See, e.g.*, 52 N.Y. JUR. 2D EMP’T RELATIONS § 4 (West Feb. 2016) (footnotes omitted) (summarizing that under New York law, “[t]he essential element or sine qua non of the employer-employee relationship is the right of control—that is, the right . . . to direct the manner in which the work is to be done”); *see also* 17 ILL. LAW AND PRAC. EMP’T § 1 (West Feb. 2016); D.C. CODE § 32-1331.04 (2016). However, some states still consider the economic realities test in addition to the control test. *See, e.g.*, *Craig v. FedEx Ground Package Sys., Inc.*, 792 F.3d 818, 819–20 (7th Cir. 2015) (per curiam) (internal quotation marks omitted) (describing Kansas’s employment classification test as “includ[ing] economic reality considerations, while maintaining the primary focus on an employer’s right to control”); *see also* *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1042 (9th Cir. 2014) (discussing Oregon’s classification test).

49. RESTATEMENT (SECOND) OF AGENCY § 220 (1958); Carlson, *supra* note 29, at 328; *see also* Barron, *supra* note 24, at 459.

relationship exists.⁵⁰ This balancing approach problematically results in a cumbersome, ambiguous, and subjective application of the test in practice. California's approach to the classification test is most significant to ongoing TNC cases.⁵¹ While California's common law control test contains a few unique nuances, it closely resembles Section 220, and its rationale for the distinction remains the same—to protect workers and to remedy the bargaining inequality faced by employees.⁵²

As a preliminary matter, when “a plaintiff [presents] evidence that he provided services for an employer, [that individual] has established a prima facie case” of an employment relationship under California law.⁵³ Once this prima facie case is established, the burden shifts to the employer to disprove an employment relationship.⁵⁴ This presumption makes proving independent contractor status particularly difficult at the summary judgment stage given California's “multi-faceted” common law control

50. See RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (considering the following non-exclusive factors in determining whether an employment relationship exists: “(a) the extent of control which . . . the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business”); see also RESTATEMENT OF THE LAW, EMPLOYMENT LAW § 1.01 (2014) (identifying the employer's “control[ing] the manner and means by which the individual renders services” as a key factor in determining employment status).

51. See generally Order of the Labor Commissioner of the State of California, *Berwick v. Uber Techs., Inc.*, Case No. 11-46739, at 10 (Cal. Super. Ct. June 16, 2015); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc.*, 2015 U.S. Dist. LEXIS 116482 (N.D. Cal. Sept. 1, 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

52. See *Cotter*, 60 F. Supp. 3d at 1074 (discussing the rationale for worker classification). As previously discussed, “[i]ndependent contractors do not receive these protections because they . . . are not dependent on a single employer in the same all-or-nothing fashion as traditional employees.” *Id.*

53. *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (citing *Robinson v. George*, 105 P.2d 914, 917 (Cal. 1940)); see also CAL. LAB. CODE § 3357 (West 2016) (establishing a presumption of employment); *Yellow Cab Coop. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1294 (1991) (explaining that section 3357 “creat[es] a presumption that a service provider is an employee unless the principal affirmatively proves otherwise”).

54. See *Narayan*, 616 F.3d at 900 (citing *Cristler v. Express Messenger Sys., Inc.*, 171 Cal. App. 4th 72, 84 (2009); *Bemis v. People*, 109 Cal. App. 2d 253, 263–64 (1952)).

test.⁵⁵ The California classification test then proceeds under what is supposed to be a two-step analysis. The primary question is whether the employer retained a right of control over the presumed employee. Beyond this question, courts look to a number of “secondary indicia” bearing on the nature of an employment relationship. In practice, however, the primary question of control tends to dominate the classification analysis.

1. *The Primary Question of Control Dominates the Employment Classification Test in California*

The primary question in determining if an employment relationship exists is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”⁵⁶ The “right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains “all necessary control” over the worker’s performance.”⁵⁷ The determinative factor, then, “is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise.”⁵⁸ Thus, an employment relationship “may still exist where ‘[a] certain amount of . . . freedom is inherent in the work.’”⁵⁹ While no one factor is dispositive in determining the extent of an employer’s right of control, the right to terminate a worker at will is “[p]erhaps the strongest evidence of the right to control” because the “power of the

55. *See id.* (noting that the summary judgment hurdle “is particularly difficult for [a defendant] to overcome in light of . . . the multi-faceted test that applies in resolving the issue [of] whether the [plaintiff is an] employee[.]”); *Cotter*, 60 F. Supp. 3d at 1070 (observing that “under California law, the question of how to classify a worker is typically for a jury”).

56. *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (internal quotations omitted). The *Borello* court also asserted that the control test should be “applied with deference to the purposes of the protective legislation.” *Id.* However, the California Supreme Court decided *Borello* less than three months before the Supreme Court decided *Reid*, in which the Court declared that the traditional common law control test was the appropriate means of determining employment classification, absent statutory direction to the contrary. *See id.*; *supra* Section II.A.2. Accordingly, the California Supreme Court later declined to extend the additional consideration of statutory purpose to the control test. *See Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 n.3 (Cal. 2014) (explaining that “those further considerations are not part of the common law test for employee status”).

57. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal 2015) (quoting *Borello*, 769 P.2d at 408 (establishing that a “business entity may not avoid its statutory obligations [to an employee] by carving up its production process into minute steps, then asserting that it lacks ‘control’ over the exact means by which one such step is performed by the responsible workers”).

58. *Ayala*, 327 P.3d at 172 (emphasis in original).

59. *Cotter*, 60 F. Supp. 3d at 1076 (quoting *Air Couriers Int’l v. Emp’t Dev. Dep’t*, 150 Cal. App. 4th 923, 934 (2007)).

principal to terminate the services of the agent gives him the means of controlling the agent's activities."⁶⁰

2. *The Secondary Indicia Are Generally Not Dispositive in California Employment Classification Cases*

Although control is the “most important” or “most significant” consideration, courts also “recognize a range of secondary indicia . . . that may in a given case evince an employment relationship.”⁶¹ These “individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.”⁶² Courts must weigh the secondary factors knowing they “are not of uniform significance.”⁶³ Indeed, “many secondary factors ‘are mer[e]ly evidentiary indicia of the right to control’ and may be of ‘minute consequence’” in a particular case.⁶⁴ In general, no secondary factor is dispositive to the employment classification question.⁶⁵ The following study of selected California classification cases provides a better understanding of how courts apply this two-pronged approach.

III. APPLYING THE CONTROL TEST: WORKER CLASSIFICATION CASES

A number of worker classification cases demonstrate how courts apply California's common law control test in practice. The circumstances of the workers in cases involving worker classification for delivery service businesses and taxi cab companies—both of which have business models analogous to that of TNCs—present a backdrop against which to analyze the similar situation of TNC drivers. The class action suit currently pending against Uber provides a useful opportunity to analyze the classification of

60. *Ayala*, 327 P.3d at 171–72 (internal quotation marks omitted) (noting, additionally, that “[w]hether a right of control exists may be measured by asking whether or not, if instructions were given, they would have to be obeyed on pain of at-will discharge[] for disobedience”); see also *Cotter*, 60 F. Supp. 3d at 1076 (quoting *Borello*, 769 P.2d at 404) (observing that “[t]he right to terminate at will, without cause, is ‘[s]trong evidence in support of an employment relationship’”).

61. *Borello*, 769 P.2d at 404; *Ayala*, 327 P.3d at 171. These secondary indicia are factors “derived principally from the Restatement Second of Agency.” See *Borello*, 769 P.2d at 404 (listing the secondary indicia); *Ayala*, 327 P.3d at 171 (same). The *Borello* court also approved of six additional factors developed by other jurisdictions which shared “many points of individual similarity” to the Restatement factors. See *Borello*, 769 P.2d at 407.

62. *Borello*, 769 P.2d at 404 (internal quotation marks and citation omitted); see also *Ayala*, 327 P.3d at 176–77.

63. *Ayala*, 327 P.3d at 176.

64. *Id.* at 177.

65. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1140 (N.D. Cal. 2015).

workers in the sharing economy and will likely result in a blanket classification of the class of Uber drivers as employees. Such a wholesale outcome will more significantly affect TNCs and other types of sharing economy companies—both in pending or future litigation and in day-to-day business—than would a similar finding for a single driver.

A. ANALOGIZING WORKER CLASSIFICATION: DELIVERY SERVICE BUSINESSES AND TAXI CAB COMPANIES

Delivery service businesses act as intermediaries to allow for the delivery of packages or other cargo. These businesses are analogous to TNCs, which act as intermediaries and providers of on-demand ride services. Two cases illustrate particularly well how California courts have applied the common law control test to delivery service businesses.

First, in *Alexander v. FedEx Ground Package System, Inc.*,⁶⁶ the plaintiff FedEx drivers asserted claims for unreimbursed employment expenses and unpaid wages on the grounds that FedEx misclassified them as independent contractors rather than employees.⁶⁷ The Ninth Circuit held that the FedEx drivers were employees as a matter of California law.⁶⁸ The court was able to make such a determination as a matter of law because the parties did not dispute that the drivers' contracts with FedEx, in conjunction with FedEx's written policies and procedures, dictated the working relationship between the drivers and FedEx. Accordingly, the issue was only the "extent to which those documents [gave] FedEx the right to control its drivers."⁶⁹ Second, in *Air Couriers International v. Employment Development Department*,⁷⁰ a

66. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

67. *Id.* at 987.

68. *See id.* at 997. The Ninth Circuit reversed the holding of the Northern District of Indiana that the drivers were independent contractors as a matter of California law. The Indiana court acted as the multidistrict litigation (MDL) court for similar suits filed against FedEx in approximately forty different states. The MDL court held "that plaintiffs were independent contractors as a matter of law in each state where employment status [was] governed by common-law agency principles." *See id.* at 987–88; *see generally In re FedEx Ground Package Sys., Inc., Emp't Practices Litig.*, 758 F. Supp. 2d 638 (N.D. Ind. 2010). In addition to *Alexander*, a number of other appeals from the MDL court have been litigated, though the results have been mixed. *See, e.g., Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 997 n.1 (8th Cir. 2015) (summarizing and providing examples that "[s]ome courts, in various legal and procedural postures, have found employee status . . . [o]ther courts, again in various postures, have found independent-contractor status . . . [and] [s]till others have concluded simply that summary judgment was inappropriate").

69. *See Alexander*, 765 F.3d at 988. The court was able to answer this question as a matter of law because "[i]n California, the meaning of a contract . . . is a question of law." *Id.*

70. *Air Couriers Int'l v. Emp't Dev. Dep't*, 150 Cal. App. 4th 923 (2007).

plaintiff delivery service company, Sonic, sued to recover employment taxes it paid to the Employment Development Department.⁷¹ Sonic argued that the Department “incorrectly levied [the taxes] against independent contractor drivers,” as California law only required employers to remit tax payments for employee drivers.⁷² The appellate court, however, affirmed the trial court’s finding that an employment relationship existed between Sonic and its drivers.⁷³

In both of these cases, the ultimate conclusions of employee status primarily rested on findings that the employers exerted all necessary control over the drivers and that, viewing the operations as a whole, the drivers were integral and essential to the employers’ businesses.⁷⁴ There are four common factors which supported those conclusions. First, the employers controlled the appearance of both the drivers and the drivers’ vehicles. For instance, in *Alexander*, FedEx required the drivers to wear FedEx approved clothing “from their hats down to their shoes and socks” and stressed that they should be “clean shaven, hair neat and trimmed, [and] free of body odor.”⁷⁵ FedEx also required that the driver-provided vehicles be painted “FedEx white,” be marked with the distinctive FedEx logos, and contain interior shelving

71. *Id.* at 926.

72. *Id.* at 931–32.

73. *Id.* at 926.

74. *See Alexander*, 765 F.3d at 991–96; *Air Couriers*, 150 Cal. App. 4th at 937–39. Two additional cases provide outlier examples of delivery service cases. *See generally* *JKH Enters., Inc. v. Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046 (2006) (finding employee status); *Millsap v. Fed. Express Corp.*, 227 Cal. App. 3d 425 (1991) (finding independent contractor status). In *JKH*, the state appellate court upheld a finding that JKH delivery drivers were employees for the purposes of workers’ compensation. *See JKH*, 142 Cal. App. 4th at 1066–67. There, the court determined that JKH retained all necessary control over the drivers and the operation as a whole by “obtaining the clients in need of [delivery] service and providing the workers to conduct it.” *Id.* at 1064. JKH did “not govern[] [its drivers] by particular rules”—such as requiring them to wear uniforms or to mark their vehicles with a JKH logo—and did not direct its drivers “about how to perform the delivery task.” *Id.* at 1051. In fact, JKH’s only requirement was that drivers deliver the packages within two to four hours. *Id.* This case represents an outlier because the court found an employment relationship after merely determining that the company controlled the whole delivery operation. In *Millsap*, by contrast, the state appellate court affirmed a finding that a FedEx delivery driver was an independent contractor in the context of a tort liability claim against FedEx. *Millsap*, 227 Cal. App. 3d at 435. The court reasoned that the driver used his own car, “was paid on a ‘per route’ basis,” and, “[o]ther than to say ‘be careful’ or to give him directions to a particular location[, the delivery company] . . . did not instruct [the driver] as to how to make the deliveries or how to drive his car.” *Id.* at 431. This case represents an outlier because the court considered whether an employment relationship existed for tort purposes and did not reference *Borello* or the “all necessary control” standard.

75. *Alexander*, 765 F.3d at 989 (internal quotation marks omitted).

consistent with FedEx specifications.⁷⁶ Likewise, in *Air Couriers*, Sonic “encouraged drivers to wear uniforms[] and provided identification badges and vehicle placards.”⁷⁷

Second, the employers effectively controlled their drivers’ hours and operating routes. In *Alexander*, the driver contracts did not allow FedEx to control driver hours. However, FedEx required drivers to arrive at the delivery terminals at a specified time each morning and return at a specified time each night; FedEx also retained the right to restructure the workload of each driver.⁷⁸ The result was that FedEx cornered drivers into making deliveries “9.5 to 11 hours every working day.”⁷⁹ Similarly, in *Air Couriers*, the drivers “worked a regular schedule” with “regular daily routes.”⁸⁰ Though Sonic claimed that drivers determined their own schedules, driver testimony indicated that “drivers were terminated if they proved unreliable.”⁸¹

Third, the employers controlled “aspects of how and when drivers deliver[ed] their packages” because the employers negotiated directly with the customers. The drivers “delivered packages to [the employers’] customers, not their own customers” and the employers “set the rates charged to customers, billed the customers, and collected payment.”⁸² Such a dynamic indicated that the drivers were in fact an integral part of the employers’ businesses. Fourth, “the simplicity of the [drivers’] work (take this package from point A to point B) made detailed supervision, or control, unnecessary.”⁸³ The question of control was determinative in both cases, and thus overshadowed the analysis of the secondary indicia.⁸⁴

76. *Id.*

77. *Air Couriers*, 150 Cal. App. 4th at 931.

78. *See Alexander*, 765 F.3d at 985, 989–90.

79. *Id.* at 990.

80. *Air Couriers*, 150 Cal. App. 4th at 937.

81. *See id.* at 926–31.

82. *See Alexander*, 765 F.3d at 990–93; *Air Couriers*, 150 Cal. App. 4th at 938.

83. *Air Couriers*, 150 Cal. App. 4th at 937; *see Alexander*, 765 F.3d at 995 (finding that the lack of skill required of the drivers favored employee status).

84. *See Alexander*, 765 F.3d at 994; *Air Couriers*, 150 Cal. App. 4th at 938–39. In *Alexander*, the court nonetheless analyzed the secondary indicia in detail. *See Alexander*, 765 F.3d at 994–98. The court’s analysis of two factors is particularly interesting for comparison to TNCs. First, the “distinct occupation or business” factor favored employment status because “the work performed by the drivers [was] wholly integrated into FedEx’s operation. The drivers look[ed] like FedEx employees, act[ed] like FedEx employees, [and were] paid like FedEx employees.” *Id.* at 995. Second, the question of “whether the work [was] part of the principal’s regular business” also favored employment status. “The work that the drivers perform[ed], the pickup and delivery of packages, [was] ‘essential to FedEx’s core business.’” *Id.* at 996.

Similar to those for delivery service businesses, taxi cab company worker classification cases act as a fitting primer for TNC classification cases. The relationship between a taxi cab company and its drivers presents an obvious analogy to the relationship between a TNC and its drivers. Two cases illustrate particularly well how courts have applied California's common law control test to taxi cab companies.

First, in *Yellow Cab Cooperative v. Workers' Compensation Appeals Board*, the state appellate court upheld a finding that lessee cab drivers were employees.⁸⁵ There, Yellow Cab operated a system in which drivers leased cabs from Yellow Cab for ten-hour shifts and paid Yellow Cab a flat rate per shift for the benefit of using such taxi cabs.⁸⁶ The court found that the drivers were employees because their conduct "was undertaken for [Yellow Cab's] benefit and was under [Yellow Cab's] discretion and control."⁸⁷ Second, in *Ali v. U.S.A. Cab Limited*, the state appellate court affirmed a denial of class certification among cab drivers who claimed to be employees rather than independent contractors.⁸⁸ There, the drivers operated under lease agreements whereby U.S.A. Cab was only a "taxi dispatch service."⁸⁹ Cab driver declarations "undercut" the assertion that U.S.A. Cab "pervasive[ly] control[led]" its drivers.⁹⁰ Importantly, in affirming that there was no "predominance of common questions of fact" as to whether the drivers were employees, *Ali* suggested that while some cab drivers might be employees, others might not be.⁹¹

Four common factors of the working relationships between the cab companies and their drivers were determinative of the control analysis in both cases. First, the courts considered whether the company required drivers to follow instructions from the dispatcher and whether the company could fire the drivers at will. In *Yellow Cab*, the drivers could only pick up customers assigned by the dispatcher, a rule that "was apparently designed to coerce drivers into accepting assignments whether or not they found them profitable enough to deserve their attention."⁹² Moreover, the

85. *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1291 (1991).

86. *Id.* at 1291–92.

87. *Id.* at 1293–94.

88. *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1337 (2009).

89. *Id.* at 1349–50.

90. *Id.* at 1337–40.

91. *See id.* at 1349–50. This notion should be kept in mind during the discussion of the class certification of Uber drivers. In particular, *Ali* supports the argument that a blanket classification of Uber drivers as either employees or independent contractors is inappropriate. *See infra* Section IV.B.

92. *Yellow Cab*, 226 Cal. App. 3d at 1298.

dispatchers “instructed [the drivers] on matters of behavior toward the public, personal appearance, and keeping their cabs clean.”⁹³ A driver’s failure to follow such directions from the dispatcher could result in Yellow Cab’s terminating that driver’s lease at will.⁹⁴ Effectively, Yellow Cab’s dispatchers controlled the drivers’ every move. By contrast, in *Ali*, U.S.A. Cab did not require its drivers to use the U.S.A. Cab dispatcher. In fact, some drivers “used it for between [twenty] and [sixty] percent of their business, many used it infrequently, and some chose not to use it at all.”⁹⁵

Second, and related to the question of dispatch instruction, the courts considered whether the drivers were free to drive for other companies. While Yellow Cab prohibited its drivers from working for other companies, U.S.A. Cab had no such ban.⁹⁶ Instead, many of the drivers in *Ali* “independently advertised and promoted their own services on Web sites and in phonebooks, and [gave] out business cards and their personal cell phone numbers.”⁹⁷

Third, the courts considered whether the drivers could set their own fares. In *Yellow Cab*, the drivers “did not set their own rates but were paid according to the number and distance of fares they carried,” whereas in *Ali*, many drivers set their own rates, such as “such as flat rates for trips, or rates below the standard metered rate.”⁹⁸ Fourth, the courts considered whether the drivers could set their own hours and work schedules. Yellow Cab assigned “shifts” to drivers “so that it could lease each cab to more than one driver in one day.”⁹⁹ This arrangement “significantly restricted [the drivers’] independence.”¹⁰⁰ On the contrary, U.S.A. Cab allowed its drivers to set their own schedules.¹⁰¹

Ultimately, U.S.A. Cab did not seem to retain pervasive control over its entire operation, whereas Yellow Cab did retain such control. The essence of Yellow Cab’s business was not merely cab leases—it had an interest in the entire cab operation and thus “had an obvious interest in the drivers’ performance *as drivers*,” not just as lessees.¹⁰² To protect that interest, Yellow Cab retained all necessary control over the operation by “soliciting

93. *Id.*

94. *Id.*

95. *Ali*, 176 Cal. App. 4th at 1349.

96. *See Yellow Cab*, 226 Cal. App. 3d at 1298; *Ali*, 176 Cal. App. 4th at 1349.

97. *Ali*, 176 Cal. App. 4th at 1349.

98. *See Yellow Cab*, 226 Cal. App. 3d at 1301; *Ali*, 176 Cal. App. 4th at 1349.

99. *Yellow Cab*, 226 Cal. App. 3d at 1298.

100. *Id.* at 1299.

101. *See Ali*, 176 Cal. App. 4th at 1340–41.

102. *Yellow Cab*, 226 Cal. App. 3d at 1299 (emphasis in original).

riders, processing requests for service through a dispatching system, [and] distinctively painting and marking the cabs.”¹⁰³

These cases illustrate the fact-intensive, subjective approach courts must take in administering the common law control test. Courts have struggled to apply this onerous balancing test to TNC worker classification questions.

B. A SQUARE PEG IN A ROUND HOLE: APPLYING CALIFORNIA’S CONTROL TEST TO TRANSPORTATION NETWORK COMPANIES

Several TNC drivers have launched suits alleging Uber and Lyft improperly classified them as independent contractors rather than employees. Thus, the plaintiff drivers’ primary claim is that they are owed unpaid wages and reimbursement of expenses, among other things, depending on the case. These suits are embodied in three cases, each of which is in a different phase of litigation.

First, in *Berwick v. Uber Technologies, Inc.*, the California Labor Commissioner¹⁰⁴ ruled that Berwick, a former Uber driver, was an Uber employee and not an independent contractor.¹⁰⁵ Second, in *Cotter v. Lyft, Inc.*, the court denied summary judgment to both Lyft and its former drivers, noting that “a reasonable jury could go either way” given California’s complex classification framework.¹⁰⁶ Third, in *O’Connor v. Uber Technologies, Inc.*, the court denied Uber’s motion for summary judgment “because a number of facts . . . remain[ed] in dispute” regarding how much control Uber exercised over its drivers.¹⁰⁷ However, the *O’Connor* court did

103. *Id.* at 1293.

104. The California Labor Commissioner’s Office, also known as the Division of Labor Standards Enforcement (DLSE), is responsible for enforcing statutes and regulations regarding employee wages and other working conditions. *A Short Course on Labor Commissioner Hearings*, WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP (May 6, 2007), <http://www.wilkefleury.com/blog/a-short-course-on-labor-commissioner-hearings> [<https://perma.cc/N897-F4AW>]. Once an employee files a claim with the DLSE, the Commissioner may take one of three actions: “decide that the employee’s claim is facially meritless, and take no action,” “pursue a civil action against the employer,” or “hold an administrative hearing on the matter.” *Id.* If the Commissioner decides to proceed with an administrative hearing, either party may appeal an order therefrom “[w]ithin 10 days . . . by filing an appeal to the superior court, where the appeal shall be heard *de novo*.” CAL. LAB. CODE § 98.2(a) (West 2014) (emphasis added). In other words, a court owes the Commissioner’s decision no deference.

105. Order of the Labor Commissioner of the State of California, *Berwick v. Uber Techs., Inc.*, Case No. 11-46739, at 10 (Cal. Super. Ct. June 16, 2015).

106. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015).

107. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (denying summary judgment). The court did find, however, that since “Uber’s drivers render[ed] service to Uber . . . [they] are Uber’s presumptive employees” as a matter of law.

certify a class of Uber drivers for trial on the “threshold employment classification question.”¹⁰⁸ The details of these cases comprise the remainder of this Part. However, more focus will be given to *O’Connor* than to *Cotter* or *Berwick* because the class certification in *O’Connor* means that its outcome will more significantly affect other TNCs and sharing economy companies than would the same outcome for a single driver.

In *Berwick*, the Commissioner had little difficulty finding employee status under California law. The Commissioner noted that Uber’s relationship with its drivers was “very similar” to Yellow Cab’s relationship with its drivers.¹⁰⁹ Like Yellow Cab, Uber “retained all necessary control over the operation as a whole” by “obtaining the clients in need of [transportation] service[s] and providing the workers to conduct” such services.¹¹⁰ Additionally, Uber conducted driver background checks, “control[led] the tools the drivers use[d],” prohibited non-registered drivers from using Uber technology, and paid drivers “a non-negotiable service fee.”¹¹¹ The Commissioner asserted that “[t]he modern tendency [was] to find employment when the work being done is an integral part of the regular business of the employer” and that Uber’s business “would not exist” without its drivers.¹¹² While this ruling is not binding in court,¹¹³ it is the first California decision to hold that a TNC misclassified a driver as an independent contractor. The opinion could be viewed as persuasive and provide an impetus for courts to rule this way in the future.

The *Cotter* and *O’Connor* courts, by contrast, struggled to apply California’s common law control test to the TNCs. Ultimately, both courts declined to decide on employee status as a matter of law, concluding that the TNC classification question was more appropriate for a jury. Both courts recognized that, while the common law control test was “outmoded” in the context of TNC worker classification, they are bound to apply that test until the legislature enacts rules more fitting for the sharing economy.¹¹⁴

Id. at 1145. This means that the burden will be on Uber at trial “to disprove an employment relationship.” *Id.*

108. *O’Connor v. Uber Techs., Inc.*, 2015 U.S. Dist. LEXIS 116482, at *9 (N.D. Cal. Sept. 1, 2015) (granting in part class certification).

109. *Berwick*, Case No. 11-46739, at 7; see generally *Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd.*, 226 Cal. App. 3d 1288 (1991).

110. *Berwick*, Case No. 11-46739, at 8.

111. *Id.* at 9.

112. *Id.* at 8.

113. See CAL. LAB. CODE § 98.2(a) (West 2014).

114. See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).

The *Cotter* court astutely observed that “the jury in this case will be handed a square peg and asked to choose between two round holes.”¹¹⁵

In *O'Connor*, four primary factual disputes led the court to deny summary judgment. First, it was unclear whether Uber had the right to fire drivers at will.¹¹⁶ Second, the parties disagreed on whether Uber required drivers to “accept any ‘leads’ generated by [the] Uber” application.¹¹⁷ Third, the parties disputed the extent to which Uber enforced the “suggestions” presented in the Uber Driver Handbook. These suggestions included carrying an umbrella for passengers, dressing professionally, and keeping the radio on “soft jazz or NPR.”¹¹⁸ The main point of dispute on the suggestions was whether the star rating system constituted enough “monitoring to warrant an inference of an employment relationship.”¹¹⁹ Fourth, the court questioned the relevance of the drivers’ ability to control their own working hours. The court noted that “freedom to choose one’s days and hours of work . . . [did] not in itself preclude a finding of an employment relationship.”¹²⁰ It noted that “the relevant inquiry [that a jury will ultimately need to consider] is how much control Uber [had] over its drivers *while they [were] on duty*.”¹²¹

Although the *O'Connor* court declined to grant summary judgment, it did certify a class of drivers for trial on the employment classification question after concluding that Uber’s “right to control [was] common with

115. *Cotter*, 60 F. Supp. 3d at 1081. At the time of the writing of this Note, the *Cotter* plaintiffs were in the process of seeking class certification. See Stipulation and Order Regarding Supplemental Briefing Schedule, *Cotter v. Lyft, Inc.*, No. 3:13-04065 (N.D. Cal. Feb. 17, 2016), ECF No. 175. If such certification is granted, the impact of the outcome in *Cotter* on other sharing economy companies will be similar to the impact this Note expects the *O'Connor* decision to have.

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

117. *Id.*

118. *O'Connor*, 82 F. Supp. 3d at 1149 (internal quotation marks omitted).

119. *Id.* at 1151. The court noted that in *Alexander*, the “ride-alongs by [FedEx] management representatives up to four times each year” were strong evidence of an employment relationship because during such ride-alongs, “the drivers were scrutinized on minute details of their performance.” *Id.* Given the factual differences between the monitoring conducted by FedEx (i.e., physical monitoring conducted at defined yearly intervals) and that by Uber (i.e., constant remote monitoring via “Uber’s application data”), the court concluded that “it [was] not immediately clear that Uber drivers are subject overall to less monitoring than the employees in *Alexander*.” *Id.*

120. *Id.* at 1152 (citing *Air Couriers Int’l v. Emp’t Dev. Dep’t*, 150 Cal. App. 4th 923, 926 (2007); *JKH Enters., Inc. v. Dep’t. of Indus. Relations*, 142 Cal. App. 4th 1046, 1051 (2006)).

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

respect to class members.”¹²² Importantly, the certification decision did not turn on “what degree of control [Uber actually] retained over the manner and means of its drivers’ performance.” Rather, certification turned on whether Uber’s “right of control over its [drivers], whether great or small, [was] sufficiently uniform to permit classwide assessment.”¹²³ The court found commonality among the putative class primarily based on six factors related to Uber’s right of control.¹²⁴ These six factors are discussed in detail below, where this Note uses them to conclude that a jury will likely determine that Uber drivers are employees under California’s common law control test.¹²⁵

Certification of the class raised the stakes in this trial. A finding that a class of Uber drivers are employees or independent contractors is more important than such a finding for a single driver would be. The outcome of this trial will have long-lasting consequences for future litigation involving TNCs and other sharing economy companies and will affect the way those companies conduct business and interact with their workers on a day-to-day basis.¹²⁶

122. *O’Connor v. Uber Techs., Inc.*, 2015 U.S. Dist. LEXIS 116482, at *37 n.6 (N.D. Cal. Sept. 1, 2015). The class was limited to “[a]ll UberBlack, UberX, and UberSUV drivers who have driven for Uber in the state of California at any time since August 16, 2009, and” (1) who drove individually for Uber and were paid personally (as opposed to those drivers who worked directly for a third-party transportation company contracted by Uber) and (2) “who are *not* bound to one of Uber’s more recent contracts” unless “the driver timely opted-out of that contract’s arbitration agreement.” *Id.* at *32 n.5, *125, *134–35. The court certified the class on the threshold employment classification and on plaintiffs’ tip reimbursement claim. However, the court did not certify a class on plaintiffs’ expense reimbursement claim. *See id.* at *9–10.

123. *Id.* at *58–59 (internal quotation marks omitted) (discussing the California standard for class certification in employment classification suits as articulated in *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 172 (Cal. 2014)).

124. *See id.* at *59–79. The court also concluded that “every single *Borello* secondary factor [could] be adjudicated on a classwide basis using common proof.” *Id.* at *80.

125. *See infra* Section IV.A.

126. *See* Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, THE CLS BLUE SKY BLOG (Nov. 9, 2015), <http://clsbluesky.law.columbia.edu/2015/11/09/navigating-the-uber-economy/> [<https://perma.cc/6TXE-9X9P>] (noting, in reference to the lawsuits against Uber and Lyft, that “[a]t stake are the prospects . . . for a nascent, multi-billion dollar ‘on-demand’ economy that relies upon independent contractors to offer goods and services as varied as home cleaning, software development, household errands, personal training, and apartment or home rentals”). The Means & Seiner blog post is a preview of their forthcoming law review article of the same name to be published in the UC Davis Law Review. *See* Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. (forthcoming 2016).

IV. O'CONNOR'S LIKELY OUTCOME AND THE NEED FOR A NEW CLASSIFICATION TEST

As both the *Cotter* and *O'Connor* courts have noted, the employment classification of Uber and Lyft drivers at trial will depend on California's common law control test, regardless of whether that test is the appropriate classification test for sharing economy workers.¹²⁷ Analyzing the facts surrounding *O'Connor* yields the conclusion that a jury will likely find the Uber drivers to be employees.¹²⁸ From a normative approach, however, the application of the control test to TNCs is problematic, and a new method of employment classification is needed for sharing economy workers.

A. O'CONNOR WILL LIKELY RESULT IN A BLANKET CLASSIFICATION OF UBER DRIVERS AS EMPLOYEES

A jury will likely conclude that the Uber drivers in *O'Connor* are employees. There are six features¹²⁹ of Uber's relationship with its drivers that will be key to the jury's determination of whether Uber retains the requisite control over its drivers to establish an employment relationship. First, Uber's right to terminate its drivers at will strongly favors employee status. Second, Uber's right to monitor driver data can be construed as de facto control over the details of the drivers' work. The jury's view of this feature of the Uber-driver relationship may determine the outcome of the trial, as such de facto control could undercut the factors that favor independent contractor status. A jury will likely conclude that Uber's monitoring evinces control and thus favors employee status. Third, Uber's unilateral right to set the rate for each ride strongly favors employee status.

127. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015). Notably, the burden at trial will be on Uber to prove that an employment relationship does not exist, as the court determined as a matter of law that Uber drivers provide a service to Uber. See *O'Connor*, 82 F. Supp. 3d at 1145. Lyft will likely be in a similar position at trial. While the *Cotter* court did not explicitly declare, as a matter of law, that the presumption of employment had been triggered, it bluntly stated that “the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one.” *Cotter*, 60 F. Supp. 3d at 1078.

128. This analysis will focus on the *O'Connor* case (and therefore on Uber) rather than on the *Cotter* case due to the recent class certification in *O'Connor*. The outcome of *O'Connor* will have a wide-reaching impact on future litigation involving TNCs and other sharing economy companies and on how those companies conduct business on a daily basis. Additionally, the facts between the two cases and Lyft's and Uber's treatment of their drivers are substantially similar, such that a prediction of the outcome of *Cotter* can reasonably be drawn from an analysis of *O'Connor*.

129. See *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at *59–79; see also *supra* Section III.B.

Fourth, that Uber does not dictate its drivers' working schedules or hours weighs in favor of independent contractor status. Fifth, that Uber does not dictate its drivers' routes and territories is at best neutral to the classification question. Sixth, that Uber does not restrict drivers from engaging in other occupations weighs in favor of independent contractor status. A jury is likely to conclude that these factors together and on balance indicate that Uber retains sufficient control (i.e., all necessary control) over its drivers such that an employment relationship exists.

1. *Uber's Right to Terminate Its Drivers at Will Favors Employee Status*

Uber retains the right to terminate its drivers at will.¹³⁰ Since the right to terminate a worker at will is “[p]erhaps the strongest evidence of the right to control,”¹³¹ Uber's retention of this right is thus strong evidence of an employment relationship. In particular, drivers are likely to follow the Uber Driver Handbook suggestions more closely when deviation from Uber's suggestions could result in termination from the Uber Platform. Uber's unfettered right to fire is of particular importance in analyzing the next feature of Uber's relationship with its drivers—Uber's right to monitor driver data.

2. *Uber's Right to Monitor Driver Data Will Likely Be Construed as De Facto Control over the Details of the Drivers' Work*

Uber collects and monitors “extensive performance data regarding all of its drivers.”¹³² This data monitoring can be broken down into two main categories for the purposes of this Note—user feedback on driver performance and driver ride acceptance rates. As a preliminary matter, it is important to underscore the significance that this feature of the Uber-driver relationship may hold at trial. Ultimately, a jury will need to determine to what extent, if any, Uber's data monitoring, in conjunction with its ability to terminate drivers at will, gives Uber de facto control over the small details (i.e., the manner and means) by which drivers complete their rides. This aspect of Uber's relationship with its drivers may control the outcome of a jury trial on the merits, as the small details of how the drivers conduct their

130. *See id.* at *72–79. Importantly, the court, in construing the pertinent Uber-driver employment contracts, made this determination as a matter of law. *See id.* Lyft's relationship with its drivers appears to have the same feature. Lyft's “Terms of Service state that ‘Either You or We may terminate Your participation in the Lyft Platform . . . at any time, for any or no reason, without explanation. . . .’” *Cotter*, 60 F. Supp. 3d at 1072.

131. *See Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014).

132. *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at *70 (emphasis in original).

rides are at the heart of the control test. This twenty-first century sharing economy form of control—effective control through the leveraging of data analytics—will likely lead a jury to find employee status for Uber drivers.¹³³

In the first category of data monitoring, Uber has implemented a system that allows users to provide feedback on drivers through a five-star rating scale. That system also permits users to provide free-form, written feedback when the user rates a driver below a certain star level. There is evidence that Uber regularly terminates drivers whose ratings fall below a certain threshold and that it “discipline[s]” drivers based on feedback from riders.¹³⁴ As a result, Uber’s monitoring puts into dispute the extent to which drivers are free to control how they give rides to users (i.e., the manner and means by which the drivers get a passenger from point A to point B)¹³⁵ and indicates that drivers instead might be de facto bound by the Uber Driver Handbook, which contains a number of “suggestions” on how drivers should conduct themselves while giving rides.¹³⁶ Among other things, the Handbook instructs drivers to dress professionally, “make sure the radio is off or on soft jazz or NPR,” open the doors for passengers, and carry umbrellas for passengers.¹³⁷ These instructions do not address the results Uber seeks (i.e., completion of a ride) but the manner and means by which its drivers accomplish that result.

Given Uber’s propensity to terminate drivers for falling below a certain star rating or for receiving negative written feedback from riders,¹³⁸ Uber drivers have a strong incentive to follow the Uber Driver Handbook suggestions as closely as possible. Other courts have found that a putative employer’s concern with such minute details indicates a level of control consistent with an employment relationship. For example, in *Alexander*, FedEx required drivers to follow “detailed specifications” as to their “fashion choices and grooming” and particular shelving and painting schemes for their trucks.¹³⁹ Additionally, FedEx managers conducted performance

133. This outcome illustrates why the common law control test is outdated, and this Note will argue that the test should be updated to accommodate sharing economy workers. See *infra* Section IV.B.

134. See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1151 (N.D. Cal. 2015); see also *Cotter*, 60 F. Supp. 3d at 1071 (describing an analogous practice by Lyft).

135. See *O’Connor*, 82 F. Supp. 3d at 1151–52.

136. As the *O’Connor* court observed, these “suggestions” appear to be “written in the language of command.” *Id.* at 1149.

137. See *id.* at 1149–50. Lyft also provides similar “suggestions” to its drivers. See *Cotter*, 60 F. Supp. 3d at 1078–79.

138. See *O’Connor*, 82 F. Supp. 3d at 1150–51.

139. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989–90 (9th Cir. 2014).

evaluation ride-alongs with drivers up to four times a year, during which the managers were to “observe and record small details about” the delivery drivers’ performance and provide the drivers with “immediate feedback.”¹⁴⁰ The *Alexander* court found adequate control for an employment relationship even though FedEx did “not require the drivers to follow managers’ recommendations after ride-along evaluations.”¹⁴¹

Still, there are details of driving from point A to point B that Uber does not control, distinguishing this case from *Alexander* and other delivery service cases. For example, FedEx maintained strict appearance requirements for both its drivers and their vehicles that “clearly constitute[d] control over its drivers.”¹⁴² By contrast, Uber drivers are vaguely instructed to “dress professionally” and, aside from the initial qualifying attributes viewed at the screening stage, Uber imposes no appearance requirements on its drivers’ vehicles.¹⁴³

In the second category of data monitoring, Uber collects data on its drivers’ trip acceptance rate. Uber strongly encourages drivers to “work towards” an acceptance rate of eighty percent.¹⁴⁴ While Uber claims that drivers never have to accept ride requests, the Uber Driver Handbook explains that drivers are expected to accept all rides and that “[r]ejecting too many trips’ [is] a performance issue that could lead to possible termination.”¹⁴⁵ Courts have recognized a driver’s effective inability to turn down rides due to potential adverse consequences as a sign of control.¹⁴⁶ Accordingly, to the extent Uber terminates drivers for low acceptance rates,

140. *Id.* at 985 (internal quotation marks omitted). The details which the managers recorded were minute, including whether a driver used a “dolly or cart to move packages, demonstrate[d] a sense of urgency, and [p]lace[d] [his or her] keys on [the] pinky finger of [his or her] nonwriting hand after locking the delivery vehicle.” *Id.*

141. *Id.* at 990; *cf.* *Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1298 (1991) (finding that Yellow Cab’s instructing drivers “on matters of behavior toward the public, personal appearance, and keeping their cabs clean,” among other factors, constituted necessary control).

142. *Alexander*, 765 F.3d at 989.

143. Note that the Uber window logo and Lyft mustache must be displayed on drivers’ vehicles per California Public Utilities Commission regulation. *See* CAL. PUB. UTILS. COMM’N, *supra* note 10, at 4 (requiring TNC vehicles to “display consistent trade dress”). Accordingly, any such trade dress drivers have on their cars is not indicative of Uber or Lyft’s right of control. Indeed, the fact that the Uber and Lyft trade dress is removable distinguishes it from the FedEx truck painting requirements.

144. *See* *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015).

145. *Id.*

146. *See supra* Section III.A (discussing *Yellow Cab*, 226 Cal. App. 3d at 1298–99; *Air Couriers Int’l v. Emp’t Dev. Dep’t*, 150 Cal. App. 4th 923, 927–30 (2007)).

this signals control.¹⁴⁷ The argument that an Uber driver may simply turn off the application if she does not wish to accept a certain ride will likely miss the mark at trial. The “relevant inquiry [will be] how much control Uber has over its drivers *while they are on duty* for Uber.”¹⁴⁸

3. *Uber’s Unilateral Right to Set the Rate for Each Ride Favors Employee Status Because It Deprives Drivers of the Ability to Negotiate Payment*

Uber unilaterally sets the rate for each ride. Although drivers are compensated on a per-ride basis, which might indicate independent contractor status,¹⁴⁹ the drivers have no power to negotiate the amount of that payment.¹⁵⁰ Instead, Uber pays drivers a flat rate of eighty percent of the fare that Uber independently calculates. “[W]here the putative employer maintains a unilateral right to control the hiree’s ‘salary,’ this supports a finding of employee status.”¹⁵¹ One of the key distinctions between employees and independent contractors is the lack of bargaining power employees possess as compared to independent contractors. Accordingly, it is unimportant that the drivers are paid by the job; it is important that they are paid a fixed, non-negotiable amount.

4. *That Uber Does Not Dictate Its Drivers’ Working Schedules or Hours Weighs in Favor of Independent Contractor Status*

In discussing the drivers’ abilities to determine their own schedules or hours, this Note refers to the drivers’ decisions to turn on the Uber application versus not logging in on any particular day.¹⁵² With this in mind,

147. Lyft “tells drivers that an acceptance rate ‘well below the community standard’ will result in an email warning, and after three such warnings the driver’s account will be deactivated.” See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1071 (N.D. Cal. 2015).

148. See *O’Connor*, 82 F. Supp. 3d at 1152 (emphasis in original) (citing as authority for this proposition *JKH Enters. Inc. v. Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046, 1051 (2006); *Air Couriers Int’l*, 150 Cal. App. 4th at 937).

149. See *Millsap v. Fed. Express Corp.*, 227 Cal. App. 3d 425, 431 (1991) (considering payment to a delivery driver “on a ‘per route’ basis” as a factor indicating independent contractor status). *Millsap*, however, is not controlling here as it does not indicate whether the driver *negotiated* the per-route payment. See *id.*

150. See *O’Connor v. Uber Techs., Inc.*, 2015 U.S. Dist. LEXIS 116482, at *62 (N.D. Cal. Sept. 1, 2015).

151. See *id.* (citing *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101 (9th Cir. 2014)). The *Ruiz* court observed that the employee “drivers [at issue] could not negotiate for higher rates, as independent contractors commonly can.” *Ruiz*, 754 F.3d at 1101.

152. When the drivers are logged onto the application, Uber strongly suggests that their drivers “work towards” an acceptance rate of eighty percent. See *O’Connor*, 82 F. Supp. 3d at 1149; see also *Cotter*, 60 F. Supp. 3d at 1071. This aspect of the Uber-driver relationship is discussed above. See *supra* Section IV.A.2.

Uber drivers are not required to work a regular schedule, a requirement which other courts have found weighs in favor of employee status.¹⁵³ One study estimates that only seventeen percent of Uber drivers keep roughly consistent hours from week to week, meaning that drivers commonly take advantage of the flexible scheduling Uber offers.¹⁵⁴ Accordingly, that Uber does not dictate its drivers' working schedules or hours weighs in favor of independent contractor status.¹⁵⁵

5. *That Uber Does Not Dictate Its Drivers' Routes and Territories Is at Best Neutral to the Classification Question*

Uber's purported lack of control over the routes its drivers take seems to weigh in favor of independent contractor status; however, this fact is at best neutral to the employment classification question since driving from point A to point B is a simple task. Uber does not need to exert control over the exact routes its drivers take to "retain[] all necessary control over the overall [transportation] operation."¹⁵⁶

Uber's lack of control over driver territories runs into an analogous issue. While Uber does not directly slot its drivers to certain territories, it arguably retains all necessary control over where its drivers are located through its surge pricing practice.¹⁵⁷ Uber admits that the purpose of the surcharge is to "incentivize more drivers to get on the streets to accommodate all [of its]

153. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 990 (9th Cir. 2014) (finding that FedEx's right to restructure drivers' schedules such that they were essentially required "to work 9.5 to 11 hours every working day" evidenced an employment relationship); *Air Couriers*, 150 Cal. App. 4th at 928–30, 937 (concluding that Sonic forced drivers into working a regular schedule by refusing work to drivers who rejected jobs, and that such a dynamic evidenced an employment relationship).

154. See Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 20 (Princeton University, Industrial Relations Section, Working Paper No. 587) (Jan. 2015), <http://dataspace.princeton.edu/jspui/handle/88435/dsp010z708z67d> [<https://perma.cc/FSF3-892W>] (finding that, from August 31, 2014 through November 22, 2014, "[o]nly [seventeen] percent of driver-partners tend[ed] to drive within [ten] percent of the amount of time that they drove in the previous week"). Note that Krueger, an economics professor at Princeton University, "acknowledge[d] working on this report under contract with Uber," but maintained that he had "full discretion over the content of the report." *Id.* at n.2.

155. Though "UberBlack drivers [must] give at least one ride every thirty days, and UberX drivers [must] give at least one ride every 180 days" to remain on the Uber platform, this minor assertion of "control" is insignificant for the purposes of this analysis as "both parties agree that Uber does not control any of its drivers'[] schedules." See *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at *60.

156. See *Air Couriers*, 150 Cal. App. 4th at 937.

157. See *Alexander*, 765 F.3d at 990 (noting that FedEx's "limiting drivers to a specific service area with specific delivery locations" evidenced control).

customers.”¹⁵⁸ By incentivizing drivers to log on to the application and to move from a normal pricing area to a surge pricing area, Uber ensures a certain level of driver availability for its customers at any given time.

6. *That Uber Does Not Restrict Drivers from Engaging in Other Occupations Weighs in Favor of Independent Contractor Status*

Uber does not restrict drivers from “engaging in any other occupation or business,” including working for other TNCs, such as Lyft.¹⁵⁹ Courts have often identified independent contractors as having multiple clients and not being subject to the bargaining disadvantage faced by an employee that works for a single employer. If the terms are unfavorable, an independent contractor can sever her relationship with a particular client. One study estimates that sixty-two percent of Uber drivers engage in another occupation,¹⁶⁰ supporting the assertion that Uber lacks control over its drivers’ outside business activities. This factor accordingly cuts in favor of independent contractor status.

The secondary factors are not likely to impact the outcome of this case. As both the *O’Connor* and *Cotter* courts have noted, while some of the secondary factors weigh toward independent contractor status—for example, drivers use their own vehicles and driving for a TNC requires no special skill—none of these secondary factors is determinative and many are “ambiguous” or “equivocal.”¹⁶¹ As such, the question of control is likely to dominate a jury’s classification decision. And, as described above, a jury is likely to conclude that Uber exercised enough control over the manner and means of its drivers’ work to establish an employment relationship.

This result seems probable because the classification question is couched in terms of a traditional common law test that focuses almost exclusively on control. The implications of such a finding will have long-lasting impacts on both TNCs and sharing economy companies more broadly. With such repercussions, the employment classification test should be tailor-made for the working relationships of the sharing economy. “Control” does not seem to fit the bill.

158. Quirk, *supra* note 13.

159. See *O’Connor*, 2015 U.S. Dist. LEXIS 116482, at *66–67 n.18.

160. See Hall & Krueger, *supra* note 154, at 17.

161. See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1152–53 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1079–81 (N.D. Cal. 2015).

B. THE SHARING ECONOMY REQUIRES AN UPDATED CLASSIFICATION TEST

The control test is not the appropriate classification test for sharing economy workers. Problematically, the case law defining the relevant parameters of the control test developed largely in an era that could not have predicted the innovations and working relationships brought about by the sharing economy. Even if the test produces the “right” outcome in the case of Uber (and by extension, other TNCs), the common law control test might produce the wrong result in future cases involving other types of sharing economy companies.

1. *A Blanket Classification for All Uber Drivers in the Certified Class Ignores Their Differing Circumstances*

The conclusion that *all* Uber drivers are employees (or even independent contractors) does not make practical sense. The underlying rationale of the common law distinction is to protect “true” employees from the bargaining disadvantage they encounter with their employers. Independent contractors are not at such a disadvantage and, in any event, “are not dependent on a single employer in the same all-or-nothing fashion as traditional employees.”¹⁶² Uber drivers on the whole do not fit into either traditional mold. While they may not have the bargaining power to negotiate rates and other aspects of their work, Uber drivers are not in the same burdened position as traditional employees; on the contrary, Uber drivers generally have little contact with management and have significant flexibility in how they accomplish their work. Hall and Krueger estimate that eighty percent of Uber drivers were working full- or part-time before they began working for Uber.¹⁶³ This suggests that the great majority of drivers did not start out completely dependent on Uber for financial support, but instead joined for the flexibility and supplemental income that Uber offers.¹⁶⁴ That study also posited that easier access to health insurance provided by the Affordable Care Act has made people more likely to “take advantage of the flexibility and income-generating potential made possible by the sharing economy.”¹⁶⁵ Thus, many Uber drivers may not be “dependent on [Uber] in the same all-or-nothing fashion as traditional employees.”¹⁶⁶

162. *Cotter*, 60 F. Supp. 3d at 1074.

163. *See* Hall & Krueger, *supra* note 154, at 10.

164. Most drivers are not solely dependent on Uber: over sixty percent of drivers maintain full- or part-time employment after they begin with Uber. *See id.* at 17.

165. *See id.* at 3.

166. *See Cotter*, 60 F. Supp. 3d at 1074.

But this is not to say that there are no drivers dependent on Uber and in need of the statutory protections provided to employees. Indeed, many drivers likely fall into that category as well. For instance, Hall and Krueger estimate that approximately one fourth of all Uber drivers rely on Uber as their sole source of income.¹⁶⁷ Accordingly, a blanket employment classification of all Uber drivers is inappropriate. Instead, drivers should be classified individually.

2. *Courts or Legislatures Need to Develop a New Approach to Employment Classification for Sharing Economy Workers*

A new approach to employment classification is needed—one tailored for the dynamic working relationships in the sharing economy. However, given the nuances of the classification inquiry, formulating an entirely new test is not an easy task. This Note identifies four possible alternatives.

First, the D.C. Circuit has veered away from the control test “in favor of a more accurate proxy” for capturing the distinction between employees and independent contractors.¹⁶⁸ In *FedEx Home Delivery v. National Labor Relations Board*, the court proclaimed that, “while all the considerations [of the] common law [control test] remain in play,” the focus of the inquiry should be on “whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss.”¹⁶⁹ There, the court found that a group of FedEx delivery drivers were independent contractors based on the entrepreneurial opportunities inherent in the drivers’ ability to subcontract, sell, or trade their assigned routes.¹⁷⁰ However, some scholars have criticized the decision as arbitrary and too simplistic, and the Ninth Circuit explicitly rejected this approach in *Alexander*.¹⁷¹

167. Hall & Krueger, *supra* note 154, at 11.

168. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

169. *Id.* (internal quotation marks omitted).

170. See *id.* at 497–500. The circumstances of FedEx’s employment with these drivers was nearly identical to the situation in *Alexander*. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984–87 (9th Cir. 2014).

171. See Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 364–67 (2011) (arguing that the D.C. Circuit’s decision “makes one long for the far-from-perfect common-law analysis” due in large part to its simplicity, as “[a]ny new [employment classification] analysis must maintain some form of multi-factored test to be effective”); Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 334 (2011) (asserting that the D.C. Circuit’s “conclusion—that entrepreneurial potential as the essence of independent contractor status—[was] just as arbitrary as the control analysis”); *Alexander*, 765 F.3d at 993–94.

Second, Benjamin Means and Joseph Seiner advocate that classification should be “shaped” by the amount of “flexibility” inherent in the working relationship.¹⁷² The most important justification for this approach is that it provides a “nuanced basis for analysis and avoids sweeping all workers in the [sharing] economy into one category or the other.”¹⁷³ However, this approach is similar to the common law test in that it focuses on just a single factor, flexibility.

Third, each state’s labor commission could define employment classification based on objective standards. For example, in Uber’s case, the California Labor Commission could determine employment status based on objective driver statistics or criteria—such as hours worked, whether driving for Uber was the driver’s only job, etc. The Commission could institute a test period upon which it would determine each driver’s initial classification. It would then review that classification for appropriate updates at regular intervals. Of course, this approach might be too costly or administratively burdensome to successfully implement. Additionally, this could incentivize drivers to change their working habits to fit into a particular classification, resulting in the “wrong” classification outcome in certain cases.

Fourth, the legislature could create a hybrid categorization for sharing economy workers that incorporates attributes of both employee and independent contractor status.¹⁷⁴ However, this would be administratively difficult and time consuming for the legislature to construct and would present issues of legal interpretation for the courts. Additionally, if defined poorly, this hybrid categorization might only prove to be a stopgap that is unable to address the next technological innovation.

172. Means & Seiner, *supra* note 126; *see also* Jost, *supra* note 171, at 335–36 (summarizing a number of additional “solutions” to the classification issue proposed by various scholars).

173. *See* Means & Seiner, *supra* note 126. Means and Seiner assert three additional justifications for their approach. First, it would not require additional legislation, as “flexibility clarifies the economic reality of labor arrangements” which many courts already consider. Second, flexibility is one of the single most important characteristics of a working relationship many sharing economy participants seek. Third, it “comports with intuitive judgments about fairness” by ensuring that workers who have more independence and flexibility than traditional employees are not able to improperly avail themselves to the statutory protections conferred upon employees. *Id.*

174. *See, e.g.*, Chris Opfer, *Uber Economy Could Spawn New Worker Classification*, BLOOMBERG BNA (Nov. 9, 2015), <http://www.bna.com/uber-economy-spawn-n57982063732> [<https://perma.cc/8RLE-44YN>] (“The solution . . . may be to add a third classification to cover workers who fall somewhere between traditional employees entitled to a full range of protections and benefits and independent contractors treated as self-employed entrepreneurs.”).

Despite their shortcomings, each of these four alternatives is a move in the right direction—they all attempt to tailor classification to the dynamic working relationships present in the sharing economy while retaining the individualized inquiry necessary to correctly classify workers. Although the first two alternatives still largely focus on a single factor, entrepreneurial opportunity and flexibility, respectively, each of these factors is more in tune with the working relationships in the sharing economy than is the dominant common law factor of control. The streamlined approach of the third alternative would alleviate the problem of subjective balancing inherent in the common law control test. The fourth approach is perhaps ideal, as the legislature could narrowly tailor the hybrid categorization to fit the needs of the sharing economy and also construct that categorization to be flexible enough to adapt to changing technological circumstances.

V. CONCLUSION

TNCs are representative of sharing economy business models; that is, those defined by “an online intermediary [or platform] that . . . acts as a market for [peer-to-peer] services and . . . facilitates exchanges by lowering transaction costs.”¹⁷⁵ Problematically, the legal and regulatory frameworks that purport to govern sharing economy businesses have not kept pace with the changing marketplace. In particular, sharing economy workers are currently classified as employees or independent contractors based on a common law test that developed in the nineteenth century to determine employer tort liability. This common law test could not have accounted for the innovations and novel working relationships brought about by the sharing economy. The outcome of the *O'Connor* case, which will undoubtedly have long-lasting implications for both Uber and sharing economy companies generally, depends on this outmoded test. As a result, the court will charge a jury with broadly classifying all Uber drivers in the certified class as either employees or independent contractors. But such a blanket result does not make practical sense. In reality, some Uber drivers should be classified as independent contractors, while others should be classified as employees (at least in the absence of a hypothetical hybrid categorization). As such, it is clear that courts or legislatures need to refocus, or even replace, the common law control test in the context of sharing economy companies. The updated classification test should encompass an individualized approach tailored to the dynamic working relationships in the sharing economy.

175. Katz, *supra* note 2, at 1070.