

# The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?

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## I. INTRODUCTION

It was a snowy evening in Paris when 2008 LeWeb Technology Conference attendees Travis Kalanick and Garrett Camp were trying to catch a taxicab.<sup>1</sup> Frustrated with being stuck in the cold without a ride, the two eventually found a way back to their apartment on the outskirts of the city and started talking with a few other entrepreneurs about potential start-ups.<sup>2</sup> Not surprisingly, an idea they discussed that night was a smartphone application, or app, that could pick up passengers the moment they requested a ride.<sup>3</sup> Although neither Kalanick nor Camp probably knew it at the time, this simple idea would lead to the creation of Uber, one of the most popular ridesharing apps of the twenty-first century.<sup>4</sup>

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1. Kara Swisher, *Man and Uber Man*, VANITY FAIR (Dec. 2014), <http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy>.

2. *Id.*

3. *Id.* (“[Kalanick and Camp] vowed then and there to solve the problem [of not being able to find a taxicab] with a revolutionary new app. The premise was dead simple: push a button and get a car.”).

4. See Steven Hill, *Keep Uber from Becoming Too Much of a Good Thing*, SAN FRANCISCO CHRON. (Oct. 12, 2015, 7:36 PM), <http://www.sfchronicle.com/opinion/artic>

Since its initial 2009 release as “UberCab,”<sup>5</sup> and its subsequent name change to “Uber” in 2010,<sup>6</sup> the app that claims to connect passengers to drivers with the “touch of a button”<sup>7</sup> has become a worldwide commercial success.<sup>8</sup> In 2015, Uber topped the list of 104 venture-backed start-ups, where it was valued at \$51 billion.<sup>9</sup> It had expanded its reach to more than 300 cities across the globe and had delivered millions of passengers to virtually wherever they wanted to go each day.<sup>10</sup> As of 2016, investors valued the company at a whopping \$62 billion.<sup>11</sup> Although the company took a loss in the first half of that year due to recruiting drivers across the world, increasing marketing efforts, and fighting regulators and taxi companies, Uber “posted significant revenue growth in the second quarter of [2016] . . . including a 31 percent jump to more than \$5 billion in second-quarter bookings . . . .”<sup>12</sup>

Despite Uber’s great many successes over the past few years, however, the company has faced several challenges as well.<sup>13</sup> In addition to provoking city regulators and causing taxi drivers to take to the streets in protest, Uber has been subject to injunctions in select cities and has been outright banned in other countries around the world.<sup>14</sup> Additionally,

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le/How-to-keep-Uber-from-becoming-too-much-of-a-good-6560109.php (“Uber, the \$51 billion global ride-hailing company, has quickly become not only a leader in the urban transportation industry but also popular among many of its users.”).

5. Julian Chokkattu & Jordan Crook, *A Brief History of Uber*, TECHCRUNCH (Aug. 14, 2014) <http://techcrunch.com/gallery/a-brief-history-of-uber/slide/4/> (“By [March 2009], Camp [had] a prototype in the works. The name [was] UberCab.”).

6. *Id.* (stating the company changed its name to Uber in October 2010).

7. *See, e.g., The Beginner’s Guide to Uber*, UBER (Jan. 29, 2015), <https://newsroom.uber.com/the-beginners-guide-to-uber-2/> (“Quite simply, Uber is a ridesharing app that connects riders to drivers at the touch of a button.”).

8. *See* Douglas MacMillan & Telis Demos, *Uber Valued at More Than \$50 Billion*, WALL ST. J. (July 31, 2015, 8:50 PM), (discussing the commercial success of the Uber app).

9. *Id.*

10. *Id.* (“Uber’s faster climb to \$50 billion reflects its aggressive global expansion into more than 300 cities and growing popularity ferrying millions of riders daily.”).

11. Mike Isaac, *How Uber Lost More Than \$1 Billion in the First Half of 2016*, N.Y. TIMES, (Aug. 25, 2016), <http://www.nytimes.com/2016/08/26/technology/how-uber-lost-more-than-1-billion-in-the-first-half-of-2016.html>.

12. *Id.*

13. *See* Reuters, *Legal Troubles—Including 173 Lawsuits in the US—Threaten Uber’s Global Push*, BUS. INSIDER (Oct. 5, 2015, 5:34 AM), <http://www.businessinsider.com/r-legal-troubles-market-realities-threaten-ubers-global-push-2015-10> (discussing some of the current lawsuits brought against Uber in the United States and other countries across the world) [hereinafter *Legal Troubles*].

14. *See id.*

many of Uber's own drivers have filed claims against the company,<sup>15</sup> arguing that they are entitled to overtime, reimbursement expenses, and other legal entitlements of being an "employee" of Uber.<sup>16</sup>

This Article considers whether Uber drivers are employees or independent contractors. First, this Article discusses the Uber app itself, its place in the sharing economy, and the current tests that distinguish employees from independent contractors. Next, it analyzes both Uber's arguments that its drivers are independent contractors, as well as the drivers' arguments that they are employees. After applying today's tests to Uber's business model, this Article argues that the laws do not provide a clear answer as to whether the drivers should be classified as employees or independent contractors. Ultimately, it recommends that the tests be applied on a case-by-case basis to consider the different types of individuals participating in the sharing economy, and that the tests be reconsidered in light of the tension between control and user safety that exists today.

## II. BACKGROUND

### A. *Uber Rideshare App*

Uber is a rideshare app that can be downloaded on any Android, iOS (Apple), or Windows smartphone, and it connects passengers to drivers using the GPS on the user's phone.<sup>17</sup> Through the phone's GPS capabilities, both the driver and passenger can see the other party's location and approximately how long it will take to reach the pick-up point, which can be set by the person requesting a ride.<sup>18</sup> Either before or immediately after the driver picks up passengers, passengers can enter a location

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15. Kristen V. Brown, *Here's Whats Going on with All of Those Uber Lawsuits*, FUSION (June 16, 2016), <http://fusion.net/story/315350/uber-class-action-lawsuit-settlement/> ("Last year, 50 lawsuits were filed against [Uber] in U.S. federal court alone-and since then, still more suits have been filed, while others have settled . . . Many of the cases challenge Uber's basic business model, arguing that that Uber misclassifies drivers as independent contractors, rather than employees.").

16. *Id.*; see also Gillian B. White, *In the Sharing Economy, No One's an Employee*, ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/> (explaining that services such as Uber and Lyft are being "sued for trying to skirt the law by treating their workers as contractors instead of employees . . . absolv[ing] them of [their] legal obligations and sav[ing] them tons of money.").

17. John Patrick Pullen, *Everything You Need to Know About Uber*, TIME (Nov. 4, 2014), <http://time.com/3556741/uber/>.

18. See *id.*

where they would like to be dropped off.<sup>19</sup> After the passenger is picked up and the driver drops the passenger off at the desired location, the passenger's credit card—which is entered into the app upon being downloaded—is charged.<sup>20</sup>

If the passenger requests the ride sometime during the day, the passenger is usually charged a standard fare.<sup>21</sup> However, if the passenger is calling for an Uber driver at late hours, on the weekend, or during a national holiday, the passenger is subject to an increased "surge pricing" fare.<sup>22</sup> Regardless of the rate at the time, Uber takes a cut for itself, ranging from 5% to 20%, and the rest of the money is directly deposited into the driver's account.<sup>23</sup> Therefore, during holidays or weekends, a driver who decides to turn on the app and provide their services can typically earn much more money than someone who drives during the week.<sup>24</sup>

Depending on location, there are several different Uber car services potential passengers, or "leads," can choose from when requesting a driver.<sup>25</sup> The first, "UberX," is a standard four-door sedan service.<sup>26</sup> Of all the services made available by Uber, this tends to be the most commonly used and also the least expensive.<sup>27</sup> The second service, "UberXL," is similar to UberX except that the vehicles seat at least six passengers instead of four and are generally minivans or SUVs.<sup>28</sup> Third, "UberSelect"—formerly known as "UberPlus"—is the luxury sedan service, and features

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19. Dan Kedmey, *Uber Now Lets You Set Your Destination Within the App*, TIME (Aug. 13, 2014), <http://time.com/3108661/uber-destination/>.

20. Pullen, *supra* note 17.

21. *See id.*

22. *See, e.g.*, Tom Gillespie, *What is Uber, How Does It Work, and Why is the Taxi Cab App So Controversial?*, SUN (Nov. 3, 2016, 4:36 PM), <https://www.thesun.co.uk/news/2067929/what-is-uber-how-does-app-work/> ("Surge pricing,' where fees go up, comes into action when demand is high at times such as Saturday nights or New Year's Eve.").

23. Pullen, *supra* note 17.

24. *See id.*

25. *See generally* B. Thermidor, *Difference Between UberX, UberXL, UberSelect, and UberBlack Cars*, RIDEORDRIVEUBER (Apr. 21, 2016), <http://rideordriveuber.com/uberx-uber-xl-ubersselect-uberblack-cars-difference/#> (explaining the differences in Uber services).

26. *Id.* UberX "is economically friendly; it's a regular car that can seat for up to 4 passengers. UberX is a really popular form of Uber as it is the least expensive by far. It expects that the driver can seat up to four passengers and typically you'll find that an UberX car should be a Honda Accord or Toyota Prius although most forms of sedan are going to be a popular pick for you to drive around with." *Id.*

27. *Id.*

28. *Id.* UberXL "cost[s] more than UberX, but it can sit up to six passengers. UberXL is very popular as it allows for bigger cars, more fares and more people. It can be up to six passengers in the vehicle at any time and will typically be an SUV or minivan type vehicle." *Id.*

cars from makers such as Audi, BMW, and Mercedes.<sup>29</sup> The fourth service, “UberBlack,” is Uber’s “executive” luxury service and typically features drivers in black SUVs and luxury sedans.<sup>30</sup> Not surprisingly, UberBlack is Uber’s most expensive widely offered service.<sup>31</sup> Uber’s last and most recent service is “UberPool,” which allows leads to share their rides with others—usually strangers—and then split the cost together.<sup>32</sup> At the time the passenger requests a driver, he or she can choose from any of the services available.<sup>33</sup> Regardless of which service is selected, if passengers are with a group of friends, for example, they are able to split the Uber fare evenly—as long as every passenger has already downloaded the app.<sup>34</sup>

Turning from the passengers to the drivers, Uber allows virtually anyone to drive for the company as long as a few minimal requirements are met.<sup>35</sup> These include passing both a background and Department of Motor Vehicles check, owning a vehicle, and having car insurance.<sup>36</sup> Additionally, depending on what level of service the driver is providing, the driver must give at least one ride within a given amount of time.<sup>37</sup> Because these minimal requirements are all that is required to drive for Uber, a wide variety of people perform the job.<sup>38</sup> For example, a passenger’s first driver one evening may be a part-time biomedical engineer, while the second driver providing the ride back to the passenger’s home may utilize Uber on a full-time basis to support his family of five.<sup>39</sup>

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29. *Id.* “UberSelect is a popular system to go with as it allows for a luxury sedan system that houses up to 4 passengers. It should be something like an Audi or a BMW as it’s for the classier range, those who want leather seats and all the extra gimmicks that make a drive feel special.”

30. *Id.* UberBlack “is much more expensive than the UberXL . . . [It] is very popular as well due to the fact that it’s a luxury service. It’s commercially registered and insured livery vehicles such as a luxury sedan tends to be used. This is the most common option for those who want the high-end service and who wish to enjoy a bit more high-end drives.” *Id.*

31. *Id.*

32. *Id.* This new service, UberPool, is common in bigger cities. The article also notes that driving UberPool can earn the driver much more money, but at the expense of a longer journey. *Id.*

33. See Pullen, *supra* note 17.

34. UBER, <https://help.uber.com/h/bf59d9ef-71cc-4b59-8b83-a2e01772e33f> (last visited Nov. 18, 2015) (describing the steps on how to split a fare with other Uber app users).

35. See Pullen, *supra* note 17.

36. *Id.*

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

38. See Pullen, *supra* note 17.

39. See *id.* (discussing the author’s experiences with two different Uber drivers, the first being a part-time biomedical engineer and the second a professional driver from Africa).

In addition to the ease of becoming an Uber driver, perhaps what makes Uber so popular is the tremendous amount of flexibility offered to its drivers.<sup>40</sup> Because Uber drivers use their own car and can turn on the app at virtually any time—whether it is six in the morning or six in the evening—they can set their own schedules and drive whenever it is most convenient for them.<sup>41</sup> Turning back to the previous example, someone who is working as a part-time biomedical engineer may only drive for a few hours on the weekends or whenever they are off-duty or taking a break, whereas full-time Uber drivers who support a family of five may drive from 9:00 AM to 5:00 PM, Monday through Saturday, so they can spend Sunday with family.<sup>42</sup> Based on all of these features, Uber has created an app that serves a dual role as both a referral and transportation service, making it one of the most popular rideshare apps in the sharing economy today.<sup>43</sup>

### *B. Uber's Place in the Sharing Economy*

The sharing economy is subject to multiple definitions and has been called many different names, such as “collaborative consumption,” “asset-light lifestyle,” “collaborative economy,” “peer economy,” and “access economy.”<sup>44</sup> However, many authors who have written on the subject agree that the sharing economy generally refers to an economic system built around unutilized human and physical resources during certain times of the day.<sup>45</sup> In other words, businesses that rely on the sharing economy

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40. *The Top 10 Facts You May Not Know About Uber Driver Partners*, UBER (Aug. 5, 2015), <https://newsroom.uber.com/2015/08/the-top-10-facts-you-may-not-know-about-uber-driver-partners/> (“87% of [Uber drivers] said that a major reason they drive [for Uber] is to be their own boss and set their own schedule.”).

41. See, e.g., *Uber Driver Pros & Cons*, UBERPEOPLE (2010), <http://uberpeople.net/pages/prosandcons/> (last visited Oct. 29, 2015) [hereinafter *Pros & Cons*].

42. See, e.g., Pullen, *supra* note 17.

43. *Id.* (“To passengers, Uber is essentially synonymous with taxis, and to drivers, it’s basically a referral service.”).

44. Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH L.J. 23, 25 (2014-15).

45. Andrew T. Bond, *An App for That: Local Governments and the Rise of the Sharing Economy*, 90 NOTRE DAME L. REV. ONLINE 77, 78 (2015) (defining the sharing economy as “a microeconomic system built around the utilization of unused human and physical resources.”); see also Cannon & Chung, *supra* note 44 (referring to the sharing economy as “bringing to market goods and labor that are otherwise unutilized during certain time periods . . .”); Molly Cohen & Corey Zehnebot, *Heads Up: What’s Old Becomes New: Regulating the Sharing Economy*, 58 BOSTON B.J. 6, 6 (2014) (defining the sharing economy as “an old concept made new through the internet-based sharing of underutilized space, skills, and stuff for monetary and non-monetary benefits.”).

take advantage of “underutilized space, skills, and goods by ‘matching providers who have specific assets or skills with the people who need them’” the most.<sup>46</sup> Although the concept of the sharing economy has existed long before the birth of the Internet, the Internet is “responsible for substantially reducing information costs, resulting in the sharing economy’s transformation and dramatic expansion” to what it is today.<sup>47</sup> More specifically, because the Internet gives smartphone users “the ability to quickly communicate through [their phones] and peer-to-peer programs, owners of . . . unused resources now have the means to connect them with consumers,” there has been an increase in the number of apps that thrive under the sharing economy.<sup>48</sup>

This is where Uber comes in.<sup>49</sup> Recognizing the frustrations of not finding a ride as quickly as one would like,<sup>50</sup> the underutilization of many resources,<sup>51</sup> and the capabilities of modern technology,<sup>52</sup> Kalanick and Camp created a rideshare app that has allowed millions of people to thrive in today’s sharing economy.<sup>53</sup> For instance, imagine a situation where a sales associate at Walmart is off-duty for a few hours and wants to make some additional money driving for Uber.<sup>54</sup> Whenever the associate is off-duty, he or she could access the Uber app to see if anyone in the surrounding area needs a ride.<sup>55</sup> If there is someone in need of a ride, the associate could then drive the car that he or she uses to get to work to take the leads wherever they need to go. Thus, through the Uber app, the sales associate working at Walmart is able to profit from his or her otherwise-unused vehicle by providing rides to those individuals who need them.

For Uber and other businesses in the sharing economy to be successful, a number of goods and service providers—or drivers—are required to meet the demands of millions of consumers—or passengers—in need of a

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46. Catherine Lee Rassman, *Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance “Gap,” and Why Pennsylvania Should Get on Board*, 15 PGH J. TECH. L. & POL’Y 81, 81 (2014).

47. Bond, *supra* note 45, at 78.

48. *Id.* at 79.

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

50. See Swisher, *supra* note 1.

51. Bond, *supra* note 45, at 77.

52. See *id.* (describing Uber as a “novel” transportation service through the use of the cell phone application).

53. See MacMillan & Demos, *supra* note 8 (describing Uber’s services as ferrying millions of riders daily).

54. Bond, *supra* note 45, at 78.

55. See *id.* (describing a situation based on the hypothetical posed by the author).

ride each day.<sup>56</sup> To ensure there are enough providers to meet all of these demands, businesses like Uber “solicit nonprofessionals to participate as providers by reducing barriers of entry . . . .”<sup>57</sup> As discussed above, because Uber’s minimal requirements permit almost anyone to drive for the company, Uber has “blur[red] established regulatory boundaries and creat[ed] a vacuum where rules for sharing are not clear.”<sup>58</sup> Since laws and regulations have not kept pace with the growth of the sharing economy, this has led to questions as to how businesses within the sharing economy should be treated.<sup>59</sup> Not surprisingly, one of the biggest questions that has been asked is whether Uber’s drivers are employees or independent contractors.<sup>60</sup>

### C. Current Employee/Independent Contractor Tests

Since the 1930s, employees have been able to claim a number of benefits and protections under law.<sup>61</sup> Today, these include—but are certainly not limited to—minimum wage, overtime, health insurance, workers’ compensation, and lower taxes.<sup>62</sup> Because providing employees with these types of benefits can be a burden on employers, the latter have a strong incentive to categorize their workers as something else other than “employees.”<sup>63</sup> One alternative to classifying a worker as an “employee” is by classifying him or her as an “independent contractor.”<sup>64</sup> In doing so, employers will presumably have far fewer persons entitled to workers’

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56. Cannon & Chung, *supra* note 44, at 25-26.

57. *Id.* at 26.

58. *Id.*

59. See generally Bond, *supra* note 45, at 77; see also White, *supra* note 16 (“But the emerging sharing economy makes it easier to muddy classification categories, especially because of the heavy reliance on new technology.”).

60. See Justin Fox, *Uber and the Not-Quite-Independent Contractor*, BLOOMBERG VIEW (June 23, 2015, 11:59 AM), <http://www.bloombergvview.com/articles/2015-06-23/uber-drivers-are-neither-employees-nor-contractors>.

61. Susan Schwochau, Note, *Identifying an Independent Contractor for Tax Purposes: Can Clarity and Fairness be Achieved?*, 84 IOWA L. REV. 163, 174 (1998).

62. White, *supra* note 16.

63. Recent Cases, *Contracts—Independent Contractor Agreements—Ninth Circuit Finds that Misclassified Employees Are Eligible for Federally Regulated Employee Benefits—Vixcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*), 111 HARV. L. REV. 609, 609 (1997).

64. See *id.* (“The independent contractor agreement is a popular, if not always successful, way to avoid the ‘employee’ label.”).



compensation and unemployment benefits, as well as protection from discrimination and being paid wages well below the statutory minimum,<sup>65</sup> thus incurring far fewer costs in general.

### 1. The Control Test

Since the mid-nineteenth century, courts have used what is commonly referred to as a “control test” in order to determine whether a worker should be classified as an employee or independent contractor.<sup>66</sup> In applying this control test, courts have traditionally looked to the “amount of control exerted over the putative employee by the employer.”<sup>67</sup> In short, if the employer exerts more control over the work of said individual, he or she is more likely to be considered an “employee” under the law.<sup>68</sup> If, however, it is found that the employer exerts little to no control over the worker, the latter will be classified as an independent contractor.<sup>69</sup>

Unfortunately, the federal government has not enacted a statutory scheme distinguishing employees from independent contractors, and many states and agencies have adopted their own version of the control test.<sup>70</sup> One such governmental agency that has adopted its own version of the control test is the Internal Revenue Service (IRS).<sup>71</sup> When applying its test, the IRS looks to several unweighted and non-dispositive common-law factors while using all the “information that provides evidence of the degree of control and the degree of independence. . . .”<sup>72</sup> The IRS separates its factors into three separate categories: (1) “behavior control,” (2) “financial control,” and (3) the “type of relationship.”<sup>73</sup>

The first category of factors, behavior control, looks to “[f]acts that show whether the [employer] has a right to direct and control how the [employee] does the task for which [employee] is hired . . . .”<sup>74</sup> The factors used by the IRS in making this determination include: “When and where

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65. Schwochau, *supra* note 61, at 166.

66. Juliene M. Munde, Note, *Not Everything That Glitters is Gold, Misclassification of Employees; the Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADV. 253, 258 (2015).

67. Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 68 (2013).

68. *Id.*

69. *Id.*

70. Munde, *supra* note 66, at 253-54.

71. See generally I.R.S. Publication 15-A 1, 7 (Employer’s Supplemental Tax Guide—Supplement to Circular E) (describing the I.R.S. control test) [hereinafter IRS Publication 15-A].

72. *Id.* at 7.

73. *Id.* at 7-8.

74. *Id.* at 7.

to do the work[;] [w]hat tools or equipment to use[;] [w]hat workers to hire or to assist with the work[;] [w]here to purchase supplies and services[;] [w]hat work must be performed by a specified individual[;] [and] [w]hat order or sequence to follow.”<sup>75</sup>

The second category of factors, financial control, looks to “[f]acts that show whether the [employer] has a right to control the business aspects of the [employee’s] job.”<sup>76</sup> The factors the IRS uses in making this determination include:

The extent to which the worker has unreimbursed business expenses . . . . The extent of the worker’s investment . . . . The extent to which the worker makes his or her services available to the relevant market . . . . How the business pays the worker . . . . [And] [t]he extent to which the worker can realize a profit or loss.<sup>77</sup>

The third and final category of factors, type of relationship, looks to “[f]acts that show the parties’ type of relationship.”<sup>78</sup> The factors the IRS uses in making this determination include:

Written contracts describing the relationship the parties intended to create[;] [w]hether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay[;] [t]he permanency of the relationship . . . . [And] [t]he extent to which services performed by the worker are a key aspect of the regular business of the company.<sup>79</sup>

The common-law factors in this control test, or some variation thereof, have been incorporated into many different federal laws, such as the Employee Retirement Income Security Act (ERISA),<sup>80</sup> the Federal Insurance Contribution Act (FICA),<sup>81</sup> the Federal Unemployment Tax Act (FUTA),<sup>82</sup> the Immigration and Naturalization Act,<sup>83</sup> the Occupational

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75. *Id.*

76. *Id.*

77. *Id.* at 7-8.

78. *Id.* at 8.

79. *Id.*

80. 29 U.S.C. §§ 1001-1461 (2012); *See* *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) (holding that a common-law test should be used for determining whether a worker is an employee under ERISA).

81. 26 U.S.C. §§ 3101-3128, 3121(d) (2012).

82. 26 U.S.C. §§ 3301-3311, 3306(i) (2012).

83. 8 U.S.C. ch. 12 (2012); 8 C.F.R. § 274a.1(f), (j) (2012).

Safety and Health Act,<sup>84</sup> and Title VII of the Civil Rights Act of 1964.<sup>85</sup> Additionally, the control test has also been incorporated into a number of states' laws as well.<sup>86</sup> Thus, because of its widespread use, the control test is considered to be the leading test in differentiating between employees and independent contractors today.<sup>87</sup>

## 2. The Economic Realities Test

Alternatively, some courts have adopted a different, more purposive test in order to determine whether an employment relationship exists.<sup>88</sup> In *NLRB v. Hearst*,<sup>89</sup> Hearst Publications, a newspaper publisher, refused to collectively bargain with a union representing newsboys who distributed their paper throughout the city.<sup>90</sup> At issue before the United States Supreme Court was whether or not the newsboys were "employees" under the National Labor Relations Act (NLRA).<sup>91</sup> Instead of giving weight to the technical legal classification of workers under the traditional common-law factors, the Court looked at the economic facts that defined the relationship of the two parties.<sup>92</sup> Because of the vast inequality of bargaining power between the publication and the newsboys,<sup>93</sup> the Court determined the latter were employees under the NLRA and, thus, afforded all of its protections by law.<sup>94</sup>

Twenty-four years after the *Hearst* decision, the Wage-Hour Administrator of the Department of Labor applied this "economic realities test"

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84. 29 U.S.C. §§ 651-678 (2012); *See Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n*, 20 F.3d 938, 940 (9th Cir.1994) ("The central inquiry is: who controls the work environment?").

85. 42 U.S.C. §§ 2000e to 2000e-17 (2012); Equal Employment Opportunity Commission, COMPLIANCE MANUAL § 2 (2000).

86. *See Narayan v. Eagle Freight Sys., Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (describing the indicia of an employment relationship in the state of California).

87. *See* JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 8 (2d ed. 2013) ("[The] 'control test' . . . became the leading test for distinguishing employees from independent contractors.") [hereinafter UNDERSTANDING EMPLOYMENT LAW].

88. Schwochau, *supra* note 61, at 176.

89. 322 U.S. 111 (1944).

90. *Id.* at 113.

91. *Id.* at 120.

92. *Id.* at 127-28 ("In short, when 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.").

93. *Id.* at 126.

94. *See id.* at 135.

to the Fair Labor Standards Act (FLSA).<sup>95</sup> In expanding the definition of “employee” as it was used in the control test, the ultimate concern shifted to “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”<sup>96</sup> In making this determination, courts weigh several factors including: the amount of the alleged contractor’s investment in facilities and equipment, or his or her employment of helpers; the nature and degree of control retained or exercised by the principal; opportunities for profit or loss; permanency of the working relationship; extent to which the services in question are an integral part of the employer’s business; the degree of independent initiative, judgment, and foresight in open-market competition with others required for the services of the independent operation; and the degree of independent business organization.<sup>97</sup> The FLSA was not the only legislation that incorporated the economic realities test, as a variation of the test is also present in the Family Medical and Leave Act (FMLA) as well.<sup>98</sup> Thus, although the control test is widely recognized as the leading test on the employee/independent contractor question, the economic realities test remains a viable alternative in determining the employee/independent contractor relationship as well.<sup>99</sup>

### III. EMPLOYEE/INDEPENDENT CONTRACTOR SPLIT

Since October 2012, there have been more than one hundred lawsuits filed against Uber in the United States alone.<sup>100</sup> Labor commissions in at least eight states—California, Colorado, Georgia, Illinois, Indiana, New York, Pennsylvania, and Texas—have wrestled with the issue as to whether Uber drivers should be classified as employees or independent contractors.<sup>101</sup> In all of the cases brought against Uber at both the federal

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95. 29 U.S.C. ch. 8 (2012 & Supp. II 2015); U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968).

96. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

97. See U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968); U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (Sept. 12, 1969).

98. 29 U.S.C. ch. 28 (2012); 29 C.F.R. § 825.105 (2012).

99. See Schwochau, *supra* note 61, at 176.

100. See *Legal Troubles*, *supra* note 13.

101. See *Uber Techs., Inc. v. Berwick*, No. CGC-15-546378, Cal. App. LEXIS 9488 (Cal. Super. June 16, 2015); Andrew Nusca, *Uber Loses Another Legal Round in the Employee vs. Independent Contractor Debate*, FORTUNE (Sept. 10, 2015, 11:59 AM), <http://fortune.com/2015/09/10/uber-california-employee/>; Heather Somerville, *Uber Has Lost Again in The Fight Over How to Classify its Drivers*, BUS. INSIDER (Sept. 10, 2015, 12:37 AM), <http://www.businessinsider.com/uber-independent-contractors-or-employee-2015-9>; *California Case*

and state levels thus far, the drivers have consistently argued they are employees of Uber under the law.<sup>102</sup> In response, Uber has defended itself by claiming that its drivers are independent contractors who are not entitled to the benefits and protections of employees.<sup>103</sup> The following section briefly summarizes each party's arguments how drivers should be classified, starting with Uber's arguments that its drivers should be considered independent contractors.

#### *A. Uber's Arguments that its Drivers Are Independent Contractors*

In all of the cases brought against Uber by its drivers, the company has consistently presented several arguments why its drivers should be classified as independent contractors and not employees.<sup>104</sup> First, regarding what type of company or business Uber is, Uber characterizes itself as a "technology company" or a "referral service" that connects its drivers to leads.<sup>105</sup> It follows that since Uber is a technology company and not a "transportation company," its drivers do not provide a fundamental service to the business since it is Uber that is actually connecting the drivers to the leads or passengers.<sup>106</sup> Thus, because Uber is a referral service and is responsible for "referring" its drivers to passengers, it argues that no employment relationship is present, and that the drivers are merely independent contractors.<sup>107</sup>

As described above, one of the principal factors of the control test is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."<sup>108</sup> One of the strongest indicia of control is whether Uber can fire its drivers at will, or without cause.<sup>109</sup> Uber argues it does not have the power to fire at will

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*Could Drive Uber's 'Independent Contractor' Claims to Pennsylvania Court*, NEWSWORKS (June 23, 2015), <http://www.newsworks.org/index.php/local/business-a-economy/83384-testing-ubers-claim-that-pennsylvania-agrees-its-drivers-are-independent-contractors>; Davy Alba, *Some Drivers Really Aren't Happy About the \$100M Uber Settlement*, WIRED (June 16, 2016, 7:44 PM), <https://www.wired.com/2016/05/drivers-really-arent-happy-100m-uber-settlement/>.

102. See, e.g., *O'Connor*, 82 F. Supp. 3d at 1133; *Berwick v. Uber Techs. Inc.*, No. 11-46739, Cal. Labor Comm'n (June 16, 2015); *O'Connor v. Uber Techs. Inc.*, No. 13-3826, 2015 U.S. Dist. LEXIS 116482 (N.D. Sept. 1, 2015).

103. *Id.*

104. See *supra* note 97 and accompanying text.

105. *O'Connor*, 82 F. Supp. 3d at 1141.

106. *Id.*

107. *Id.* at 1137-38.

108. *Id.* at 1148-49 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014)).

109. *Id.* at 1149.

because it is only permitted to terminate its drivers “with notice or upon the [drivers’] material breach’ of the governing contracts” that they sign.<sup>110</sup> Because of this, Uber argues this common-law factor is not met, favoring an independent contractor relationship.<sup>111</sup>

Furthermore, with respect to control, Uber also addresses the drivers’ schedules.<sup>112</sup> The company argues it does not exercise any control over the drivers’ schedules because they “can work as much or as little as they like, as long as they give at least one ride every 180 days [for UberX] or every 30 days [for UberBlack].”<sup>113</sup> Additionally, Uber provides a similar argument for the drivers’ driving routes, claiming the company does not uniformly exercise any control over “where its drivers work or what routes they take.”<sup>114</sup> Since Uber’s drivers can decline leads and “completely control how to give any rides they do accept,” Uber argues it lacks the requisite amount of control over the manner and means in which the drivers perform their work.<sup>115</sup>

Regarding pay being set unilaterally by Uber, the company argues that some of its drivers “have negotiated to receive higher fares from Uber . . .” and use “surge pricing’ as a form of negotiation to bid up compensation and entice drivers to log in and accept ride requests.”<sup>116</sup> Alternatively, Uber argues the drivers “have the power to negotiate their own fares with riders because they can turn off the Uber application before a ride is complete.”<sup>117</sup> Thus, the company concludes its drivers are more like independent contractors than employees because they can negotiate for higher rates and set their own compensation simply by turning off the app whenever they choose.<sup>118</sup>

Concerning Uber’s driving instructions, star ratings, and monitoring of their drivers’ performances, the company contends it merely provides its drivers with suggestions that “its drivers . . . dress professionally or listen to soft jazz or NPR,” and that these suggestions are not actual requirements.<sup>119</sup> Furthermore, the company asserts its drivers are not subject to extensive monitoring as to whether they comply with these suggestions, as its “employees or members of management never conduct

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110. *Id.*

111. *See id.*

112. *See id.*; *see also O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*59-60.

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

114. *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*61.

115. *O'Connor*, 82 F. Supp. 3d at 1149 (emphasis omitted).

116. *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*62, \*63.

117. *Id.* at \*63-64 (emphasis omitted).

118. *See id.* at \*62-65.

119. *O'Connor*, 82 F. Supp. 3d at 1150.

any performance inspections or ride-alongs with its drivers.”<sup>120</sup> Since the drivers are only subject to a rating from one to five stars and nothing else, Uber ultimately argues it does not have the “ability to ensure that any driver actually complies with its ‘suggestions’ or otherwise actively monitor its drivers’ performance.”<sup>121</sup>

Last, Uber notes that several significant secondary factors support classifying its drivers as independent contractors.<sup>122</sup> These include that the drivers use their own vehicles and not vehicles provided by Uber, can employ others to drive on their behalf, and “signed an agreement stating no employment relationship is created.”<sup>123</sup> For these reasons, Uber argues the drivers should be classified as independent contractors and not employees and, thus, should not be entitled to the benefits and protections the various employment laws afford.<sup>124</sup>

### *B. Drivers’ Argument that They Are Employees*

The drivers paint a very different picture of the business when asserting they are employees and not independent contractors. First, in response to Uber’s argument that it is a technology company serving as an intermediary between potential riders and potential drivers, the drivers argue Uber is a transportation company and “would not be a viable business entity without its drivers.”<sup>125</sup> More specifically, the drivers argue that because they actually pick up the passengers and deliver them to their selected destination, they provide a fundamental service to Uber.<sup>126</sup> Thus, because the drivers provide this service to Uber, a transportation company, the drivers contend they are employees and not independent contractors.<sup>127</sup>

Regarding Uber’s assertions that it exercises a minimal amount of control over its drivers, the drivers counter that Uber exercises significant control over the manner and means in which they operate.<sup>128</sup> Despite what Uber says, the drivers have pointed out “the actual contracts seem to allow Uber to fire its drivers for any reason and at any time.”<sup>129</sup> More specifically, they point to provisions that reserve Uber’s right to “reclaim,

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120. *Id.* at 1151 (emphasis omitted).

121. *Id.* at 1150.

122. *Id.* at 1153.

123. *Id.*

124. *See id.*

125. *Id.* at 1142.

126. *Id.*

127. *See id.*

128. *Id.* at 1149-50.

129. *Id.* at 1149.

prohibit, suspend, limit or otherwise restrict . . . the Driver from accessing or using the Driver App . . . .”<sup>130</sup> Because of these provisions, the drivers contend that Uber exercises significant control over them—a factor in favor of an employment relationship as opposed to an independent contractor.<sup>131</sup>

Furthermore, on the issue of control, the drivers argue Uber exercises a significant amount of control over the qualifications and selection of its drivers.<sup>132</sup> In doing so, the drivers point out that, before driving for the company, they have to “first complete Uber’s application process, including a background check, city knowledge exam, vehicle inspection, and personal interview.”<sup>133</sup> Because of these stringent requirements, the drivers argue Uber exercises a significant amount of control in choosing who will be selected to drive for the company and who will not.<sup>134</sup>

In response to Uber’s argument that there is no control because drivers can work as much or as little as they like, the drivers cite the Uber Driver Handbook.<sup>135</sup> In the handbook, the drivers point to a provision stating “[Uber] expect[s] on-duty drivers to accept all [ride] requests,” and that Uber will “follow-up with all drivers that are rejecting trips.”<sup>136</sup> Furthermore, the drivers cite several documents that instruct Uber drivers to dress professionally, send a potential passenger a text message when they are close to the pick-up location, make sure the radio is off or on soft jazz or NPR, and ensure the door is open when picking up a passenger.<sup>137</sup> Because these instructions are written more as commands than mere suggestions, the drivers contend that Uber has significant control over the manner and means of how they perform their job.<sup>138</sup>

Regarding Uber’s monitoring actions, the drivers argue that Uber mischaracterizes its five-star rating system.<sup>139</sup> The drivers argue the five-star rating system is used to ensure that the drivers “compl[y] with Uber’s many quality control ‘suggestions.’”<sup>140</sup> Because Uber can terminate “any driver whose star rating ‘falls below the applicable minimum star-rating . . . .’” and there is evidence Uber has terminated its drivers

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130. *Id.*

131. *See id.* at 1149-50.

132. *Id.* at 1142.

133. *Id.*

134. *See id.*

135. *Id.* at 1149.

136. *Id.*

137. *Id.* at 1149-50.

138. *Id.*

139. *Id.* at 1150-51; *O’Connor*, 2015 U.S. Dist. LEXIS 116482, at \*70-72.

140. *O’Connor*, 82 F. Supp. 3d at 1150-51.



on those grounds, the drivers argue there is an effective enforcement mechanism in place to ensure the drivers are doing their job up to Uber's standards.<sup>141</sup>

Although Uber maintains the drivers can negotiate to receive higher fares, the drivers say this is simply not true, and that the company does not consider any input from them.<sup>142</sup> Furthermore, the drivers state Uber unilaterally sets the amount of pay because it sets the fares it charges riders, regardless of what type of service the driver is providing or when they decide to drive.<sup>143</sup> Thus, because Uber controls the amount of money the drivers are paid, the drivers argue this is a factor that leans toward employment.<sup>144</sup> For these reasons, the drivers conclude they should be classified as employees under the law and are, thus, entitled to the benefits and protections that the law affords.<sup>145</sup>

#### IV. ANALYSIS

##### *A. Application of the Control Test to Uber*

As discussed in Part II, the first set of control test factors examines behavioral control by looking at whether Uber has a right to direct and control how its drivers perform their task of transporting the company's leads, or passengers.<sup>146</sup> In making this determination, courts consider factors such as, "When and where to do the work[;] [w]hat tools or equipment to use[;] [w]hat workers to hire or to assist with the work[;] [w]here to purchase supplies and services[;] [w]hat work must be performed by a specified individual[;] [and] [w]hat order or sequence to follow."<sup>147</sup>

Applying Uber's current business model to this first set of common-law factors, some factors favor employment status, while others favor that of an independent contractor. For instance, Uber drivers have control over when and where they work as well as what tools or equipment they use since they can set their driving schedules and use their vehicles in transporting passengers to the target destination.<sup>148</sup> Furthermore, the drivers have the freedom to purchase supplies and services wherever they like, as Uber does not dictate where the drivers go to fill up on gasoline, have their vehicle inspected, or get it washed. Because the driver

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141. *Id.* at 1151.

142. *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*62.

143. *Id.* at \*62-63.

144. *See id.*

145. *See id.*

146. IRS Publication 15-A, *supra* note 71, at 7.

147. *Id.*

148. *See O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*59-61.

is responsible for making many important decisions without Uber's permission or supervision, some factors in this first category strongly suggest the driver has a substantial amount of control over his or her work and thus is an independent contractor.

However, many other common-law factors seem to cut the other way. For instance, Uber decides which drivers to hire based on a number of criteria that include a background check, city knowledge exam, and personal interview.<sup>149</sup> Additionally, Uber provides its drivers with a detailed set of instructions in the Uber Driver Handbook.<sup>150</sup> Some of these instructions, which courts have determined to be written in the form of a command, include: dressing professionally; sending the lead a text message when the driver is approaching the pick-up destination; turning off the radio, or alternatively, turning on soft jazz or NPR; and providing passengers with an umbrella upon entering and exiting the vehicle.<sup>151</sup> Because Uber dictates what the driver does from the time before the lead is picked up until the time the lead is dropped off, it would seem that Uber has significant control over the manner and means in which its drivers operate—signifying an employment relationship.<sup>152</sup>

The second set of common-law factors focuses on financial control, or whether Uber has the right to control the business aspects of the driver's job.<sup>153</sup> In making this determination, courts examine:

The extent to which the worker has unreimbursed business expenses . . . . The extent of the worker's investment . . . . The extent to which the worker makes his or her services available to the relevant market . . . . How the business pays the worker . . . . [And] [t]he extent to which the worker can realize a profit or loss.<sup>154</sup>

Again, applying this set of factors to Uber's current business model, some factors indicate an independent contractor relationship, while other factors go the other way. First, Uber drivers are not reimbursed for expenses related to operating their vehicles, such as paying for gasoline,

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

150. *Id.* at 1149.

151. *Id.* at 1149-50.

152. See *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*69-72. In denying Uber's motion for summary judgment, the United States District Court for the Northern District of California held that it was more significant to look at how much control Uber exercised over their drivers while they were on duty. The court found that there was mixed questions of law and fact as to whether the drivers should be classified as employees or independent contractors. See *id.*

153. IRS Publication 15-A, *supra* note 71, at 7.

154. *Id.* at 7-8.

tolls, or parking tickets and citations.<sup>155</sup> The drivers are simply given a substantial portion of the passenger's fare while Uber takes the rest.<sup>156</sup> Second, the drivers presumably invest a substantial amount of money into their vehicles for other expenses, such as insurance, having the car detailed, and making any other necessary repairs.<sup>157</sup> Third, the drivers make themselves available to a fairly large market since they pick up leads from virtually any part of the city they are driving in.<sup>158</sup> Thus, because drivers pay for a number of different expenses related to the transportation of passengers and open themselves up to large parts of any given city, there is a strong argument that they should be treated as independent contractors and not employees.

Conversely, other factors indicate the existence of an employment relationship. For instance, Uber sets drivers' pay unilaterally, regardless of whether it is a normal fare or the increased surge pricing fare during weekends or holidays.<sup>159</sup> Further, drivers do not have the opportunity to negotiate with Uber to receive higher fares or set their own compensation.<sup>160</sup> Thus, because Uber can raise or lower prices whenever it wishes it would seem the drivers have very little control over the business aspect of their job—a characteristic of a typical employment relationship.<sup>161</sup>

The third set of common-law factors examines the type of relationship between Uber and its drivers.<sup>162</sup> In characterizing the relationship, courts consider factors such as:

Written contracts describing the relationship the parties intended to create[;] [w]hether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay[;] [t]he permanency of the relationship . . . [And] [t]he extent to which services performed by the worker are a key aspect of the regular business of the company.<sup>163</sup>

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155. See, e.g., *Berwick*, No. 11-46739, Cal. Labor Comm'n. In this case, former Uber driver Barbara Ann Berwick estimated that she drove for 132 hours per day for 49 days, paid \$256.00 in bridge tolls, and received a parking citation. *Id.* at 6.

156. See Pullen, *supra* note 167.

157. See Avi Asher-Schapiro, *Is Uber's Business Model Screwing Its Workers?*, MOYERS & CO. (Oct. 1, 2014), <http://billmoyers.com/2014/10/01/ubers-business-model-screwing-workers/> ("Uber drivers have no say in the pricing, yet they must carry their own insurance and foot the bill for gas and repairs—a cost of 56¢ per mile, according to IRS estimates.").

158. See Pullen, *supra* note 17.

159. *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*62-63.

160. *Id.* at \*64.

161. *Id.* at \*64-65.

162. See IRS Publication 15-A, *supra* note 71, at 8.

163. *Id.*

The common-law factors which show the type of relationship between the parties, as with both the behavioral control and financial control aspects, appear to be split on the issue of whether an Uber driver is an employee or an independent contractor.<sup>164</sup> Regarding the written contracts describing the relationship between the parties, the agreements “explicitly provide that the relationship between the transportation providers and [Uber] ‘is solely that of independent contracting parties.’”<sup>165</sup> Further, Uber does not provide its employees with any type of benefits that would indicate an employment relationship, such as insurance, a pension plan, vacation pay, or sick pay.<sup>166</sup> Thus, based on these facts, it would seem the relationship between Uber and its drivers resembles that of an independent contractor.

The remaining factors are not as clear. Regarding permanency, some Uber drivers are full-time, or permanent, meaning their sole source of income comes from the passengers they deliver on a daily basis.<sup>167</sup> However, some drivers only drive part-time, or whenever it is most convenient for them based on their prior commitments.<sup>168</sup> Thus, because permanency depends on how much the driver uses the Uber app, this factor does not aid in finding either an employment or independent contractor relationship.

Similarly, some drivers only drive for Uber. Other drivers may drive for both Uber and other ride-sharing companies, like Lyft, simultaneously, picking up passengers from each service interchangeably depending on which service offers the most convenient passenger at the moment the driver is looking for a fare. Monogamous drivers look more like employees; polygamous drivers look more like independent contractors.

Lastly, the “extent to which services performed by the worker are a key aspect of the regular business of the company” is also up for debate.<sup>169</sup> According to Uber, it is a “technology company” that simply connects drivers to leads who need a ride.<sup>170</sup> Because Uber’s GPS technology is responsible for matching drivers to leads, it follows that the drivers do

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164. *See id.*

165. *O'Connor*, 82 F. Supp. 3d at 1136 (citing Driver Addendum Related to Uber Services at 7).

166. *See* James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits> (explaining a typical full-time employee “gets health care, a pension, unemployment insurance, and so on . . .” in a world of “stable employment[,]” but acknowledging many Americans “no longer live in that world . . .”).

167. *See, e.g.*, Pullen, *supra* note 17.

168. *See id.*

169. *See* IRS Publication 15-A, *supra* note 71, at 8.

170. *O'Connor*, 82 F. Supp. 3d at 1141.

not perform a key aspect of the business since Uber is matching people within the sharing economy.<sup>171</sup> Not surprisingly, the drivers characterize Uber much differently. They argue Uber is a “transportation company” that relies on its drivers for actually transporting the leads in any given area.<sup>172</sup> Thus, in the drivers’ view, because Uber is a transportation company that “would not be a viable business entity without its drivers,” they argue that drivers should be categorized as employees and not independent contractors.<sup>173</sup>

*B. Application of the Economic Realities Test to Uber*

Unlike the control test, the economic realities test looks primarily at “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”<sup>174</sup> Like the control test, courts weigh several factors in making this determination.<sup>175</sup> These include the amount of the contractor’s investment in equipment; the nature and degree of control by the principal; opportunities for profit and loss; the permanency of the relationship; the extent to which the services are integral to the business; the degree of initiative, judgment, and foresight in open competition; and the degree of independent business organization.<sup>176</sup>

Regarding the first factor, investment in equipment, it has already been established that Uber’s drivers put a substantial amount of money in their vehicles.<sup>177</sup> In addition to either leasing or purchasing the car itself, drivers must pay for insurance, gasoline, inspections, maintenance repairs, tolls, parking tickets or citations, and any other costs associated with owning a car.<sup>178</sup> Thus, because the drivers invest a substantial amount of their own money in driving for Uber, the first factor indicates the drivers should be considered independent contractors.

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171. *See id.*

172. *Id.* at 1141-42.

173. *See id.* at 1142.

174. *Brock*, 840 F.2d at 1059.

175. *See* U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968); U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (Sept. 12, 1969).

176. *See* U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968); U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (Sept. 12, 1969).

177. *See* Asher-Schapiro, *supra* note 157.

178. *Id.*

However, the second factor, which deals with the nature and degree of control exercised by Uber, seems to go the other way. As previously discussed, Uber exercises a high degree of control over its drivers through various documents that set forth commands such as sending a text message to the lead when the driver gets close and either keeping the radio off, or playing soft jazz or NPR.<sup>179</sup> Additionally, Uber monitors its drivers' adherence to those standards based on the five-star rating system that passengers fill out upon arriving at their destination.<sup>180</sup> Thus, because Uber exercises control over the manner and means in which the drivers perform their job whenever the app is on, it would seem this factor would suggest an employment relationship.

Turning to the third factor, opportunities for profit and loss, drivers have very few chances to realize any additional monetary gains.<sup>181</sup> As discussed above, Uber unilaterally sets both the normal fare and surge price fare on weekends and holidays, and forecloses any opportunity for the drivers to negotiate how much money they receive.<sup>182</sup> Thus, because Uber significantly limits the drivers' opportunities to extract any additional profits outside of their portion of the fare price, this factor would persuade a finding of an employment relationship instead of an independent contractor relationship.<sup>183</sup>

Just like the permanency analysis under the control test, an application of the economic realities test's fourth factor does not provide a clear answer as to whether the drivers are employees or independent contractors. As suggested above, it is impossible to determine the permanency of the relationship of all Uber drivers, as some people make a career of driving for Uber while others only use the app sporadically<sup>184</sup> and some drivers only drive for Uber while others are polygamous. Because this factor could benefit either Uber or the drivers depending on the individual driver, it does not favor a finding of an employment or an independent contractor relationship.

Similarly, the fifth factor, which looks at the extent to which the services are an integral part of Uber's business, depends on how that business is classified.<sup>185</sup> For instance, if Uber is considered a technology company that simply connects drivers to passengers, then it would not seem

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179. *O'Connor*, 82 F. Supp. 3d at 1149-50.

180. *Id.* at 1150-51.

181. *Id.* at 1142.

182. *O'Connor*, 2015 U.S. Dist. LEXIS 116482, at \*62-63.

183. *See id.* at \*64-65.

184. *See, e.g.*, Pullen, *supra* note 17.

185. *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1141-42.

drivers play an integral part of the business as it is Uber's GPS technologies connecting people within the sharing economy.<sup>186</sup> On the other hand, if Uber is viewed as a transportation company, then the drivers would provide a significant service to Uber since they are responsible for actually transporting the passenger from point A to point B.<sup>187</sup> Therefore, because the extent to which the service provided by the driver is an integral part of the business depends on how the business is categorized, and the business can be reasonably categorized in two dichotomous ways, this factor does not assist in determining whether an employment relationship exists.<sup>188</sup>

Last, courts weigh the independence of the business organization, or in this case, the degree of independence of Uber's drivers.<sup>189</sup> As already discussed in this section, Uber exercises a significant amount of control over the manner and means in which the driver performs their job from the time the app is turned on until the passenger is dropped off.<sup>190</sup> However, the drivers also exercise a significant amount of independence in using their vehicles, setting their schedules, and driving in whatever part of a given city they choose.<sup>191</sup> Thus, it would seem the degree of independence depends on whether the court looks to the control the driver has in working whenever the driver would like or, alternatively, the control Uber has once the driver decides to utilize the app.<sup>192</sup>

### *C. Why the Control and Economic Realities Tests Both Fall Short*

#### **1. Both Tests Lead to Indeterminate Results**

Based on the application of all the common-law factors provided in both the control test and the economic realities test, there are many problems present with respect to properly classifying those individuals driving for Uber. Perhaps most obviously, neither the control test nor the economic realities test provide any real guidance as to whether Uber's drivers are employees or independent contractors because there are just

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186. *Id.* at 1141.

187. *Id.* at 1141-42.

188. *See id.* at 1140-42.

189. *See* U.S. Dep't of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968); U.S. Dep't of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (Sept. 12, 1969).

190. *See O'Connor*, 82 F. Supp. 3d at 1152 ("The more relevant inquiry is how much control Uber has over its drivers *while they are on duty* for Uber.").

191. *Pros & Cons*, *supra* note 41.

192. *See O'Connor*, 82 F. Supp. 3d at 1152 (acknowledging the tension in examining Uber's control of drivers while they are on duty and off duty).

as many factors that sway in favor of an employment relationship as there are for an independent contractor.<sup>193</sup> As highlighted above, many factors can favor either the drivers or Uber, depending on how the test is applied or on the specific facts pertaining to an individual driver.<sup>194</sup> Because no single factor is controlling or dispositive in an analysis of Uber's business model under either the control test or the economic realities test,<sup>195</sup> it can safely be said that both tests are largely unhelpful in reaching a definitive answer on the question.<sup>196</sup>

Since both the control test and the economic realities test provide mixed or indeterminate results,<sup>197</sup> it should come as no surprise that courts all over the country have not been consistent in ruling as to whether the drivers are employees or independent contractors.<sup>198</sup> Again, because there is no controlling factor in an analysis under either the control test or the economic realities test, it would appear that it is up to the subjective mind of the judge hearing the case to determine which factor or factors should be given the most weight. If judges bring their own past experiences and personal thoughts when weighing the merits of each case and have a different understanding of how the business works in this new sharing economy, it is unclear how a judge will rule on any given day. For example, a judge who worked as a taxi driver prior to coming to law school might be sympathetic toward the drivers, whereas a judge who formerly owned a small business might better understand the arguments made by Uber. Thus, it would appear that the indeterminacy of both the control test and the economic realities tests, or some variation thereof, may be responsible for the split that exists among states today on whether Uber drivers are employees or independent contractors.<sup>199</sup>

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193. See *supra* Parts IV.A.-B.

194. See *supra* notes 177-85 and accompanying text (including permanency, the extent to which the services provided are an integral part of the business, and the degree of independence).

195. See UNDERSTANDING EMPLOYMENT LAW, *supra* note 87, at 9 ("The factors are unweighted and nondispositive, and not every factor will apply to every case.").

196. See *id.* at 11 (explaining that the economic realities test is just as formalistic and indeterminate as the control test).

197. *Id.*

198. See Somerville, *supra* note 101 ("Eight states have issued rulings that classify Uber drivers as independent contractors: Georgia, Pennsylvania, Colorado, Indiana, Texas, New York, Illinois, and California, which made such a ruling in 2012 that applied to only a specific case.").

199. See UNDERSTANDING EMPLOYMENT LAW, *supra* note 87, at 11.



Recall that the economic realities test was created to address some of the perceived deficiencies of the control test.<sup>200</sup> However, after applying its factors to Uber's business model, it seems the economic realities test is just as ineffective at distinguishing employees from independent contractors as its predecessor.<sup>201</sup> This is, in large part, because many of the common-law factors used in the economic realities test are the very same factors as, or are at least similar to, those used in the control test.<sup>202</sup> Thus, because the control test provides mixed results as to whether or not Uber's drivers should be employees or independent contractors, and the economic realities test does very little additional work to change the outcome, it follows that both tests lead to equally indeterminate results when applied in the sharing economy context.<sup>203</sup>

## 2. Both Tests Should Be Applied on a Case-By-Case Basis

After applying all of the common-law factors to Uber's current business model, both the control test and the economic realities test fail to answer the question of whether Uber drivers should be classified as employees or independent contractors.<sup>204</sup> One reason is because some of the common-law factors tend to favor an employment relationship, while others favor an independent contractor relationship. However, many of these determinations—especially those that cut both ways—depend not on Uber's app, but how its drivers use the app. For example, one factor examined in both the control test and the economic realities test is the permanency of the relationship.<sup>205</sup> As discussed throughout this Article, there are some individuals who drive full-time as their main source of income, such as a parent supporting a family.<sup>206</sup> When applying this common-law factor to an Uber driver providing for a family, the driver would have a much more permanent relationship with Uber than, for example,

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200. *Id.* at 10 ("The economic realities test represents an attempt to correct the deficiencies of the control test.").

201. *Id.* at 11.

202. *Id.*

203. *See id.*

204. *See supra* Part IV.C.1.

205. *See* IRS Publication 15-A, *supra* note 71, at 8; *see also* U.S. Dep't of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968); U.S. Dep't of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (Sept. 12, 1969).

206. *See, e.g.,* Moises Abrego, *Driving an Uber Car Saved My Life—Don't Take it Away*, N.Y. POST (June 30, 2015, 9:52 PM), <http://nypost.com/2015/06/30/driving-an-uber-car-saved-my-life-dont-take-it-away/>.

a part-time Walmart associate who drives leads while on lunch break.<sup>207</sup> Similarly, a monogamous driver who only drives for Uber might, for good reason, be classified differently from a polygamous driver who drives for multiple ride-sharing apps. Thus, depending on how the Uber app was used, differing results may be reached in each case.<sup>208</sup>

The permanency of the relationship is not the only common-law factor that could vary depending on the individual bringing the claim, as drivers can have different amounts of investments and unreimbursed expenses, make themselves available to the app users at different times, and perhaps even undergo different hiring processes in order to drive for Uber.<sup>209</sup> Given the wide range of individuals who drive for Uber and the variations between the tests at the federal and state levels, it seems there cannot be any blanket answer for determining employment. Thus, each case brought against Uber should be considered on a case-by-case basis.<sup>210</sup>

Although this approach may prove to be time-consuming and costly, it would be the most effective due to the vast number of drivers utilizing the app in different ways. In fact, the same driver could use the app more as an employee than an independent contractor at any given time of the day. Thus, although neither the control test nor the economic realities test provide a definitive answer as to whether the Uber drivers should be classified as employees or independent contractors, perhaps this may be a good thing, given the wide range of how Uber drivers utilize the app at any given time and the increasing fluidity that exists in the sharing economy today.

## V. CONCLUSION

In 2008, Travis Kalanick and Garrett Camp had an idea—an idea that would eventually lead to Uber, one of the most popular rideshare apps in today's sharing economy.<sup>211</sup> While Uber has provided its drivers with the opportunity to be their own boss whenever they wish, it has also caused some of those same people great harm as the drivers are unable to receive benefits and protections they believe they are entitled to under state and

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207. *Compare id.* (describing someone who was fired from their job and began driving for Uber full time), *with* Bond, *supra* note 45, at 78 (describing a part-time Walmart sales associate who drives during his or her breaks).

208. *See id.*

209. *See* IRS Publication 15-A, *supra* note 701, at 718.

210. *See* Somerville, *supra* note 101 (explaining that eight states have specified that their ruling only applies to that case).

211. *See* Swisher, *supra* note 1.

federal law.<sup>212</sup> This has brought about a number of lawsuits that raise a seemingly simple question: are Uber drivers employees or independent contractors?<sup>213</sup>

Unfortunately, the current legal tests designed to answer that question have led to indeterminate results, and states all across the country have been just as inconsistent in their rulings as the application of the factors themselves.<sup>214</sup> While this indeterminacy may not be a bad thing, these tests should be reconsidered in light of the sharing economy. More specifically, these tests need to keep being applied on a case-by-case basis in order to take into consideration each individual participant and how they utilize the rideshare app.<sup>215</sup>

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212. *See id.*

213. *See White, supra* note 16.

214. *See, e.g., O'Connor*, 82 F. Supp. 3d at 1133; *Berwick*, No. 11-46739, Cal. Labor Comm'n; *O'Connor*, 2015 U.S. Dist. LEXIS 116482.

215. *Id.*

