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## A NEW CLASS OF WORKER FOR THE SHARING ECONOMY

Megan Carboni\*

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### I. INTRODUCTION

#### A. Cobbling Together an Uncertain Income

[1] Jennifer Guidry begins her workday at four a.m.<sup>1</sup> She begins by vacuuming her personal car, preparing it to “ferry around strangers” for Uber, Lyft, and Sidecar.<sup>2</sup> Uber, Lyft, and Sidecar are “ride services that let people summon drivers on demand via [electronic] apps.”<sup>3</sup> Her phone pings just moments after four-thirty a.m.—an Uber customer requesting a ride to the airport.<sup>4</sup> She accepts immediately, makes a round trip to the airport in just over an hour, and pockets twenty-eight dollars.<sup>5</sup> This does not account for the cost of gas or wear and tear on her car.<sup>6</sup> She performs

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\*J.D., 2016, University of Richmond School of Law. Many thanks to Professor Ann C. Hodges for her guidance throughout the drafting process.

<sup>1</sup> See Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), [http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?\\_r=1](http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=1), archived at <https://perma.cc/Ry6C-7KRS>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See Singer, supra* note 1.

the airport loop a second time before returning home to roust her family from bed and make them breakfast.<sup>7</sup>

[2] Jennifer Guidry is thirty-five years old, has three children, a husband, bills and rent to pay, and a patchwork of jobs.<sup>8</sup> Not only does she offer her services via Uber, Lyft, and Sidecar, she also finds work through TaskRabbit and Favor, other electronic marketplace applications.<sup>9</sup> She generally works seven days a week, sometimes around the clock.<sup>10</sup> Although Jennifer was educated as a professional accountant and has U.S. Navy training, she now offers services including those of chauffer, delivery person, repair- and handy-woman, painter, chef, caterer, gardener, and dog sitter.<sup>11</sup> She is the quintessential sharing economy worker.

[3] Six years ago, during the height of the Great Recession, Jennifer left her full time job as controller of a small company.<sup>12</sup> She had just given birth to her third child when her company asked her to extend her hours, rather than allow her to cut back to accommodate work and family.<sup>13</sup> When she left, she attempted to find part-time work, but those opportunities were “very rare and highly competitive.”<sup>14</sup> Instead she

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<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See Singer, supra* note 1.

<sup>12</sup> *See id.*; *see Feature: The Great Recession*, STATE OF WORKING AMERICA, <http://stateofworkingamerica.org/great-recession/>, archived at <https://perma.cc/78FS-WAS3> (last visited Apr. 16, 2016).

<sup>13</sup> *See Singer, supra* note 1.

<sup>14</sup> *Id.*

turned to an “on-demand . . . marketplace” to patch a living together for her family, whose patriarch was also out of work during the worst of the Recession.<sup>15</sup> These piecemeal jobs—procured via the new virtual marketplace—allowed her to flexibly care for her family while also accommodating her own disability, “a back and hip injury she had sustained in 2000 when training for the Navy.”<sup>16</sup> Jennifer says she “like[s] [her] freedom,” but “recognizes that her current routine may not be sustainable.”<sup>17</sup> Cobbling together this type of living is indeed difficult to pull off alone; very few (if any) traditional full-time employee benefits are offered—such as health insurance, retirement savings plans, and tax withholding.<sup>18</sup>

[4] What would happen to Jennifer and her family if she were to get seriously sick or injured on the job? If work offered via these social applications dries up? Under her current legal status as an independent contractor, she would be left with few benefits and protections afforded to traditional employees. How much of a choice does Jennifer have in the matter?

### **B. The Birth of an App Changes the Economic Landscape**

[5] Although Uber is not the only company to harness the power of social technology platforms, Uber does typify the ultimate shared economy business model.<sup>19</sup> Founded in 2009—in the midst of the Recession—Uber sought to “seamlessly [connect] riders to drivers through

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Singer, *supra* note 1.

<sup>19</sup> See Molly Reynolds, *Why Every Business Model May Soon Look Like Uber's*, INC.COM (Mar. 5, 2015), <http://www.inc.com/molly-reynolds/is-our-future-heading-toward-the-uber-business-model.html>, archived at <https://perma.cc/MPD8-VXWH>.

our app[s],” and “make cities more accessible, opening up more possibilities for riders and more business for drivers.”<sup>20</sup>

[6] Clearly, Uber hit a nerve—employing the power of “the technology-enabled sharing economy” to create a global presence in hundreds of cities in North America and sixty-three countries.<sup>21</sup> Not only has Uber created the ultimate ease in procuring rides to and from virtually anywhere, it offers its drivers flexible schedules to work when they want to work, and drive when they want to drive.<sup>22</sup>

[7] Uber bills itself as a technology “arena, like eBays for” driving services.<sup>23</sup> Under this definition, Uber treats its drivers not as employees, but independent contractors—providing a service directly to Uber’s subscribers.<sup>24</sup> As independent contractors, Uber drivers are offered the promise of taking their own car and “[turning] it into a money machine.”<sup>25</sup>

#### DRIVE WHEN YOU WANT.

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<sup>20</sup> *Product Manager—Growth Platform—Communications*, UBER.COM (last visited Apr. 13, 2016), <https://www.uber.com/careers/list/19559/>, archived at <https://perma.cc/R7US-ZYVR>.

<sup>21</sup> Koen Frenken et al., *Smarter Regulation for the Sharing Economy*, THE GUARDIAN (May 20, 2015, 2:00 PM), <http://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy>, archived at <https://perma.cc/PRS4-HG48>; see *Find a City*, UBER, <https://www.uber.com/cities/>, archived at <https://perma.cc/Q8SA-SBK8> (last visited Apr. 16, 2016).

<sup>22</sup> See *Sign Up to Drive with Uber*, UBER, [https://get.uber.com/p/drive-v-a/?\\_ga=1.208961938.1206791507.1460322538](https://get.uber.com/p/drive-v-a/?_ga=1.208961938.1206791507.1460322538), archived at <https://perma.cc/Q8N2-27PV> (last visited Apr. 16, 2016).

<sup>23</sup> Singer, *supra* note 1.

<sup>24</sup> See *id.*

<sup>25</sup> *Sign Up to Drive with Uber*, UBER, <https://get.uber.com/drive/>, archived at <https://perma.cc/Q8N2-27PV> (last visited Apr. 16, 2016).

Need something outside the 9 to 5? As an independent contractor with Uber, you've got freedom and flexibility to drive whenever you have time. Set your own schedule, so you can be there for all of life's most important moments.

#### NO OFFICE, NO BOSS.

Whether you're supporting your family or saving for something big, Uber gives you the freedom to get behind the wheel when it makes sense for you. Choose when you drive, where you go, and who you pick up.<sup>26</sup>

[8] This entrepreneurial spirit toward its drivers comes with benefits for Uber. Uber's choice to classify its drivers as independent contractors saves the company significant amounts of money, and reduces exposure to legal liability.<sup>27</sup> Currently, Uber does not pay an employer's share of payroll taxes, workers compensation insurance for employees hurt on the job, health insurance benefits, overtime wages, or unemployment insurance for laid off employees.<sup>28</sup> From a business standpoint, saving money maximizes revenue and profit, and one way to do that is by using independent contractors, not employees.<sup>29</sup> Although dubbed a success, recently leaked documents suggest that Uber is actually not making a huge

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<sup>26</sup> *Id.*

<sup>27</sup> See Gillian B. White, *In the Sharing Economy, No One's an Employee*, THE ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/>, archived at <https://perma.cc/SDU8-BHVC>.

<sup>28</sup> *See id.*

<sup>29</sup> See Stephen Fishman, *Pros and Cons of Hiring Independent Contractors*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/pros-cons-hiring-independent-contractors-30053.html>, archived at <https://perma.cc/FE35-S97E> (last visited Apr. 16, 2016).

profit.<sup>30</sup> If forced to reclassify its drivers from independent contractors to employees, what would happen to Uber?

[9] Uber's success has produced many followers, mimicking the technology application's service sharing model, using independent contractors to provide services: Lyft (ride broker),<sup>31</sup> Sidecar (delivery broker),<sup>32</sup> TaskRabbit (chore marketplace),<sup>33</sup> Fiverr (creative and professional services marketplace),<sup>34</sup> Postmates (delivery service platform),<sup>35</sup> Favor (deliver service platform),<sup>36</sup> Homejoy (cleaning service marketplace),<sup>37</sup> and Instacart<sup>38</sup> (grocery delivery platform).<sup>39</sup> And Uber

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<sup>30</sup> See Maya Kosoff, *New Revenue Figures Show \$50 Billion Uber is Losing a Lot of Money*, BUS. INSIDER (Aug. 5, 2015, 2:34 PM), <http://www.businessinsider.com/ubers-revenue-profit-and-loss-2015-8>, archived at <https://perma.cc/C2SU-UPT3>.

<sup>31</sup> See LYFT, <https://www.lyft.com>, archived at <https://perma.cc/5F6U-NVU5> (last visited Apr. 16, 2016).

<sup>32</sup> See SIDECAR, <https://www.side.cr>, archived at <https://perma.cc/B9E3-7QHW> (last visited Apr. 16, 2016).

<sup>33</sup> See TASKRABBIT, <https://www.taskrabbit.com>, archived at <https://perma.cc/JY6F-WFUU> (last visited Apr. 16, 2016).

<sup>34</sup> See FIVERR, <https://www.fiverr.com>, archived at <https://perma.cc/SLE2-RHVV> (last visited Apr. 16, 2016).

<sup>35</sup> See POSTMATES, <https://postmates.com>, archived at <https://perma.cc/PFU6-WNUS> (last visited Apr. 16, 2016).

<sup>36</sup> See FAVOR, <https://favordelivery.com>, archived at <https://perma.cc/978N-GVQ2> (last visited Apr. 16, 2016).

<sup>37</sup> Homejoy is closed as of July 31, 2015. See Jahna Berry, *San Francisco Startup Homejoy Will Shut Down*, S.F. BUS. TIMES (July 17, 2015, 2:17 PM), <http://www.bizjournals.com/sanfrancisco/blog/2015/07/homejoy-shuts-down-independent-contractors-cheung.html>, archived at <https://perma.cc/HQ9M-URUX>.

<sup>38</sup> See INSTACART, <https://www.instacart.com>, archived at <https://perma.cc/76RZ-XJ6E> (last visited Apr. 16, 2016).

has continued to expand beyond its basic ridesharing services to uberX, uberRUSH, and UberEATS.<sup>40</sup> What if all of these new companies had to reclassify their independent contractors as employees? Would this service sharing or on-demand business model still be viable?<sup>41</sup>

### C. The Problem in the Legal World

[10] The sharing economy is also known as the gig economy, “the peer economy, the collaborative economy,” and the on-demand economy.<sup>42</sup> Each term is used synonymously, yet slightly different. The sharing economy has been defined as “consumers granting each other temporary access to under-utilised physical assets . . . possibly for money.”<sup>43</sup> The collaborative economy has been defined as “[a]n economy built on distributed networks of connected individuals and communities versus

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<sup>39</sup> See Singer, *supra* note 1.

<sup>40</sup> See Chetan Narain, *The New UberEATS App is Here*, UBER NEWSROOM (Mar. 15, 2016), <https://newsroom.uber.com/ubereats-app/>, archived at <https://perma.cc/DK54-M3PQ>; Lori, *Uberx*, UBER NEWSROOM (Dec. 30, 2015), <https://newsroom.uber.com/tag/uberx/>, archived at <https://perma.cc/947U-RUFT>; Kimiko, *A Reliable Ride for Your Deliveries*, UBER NEWSROOM (Apr. 7, 2014), <https://newsroom.uber.com/us-new-york/a-reliable-ride-for-your-deliveries/>, archived at <https://perma.cc/Y228-Z4JH>.

<sup>41</sup> See Maya Kosoff, *How Two Lawsuits Could Destroy Uber and Lyft’s Business Model – and Set a Precedent for the Rest of the Sharing Economy*, BUS. INSIDER (Mar. 12, 2015, 10:12 AM), <http://www.businessinsider.com/uber-lyft-business-models-and-lawsuits-2015-3>, archived at <https://perma.cc/GCC3-PAZ3>.

<sup>42</sup> Singer, *supra* note 1 (making a distinction between the sharing economy and on-demand economy under this author’s definition of “sharing economy”).

<sup>43</sup> Frenken et al., *supra* note 21 (parsing out definition of sharing economy into three elements); see also Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FASTCOEXIST (Nov. 21, 2013, 7:30 AM), <http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition#5>, archived at <https://perma.cc/Y8AF-FAFB>.



centralized institutions, transforming how we can produce, consume, finance, and learn.”<sup>44</sup> Indeed, this newly created economy lacks a coherent definition, yet its various aspects share common features.<sup>45</sup> Meaningful overlap exists where new technologies are harnessing untapped and “underutilized assets,” creating an “[i]nnovative and [e]fficient” use of assets, shifting “passive consumers to active and connected creators, collaborators, producers, financiers, and providers.”<sup>46</sup> The potential benefit of this type of model is a more sustainable economy, if the marketplace strategy and benefits can find harmony within the current employment and labor.<sup>47</sup>

[11] The sharing economy worker has been described as the “microentrepreneur,” or the new “[p]iecemeal labor[er].”<sup>48</sup> Regardless of the title, all of the sharing economy companies have classified their workers as “independent contractors.”<sup>49</sup> While there are benefits to working as a contractor for one of these gig or sharing economy companies (e.g., flexibility), there are many traditional legal protections that are not available to workers classified as independent contractors.<sup>50</sup>

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<sup>44</sup> Botsman, *supra* note 43 (outlining four components to the collaborative economy: (1) Production; (2) Consumption; (3) Finance; and (4) Education).

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See* Frenken et al., *supra* note 21; Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST CO. (Feb. 17, 2015, 6:00 AM), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death>, archived at <https://perma.cc/9AG2-4A8A>.

<sup>48</sup> Singer, *supra* note 1.

<sup>49</sup> White, *supra* note 27.

<sup>50</sup> *See id.*

[12] This does not sit well with some workers, who feel they are working for a traditional employer, rather than working as independent mini-entrepreneurs.<sup>51</sup> These workers feel they are entitled to the rights and benefits that come along with being classified as an employee.<sup>52</sup> These workers are taking Uber and others companies like it to court to resolve the workers' claims of worker misclassification, seeking past and current benefits, and rights afforded to those called "employees."<sup>53</sup>

[13] From the business perspective, classifying workers as independent contractors saves money and removes much of the legal liability from issues arising out of work.<sup>54</sup> These positives cannot be understated for the Ubers of the world, who are attempting to turn a profit with little overhead and not much experience to go on. On the other hand, workers who need to take these piecemeal jobs may not have been worried about being classified as independent contractors or employees at the time they took the ad-hoc work—they were worried about paying their bills and caring for families.<sup>55</sup>

[14] After performing under contingent working conditions for some time, many workers are feeling the rub without traditional employee benefits.<sup>56</sup> Although many of these gig workers may want to claim that they have rights as employees, these workers are also afraid of losing the only source of income they have by being blacklisted from these service

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<sup>51</sup> See Kessler, *supra* note 47.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*; O'Connor v. Uber Techs., Inc., No. C-13-3862 EMC, 2013 U.S. Dist. LEXIS 171813, at \*3-4 (N.D. Cal. Dec. 5, 2013).

<sup>54</sup> See Fishman, *supra* note 29.

<sup>55</sup> See Singer, *supra* note 1.

<sup>56</sup> See *id.*

brokerage companies.<sup>57</sup> Recently, however, some of these workers are coming forward, challenging their classification as independent contractors.<sup>58</sup>

[15] Though on-demand service apps like Uber are relatively new, cases against these companies are starting to pop up across the U.S.<sup>59</sup> Plaintiffs in these cases claim that these companies misclassified their workers as independent contractors, thus denying the alleged employees many benefits and legal protections provided for them in federal and state legislation.<sup>60</sup> Although the issue of worker misclassification is not new, its application to a budding economic business model is complicated.<sup>61</sup> All prior labor and employment regulation and legal interpretation does not quite fit the new sharing economy business or its workers.<sup>62</sup> To choose the business over the workers is to support the American marketplace at the expense of those trying to live within it.<sup>63</sup> To choose workers over the business is to stifle technological advancement and an evolving

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<sup>57</sup> *See id.*

<sup>58</sup> *See* Caroline O'Donovan, *What a New Class of Worker Could Mean for the Future of Labor*, BUZZFEED (June 18, 2015, 4:01 PM), <http://www.buzzfeed.com/carolineodonovan/meet-the-new-worker-same-as-the-old-worker#.ondaqNxyj>, archived at <https://perma.cc/L9E7-XB3C>.

<sup>59</sup> *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (demonstrating one of many cases brought against companies for improper classification).

<sup>60</sup> *See id.*

<sup>61</sup> *See* Greg Miller, *California's Uber Ruling Could Erase Billions*, WALL ST. DAILY (June 26, 2015, 5:00 AM), <http://www.wallstreetdaily.com/2015/06/26/uber-california-ruling/>, archived at <https://perma.cc/L4VC-C67V> (discussing the implications of California's ruling that Uber drivers are employees of Uber).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

economy.<sup>64</sup> Rather than choose one at the destruction of the other, federal legislators should seek a balanced approach by creating a third classification of worker: the “dependent contractor.”<sup>65</sup>

[16] This comment proposes a third legislative category of worker under the Fair Labor Standards Act—the “dependent contractor”—and explains why such an additional category is necessary in light of the evolving economy. This comment will use recent litigation under state wage and hour laws to illustrate the problem at hand. This comment will predominantly focus on federal labor rules for worker classification and a proposed federal rule as applied to the sharing economy under the Fair Labor Standards Act. While a new definition under the FLSA does not resolve all of the workforce implications of a proposed third class of employee,<sup>66</sup> a proposed FLSA definition is a launching pad from which Congress may amend other statutes implicated upon such a proposal or states may model their own legislation.<sup>67</sup> Part II provides background information regarding original worker designations as employee or independent contractor, and how having only two designations led to the issue at hand. Part III briefly discusses how other countries have integrated a third category of worker in light of worker misclassification in a

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<sup>64</sup> *See id.*

<sup>65</sup> Doug Hass, *Protecting the Sharing Economy: Creating an FLSA Dependent Contractor Status*, DAY SHIFT (Sept. 22, 2015), <http://dayshift.com/2015/09/22/protecting-the-sharing-economy-creating-an-flsa-dependent-contractor-status/>, archived at <https://perma.cc/4XKW-8JAB>.

<sup>66</sup> Such implications include Tax Code issues that would arise upon promulgation of a new category of worker. *See* Connie Loizos, *A Third Classification of Worker? Don't Count On It*, TECHCRUNCH (July 2, 2015), <http://techcrunch.com/2015/07/02/a-third-classification-of-worker-dont-count-on-it/>, archived at <https://perma.cc/4JC6-ALGX>.

<sup>67</sup> *See, e.g.*, 29 U.S.C. § 203(e)(1) (2014) (defining employee under FLSA standards); *see also* CAL. LAB. CODE §§ 3351, 3353, 3357 (Deering 2016) (defining “Employee,” “Independent Contractor,” and the “Presumption as to a person being an employee”). *But see* N.Y. LAB. LAW § 2(5) (Consol. 2016) (defining the status employment).

changing economy. Part IV proposes an amendment to Fair Labor Standards Act worker designations to include a third category of worker. Part V explains why legislative intervention is preferred in this area of labor and employment regulation over court interpretation or market regulation. Part VI explores a hypothetical application of this comment's proposal. Finally, Part VII touches on the future implications of implementing such a proposal.

## II. BACKGROUND

### A. Overview of the Main Players

[17] The line between “employee” and “independent contractor” is often blurred, and employers struggle to correctly classify their workers as one or the other—or they take advantage of the blurred line in order to qualify for financial loopholes given to those employers who hire independent contractors.<sup>68</sup> For an individual, being classified as an employee or independent contractor is key in determining that individual's legal rights, protections, benefits, and liabilities as a worker under different federal labor and tax schemes.<sup>69</sup> Determining the proper classification of workers has been a longstanding issue.<sup>70</sup>

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<sup>68</sup> See *Fact Sheet 2014: The Misclassification of Employees as Independent Contractors*, AFL-CIO DEP'T OF PROF. EMP. (Oct. 2014), <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2014.pdf>, archived at <https://perma.cc/N7B6-UZYJ> (discussing the benefits of proper employee classification, such as reduced labor costs and lower federal and state tax burdens).

<sup>69</sup> See Kosoff, *supra* note 41.

<sup>70</sup> See DAVID WEIL, WAGE & HOUR DIV., U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2015-1, at 4 (2015), [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf), archived at <https://perma.cc/U7EV-RZAR>.

[18] Courts and state legislatures have taken years to distil rules and tests determining when an individual is an employee or an independent contractor, and under what circumstances the appropriate analysis should be applied. Both the judiciary and legislature are quick to say that these tests and standards should be applied on a fact-by-fact basis, giving employers uncertain ground to tread when classifying employees for tax or labor purposes.<sup>71</sup> One difficulty is that under several federal statutes, definitions of what constitutes an employee versus an independent contractor differ.

[19] For companies wishing (or more realistically, needing) to analyze whether their workers are properly classified as employees or independent contractors, they must look to a myriad of tests that pair with the appropriate statute regulating certain segments of business, labor, and employment law. For example, there's the Internal Revenue Service's "right to control" test used for federal tax purposes;<sup>72</sup> the common law right to control test used for federal discrimination law;<sup>73</sup> the Employment Retirement Income Security Act of 1974 ("ERISA");<sup>74</sup> a modified Treasury version of the common law right to control test used for Affordable Care Act purposes;<sup>75</sup> a newly modified version of common law

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<sup>71</sup> See I.R.C. §§ 31.3121(d)-1(c)(3) (1960) (amended 1980).

<sup>72</sup> See, e.g., *Lowen Corp. v. United States*, No. 90-1589-MLB, 1993 U.S. Dist. LEXIS 9667, \*34-\*35 (D. Kan. June 14, 1993).

<sup>73</sup> See, e.g., *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983).

<sup>74</sup> See, e.g., *Renda v. Adam Meldrum & Anderson Co.*, 806 F.Supp. 1071, 1077 (W.D.N.Y. 1992).

<sup>75</sup> See Miriam L. Fisher et. al., *10 Facts About the Affordable Care Act and Worker Classification*, 1611 CLIENT ALERT COMMENTARY (Latham & Watkins, D.C.) Nov. 18, 2013, at 2, <https://www.lw.com/thoughtLeadership/lw-affordable-care-act-employee-classification>, archived at <https://perma.cc/4HKN-Z7LZ>.

right to control test formulated for National Labor Relations Act,<sup>76</sup> and the economic realities test applied to Fair Labor Standards Act.<sup>77</sup> Below is a description of the statutes and tests currently under fire regarding the sharing economy and the problem with classifying workers who are making a living in it.

### **B. The Fair Labor Standards Act**

[20] The Fair Labor Standards Act (“FLSA”) defines “employee” as “any individual employed by an employer.”<sup>78</sup> The Supreme Court has instructed that the definition of employee under the FLSA is quite broad, “stretch[ing] the meaning of employee to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>79</sup> As this definition is vague and confusing for employers to accurately apply, the judiciary and U.S. Department of Labor were compelled to create the “economic realities” test, comprised of six factors to be considered in determining whether an individual is an employee for the purpose of FLSA:

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<sup>76</sup> See, e.g., *FedEx Home Delivery*, 361 N.L.R.B. No. 55, 2014 NLRB LEXIS 753, at 2–3 (Sept. 30, 2014).

<sup>77</sup> See Todd Lebowitz, *NLRB Adopts New Test for Independent Contractor Misclassification, Applies it to Find FedEx drivers are Employees Who Can Unionize*, BAKER HOSTETLER (Oct. 10, 2014), <http://www.employmentlawspotlight.com/2014/10/nlr-adopts-new-test-for-independent-contractor-misclassification-applies-it-to-find-fedex-drivers-are-employees-who-can-unionize/>, archived at <https://perma.cc/N4NU-825W>; see also *FedEx Home Delivery*, 361 N.L.R.B. No. 55, 2014 NLRB LEXIS 753, at 16.

<sup>78</sup> 29 U.S.C. § 203(e)(1) (2012); see 29 U.S.C. § 203(d) (2012) (defining employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . .”); see also 29 U.S.C. §§ 203(e)(3)–(5) (2012) (citing exceptions to general meaning of employee); see 29 U.S.C. § 203(g) (2012) (defining “employ” as “suffer or permit to work”).

<sup>79</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit loss; (3) the worker's investment in business; (4) the permanence of working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which work is integral part of the alleged employer's business.<sup>80</sup>

[21] The purpose of this test is to determine the level of "economic dependence" the worker has in its relationship with employer.<sup>81</sup> Under this approach, "[n]o one of these factors is dispositive; rather, the test is based on the totality of the circumstances."<sup>82</sup> Both Congress and courts have recognized that "of all the acts of social legislation, the [FLSA] has the broadest definition of 'employee.'"<sup>83</sup> A classification as an employee under FLSA guarantees workers a minimum wage and overtime pay, and it provides a means of recovery for the employee when an employer violates certain provisions of the FLSA.<sup>84</sup>

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<sup>80</sup> Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998).

<sup>81</sup> Weil, *supra* note 70, at 2.

<sup>82</sup> *Id.* at 14. (citing Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988)).

<sup>83</sup> William Hays Weissman & Sarah Ross, *The Truth About Recent Attacks on the Independent Contractor Classification*, LITTLER MENDELSON REP. (Feb. 2010), at 2, <https://www.littler.com/truth-about-recent-attacks-independent-contractor-classification>, archived at <https://perma.cc/9GHL-2SRW> (citing *In re Miller*, 86 B.R. 817, 820 (Bankr. E.D. Pa. (1988)) (alteration in original)).

<sup>84</sup> See 29 U.S.C § 216 (2012); 29 U.S.C. § 218(c) (2012). *But see* 29 U.S.C § 213 (2012) (listing worker exceptions covered by FLSA).



[22] A recent conflict in *O'Connor v. Uber Technologies, Inc.* involved worker misclassification arising under California's Labor Code.<sup>85</sup> This case was brought as a California state wage and hour claim; therefore, the federal district court applied the state common law test of employment.<sup>86</sup> Commonly referred to as the *Borello* test<sup>87</sup>, this standard cites a "number of indicia of an employment relationship."<sup>88</sup> The primary consideration under *Borello* is the "putative employer's right to control work details . . . ."<sup>89</sup> Formulated differently, "principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."<sup>90</sup>

[23] Under the primary "right to control" factor, the relevant question is "not how much control a hirer *exercises*, but how much control the hirer retains the right to exercise."<sup>91</sup> In addition to the "right to control" consideration, the *Borello* standard contemplates a number of secondary indicia:<sup>92</sup>

(a) whether the one performing services is engaged in a

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<sup>85</sup> See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015). Although this case involves a state hour and wage claim, the factors in *Borello* test share factors with FLSA economic realities test.

<sup>86</sup> See *id.* at 1138.

<sup>87</sup> *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 769 P.2d 399, 404 (Cal. 1989).

<sup>88</sup> *O'Connor*, 82 F. Supp. 3d. at 1139 (citing *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)).

<sup>89</sup> *Id.* (citing *Borello*, 769 P.2d at 403).

<sup>90</sup> *Id.* at 1148–49 (quoting *Borello*, 769 P.2d at 404 (internal citations omitted)).

<sup>91</sup> *Id.* at 1139 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 172 (Cal. 2014)).

<sup>92</sup> See *Borello*, 769 P.2d at 404.

distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.<sup>93</sup>

[24] In addition to the abovementioned factors, the *Borello* court “approvingly cited” five factors originating from the federal FLSA test of employment:

(1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or material required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.<sup>94</sup>

[25] Under the *Borello* test, no single factor is dispositive of a classification of employee or independent contractor status; rather, courts apply these considerations in a non-mechanical fashion to the specific facts of each case.<sup>95</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 407 (internal citations omitted).

<sup>95</sup> See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1140 (N.D. Cal. 2015).

[26] Applying the *Borello* test's primary consideration, the *O'Connor* court concluded that the California Uber drivers bringing the class action were employees under the law.<sup>96</sup> The court noted that although the employees retain flexibility over their working schedule and retained the ability to work for other third-party applications like Sidecar and Lyft, Uber unilaterally set its drivers' rate of compensation. In addition, Uber regularly monitored drivers' performance through training and driver suggestions via customer reviews, and Uber retained its right to discharge its drivers at will.<sup>97</sup> Further applying the *Borello* test's secondary indicia and FLSA factors, the court ultimately determined that the drivers bringing suit could proceed as a class beyond summary judgment.<sup>98</sup>

### C. The National Labor Relations Act

[27] Another take on defining who is an employee for the purposes of statutory protection comes from the National Labor Relations Act ("NLRA"). The NLRA states that "'employee' shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include . . . any individual having the status of independent contractor."<sup>99</sup> If a worker qualifies as an "employee" under the NLRA, he or she has the right to the following, among other things:

- [o]rganize a union to negotiate with [his or her] employer concerning wages, hours, and other terms and conditions of

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<sup>96</sup> See *id.* at 1152.

<sup>97</sup> See *id.* at 1139 (noting that where an employer retains the right to discharge a worker at a will, this is strong evidence that there is an employee-employer relationship) (internal citations omitted).

<sup>98</sup> See *id.* at 1152–53.

<sup>99</sup> 29 U.S.C. § 152(3) (2014) (also addressing specific groups of workers not covered by NLRA).

- employment;
- [f]orm, join or assist a union;
- [b]argain collectively through representatives of employees' own choosing . . . ;
- [d]iscuss [his or her] wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union;
- [t]ake action with one or more co-workers to improve working conditions . . . ; [ . . . ]
- [c]hoose not to participate in any of these [concerted] activities . . .

[28] Additionally, protection under the NLRA makes it illegal for an employer to prohibit employees from engaging in protected activity during non-work time. It also prohibits employers from “fir[ing], demot[ing], transfer[ring] [employees] . . . or otherwise tak[ing] adverse action against [an employee][...]because [the employee] join[s] or support[s] a union, or because [the employee] engage[s] in [a] concerted activity for mutual aid and protection. . . .”<sup>101</sup> Although the NLRA sets out applicable protections and rights of workers if covered by the scheme, the Act itself does not define in workable terms what “employee” for purposes of concerted

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<sup>100</sup> *Employee Rights Under the National Labor Relations Act*, NLRB (Sept. 2011), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3788/employeerightsposter-8-5x11.pdf>, archived at <https://perma.cc/9L4N-BE9P>; see *Employee Rights*, NLRB, <https://www.nlr.gov/rights-we-protect/employee-rights>, archived at <https://perma.cc/74QS-7NC5> (last visited Apr. 16, 2016, 4:39 PM) (Protected ‘concerted activity’ is “when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for action.”)

<sup>101</sup> *Employee Rights Under the National Labor Relations Act*, NLRB (Sept. 2011), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3788/employeerightsposter-8-5x11.pdf>, archived at <https://perma.cc/9L4N-BE9P>; see also 29 U.S.C. §§ 157–158(a), (c), (d) (2012).

activity means. In need of guidance for courts and employers alike, the National Labor Relations Board (“NLRB”) has adopted several employee versus independent contractor misclassification tests over time. In light of the recent D.C. Circuit Court of Appeals’ articulation of a standard for evaluating who is an employee under federal labor law, the NLRB has adopted a slightly different test, rebuking the court’s strong emphasis on entrepreneurial opportunity factor of the non-exhaustive ten-factor agency test.<sup>102</sup> The NLRB has selected an eleven-factor test to determine who is an employee eligible to seek protection under the NLRA.<sup>103</sup> As with many multi-factor tests, weight given to each factor is not pre-determined; rather the factors are weighed in light of the factual circumstances of the case:

- (1) Extent of control by the employer;
- (2) Whether or not the individual is engaged in a distinct occupation or business;
- (3) Whether the work is usually done under the direction of the employer or by a specialist without supervision;
- (4) Skill required in the occupation;
- (5) Whether the employer or individual supplies instrumentalities,

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<sup>102</sup> See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (articulating and applying the common law of agency standard to measure employee status); see also *RESTATEMENT (SECOND) OF AGENCY* § 220(2)(a) (1958) (weighing the following facts to be considered when determining whether one is “acting for another [as] a servant or an independent contractor” include “(a) the extent of control which, by agreement, the master may exercise over the details of 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.”).

<sup>103</sup> See *Lebowitz*, *supra* note 77.

- tools, and place of work;
- (6) Length of time for which individual is employed;
  - (7) Method of payment;
  - (8) Whether or not work is part of the regular business of the employer;
  - (9) Whether or not the parties believe they are creating an independent contractor relationship;
  - (10) Whether the principal is or is not in the business; and
  - (11) Whether the evidence tends to show that the individual is, in fact, rendering services as an independent business.<sup>104</sup>

[29] As stated by the IRS, “[t]he keys are to look at the entire relationship, consider the degree or extent of right to direct and control” the individual.<sup>105</sup> Under the IRS’s right to control test, an employer must consider and balance all of the factors.<sup>106</sup> The difficulty in application under this test is that no one or set of factors will determine whether a worker is an employee or independent contractor; rather, the employer must look at the totality of the circumstances for an ultimate determination.<sup>107</sup>

[30] One of the recent cases to come up from the NLRB is *FedEx Home Delivery v. NLRB*.<sup>108</sup> In that case, FedEx sought a review of the Board’s

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<sup>104</sup> See *FedEx Home Delivery*, 361 NLRB. No. 55, 2014 NLRB LEXIS 753, at \*58–\*70 (Sept. 30, 2014) (finding the FedEx drivers to be employees, contrary to D.C. Circuit findings in 2009).

<sup>105</sup> *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>, archived at <https://perma.cc/LR9B-CWNT> (last updated Aug. 5, 2015) [hereinafter IRS].

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*; see also *FedEx Home Delivery*, 2014 NLRB LEXIS 753, at \*3.

<sup>108</sup> See generally *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009).

determination that FedEx had committed an unfair labor practice by refusing to bargain with the union representing FedEx drivers in Massachusetts.<sup>109</sup>

[31] FedEx's contention was that its single route drivers were not employees covered under the NLRA; rather, these drivers were independent contractors.<sup>110</sup> Although the NLRB changed its position upon remand,<sup>111</sup> this case is significant because it illustrates the difficulty courts are having in the application of a dual worker classification scheme to a newer business model.<sup>112</sup> In *FedEx v. NLRB*, the District of Columbia Circuit Court of Appeals held that FedEx's single-route drivers were independent contractors rather than employees under the NLRA.<sup>113</sup> The D.C. Circuit focused much of its analysis on the drivers' "entrepreneurial potential" as a major factor leaning toward a classification as independent contractors.<sup>114</sup> The element of entrepreneurialism is addressed in both the FLSA "economic realities" test and in *Borello's* secondary indicia factors as the employee's opportunity to realize profit or loss based on his or her own managerial skills.<sup>115</sup> The dissent in *FedEx v. NLRB* argues that the

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<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See generally* FedEx Home Delivery, 361 NLRB No. 55, 2014 NLRB LEXIS 753 (Sept. 30, 2014) (adding factor (11) to its independent contractor misclassification test, the Board found that the drivers were employees under the same facts of the D.C. circuit case); *see also* Lebowitz, *supra* note 77.

<sup>112</sup> *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 496, 498 (D.C. Cir. 2009)

<sup>113</sup> *See id.* at 495–96 (applying the 10 factor common-law agency test, which was later amended by the Board upon remand to add factor eleven).

<sup>114</sup> *Id.* at 498–99.

<sup>115</sup> *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *see also* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel., 769 P.2d 399, 407 (Cal. 1989).

majority's attention to entrepreneurial opportunities does not follow from the common-law agency test applied in the past, nor is it in line with the intentions of Congress.<sup>116</sup> Although holding that the Board's determination was not enforceable, the majority acknowledged that "evidence [could] be marshaled and debater's points scored on both sides . . . ."<sup>117</sup>

#### D. Internal Revenue Code

[32] Compare the FLSA and NLRA definitions of employee with that of the Internal Revenue Code ("IRC"). The IRC, regulated by the Internal Revenue Service ("IRS"), defines "employee" in part "as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee. . . ."<sup>118</sup> The "usual common law rules" state that if an employer has the right to control the means by which the worker performs his or her services as well as the ends, the worker is an employee.<sup>119</sup> In essence, "it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so."<sup>120</sup> The rule goes on

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<sup>116</sup> See *FedEx Home Delivery*, 563 F.3d at 504 (Garland, J., dissenting).

<sup>117</sup> *Id.* at 504. The D.C. Circuit's holding and emphasis on entrepreneurial opportunity from *FedEx* is rejected in *Alexander v. FedEx Ground Pkg. Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014). Although *Alexander* involved a California state claim, the court states, "[t]he D.C. Circuit's decision in *FedEx Home Delivery* . . . has no bearing on this case. There is no indication that California has replaced its longstanding right-to-control test with the new entrepreneurial-opportunities test developed by the D.C. Circuit. Instead, California cases indicate that entrepreneurial opportunities do not undermine a finding of employee status." *Alexander*, 765 F.3d at 993.)

<sup>118</sup> I.R.C. § 3121(d)(2) (2014).

<sup>119</sup> I.R.C. § 31.3121(d)-1(c)(2) (1960) (amended 1980); see RESTATEMENT (SECOND) OF AGENCY § 220.

<sup>120</sup> I.R.C. § 31.3121(d)-1(c)(2) (1960) (amended 1980).



to state that “if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor” and not an employee.<sup>121</sup> Addressing the continuing struggle to create and apply a uniform legal test to determine the status of an individual as employee or contractor, the IRS issued Revenue Ruling 87-41 in 1987.<sup>122</sup> This guidance document identifies twenty factors to be considered by employers and courts when determining worker classification for the purpose of correctly identifying the employment status for a taxpayer:

- (1) Instructions (employee must comply with instructions about when where and how to work; control factor is present if employer has right to require compliance with instructions).
- (2) Training (employee receives ongoing training from or at the direction of employer).
- (3) Integration (employee’s services are integrated into business operations because services are important to the business).
- (4) Services Rendered Personally (if services must be rendered personally, presumably the employer is interested in methods used to accomplish the work as well as the end results; employee often does not have the ability to assign their work to other employees, whereas independent contractors may assign work to others).
- (5) Hiring, Supervising and Paying Assistants (If an employer hires, supervises and pays assistants, the worker is generally categorized as an employee. An independent contractor hires, supervises and pays assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result).
- (6) Continuing Relationship (A continuing relationship between the worker and the employer indicates that an employer-employee

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<sup>121</sup> *Id.*

<sup>122</sup> *See generally* Rev. Rul. 87-41, 1987-1 C.B. 296.

relationship exists. The IRS has found that a continuing relationship may exist where work is performed at frequently recurring intervals, even if the intervals are irregular).

(7) Set Hours of Work (A worker who has set hours of work established by an employer is generally an employee. An independent contractor sets his/her own schedule).

(8) Full Time Required (An employee normally works full time for an employer. An independent contractor is free to work when and for whom he or she chooses).

(9) Doing Work on Employer's Premises (Work performed on the premises of the employer for whom the services are performed suggests employer control, and therefore, the worker may be an employee. Independent contractor may perform the work wherever the contractor desires as long as the contract requirements are performed).

(10) Order or Sequence Set (A worker who must perform services in the order or sequence set by an employer is generally an employee. Independent Contractor performs the work in whatever order or sequence they may desire).

(11) Oral or Written Reports (A requirement that the worker submit regular or written reports to the employer indicates a degree of control by the employer).

(12) Payment by Hour, Week, Month (Payments by the hour, week or month generally point to an employer-employee relationship).

(13) Payment of Business and/or Traveling Expenses (If the employer ordinarily pays the worker's business and/or travel expenses, the worker is ordinarily an employee).

(14) Furnishing of Tools and Materials (If the employer furnishes significant tools, materials and other equipment by an employer, the worker is generally an employee).

(15) Significant Investment (If a worker has a significant investment in the facilities where the worker performs services, the worker may be an independent contractor).

(16) Realization for Profit or Loss (If the worker can make a profit or suffer a loss, the worker may be an independent

contractor. Employees are typically paid for their time and labor and have no liability for business expenses).

(17) Working for More Than One Firm at a Time (If a worker performs services for a multiple of unrelated firms at the same time, the worker may be an independent contractor).

(18) Making Service Available to General Public (If a worker makes his or her services available to the general public on a regular and consistent basis, the worker may be an independent contractor).

(19) Right to Discharge (The employer's right to discharge a worker is a factor indicating that the worker is an employee).

(20) Right to Terminate (If the worker can quit work at any time without incurring liability, the worker is generally an employee).<sup>123</sup>

[33] Augmenting the 20 factors, the IRS further added three categories of factors to assess degree of control and independence: (1) "Behavioral Control", which includes types of instruction given, degree of instruction, evaluation systems, and training; (2) "Financial Control", which includes the degree of investment, whether there are unreimbursed expenses, the opportunity for profit and loss, the services available to market, and the method of payment; and (3) the "Relationship of the Parties", which includes looking at written contracts, employee benefits, permanency of the relationship, the services provided as the key activities of the business.<sup>124</sup>

[34] With all of these factors to consider, it is no wonder that courts and employers alike are having difficulty applying these IRS rules to each scenario. Yet the pressure to make the correct determination is of the utmost importance, whether simply trying to avoid audit or trying to abide

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<sup>123</sup> *Id.* at 298–99.

<sup>124</sup> See I.R.S. Pub. No. 1779, *Independent Contractor or Employee* (2012), <https://www.irs.gov/pub/irs-pdf/p1779.pdf>, archived at <https://perma.cc/2CWX-KEB8>; see IRS, *supra* note 105.

by or thwart the tax laws.<sup>125</sup> The correct taxpayer status determines the employer's obligations under the Federal Insurance Contributions Act (FICA),<sup>126</sup> the Federal Unemployment Tax Act (FUTA),<sup>127</sup> and the Collection of Income Tax at Source on Wages.<sup>128</sup> This is crucial in determining how much money an employer will have to spend based on labor.

[35] While most of the current court action confronting worker misclassification is arising under FLSA and NLRA claims, courts are pulling from the IRC test factors as a secondary set of considerations.<sup>129</sup> This indicates that the courts are struggling to apply prior tests and standards to this new sect of workers.<sup>130</sup> Courts applying these tests have frequently struggled with employee-versus-independent-contractor classification long before on-demand businesses started to emerge. Now that the market is changing, these longstanding tests are being stretched beyond reason and fairness to both sides of the litigations: workers and employers. While the FLSA, NLRB, and IRC tests are the most prominent in media coverage of labor and employment law, their application by each court has a ripple effect to other federal employment claims, like suits

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<sup>125</sup> See Weissman & Ross, *supra* note 83.

<sup>126</sup> See I.R.C. §§ 3121–3128 (2012).

<sup>127</sup> See I.R.C. §§ 3301–3311 (2012).

<sup>128</sup> See 26 U.S.C. § 3401 *et seq.* (2012) (assigning liability to the employer for the payment of the tax required to be deducted and withheld).

<sup>129</sup> See, e.g., *In re FedEx Ground Pkg. Sys., Inc.*, 734 F. Supp. 2d 557, 585 (N.D. Ind. 2010), *rev'd*, 792 F.3d 818 (7th Cir. 2015); *Craig v. FedEx Ground Package Sys. Inc.*, 300 P.2d 66, 74 (Kan. 2014).

<sup>130</sup> See *Alexander v. FedEx Ground Pkg. Sys., Inc.*, 765 F.3d 981, 998 (9th Cir. 2014) (Trott, J., concurring) (“Although our decision substantially unravels FedEx’s business model, FedEx was not entitled to ‘write around’ the principles and mandates of California Labor Law . . . .”).

under Title VII and ERISA.<sup>131</sup> Although this comment does not address the specifics of Title VII or ERISA claims under worker classification concerns, it is noted that the standards of the FLSA could affect the standards of ERISA or Title VII; therefore, it is necessary to include them for consideration purposes.<sup>132</sup>

[36] As these long-used standards are stretching to meet the demands of a new marketplace, it is becoming evident that these standards may be ready for an update.<sup>133</sup> Taking a cue from our sister nations, the United States is poised to introduce a third category of worker, filling the chasm between the traditional yet limited roles of employee and independent contractor classifications.<sup>134</sup>

### III. COMPARED TO OTHER NATIONS

#### A. Italy

[37] Italy classifies its workers under two categories: the subordinate employee and the self-employed worker.<sup>135</sup> Under the classification of

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<sup>131</sup> This comment will not seek to explore the standards under Title VII or ERISA. This comment merely proposes one definition under FLSA as a starting point from which other state or federal regimes may model a similar approach in adding a third classification of worker.

<sup>132</sup> See, e.g., Ryan P. Moulder, *How the ACA, ERISA §510, and FLSA §18C Interact*, MOULDER LAW (2013), <http://moulderlaw.com/how-the-aca-erisa-510-and-flsa-18c-interact/>, archived at <https://perma.cc/PD39-FS55> (discussing how ERISA, FLSA, and the Affordable Care Act interact).

<sup>133</sup> See O'Donovan, *supra* note 58.

<sup>134</sup> See *id.*

<sup>135</sup> See Art. 2094 Codice civile [C.c.] (It.) (defining “subordinate employees” as those who, in consideration of a certain salary, bind themselves to perform their intellectual or manual work activity within the company, under the management and the control of their employer); Art. 2222 Codice civile [C.c.] (It.) (defining “self-employed workers” as

self-employed, there is a subcategory of workers called “para-subordinate” or “project based workers.”<sup>136</sup> While subordinate employees are entitled to all statutory employment rights and benefits—as well as strong protection against unfair dismissals—self-employed workers enjoy almost no protective rights granted to the former. Yet, para-subordinate workers enjoy many of the same rights as subordinate workers, such as sick leave and parental leave.<sup>137</sup> Italian employers are required to file online with Ministry of Labour when hiring, firing, transforming or extending an

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those who, in consideration of a certain remuneration, undertake to perform a piece of work or to provide a service, primarily by their own effort and without a relationship of subordination with respect to the principal). Indicators of subordinate employment include: “(1) technical and functional integration; (2) exercise of managerial and disciplinary powers; (3) commercial risk; (4) Ownership of raw material, equipment and tools; (4) working hours; and (5) form of payment.”). See Michele Tiraboschi, *Employment Contract: Disputes on Definition in the Changing Italian Labour Law*, in 1 JILPT REPORT, THE MECHANISM FOR ESTABLISHING AND CHANGING TERMS AND CONDITIONS OF EMPLOYMENT/ THE SCOPE OF LABOR LAW AND THE NOTION OF EMPLOYEES 154–55 (Japan Institute for Labour Policy & Training, 2004), <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf>, archived at <https://perma.cc/ME5L-2HCK>.

<sup>136</sup> See Decreto Legislativo 10 settembre 2003, n. 276 (It.) (regulating employer-coordinated freelance relationship more stringently). The “term indicates a variety of self-employment that, given its characteristics and the way in which it is performed, has a sufficient number of the typical elements of employment to justify the extension to it of a limited number of the protections afforded to employees.” Stefano Liebman, *Employment Situations and Workers’ Protection* (Sept. 1, 1999) (unpublished manuscript) (on file with the Int’l Labour Org.), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/genericdocument/wcms\\_205366.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205366.pdf), archived at <https://perma.cc/478Z-73M8>.

<sup>137</sup> See *Multi-Jurisdictional Guide 2014/15, Employment and Employee Benefits in Italy Overview*, PRACTICAL LAW (2014), <http://uk.practicallaw.com/2-503-3122?q=&qp=&qo=&qe=>, archived at <https://perma.cc/763A-LKLE> [hereinafter *Multi-jurisdictional Guide*].

employment contract<sup>138</sup> for any category of worker; thus the government may monitor employer classification for administrative and social security purposes.<sup>139</sup> Additionally, para-subordinate workers are treated the same as subordinate employees for the purpose of social security and tax law.<sup>140</sup>

[38] Although this classification scheme appears logical on its face, the para-subordinate as third category of worker has drawn considerable criticism. One criticism concerns the “expansion of the grey area between subordinate employment and self-employment.”<sup>141</sup> As with the American labor law landscape, much litigation has arisen from the problem of incorrectly classifying workers, particularly where the cases are “border line or grey area between” the two traditional classifications.<sup>142</sup> This litigation is coming from “new professional roles . . . that cannot easily be fitted into organisational models . . . .”<sup>143</sup> Because the para-subordinate worker inhabits this grey area, critics are concerned that with the evolving economic landscape, the grey area will overly expand, thus eroding the traditional categories of workers and thwarting many worker exceptions.<sup>144</sup> Other critics suggest that the formalization of the para-subordinate category of worker is just a “hypocrisy,” “composed of self-employed workers on paper but substantially subordinate workers in

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<sup>138</sup> Italy, as well as France, mandates a written employment contract system between employer and worker to enforce terms of employment, as opposed to employment at will. See Council Directive 91/533, 1991 O.J. (L 288) 32, 33–34 (EC).

<sup>139</sup> See *Multi-Jurisdictional Guide*, *supra* note 137.

<sup>140</sup> See Tiraboschi, *supra* note 135, at 157.

<sup>141</sup> *Id.* at 153.

<sup>142</sup> *Id.* at 155.

<sup>143</sup> *Id.* (giving the example of a motorcycle driver who picks up and distributes mail in urban areas).

<sup>144</sup> See *id.* at 156.

substance.”<sup>145</sup> Under this view, a return to the traditional worker classifications is preferred.<sup>146</sup>

## B. France

[39] France recently introduced a third category of worker called the “auto-entrepreneur.”<sup>147</sup> Reformed under Le Loi Pinel (“Pinel Law”),<sup>148</sup> one of the goals of the auto-entrepreneur classification is to simplify a small business set-up for individuals providing freelance services.<sup>149</sup> The

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<sup>145</sup> Maurizio Del Conte, *Restructuring the Standard Employment relationship: Italy and the Increasing Protection Contract* 16 (2015) (Unpublished book chapter, Hart Publications).

<sup>146</sup> See *id.* at 16–17.

<sup>147</sup> The “auto-entrepreneur” program was originally introduced in 2009, but was reformed to its current status in 2014. See McPartland, *infra* note 157; *Auto-Entrepreneur Reforms are Passed*, CONNEXION (July 2014), <http://www.connexionfrance.com/auto-entrepreneur-reforms-are-passed-11994-news-article.html>, archived at <https://perma.cc/MC43-H3FB>.

<sup>148</sup> See Loi No. 2014-626 du 18 juin 2014 de relative à l'artisanat, au commerce et aux très petites entreprises, June 19, 2014, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], p. 10105 (Fr.), [https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=9DD9FE41A237D52195F4F0072C0AA1F7.tpdjo04v\\_1?cidTexte=JORFTEXT000029101502&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000029101499](https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=9DD9FE41A237D52195F4F0072C0AA1F7.tpdjo04v_1?cidTexte=JORFTEXT000029101502&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000029101499), archived at <https://perma.cc/S2NB-XAYN> (translated by Google) [hereinafter Pinel Law]; see also LOI PINEL GOUV (Fr.), <http://loipinel-gouv.org/>, archived at <https://perma.cc/QAA7-WKJW> (last visited Apr. 15, 2016) (discussing the reasoning for title, named after Sylvia Pinel, junior minister for trades at time of bill Passage by French Senate) (translated by Google).

<sup>149</sup> See Sylvia Davis, *Small Business in France: the Former Auto-Entrepreneur Becomes 'Micro-Entrepreneur'*, FRENCH ENTRÉE (Feb. 4, 2016) <https://www.frenchentree.com/living-in-france/employment/new-autoentrepreneur-system-for-small-businesses/>, archived at <https://perma.cc/2XC3-QBPZ>; *Becoming a Freelance or Self-Employed Worker in France*, EXPATICA, <http://www.expatica.com/fr/employment/How-to-set-up-a-small-business-or-become->



legal enforcement of the third category would arise under France's micro-tax regime.<sup>150</sup> Though the aims of the Pinel Law are directed toward a different tax scheme for those who are classified as auto-entrepreneurs, the result is a third class of workers with limited benefits between traditional employees and contractors. As auto-entrepreneurs, workers would be expected to pay a range of taxes, or "social charges,"<sup>151</sup> depending on the nature of their work.<sup>152</sup> In the previous tax regime, self-employed workers would have faced higher social charges.<sup>153</sup> Under the new regime, the self-employed workers or those earning a secondary income as auto-

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self-employed-in-France\_445986.html, archived at <https://perma.cc/6423-AVQD> (last visited May 9, 2016).

<sup>150</sup> See Pinel Law, *supra* note 148; Debbie Bradbury, *The French Auto-Entrepreneur Scheme*, COMPLETE FR. (Dec. 2, 2014, 9:47 AM), [http://www.completefrance.com/french-property/tax/the\\_french\\_auto\\_entrepreneur\\_scheme\\_1\\_3870304](http://www.completefrance.com/french-property/tax/the_french_auto_entrepreneur_scheme_1_3870304), archived at <https://perma.cc/4NMA-T935>, ("Micro is a simplified tax regime where there are no profit and loss calculations, no annual accounts and you simply declare your gross turnover each year.").

<sup>151</sup> The French "contributions sociales" is a charge comprising five taxes: Contribution Sociale Généralisée (CGC); Contribution au Remboursement de la Dette Sociale (CRDS); Prélèvement Social (PS); Contribution Additionnelle; and Prélèvement de Solidarité. These social charges are not a part of the French income tax system, though they are a taxation of certain sources of income. See *Social Security Contributions in France*, FRENCH-PROPERTY.COM, <http://www.french-property.com/guides/france/finance-taxation/taxation/social-security/social-welfare-levy/>, archived at <https://perma.cc/9D2J-RPT2> (last visited Apr. 13, 2015).

<sup>152</sup> For example, auto-entrepreneurs involved in service-based business activity would be expected to pay a "social charge" based on their actual earnings. See Davis, *supra* note 149.

<sup>153</sup> See *id.*

entrepreneurs face fewer restrictions<sup>154</sup> and lower social charges based on actual income rather than a rigid amount or percentage.<sup>155</sup>

[40] The outcome of such a scheme is yet unproven, as the Pinel Law only came into effect on January 1, 2015.<sup>156</sup> While the result of the reforms is unknown, the new law does have its critics. Under the auto-entrepreneur system, employment misclassification is still being abused where employers would prefer to classify workers as independents, thereby saving the employer social charge fees for fulltime employees.<sup>157</sup> While the auto-entrepreneur program does not stamp out misclassification abuses, it does alert the government to how the status is being used. For example, “under the rules of being an auto-entrepreneur [the worker] should have more than one client paying [him] for [his] services . . . .”<sup>158</sup> If serving only one client, or one employer, this work resembles a traditional employee-employer relationship, rather than a self-employed service worker.<sup>159</sup> Government auditors looking into auto-entrepreneur classifications will be looking out for this.<sup>160</sup>

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<sup>154</sup> Restrictions include business or tax restrictions based on tax filing or business registration filings indicating employee status. *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See* Pinel Law, *supra* note 148.

<sup>157</sup> *See* Ben McPartland, *The Pitfalls of France’s Auto-Entrepreneur Status*, LOCAL.FR (May 16, 2013, 8:00 AM), <http://www.thelocal.fr/20130516/the-pitfalls-of-being-an-auto-entrepreneur-in-france>, archived at <https://perma.cc/Q4YW-9E7T>.

<sup>158</sup> *Id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See id.* (“We have known a couple of companies who were only employing AEs when they really should have had salaried people on their books and these businesses have been caught out.”).

[41] Additionally, there may be hidden costs to those classified as auto-entrepreneurs. The auto-entrepreneur system is a great way for workers to test out the market with little risk, but the system is not set up to be a launching pad for small businesses.<sup>161</sup> Workers need to consider payout costs. Although there are no startup fees or taxes for auto-entrepreneurs, social charges paid to the government are based on all income, not excluding costs of doing business.<sup>162</sup> This is a good program for those workers who will have few costs and who are able to pay their social charges.<sup>163</sup> Further, because the worker is paying reduced social charges and therefore receives reduced social benefits, if the work “dries up,” there is no unemployment insurance to carry the worker for a period.<sup>164</sup>

[42] The pros and cons of France and Italy’s legislative solutions<sup>165</sup> should be considered as an example but not relied upon for an American rule, as these other countries have fundamentally different political and cultural philosophies driving their views on labor reform.<sup>166</sup>

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<sup>161</sup> *See id.*

<sup>162</sup> *See* McPartland, *supra* note 157; *Auto-Entrepreneur Reforms are Passed*, CONNEXION (July 2014), <http://www.connexionfrance.com/auto-entrepreneur-reforms-are-passed-11994-news-article.html>, *archived at* <https://perma.cc/UC53-33UV> (“An important downside is that you will pay tax and charges on any expenses you invoice. If your activity is likely to incur significant costs, you should look into classic business set-ups.”).

<sup>163</sup> *See* McPartland, *supra* note 157.

<sup>164</sup> *Id.*

<sup>165</sup> *See generally id.* (discussing the pitfalls of France’s auto-entrepreneur status and the pros and cons).

<sup>166</sup> *See The World Factbook: Government Type*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2128.html>, *archived at* <https://perma.cc/BQ7X-3V6N> (last visited Apr. 12, 2016).

### C. Spain

[43] Spain classifies its workers under either an employment relationship contract or a civil/mercantile relationship contract.<sup>167</sup> Under an employment relationship contract, the employee-employer relationship is defined as

an agreement under which people (employees) voluntarily offer their physical or intellectual services for payment to an employer. . . . [T]he Workers' Statute applies to people who render their services voluntarily under the management of another person . . . , where the person rendering services is the employee and the person . . . receiving services is the employer.<sup>168</sup>

[44] In order for an employment contract to be established there must be "generic elements of employment in the relationship."<sup>169</sup> These generic elements include that the employer manages the employee; the employee "is dependent on the employer;" the employee "engages in no risk-sharing with the employer;" and the employee "receives a guaranteed payment for services rendered."<sup>170</sup> This is contrasted with the civil/mercantile relationship, where the Spanish "contract for the provision of services . . . is in fact an exchange of obligations and contributions, which are rewarded with a payment for services provided."<sup>171</sup>

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<sup>167</sup> See Íñigo Sagardoy de Simón, *Employment and Employee Benefits in Spain: Overview*, in ASS'N OF CORPORATE COUNSEL, EMPLOYMENT AND EMPLOYEE BENEFITS MULTI-JURISDICTIONAL GUIDE 2013/14 (Thomson Reuters 2013).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

[45] Additionally, Spain separately regulates a third worker status called “economically dependent autonomous employee”<sup>172</sup> or “economically dependent independent contractor” (EDIC).<sup>173</sup> This separate worker classification is defined as “a natural person who[:] [p]erforms a professional activity for profit on a regular basis[;] [c]arries out that activity personally, directly and principally for one natural or legal person (called a client)[;] [and d]epends on this client to receive at least 75% of their income.”<sup>174</sup> Additional criteria must be met in order to be considered an EDIC—including exclusion from hiring other individuals, and contracting or subcontracting part or all of the worker’s work to third parties.<sup>175</sup> Employers wishing to contract with EDICs must formalize their agreement in writing.<sup>176</sup> Contract provisions should account for specific rules of termination designated under Spain’s 2007 Independent Contractor’s Law, including compensation for damages and provision of eighteen vacation days per year.<sup>177</sup> Although specifically regulated, these self-employed, dependent workers have a specific union set up within the Trade Union Confederation of Workers (CC.OO) of Catalonia, called Autonomous and Dependent Workers’ Federation (TRADE).<sup>178</sup>

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<sup>172</sup> Sagardoy de Simón, *supra* note 167.

<sup>173</sup> *Id.*; BAKER & MCKENZIE, *THE GLOBAL EMPLOYER: FOCUS ON SPAIN* 7 (2015), [http://www.bakermckenzie.com/files/Publication/6a22853a-87f7-46ae-b580-df7223ed8a06/Presentation/PublicationAttachment/0e83f243-d8ff-4f68-b729-e0b20b86a4b4/bk\\_employment\\_globalemployerspain\\_jan15.pdf](http://www.bakermckenzie.com/files/Publication/6a22853a-87f7-46ae-b580-df7223ed8a06/Presentation/PublicationAttachment/0e83f243-d8ff-4f68-b729-e0b20b86a4b4/bk_employment_globalemployerspain_jan15.pdf), *archived at* <https://perma.cc/8Z7Z-B44U>.

<sup>174</sup> Sagardoy de Simón, *supra* note 167.

<sup>175</sup> *See* BAKER & MCKENZIE, *supra* note 173, at 7–8.

<sup>176</sup> *See id.* at 8.

<sup>177</sup> *See id.*

<sup>178</sup> *See* “Economically Dependent Workers” (EDW) – Representation and Collective Bargaining, CESIFO GROUP MUNICH (Nov. 4, 2002), <http://www.cesifo->

[46] While Spain, Italy, and France have implemented a third worker classification under a tax regime, the theory and model can apply to the U.S. labor and employment law context.

#### IV. THE PROPOSAL

[47] The following proposed third classification of worker is necessary in light of the boom in the sharing economy business model. A third classification will allow courts to find a happy medium between employee protections, flexibility in the workplace, and employer business needs, like predictability and growth. As discussed prior, courts are now struggling to force classification of workers at the expense of the companies who contract with them or at the expense of the workers themselves. For example, where a court holds an Uber driver to be an employee, Uber is forced to sacrifice its formula for success and pay out potentially massive damages, risking bankruptcy of a once successful business model.<sup>179</sup> Where a court deems a group of workers as independent contractors, the workers sacrifice their potential right to statutory protection under wage and hour laws, tax laws, and benefit laws.<sup>180</sup> This third category of worker, or the “dependent contractor,” seeks to lessen the burden on both the employers and the workers in the sharing economy.

[48] While this proposal is limited to a dependent contractor status under the FLSA, it borrows elements from the standards and tests under

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group.de/ifoHome/facts/DICE/Labour-Market/Labour-Market/Unions-Wage-Bargaining-Labour-Relations/Eco-dep-work/fileBinary/Eco-dep-work.pdf, *archived at* <https://perma.cc/3P5V-K2GZ>.

<sup>179</sup> See generally *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 U.S. Dist. LEXIS 116482, \*134–35 (N.D. Cal. 2015) (holding that current and former Uber drivers were employees of Uber and eligible for various protections for employees under California Labor Code § 351).

<sup>180</sup> See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495–96 (D.C. Cir. 2009).

the IRC and NLRA. This comment limits the proposed definition to the FLSA only as a means to begin the transition away from a dual worker classification system to a more modern, flexible, and accurate reflection of the current employment landscape.

[49] The “Dependent Contractor,” (a Definition and Two Part Test) Amended definition under Fair Labor Standards Act, 29 U.S.C § 203(e)(1):

(a) Except as provided in paragraphs (2), (3), and (4), the term “employee” means an individual employed by an employer.<sup>181</sup>

(b) In determining whether an individual is an employee or independent contractor for the purposes of this Act, the following factors should be considered:

1. The extent to which the worker's services are an integral part of the employer's business;
2. The permanency of the relationship; The amount of the worker’s investment in facilities and equipment;
3. The nature and degree of control by the principal;
4. The worker’s opportunities for profit and loss; and,
5. The level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.<sup>182</sup>

Upon consideration of these factors and a finding that an individual

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<sup>181</sup> 29 U.S.C. § 203(e)(1) (2012).

<sup>182</sup> See WEIL, *supra* note 70, at 4.

is an “employee,” it may be necessary to proceed to § 203(a)(1)(B) of the Act to further determine the individual’s status as “dependent contractor.”

The term “dependent contractor” means an individual who, pursuant to a written agreement and in return for remuneration, carries out an economic activity or a profession, personally and directly, for an employer; and who:

1. Possesses at least some material and/or infrastructure necessary for the activity, independent of the employer’s material and/or infrastructure;
2. Works subject to at least some of their own criteria, subject to organizational, technical and procedural criteria that the employer provides, such as business production styles, scheduling and other employer or end-client requirements;
3. Performs the activity autonomously, that is without being subject to close supervision of the employer and regardless of the time needed to carry out the task;
4. Receives remuneration based on the quantity and quality of the work performed.<sup>183</sup>

[50] As discussed below, these definitions will give way to specific rights and benefits arising out of each classification<sup>[11]</sup>. For such proposals, look to policy makers and members of Congress.<sup>184</sup> Though restricted to a

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<sup>183</sup> See 29 U.S.C. § 203(e)(1) (2012); *Id.* at 4; Hass, *supra* note 65.

<sup>184</sup> Senator Mark Warner has been vocal about policy proposals. See O’Donovan, *supra* note 58. Though he has yet to suggest a formal policy, he has suggested possible models for a third class of workers, including “health care exchange-type system for workers’ comp and unemployment . . . [and] the possibility of an hour bank, . . . in which both the employee and employer would pay into a fund managed by a third party.” *Id.*



definition under FLSA, this is a starting place for reform. This proposal could serve as a model for a third category of worker under the IRC, NLRA, and parallel state statutes.

## V. IN DEFENSE OF THE PROPOSAL

### A. Step One

[51] A third category of worker runs the risk of further muddying the waters where they are already run murky. By incorporating the broad FLSA economic realities test directly into the first part of the definition of “dependent contractor,” much of the heavy lifting is done.

[52] The FLSA defines “employ” to include “to suffer or permit to work.”<sup>185</sup> This definition of “employ” is given a broad reading, “whose striking breadth . . . stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>186</sup> According to the Department of Labor, the “‘suffer or permit’ standard was specifically designed to ensure as broad of scope of statutory coverage as possible.”<sup>187</sup> Because a broader scope of coverage was intended, common law agency principles of an employer’s right to control were dismissed for an “economic realities” standard.<sup>188</sup> The economic realities test was broad enough to ascertain the nature of the working relationship of employer and employee under FLSA.<sup>189</sup> If applied as broadly as Congress and the Department of Labor

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<sup>185</sup> 29 U.S.C. § 203(g) (2012).

<sup>186</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

<sup>187</sup> WEIL, *supra* note 70, at 3.

<sup>188</sup> *See id.*

<sup>189</sup> *See id.* at 1.

intends, the majority of workers will be classified as employees.<sup>190</sup>

[53] The fact that the majority of workers would be classified as employees under FLSA is in line with current court decisions.<sup>191</sup> In *O'Connor v. Uber Technologies*, the court relied on California's *Borello* factors as well as the FLSA economic realities factors to come to the conclusion that the Uber drivers in question were in fact employees under the broad reaching standard.<sup>192</sup> In *Craig v. FedEx Ground Package System, Inc.*, the court applied the Kansas Wage Payment Act ("KWPA").<sup>193</sup> Like the FLSA, the KWPA is "an expansive and comprehensive legislative scheme that is broad in its scope."<sup>194</sup>

[54] Again, the court concluded that the drivers at issue were employees under the broad KWPA standard.<sup>195</sup> The general trend among courts deciding these misclassification challenges is clearly on the side of plaintiff workers seeking protections under the FLSA and its state

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<sup>190</sup> See *id.* at 15 ("The very broad definition of employment under the FLSA as 'to suffer or permit to work' and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a workers is an employee or an independent contractor.").

<sup>191</sup> Though the following cases are decided under state law, the standards include FLSA "economic realities" factors to determine if disputed workers are employees under the statute.

<sup>192</sup> *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138–53, 1153 (N.D. Cal. 2015) (citing *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 406–07 (1989)).

<sup>193</sup> See *Craig v. FedEx Ground Pkg. Sys.*, 686 F.3d 423, 425 (7th Cir. 2012).

<sup>194</sup> *Id.* at 429.

<sup>195</sup> See *In re Fedex Ground Pkg. Sys.*, 792 F.3d 818, 821 (7th Cir. 2015).

counterparts.<sup>196</sup>

[55] The first part of the proposed definition is not yet intended to change the FLSA standard, but to enforce the breadth with which it should be applied. While there is no per se presumption of employee status, the Department of Labor Wage and Hour Division has issued guidance as to how broadly the classification should be applied.<sup>197</sup> Pairing the general “employee” definition with factors to be considered in light of Congress’s intended broad application, employers should be able to predict how their employees will properly be classified into two basic categories.<sup>198</sup> Further, by incorporating and codifying the economic realities factors into the definition, expectations and application should hold little mystery for those laypersons and attorneys alike attempting to interpret and uniformly apply the known standard.<sup>199</sup>

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<sup>196</sup> *But see* FedEx Home Delivery v. NLRB, 563 F.3d 492, 504 (2009) (finding FedEx drivers to be independent contractors, relying on the entrepreneurial opportunities aspect of the common law agency test).

<sup>197</sup> *See* WEIL, *supra* note 70, at 5–15.

<sup>198</sup> *See id.* at 15.

<sup>199</sup> Indeed, the factors should not be applied mechanically; rather they should be applied specifically with an eye to the circumstance of the case. However, a uniform set of factors should be useful guidance. *See id.*; *see also, e.g.*, Americans With Disabilities Act (“ADA”), 42 U.S.C. § 12111(10)(B) (2012) (codifying factors to be considered when determining “undue hardship” to employer); *see also* *Attorneys React to DOL Misclassification Guidance*, LAW360 (July 15, 2015), <http://www.law360.com/articles/679455/attorneys-react-to-dol-misclassification-guidance>, archived at <https://perma.cc/Y363-QGW5> (“The legal standards for determining if a worker is an employee or independent contractor have existed for decades. The law has always favored treating most workers as employees — albeit temporary, part-time or seasonal. If the employer tells a worker when to work and what to do, most likely they are an employee. A true independent contractor is the person you hire to paint your house: You don't know when they will show up, when they will finish, and they bring their own paintbrushes and supplies. The DOL’s new guidance just highlights the simple fact that it is very difficult to be a true independent contractor.”).

[56] But all is not lost for new businesses incorrectly relying on an independent contractor classification. Newer, leaner business models can still thrive and progress in the evolving marketplace. Under this proposal, the initial classification as “employee” is not the final step. Where employers and their employees seek to form a different relationship, somewhere on the spectrum between FLSA’s original definition of employee and an independent contractor, there is an available middle ground option, “dependent contractor.” With the economic realities inquiry of Step One fairly settled, a finding that a worker is an employee under the FLSA § 203(e)(1)(A) determination leads to Step Two: The Dependent Contractor inquiry.

### **B. Step Two**

[57] Where an employer seeks to establish a “dependent contractor” relationship with an employee, the employer or his counsel needs to proceed to § 203(e)(1)(B). Because the FLSA category of § 203(e)(1)(A) “employee” is to be construed broadly, an employer choosing to operate with dependent contractors, whether for business purposes or other reasons, must take active steps to establish that any of its workers are indeed dependent contractors. Where an employer fails to establish this statutory relationship, the default classification of the worker will be as a § 203(e)(1)(A) “employee.” This approach to a third category borrows some aspects from Spanish and Italian employment contract schemes,<sup>200</sup> while parsing out the level of autonomy and economic dependence that divides dependent contractors from traditional employees.<sup>201</sup>

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<sup>200</sup> See Franco Toffoletto, et al., *Employment and Employee Benefits in Italy: Overview*, in ASS’N OF CORPORATE COUNSEL, EMPLOYMENT AND EMPLOYEE BENEFITS GLOBAL GUIDE 2015/16 (Thomson Reuters 2015), <http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1248057361096&ssbinary=true>, archived at <https://perma.cc/W4KT-7KNP>; see also Sagardoy de Simón, *supra* note 167, at 1.

<sup>201</sup> See Hass, *supra* note 65.

[58] At its most basic, a “dependent contractor” is a “hybrid model,”<sup>202</sup> somewhere between an independent contractor and an employee as the classifications are currently understood.<sup>203</sup> The concept behind such a classification is a blending of employee protections built into the FLSA with the flexibility afforded to independent contractors.<sup>204</sup> Many of the factors set out in the IRC’s “right to control” test are utilized in this portion of the dependent contractor analysis.<sup>205</sup> “Right to control” factors such as instructions, integration, work done on premises, payment, order of sequence set, and furnishing of tools and material are addressed by the four factors proposed in § 203(e)(1)(B).<sup>206</sup> Consider the factors determining a dependent contractor status: what they have in common is a shared economic burden on both the worker and employer unlike an independent contractor or traditional employee.

[59] Under proposed § 203(e)(1)(B)(1), it is clear that both the dependent contractor and employer would provide “materials and/or infrastructure” in order to carry out the business activity. The self-supplied materials or planning from both the dependent contractor and employer are independent from the other. This establishes a duality of sources of supplies, materials, and infrastructure. This duality is unlike a traditional employee, where the employer supplies most if not all supplies and

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<sup>202</sup> O’Donovan, *supra* note 58; *Upstart Technology Disrupts Regulators*, YAHOO (June 1, 2015, 3:54 PM), <http://finance.yahoo.com/news/upstart-technology-disrupts-regulators-195400952.html>, archived at <https://perma.cc/6GPX-TKHR>.

<sup>203</sup> See Hillary Findlay, *Dependent Contractors: A Third Employment Relationship with Legal Concerns for Sport Organizations*, SPORT L. & STRATEGY GRP. (July 29, 2013), <http://www.sportlaw.ca/2013/07/dependent-contractors-a-third-employment-relationship-with-legal-concerns-for-sport-organizations/>, archived at <https://perma.cc/5869-3CXW>.

<sup>204</sup> See O’Donovan, *supra* note 58.

<sup>205</sup> See Rev. Rul. 87-41, 1987-1 C.B. 296.

<sup>206</sup> See *id.*

infrastructure by which the employee may complete his or her task. Further, this duality is unlike the burden placed on the independent contractor, expected to supply most if not all material in order to complete the contracted for task.

[60] Under proposed § 203(e)(1)(B)(2), “work subject to at least some of [worker’s] own criteria,” is shared with that of the employer’s prerogative to set some organizational criteria. This factor again shows the duality of expectations and actions between the dependent contractor and employer. There is the essence of collaboration between the worker and employer in accomplishing the business task. Under a traditional employee-employer relationship, the employee may bring his skills to work, but the employer sets the vast majority of criteria by which the assigned work should be accomplished. On the other end of the spectrum, an independent contractor is tasked with a certain outcome or desired result but is left alone to determine the means by which he will accomplish it. The dependent contractor status sits nicely between the two classifications.

[61] Under proposed § 203(e)(1)(B)(3), the dependent contractor should be found to “perform the [business] activity autonomously, . . . without being subject to close supervision of the employer.” This factor establishes an independence from the employer that could be construed as a factor leaning toward an independent contractor status; however, the previous factor determining the means by which a task is accomplished necessarily limits how autonomous the dependent contractor can actually be. Therefore, a task completed during the employer’s non-business hours, without supervision, is still affected by the criteria set out by the employer. The dependent contractor’s “autonomy” is limited but not regulated to the point of total control by the employer.

[62] Finally, proposed § 203(e)(1)(B)(4) merely establishes that “remuneration,” or payment shall be established by the quantity and quality of work. This payment system reflects that payment will not be predetermined as a salary. For traditional employees, a predetermined

salary, or “amount of pay” cannot “be reduced based on the quality or quantity of the work performed.”<sup>207</sup> On the other side, independent contractors are paid on a per-job basis, and expenses incurred by the independent contractor will not be directly reimbursed by the employer; rather these costs are a part of the contractor’s fees.<sup>208</sup> The standard set by the proposed rule is flexible, and includes payment types acceptable to both independent contractors and traditional employees, except salary. Where salary is exclusively a method of payment for a traditional employee, and pay-per-job is payment to independent contractors, a dependent contractor could strike a bargain somewhere in between – perhaps a smaller monthly payment from the employer combined with performance or ratings based pay per hour.

[63] Finally, when establishing a dependent contractor classification, there must be written evidence that this is the relationship that the worker and employer intends to create. As stated above, where an employer fails to establish such a relationship, as evidenced by the written contract, the dependent contractor classification will fail and default to traditional employee classifications, obligating the employer to the full gambit of liabilities and penalties set forth in the FLSA.<sup>209</sup> The contract establishing a dependent contractor relationship between an employer and worker could contain the following:<sup>210</sup>

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<sup>207</sup> *FLSA Overtime Security Advisor: Salary Basis or Fee Basis*, U.S. DEP’T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/overtime/cr2.htm>, archived at <https://perma.cc/85XS-C36A> (last visited Apr. 22, 2016).

<sup>208</sup> See *Hiring Independent Contractors for Your Work Force Needs*, BIZFILINGS (May 24, 2012), <http://www.bizfilings.com/toolkit/sbg/office-hr/hiring-workers/hiring-independent-contractors.aspx>, archived at <https://perma.cc/UEY6-KH8H>.

<sup>209</sup> Although the protective rights, benefits, and penalties allocated to dependent contractors is beyond the scope of this comment, it should be noted that there will likely be differences in allocation between an employee and dependent contractor regarding certain benefits, but should be given the full ambit of worker protections.

<sup>210</sup> This is a suggested list of contract provisions, and is not closely examined as the contract itself is not the focus of this comment.

1. Identity of the parties;
2. Place of employer's business;
3. Place where dependent worker may be contacted;
4. Date on which the contract begins;
5. Job category (e.g. "dependent contractor for purposes of...");
6. Duration of contract (e.g. "for so long as either party desires..."<sup>211</sup>);
7. Method of payment (and how expenses are to be addressed); and
8. Rights and benefits arising under relationship established by the contract.<sup>212</sup>

[64] The written evidence requirement does put an added burden on the parties, mainly the employer, wishing to create such a relationship. This burden is reasonable: where an employer seeks to obtain the benefits<sup>213</sup> of a dependent contractor classification in order to operate under a specific business model, it is not overly burdensome to require the employer to expressly do so. While the contract itself is not determinative in finding that the worker is actually a dependent contractor,<sup>214</sup> it is an indication of

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<sup>211</sup> Implicating at-will employment presumption; conflicts with notion of contract employment, but contract for-cause presumption may be altered by terms of contract.

<sup>212</sup> See Toffoletto et al., *supra* note 200, at 1.

<sup>213</sup> Such as moderate tax savings, lower reimbursement cost of supplies, and perhaps an altered overtime standard. See James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>, archived at <https://perma.cc/8JXT-D7BA> ("We'd do better to create a third legal category of workers, who would be subject to certain regulations, and whose employers would be responsible for some costs (like, say, reimbursement of expenses and workers' compensation) but not others (like Social Security and Medicare taxes). Other countries, including Germany, Canada, and France, have rewritten their laws to expand the number of worker categories. There's no reason we can't do the same, and give gig-economy workers a better balance of flexibility and security.").

<sup>214</sup> As with independent contractor agreements, what is put to paper is not necessarily the reality of the working relationship. See *Alexander v. FedEx Ground Pkg. Sys.*, 765 F.3d 981, 984, 997 (9th Cir. 2014) (stating that the employer's operating agreement, in tandem



both parties' expectations and intentions.

[65] As with the “economic realities” test and the “right to control” test, § 203(e)(1)(B) must be applied on an individual basis, and the “totality of the working relationship is determinative,” including all relevant facts under the circumstances.<sup>215</sup> Correct application is key.

## **VI. RETURNING TO JENNIFER GUIDRY—COULD SHE BE A DEPENDENT CONTRACTOR FOR UBER?**

### **A. Part One**

[66] Assuming that this proposed classification is adopted, would Jennifer Guidry be correctly classified as a dependent contractor? The first step is to apply the known law in § 203(e)(1)(A). This step sifts the independent contractors from the larger pool of workers designated as employees.<sup>216</sup> Is Jennifer “suffer[ed] or [permit[ted] to work” by Uber?<sup>217</sup> In working through the first part of the analysis, the “economic realities” test should be judged with an eye to the “ultimate determination of whether the worker is really in business for him or herself (and thus is an

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with extrinsic evidence, supported a classification as employees regardless of the fact that the contract deemed the workers to be “independent contractors” in title); *see also* FedEx Home Delivery v. NLRB, 563 F.3d 492, 498, 501 (D.C. Cir. 2009) (enforcing the operating agreement’s classification of workers as independent contractors upon finding extrinsic evidence supporting the terms of such a contract).

<sup>215</sup> U.S. DEP’T. OF LABOR, FACT SHEET 13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2014), <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf>, *archived at* <https://perma.cc/4EAP-USCK>; IRS, *supra* note 105.

<sup>216</sup> Deferring to DOL’s guidance, suggesting that employers should generally classify most workers as “employees,” as the intended coverage of the FLSA is purposefully broad. *See* WEIL, *supra* note 70, at 15.

<sup>217</sup> 29 U.S.C. § 203(g) (2012).

independent contractor) or is economically dependent on the employer (and thus is its employee).”<sup>218</sup>

[67] Applying the “economic realities” test, Jennifer should be classified as an employee at this stage.<sup>219</sup> First, Jennifer performs work that is an “integral part of [Uber’s] business.”<sup>220</sup> Uber “provides a smartphone-based transportation-request service,”<sup>221</sup> connecting the service providers (the drivers) with potential clients (the riders).<sup>222</sup> Although “Uber bills itself as a technology company”,<sup>223</sup> it is clear that without drivers to provide transportation services to clients, Uber would not have a business at all. Jennifer performs the integral service of driving for Uber, though the quantity of service may vary.

[68] Second, Jennifer does have opportunity to realize profit in driving for Uber, but that potential is limited.<sup>224</sup> Jennifer may accept as many ride offers as she desires, but she does not set the rate at which she is paid for each service.<sup>225</sup> In this way, Uber limits the profitability realized by its

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<sup>218</sup> See WEIL, *supra* note 70, at 15.

<sup>219</sup> See 29 U.S.C. § 203(e)(1)(A)(ii) (2012).

<sup>220</sup> WEIL, *supra* note 70, at 6–7.

<sup>221</sup> *Greenwich Taxi, Inc. v. Uber Techs., Inc.*, 123 F. Supp. 3d 327, 335 (D. Conn. 2015).

<sup>222</sup> Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), [http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?\\_r=2](http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=2), archived at <https://perma.cc/Y3YK-T2A3>.

<sup>223</sup> Amy Lanfield, *Uber Ruling Puts Spotlight on Independent Contractors*, CBS NEWS (June 18, 2015, 1:36 PM), <http://www.cbsnews.com/news/uber-ruling-puts-spotlight-on-independent-contractors/>, archived at <https://perma.cc/SJ5C-L7TK>.

<sup>224</sup> See WEIL, *supra* note 70, at 7.

<sup>225</sup> See Singer, *supra* note 1.

drivers. Uber's customer base may set the market rate for the driving services, but Uber has the final say as to how and how much each driver is paid for their work.<sup>226</sup> Further, Jennifer's drive to compete as many runs in not contingent on her managerial skill level. Perhaps she manages her time, but she does not delegate tasks or operate as an independent business.<sup>227</sup> "[T]he worker's ability to work more hours and the amount of work available from the employer have nothing to do with the worker's managerial skill and do little to separate employees from independent contractors—both of whom are likely to earn more if they work more and if there is more work available."<sup>228</sup> Under this standard, Jennifer is something closer to an employee.

[69] Third, compared to Uber's investment of developing and providing the infrastructure of the application, Jennifer's investment is arguably equal. Jennifer provides the vehicle with which she completes her services, and she maintains it to standards desirable for the Uber customers she drives.<sup>229</sup> However, "investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor;" rather, "the tools and equipment may simply be necessary to perform the specific work for the employer."<sup>230</sup> Under this standard, Jennifer is a § 203(e)(1)(A) employee.

[70] Fourth, Jennifer's work does not require special skills or initiative.<sup>231</sup> "A worker's business skills, judgment, and initiative, not his

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<sup>226</sup> *See id.*

<sup>227</sup> *See WEIL, supra note 70, at 8 (internal citation omitted).*

<sup>228</sup> *Id.* at 7 (internal citation omitted).

<sup>229</sup> *See Singer, supra note 1.*

<sup>230</sup> *WEIL, supra note 70, at 9 (internal citations omitted).*

<sup>231</sup> *See id.* at 4.

or her technical skills, will aid in determining whether the worker is economically independent.”<sup>232</sup> The skill requirements of driving and being able to operate the Uber app are not unique to Jennifer; in fact, they are technical skills that can be learned by other individuals who possess a driving permit and a car.<sup>233</sup> As such, she would be an employee under this factor.

[71] Fifth, the relationship between Uber and Jennifer is not permanent but is indefinite so long as Jennifer wishes to drive and Uber wishes to maintain her as a driver.<sup>234</sup> Jennifer has the independence to refuse certain ride offers, but her relationship with Uber continues.<sup>235</sup> Importantly, “neither working for other employers nor not relying on the employer as his or her primary source of income transforms the worker into the employer’s independent contractor.”<sup>236</sup> Jennifer may still work for other employers, like Lyft or TaskRabbit, without suggesting that her flexible working relationship with Uber is the result of her own “independent business initiative.”<sup>237</sup> Because Jennifer works for Uber continuously, accepting jobs provided via Uber’s application evidences an employer-employee relationship under this factor.

[72] Finally, what is the nature and degree of Uber’s control over

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<sup>232</sup> *Id.* at 10.

<sup>233</sup> See *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1318 (11th Cir. 2013); *Keller v. Miri Microsystems, LLS*, 781 F.3d 799, 809–10 (6th Cir. 2015) (contracting workers with “unique skill” with those technicians who do not need “unique skills” to perform work; rather the workers are selected on the basis of “availability and location.”).

<sup>234</sup> See WEIL, *supra* note 70, at 4.

<sup>235</sup> See Singer, *supra* note 1.

<sup>236</sup> WEIL, *supra* note 70, at 12 (citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988)).

<sup>237</sup> *Id.* (citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988)).

Jennifer as a worker?<sup>238</sup> The fact that Jennifer works offsite, according to her own hours, is not determinative of Uber’s ultimate control over her work.<sup>239</sup> In order to be an independent contractor, Uber would need to show that Jennifer “exerts such [actual] control over [the] meaningful part[s] of the business that she stands as a separate economic entity.”<sup>240</sup> This factor must be in light of the ultimate economic realities determination, whether the worker is economically dependent on the employer.<sup>241</sup> Here, Uber provides a platform that lists all driving opportunities that Jennifer may take. Once Jennifer accepts a ride, Uber is informed, and Jennifer must comply with Uber’s quality standards and monitoring policies.<sup>242</sup> In this case, Jennifer depends on Uber providing her with clients and depends on Uber’s pay rate in order to earn a living. This is the type of meaningful control that creates an employer-employee relationship.

## B. Part Two

[73] Under § 203(e)(1)(B), a dependent contractor is an individual who [carries] out an economic activity or a profession, personally and directly, for an employer, and who: (1) possesses at least some material and/or infrastructure necessary for the conduct of the activity . . . ; (2) [w]ork[s] subject to at least some of their own criteria, subject to [some] criteria that the employer provides . . . ; (3)

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<sup>238</sup> *See id.* at 13.

<sup>239</sup> *Id.*

<sup>240</sup> *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1313 (11th Cir. 2013) (quoting *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312–13 (5th Cir. 1976)).

<sup>241</sup> *See WEIL, supra* note 70, at 14.

<sup>242</sup> *See Singer, supra* note 1.

[p]erforms the activity autonomously . . . ; (4) receives remuneration based on quantity and quality of work performed.<sup>243</sup>

Applying this to an individual who has been deemed an employee under Part One requires the employer or practitioner to drill down to the actual expectations and realities of the working relationship established by the employer.

[74] Under prong one, Jennifer “possesses at least some material . . . for the conduct of the activity,” while Uber additionally supplies the infrastructure under which the work shall be completed.<sup>244</sup> Jennifer provides her car, gas, maintenance, and interpersonal skills; Uber provides the technology service that alerts Jennifer of potential rides, provides payment and sets rates, and sets quality standards with which Jennifer complies.<sup>245</sup> Under the second prong, Jennifer works subject to her own hours, style of driving and speaking with clients, and determines how many rides she is willing to take on.<sup>246</sup> On the other side, Uber subjects Jennifer to using Uber’s app and procedures in order to accept a ride offer, as well as compliance with certain service standards. Under prong three, Jennifer performs the driving service autonomously.<sup>247</sup> Once a drive has been accepted, Jennifer is in the driver’s seat, so to speak. While she does have to comply with certain service standards and reviews from Uber customers, she is not closely monitored while performing her job, and she is not monitored or limited while pursuing work from other sources.

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<sup>243</sup> Hass, *supra* note 65.

<sup>244</sup> *Id.*

<sup>245</sup> See Singer, *supra* note 1.

<sup>246</sup> See Hass, *supra* note 65.

<sup>247</sup> See *id.*

Finally, under prong four, Jennifer's payment is calculated, based on a set fee determined by Uber, driven by consumer demand.<sup>248</sup>

[75] Arguably, Jennifer's payment is based on quantity only, to the exception of quality; however, one may argue that Uber's driver review system creates a higher demand for those drivers with higher quality of skill. Further, Uber's tip system is based on the quality of a customer's experience, and the predetermined ride fee accumulates based on quantity. Thus, Jennifer's remuneration is based on quantity and quality.

[76] In addition to the factors set out above, proposed § 203(e)(1)(B) requires that Uber have a written contract with Jennifer expressly stating that it is both parties intentions to create a dependent contractor relationship.<sup>249</sup> Although the written evidence is not determinative of the correct classification of Jennifer as dependent contractor, it is indicative of the intended relationship, and it is necessary if Uber wants to take advantage of classifying Jennifer as a dependent contractor. Where Uber does not provide a written contract in compliance with proposed § 203(e)(1)(B), Jennifer's status as a worker would then default to that of a traditional employee, as noted above.

## VII. FUTURE IMPLICATIONS

[77] While this definition may not be the only way to achieve a more accurate means to classify workers in the sharing economy, this proposal provides a model from which federal and state legislatures can draft their own definitions and apply them appropriately outside of the FLSA context. Most importantly, if adopted, a third category of workers will allow the sharing economy business model to continue to grow and invest in new technology, thereby continuing to stimulate the economy, increase technology and intellectual property being developed in the U.S., and

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<sup>248</sup> See *id.*; Singer, *supra* note 1.

<sup>249</sup> See Hass, *supra* note 65.

allow for the continued employment of thousands of Americans.<sup>250</sup> Without a third classification, the future investment in this type of sharing technology could be chilled, as it is simply not worth it for these businesses to invest money and effort into a profitless business model. The public would suffer greatly from this.<sup>251</sup> This solution will equally grant workers in the sharing economy an ideal balance between the flexibility and independence and some security provided by an employer. How to strike that balance is yet to be determined. Introducing this third category is but the beginning of many changes certain to come.

### VIII. CONCLUSION

[78] This proposed definition attempts to strike the balance of employers' and workers' competing needs in the expanding on-demand or sharing economy business model. With only two definitions—employee and independent contractor—it is hard to strike this balance without severely interfering with the employer's business necessity or employee expectations and needs. This is precisely what the courts are struggling with now. Employers need to freely invest in new business models and opportunities, to continue to grow and evolve the American market in a global economy of services. Employers need predictability in determining how their workforce is set up so they can properly allocate funds and resources in accordance with regulations, like FLSA. Equally, workers need protections and benefits commensurate with the work they do. Workers should not be expected to work under certain circumstances without the rights, protections, and privileges of something more than an independent contractor status. Workers need predictability and

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<sup>250</sup> See Charlie Warzel, *The Danger of Calling Uber a "Tech Company"*, BUZZFEEDNEWS (Jan. 7, 2015 5:11 PM), <http://www.buzzfeed.com/charliwarzel/the-danger-of-calling-uber-a-tech-company#.qdARaa683>, archived at <https://perma.cc/7UGW-RTKY>.

<sup>251</sup> See Jake Novak, *Why Uber is Making America Better*, CNBC (Jan. 22, 2015 12:39PM), <http://www.cnbc.com/2015/01/22/why-uber-is-making-america-better-commentary.html>, archived at <https://perma.cc/ZJG5-ZHKZ>.



sustainability as much as their employers. Introducing a third type of worker under the FLSA strikes a fairer and more accurate balance between the rights and needs of both employers and workers. The addition of the dependent contractor category allows for continued investment in the sharing economy, and protects those tasked with providing the services integral to those on-demand businesses.