**Abstract:**
A recent innovation, the ride-share sector, is the fastest growing sector of the sharingeconomy. These companies provide drivers with a mobile-based platform to find a fare and take a cut of the same, discouraging cash tipping. As advertisements for the companies suggest that these drivers can make anywhere between $20-$40 per hour, it's no surprise that the companies are welcoming throngs of workers suffering in a sluggish economy and searching for a way to make ends meet, advertising themselves a potential vehicle for micro-entrepreneurial opportunity that allows workers to have more control and flexibility at work.

This paper provides a brief examination of the relevant legal framework as concerns the misclassification of rideshare drivers; recent misclassification decisions in Oregon, Florida, and California; and the recent Uber and Lyft settlements. This analysis considers the way ridesharedrivers are impacted by the fact that no one determinative test concerning misclassification exists, and looks at the ways in which different jurisdictions have come to different conclusions regardingthe same set of workers. The article focuses on key similarities between the major misclassification tests and the essentially uniform company policies and practices applicable to each individual company's workforce, to provide a meaningful review of the relevant facts which can guide the decision-making processes of courts, policymakers, and other stakeholders, as well as research that concerns worker classification in the ridesharing sector. This analysis reveals that upon close examination, ride share drivers are indeed misclassified as independent contractors, when in fact they are employees.

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# Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector

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# MATTERS SETTLED BUT NOT RESOLVED: WORKER MISCLASSIFICATION IN THE RIDESHARE SECTOR

BY
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## I: INTRODUCTION

A recent innovation, the ride-share sector, is the fastest growing sector of the sharing economy. These companies provide drivers with a mobile-based platform to find a fare and take a cut of the same, discouraging cash tipping. As advertisements for the companies suggest that these drivers can make anywhere between $20-$40 per hour, it's no surprise that the companies are welcoming throngs of workers suffering in a sluggish economy and searching for a way to make ends meet, advertising themselves a potential vehicle for micro-entrepreneurial opportunity that allows workers to have more control and flexibility at work.

Although the grounding tenet of the sharing economy is collaborative consumption and the sharing of resources, these companies are privately owned, venture capital funded corporations like Uber, Lyft, and Sidecar. And for these companies, business is booming, the companies employing a steadily growing global workforce, providing alluring economic opportunities to struggling workers in times of high underemployment and unemployment.[2] However, a worrisome

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[2] Uber alone received a $3.5 billion investment from Saudi Arabia's sovereign wealth fund (maintaining its private valuation of $62.5 billion) this year. Alex Konrad, *Uber Raises $3.5 Billion From Saudi Sovereign Wealth Fund, Keeps $62.5 Billion Valuation*, FORBES TECH (JUN 1, 2016, 05:12 PM), http://www.forbes.com/sites/alexkonrad/2016/06/01/uber-raises-3-5-billion-from-saudi-sovereign-fund-at-62-5-billion-valuation/#7ddd9bac41d4. Uber also received a $258 million investment from Google in 2003, the company being valued at about $62.5 billion. Carolyn Said, *Uber Survey Highlights Driver Happiness, Ignores Earnings*, SF GATE (Dec. 7, 2015, 3:00 AM), http://www.sfgate.com/business/article/Uber-survey-highlights-driver-happiness-ignores-6676872.php. Uber operates in 35 countries and 57 U.S. cities. Robert Hof, *As Google Ventures Invests $250 Million In Uber, What's Next? Driverless Cars On Demand?*, FORBES (Aug. 23, 2013, 2:18 AM), http://www.forbes.com/sites/roberthof/2013/08/23/as-google-ventures-invests-250-million-in-uber-whats-next-driverless-cars-on-demand/#5aeb477343f3. Lyft also recently raised $250 million from venture capitalists; Lyft's latest valuation listed the company at more than $700 million. Jeff Bercovici, *Lyft Raises $250 Million Series D to*

picture of the direction of the rapidly growing ride-share sector has started to emerge. Cases filed by rideshare workers, research, media coverage, and worker organizing efforts have revealed evidence and worker claims of low wages, nonpayment of wages, tip skimming, harassment from consumers, and misclassification.

Whether or not the growing cadre of rideshare workers are employees misclassified as independent contractors, is perhaps the most significant issue currently facing rideshare workers today. Rideshare drivers have filed multiple class-action lawsuits alleging the same. While recent settlements by Uber and Lyft of misclassification cases have allowed both companies to retain their independent contractor models, the settlements have done nothing to resolve the underlying issue of worker misclassification, neither for the workers receiving said settlements, nor for rideshare workers more generally.

This paper provides a brief examination of the relevant legal framework as concerns the misclassification of rideshare drivers; recent misclassification decisions in Oregon, Florida, and California; and the recent Uber and Lyft settlements. This analysis considers the way rideshare drivers are impacted by the fact that no one determinative test concerning misclassification exists, and looks at the ways in which different jurisdictions have come to different conclusions regarding the same set of workers. The article focuses on key similarities between the major misclassification tests and the essentially uniform company policies and practices applicable to each individual company's workforce, to provide a meaningful review of the relevant facts which can guide the decision-making processes of courts, policymakers, and other stakeholders, as well as research that concerns worker classification in the ridesharing sector. This analysis reveals that upon close examination, ride share drivers are indeed misclassified as independent contractors, when in fact they are employees.

## II: MISCLASSIFICATION

### A. *Settled but not Resolved*

The ongoing debate about whether or not the growing cadre of rideshare workers are employees or independent contractors, is perhaps the most significant issue currently facing rideshare workers today. Rideshare drivers have filed multiple class-action lawsuits, charging rideshare companies are misclassifying them as independent contractors.[3] Recent settlements by

*Fight the Car Wars*, FORBES (Apr. 2, 2014, 12:00 PM), http://www.forbes.com/sites/jeffbercovici/2014/04/02/lyft-raises-250-million-series-d-to-fight-the-car-wars/. Sidecar also raised $10 million from investors. This kind of growth is especially impressive considering Uber was launched in 2009, with Lyft and Sidecar only having been launched in 2012. Uber saw a 209% growth in national sales as well as a 305% growth in the number of rides between 2012 and 2013. Similarly, Lyft saw a 305% growth in national sales as well as a 330% growth in the number of rides during the same period. Liz Gannes, *Uber Saw a Small Dip in Growth During its Bad Press Week*, CNBC (Dec. 4, 2014, 10:36 AM), http://www.cnbc.com/id/102240065#.

[3] See Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059 (N.D. Cal. 2014)
; O'Connor v. Uber Techs., Inc., No. 13-03826-KAW, 2013 U.S. Dist. LEXIS 120406 (N.D. Cal. Aug. 23, 2013)
; Lavitman v. Uber Techs., Inc., SUCV2012-04490, 2015 Mass. Super. LEXIS 7 (Mass. Supp. Jan. 26, 2015)
; and Ehret v. Uber Techs., Inc., No. C-14-0113 EMC, 2014 U.S. Dist. LEXIS 103128 (N.D. Cal. July 28, 2014); Singh v. Uber Technologies, Inc., No. 3:2016cv03044 (New Jersey May 27, 2016); Bonke v. Uber Technologies Incorporated et al, No. 2:2016cv01534 (Arizona May 18, 2016); Carey v. Uber Technologies Inc., No. 1:2016cv01058 (N.D. Ohio May 2, 2016); Trosper v. Uber Technologies, Inc. et al, No. 1:2016cv04842 (N.D. Illinois May 1, 2016); Lamour v. Uber Technologies, Inc., No. 1:2016cv21449 (S.D. Florida April 22, 2016); Bradshaw et al v. Uber Technologies Inc et al, No. 5:2016cv00388 (W.D. Oklahoma April 19, 2016); Zawada et al v. Uber Technologies,

Uber and Lyft of misclassification cases, which allowed both companies to retain their independent contractor models, have not resolved the underlying issue of worker misclassification, neither for the workers receiving said settlements, nor rideshare workers more generally. Certainly, the heaving mass of discontented drivers speaks to this fact. Not only have new class action lawsuits claiming worker misclassification been filed since Uber and Lyft reached their settlements,[4] but lead plaintiff in the Uber case, Douglas O'Conner filed a declaration objecting to the proposed O'Connor class action settlement, citing that that he had not been been informed and consulted contemporaneously on the details of the settlement agreement and did not receive a copy of the settlement agreement, until after the same was publicly announced. O'Conner calls the settlement "a disastrous settlement agreement" under which "Uber drivers are being sold out and shortchanged by billions of dollars while sacrificing the determination of their classification as employees."[5]

### B. *What is Misclassification? Why Does It Matter Here?*

Employee misclassification refers to the act of employers improperly categorizing workers as independent contractors instead of employees. Whether rideshare workers are recognized as employees or independent contractors has tremendous consequences to the workers, and this status determines the access to worker protections and remedies to workplace harms. In their current classification as independent contractors, rideshare drivers are not considered employees of transportation network companies. Thus, they aren't protected by those workplace laws that cover most other workers. Rideshare workers use their own vehicles, pay for vehicle maintenance, and pay for their own gas.

The practice of misclassifying workers as independent contractors in order to cut labor costs and avoid paying state and federal taxes, is recognized as an increasing, and very significant, problem.[6] State and federal governments have acknowledged as much and responded with amplified investigative, enforcement, and legislative efforts to understand the processes and costs

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Inc. et al, No. 2:2016cv11334 (E.D. Michigan April 12, 2016); National Labor Relationships Board v. Uber Technologies Inc., No. 3:2016cv00987 (N.D. California Feb. 29, 2016); Razak et al v. Uber Technologies, Inc. et al, No. 2:2016cv00573 (E.D. Pennsylvania Feb. 4, 2016); Suarez et al v. Uber Technologies, Inc., No. 8:2016cv00166 (M.D. Florida Jan. 22, 2016); Berger v. Uber Technologies, Inc. et al, No. 3:2016cv00041 (N.D. California Jan. 5, 2016); Rimel v. Uber Technologies, Inc. et al, No. 6:2015cv02191 (M.D. Florida Dec. 31, 2015); Ortega et al v. Uber Technologies, Inc. et al, No. 1:2015cv07387 (E.D. New York Dec. 29, 2015); Varon v. Uber Technologies, Inc. et al, No. 1:2015cv03650 (Maryland Nov. 30, 2015); Karaali v. Uber Technologies, Inc., No. 4:2015cv03454 (S.D. Texas Nov. 24, 2015); David Micheletti v. Uber Technologies, Inc., et al, No. 5:2015cv01001 (W.D. Texas Nov. 16, 2015); Ogunmoken et al v. Uber Technologies, Inc. et al, No. 1:2015cv06143 (E.D. New York Oct. 26, 2015); Frederic v. Lyft, Inc., No. 8:2015cv01608 (M.D. Florida July 8, 2015); Bekele v. Lyft, Inc., No. 1:2015cv11650 (Massachusetts Apr. 21, 2015); Borja et al v. Uber Technologies, Inc. et al, 1:2015cv20040 (S.D. Florida Jan. 7, 2015).

[4] Id.

[5] Declaration at 4 and 3-4, O'Connor v. Uber Techs., Inc., No. 13-03826-KAW, 2013 U.S. Dist. LEXIS 120406 (N.D. Cal. Aug. 23, 2013) (No. 13-03826-KAW), *available at* https://consumermediallc.files.wordpress.com/2016/05/oconnor_declaration_uber_lawsuit.pdf.

[6] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT (July 2015), http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf.; Francoise Carre and Randall Wilson, *The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry,* CONSTRUCTION POL'Y RES. CENTER & LAB. AND WORKLIFE PROGRAM & HARVARD L. SCH. & HARVARD SCH. OF PUB. HEALTH (Apr. 25, 2005), http://www.law.harvard.edu/programs/lwp/Maine%20Misclassification%20Maine.pdf.

of misclassification, and protect workers.[7] These efforts include the partnering of state and federal agencies to identify misclassification, facilitating the sharing of information between federal and state agencies to identify misclassification and increase enforcement. Misclassifying employees as independent contractors facilitates an employer capacity to cut labor costs and evade their legal responsibilities to workers, as labor and employment laws is based on the traditional employee-employer relationships.[8] In the last fifteen years, many states altered their independent contractor statutes and expanded enforcement structures and penalties to hold employers accountable for the misclassification of workers.[9]

Workers classified as independent contractors are denied coverage by most labor and employment laws, including the Fair Labor Standards Act (FLSA),[10] National Labor Relations Act (NLRA),[11] and other worker protections, as well as the remedies to workplace harms. Deprived of coverage under these laws, employees classified as independent contractors are denied critical benefits, including minimum wage protections, overtime compensation, family and medical leave,[12] occupational health and safety laws,[13] anti-discrimination and sexual harassment protections,[14] the right to union organizing and collective bargaining, health insurance and sick days, workers' compensation, reimbursement of business-related expenses, unemployment insurance and additional safety net benefits, social security and Medicaid payments credited to employees and other retirement benefits[15], among other things. Inasmuch, when putting forth misclassification suits, worker-plaintiffs generally argue that they have been misclassified as independent contractors thus improperly denied of their rights as employees.

When companies like Uber and Lyft classify rideshare workers as independent contractors, they are not required to pay payroll taxes, or cover workers' compensation or unemployment insurance for drivers, the companies save money, and workers lose out. With research showing that misclassification can cut labor costs 20-40 percent,[16] rideshare companies are reaping the financial benefits of classifying drivers as independent contractors while courts, scholars, and the

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[7] Wage and Hour Division, *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/workers/Misclassification/.

[8] United States Government Accountability Office, *Employee Misclassification Improved Outreach Could Help Ensure Proper Worker Classification*, U.S. GOV'T ACCOUNTABILITY OFF. (May 8, 2007, 9:30 AM), *http://www.gao.gov/new.items/d07859t.pdf*.

[9] Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 58 (2015), *available at* http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1177&context=jlasc.

[10] Wage and Hour Division, *Compliance Assistance- Wages and the Fair Labor Standard*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/flsa/.

[11] 29 U.S.C. § 152(3) (2013), *available at* https://www.nlrb.gov/resources/national-labor-relations-act.

[12] Department of Labor, *FMLA (Family & Medical Leave)*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/benefits-leave/fmla.

[13] Occupational Safety and Health Act of 1970., 84 Stat. 1590, *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=2743.

[14] Employers that misclassify workers evade laws that protect the workplace civil rights of employees, including employment discrimination based on age, race, gender, sexual orientation, gender identity, disability, or pregnancy, including the age Discrimination in Employment act of 1967, title VII of the Civil rights act of 1964, the Pregnancy Discrimination act of 1978, the Americans with Disabilities Act, and other state and federal laws.

[15] Employee Retirement Income Security Act of 1974, 88 Stat. 829.

[16] Department of Labor, *Statement from Seth Harris Before the Committee on Health Education Labor and Pensions*, U.S. DEP'T OF LAB., (June 3, 2010), https://www.dol.gov/general/topic/benefits-leave/fmla; Robert Habans, *Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors* (December 2015), UCLA INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, http://www.irle.ucla.edu/publications/documents/IndependentContractorCost_20151209.pdf.

public continue to debate the issue, and drivers continue to endure the pernicious consequences of misclassification.

Misclassification represents a tremendous amount of lost income to ride-share drivers, as a recent National Employment Law Project report noted that "misclassified workers' net income is often significantly less than for similar workers paid as employees."[17] The same report concluded that:

> "A lead plaintiff in a case against Uber estimated that his unreimbursed costs for gas, carwashes, oil changes, and insurance, for which he might seek reimbursement under California law, topped $10,000 per year, and a former driver for Uber and Lyft calculated that he netted only $2.64 per hour, after expenses."[18]

In the case of rideshare drivers, this is income lost on already low pay. Although an oft-cited Uber commissioned report contends that drivers are doing well with respect to earnings (detailing drivers in Los Angeles earn $16.37 to $17.07 dollars; Chicago $15.60 to $16.12 dollars; New York $26.03 to $29.65 per hour, depending on the number of hours worked, and finding that Uber drivers in Los Angeles earn 45% more per hour than taxi drivers and chauffeurs), these numbers are misleading. In reality, these figures represent a significant over-estimation of driver income, as they reflect gross earnings of drivers without adjusting for the costs incurred during the course of their work, including those related to vehicle ownership and maintenance.[19]

Additionally, rideshare companies have continued to drop fares in an effort to increase demand. In January 2016, Uber cut fares in more than 100 cities,[20] in some cases by as much as 45 percent.[21] As a result some drivers have reported that they are making as little as $2.89 per hour.[22] The living document, Not Cool Uber, allows drivers to share screenshots of their hourly earnings, after fees are deducted by Uber, but before drivers pay for gas or vehicle maintenance, indicating that at least some of the workforce is receiving less than minimum wage for numerous shifts, with one driver making $2.89 an hour before expenses, and another making $1.12 an hour before expenses.[23] After this, drivers, who are being classified by rideshare companies as independent contractors, must then pay for vehicle ownership and maintenance costs, as well as gas, and do not receive reimbursement for any business-related expenses. Self-reported driver

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[17] Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Misclassification Matters and What we can do to Stop It*, NAT'L EMP. L. PROJECT, at 3 (May 09, 2016), http://www.nelp.org/publication/independent-contractor-vs-employee/.

[18] Id.

[19] Andrea Peterson, *The missing data point from Uber's driver analysis: How far they drive*, WASH. POST, JAN. 22, 2015, HTTPS://WWW.WASHINGTONPOST.COM/NEWS/THE-SWITCH/WP/2015/01/22/THE-MISSING-DATA-POINT-FROM-UBERS-DRIVER-ANALYSIS-HOW-FAR-THEY-DRIVE/. Further, the suggestion of the existence of a financial advantage of working as a ride-share driver instead of a taxi driver or chauffer, does not account for the fact that taxi drivers and chauffeurs, although independent contractors, frequently lease their vehicles from their contracted company and are thus not responsible for these costs.

[20] Rachel, *Beating the Winter Slump: Price Cuts for Riders and Guaranteed Earnings for Drivers*, UBER NEWSROOM (Jan. 8, 2016), https://newsroom.uber.com/beating-the-winter-slump-price-cuts-for-riders-and-guaranteed-earnings-for-drivers/.

[21] Sage Lazzaro, *Fare Cuts Slash Their Earnings to Below Minimum Wage*, OBSERVER (Jan. 19, 2016, 11:55 AM), http://observer.com/2016/01/uber-drivers-plan-boycott-after-fare-cuts-slash-their-earnings-to-below-minimum-wage/.

[22] Id.

[23] Id.

compensation data driver available on SherpaShare and NerdWallet,[24] supports these workers claims, indicating that Uber drivers in Los Angeles working less than fifteen hours a week (who according to the Uber commissioned report account for 48-59% of drivers) are receiving less than minimum wage and are unable to afford the costs of vehicle ownership, maintenance, and insurance. This data further indicates that even those drivers who work between twenty and thirty-four hours per week are earning less than minimum wage.[25]

To be sure, the consequences of misclassification that go beyond the workers themselves are tremendous. A 2009 report estimated the cost of misclassification in general to federal revenues at $2.72 billion dollars in 2006.[26] At the local level, this type of misclassification impacts local and state governments supported by payroll and income,[27] with workers compensation insurance carriers losing premium payments on employee payroll with these costs then covered by additional taxes to businesses and taxpayers.[28] Misclassification also negatively impacts competitive behavior in the marketplaces by serving to unfairly disadvantage employers who properly classify their employees and thus lose out on the ill-gotten gains of law-evading competitor, which Professor of Business and Law Christopher Buscaglia acknowledges, "leads to an unfair distribution of economic burdens, which in turn damages the business environment."[29]

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[24] John Kuo, *Here's How Much You Need to Drive for Uber, Lyft and Sidecar to Cover Your Car Insurance, Other Costs,* NERDWALLET (Dec. 1, 2014), https://www.nerdwallet.com/blog/insurance/number-rides-pay-insurance-lyft-uber/.

[25] While legal developments indicate that the central most labor issue between drivers and transportation network companies is the potential misclassification of drivers as independent contractors, cases filed by rideshare workers also reveal claims for wage theft and tip skimming, painting a worrisome picture of the direction of a rapidly growing industry. A recent study found that Uber drivers had been advertised one rate of pay, in the case of surge pricing. (See ALEX ROSENBLAT & LUKE STARK, UBER'S DRIVERS: INFORMATION ASYMMETRIES AND CONTROL IN DYNAMIC WORK 3 (2015)). Surge pricing, is "algorithmic assessment of supply and demand will temporarily raise fares for a particular geographic location." (7) The authors also found that while Uber drivers bear the responsibility of returning items left behind to passengers, they are not compensated for the time they spend doing so. (Id.) Additionally, drivers are not compensated for that time in which they are waiting for a ride request with their apps turned on. (Id.) Drivers have also claimed that while the company advertises that gratuity is charged with the fare, drivers do not receive gratuity paid (*see* Maya Kosoff, *Here's How Uber's Tipping Policy Puts Drivers at a* Disadvantage, BUS. INSIDER (Oct. 29, 2014, 2:26 PM), http://www.businessinsider.com/uber-tipping-policy-2014-10).

[26] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide Employment Tax Program and Better Data Are Needed, U.S. DEP'T OF THE TREASURY. (February 2014).* https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf. Citing, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* (GAO-06-656, dated July 11, 2006). The authors arrived at this estimate using the most recent available data, from 1984 (suggesting approximately 15 percent of employers misclassified 3.4 million workers as independent contractors in 1984). The 1984 estimated tax loss was $1.6 billion (including Social Security tax, unemployment tax, and income tax that should have been withheld from wages). The Government Accountability Office adjusted the $1.6 billion estimate to $2.72 billion in inflation-adjusted 2006 dollars. For a brief review of Questionable Employment Tax Practices Initiative (QETP) states' cumulative results for misclassification assessments, see Tom Crowley, Worker Misclassification An Update from Constitution Ave, Naswa (2012), at http://www.naswa.org/assets/utilities/serve.cfm?gid=86824dbe-575c-4edb-9e93-444cef85c837&dsp_meta=0.

[27] National Employment Law Project, *supra* note 6. *See also* Carre & Wilson, *supra* note 6.

[28] Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification,* 9 U.C. DAVIS BUS. L.J. 111, 135 (2009) (listing appendix of states using misclassification statutes versus common law factor tests).

[29] Id. at 116 (identifying additional costs shouldered by employers who properly classify employees).

### C: *Worker Classification Tests, Generally*

Key to understanding the issue of misclassification as it presents itself to rideshare workers is the fact that no one determinative test concerning the classification of these particular workers exists. Instead, rideshare workers alleging misclassification, and those scholars and policymakers addressing the issue, have to wrestle with the fact that different misclassification tests exist for different purposes in federal law, and states maintain their own employee and independent contractor statutes and common law classifications, which vary between jurisdictions.[30] There are a multitude of contexts in which classification issues might arise, including requirements under: Federal and state labor and employment laws; Federal and state payroll and unemployment tax laws; Employee Retirement Income Security Act of 1974 (ERISA); the Affordable Care Act (ACA) requirements; and immigration law. Given these varying tests, it is possible for a worker to be considered and employee under one statute yet be considered an independent contractor under another.

Despite there being a plethora of divergent classification tests, the same can be grouped into three general categories: the traditional or common law control test, which serves as the most dominant test; the economic realities test, which is used widely by various jurisdictions and venues, including the U.S. Department of Labor[31]; and hybrid tests, also referred to as relative nature of work tests, that combine the control and economic realities tests and are "used in circumstances where a potential employment relationship has been created by social legislation."[32] As the common law control test remains the dominant one, the other two are generally used to complement the control test, while each also overlap. [33]

The IRS, along with most government agencies that considering worker classification, generally rely on some rendition of the common law test for employment. Under the common law control test, an inquiry into whether rideshare drivers constitute employees centers on the rideshare companies' right to control what, and how, work is done by rideshare drivers.[34] Important here is that the test does not focus on whether the rideshare companies actually control what, and how, the work was done, but specifically whether the companies reserve the right to control the same, not whether they exercise the right.[35] While it focuses primarily on control, this test also considers twenty additional diverse factors, including whether: instructions and/or training are provided; the employer's business and contractor's are integrated; the worker's services are rendered personally; whether the worker hires, supervises and pays assistants; the relationship is ongoing; there are set work hours; the work is full-time; the work is performed on employer's premises; there is an order or sequence of work; oral or written reports are required; payments are regular; the employer or worker furnishes necessary tools and materials; the worker makes a significant investment; employer pay business and or traveling expenses; whether worker realize a profit or loss; whether the worker can work for multiple firms; the worker can make services available to the general

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[30] United States Government Accountability Office, *supra* note 8.

[31] Julien M. Mundele, *Note- Everything That Glitters is Gold, Misclassification of Employees: The Blurred Line between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 262 (2015). This test is employed by many jurisdictions and venues. These include the U.S. Department of Labor, the Social Security Administration, the Fifth circuit court, and the National Labor Relations Board.

[32] Id. *See also*, United States Government Accountability Office, *supra* note 8.

[33] Id.

[34] Stephanie Sullivant, *Comment, Restoring the Uniformity: An Examination of Possible Systems to Classify Franchisees for Workers' Compensation Purposes*, 81 UMKC L. REV. 993, 1004 (2013).

[35] Tina Quinn, *Worker Classification Still Troublesome*, 207.3 J. ACCT. 83 (2009).

public; whether employer has the right to terminate the worker and; and whether the worker has the right to terminate the work relationship.[36] Beyond the right to control, all factors need not be considered, nor is one factor determinative alone.[37] In some cases, as the with the IRS,[38] the control test has been further simplified to include three main categories: behavior control, financial control, and the relationship of the parties.[39]

Under the economic realities test, the question would be whether rideshare workers are economically dependent upon rideshare companies. The test considers a variety of factors, including the control the employer exercised over the worker, the capacity of the employer to discipline the worker, the worker's opportunity for profit or loss, the worker's own financial investment in the work, the degree of skill required for the work, the permanency of the working relationship, and whether the worker is an integral part of the employer's business.[40] Under the hybrid test, the court will use the control test and additionally consider factors relevant to the nature of the work performed and relationship between the worker and the employer. Here, courts will consider the skill required to do same, the degree to which the work could be considered a separate operation from the employer's business, and extent of the worker's expected individual liability. With regard to the relationship between the worker and employer, courts consider whether work performed by the worker is a regular part of the employer's business, the permanency and regularity of the work performed, and whether the work performed could be considered continuing services or contracting for the completion of a specific jobs.[41]

### *D. Federal Law*

The Fair Labor Standards Act (FLSA), the primary federal law that establishes minimum wage, overtime pay, record keeping, and the Family and Medical Leave Act (FMLA), defines "employee" as "any individual employed by an employer,"[42], with "employer" being defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[43] This definition includes "to suffer or permit to work,"[44] the same being broadly defined to allow for a wide scope of coverage[45] and integral to determinations of employee status and corresponding protections. Distinctly different from the common law test under which a

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[36] Debbie Whittle Durban, *Independent Contractor or Employee? Getting it Wrong Can Be Costly*, 21 JAN S.C. L. 30, 34 (2010).
[37] Id.
[38] Id.
[39] *See* Andrea M. Kirshenbaum, *Labor Department Targets Independent Contractor Misclassification: Wage and Hour*, THE LEGAL INTELLIGENCER, (2013) (stating Labor Department is targeting Independent Contractor Misclassification) (stating Labor Department is targeting Independent Contractor Misclassification). Additionally, the IRS is trying to help make it easier to properly classify employees by reducing its twenty factor test into a three factors. Id.
[40] United States v. Silk, 331 U.S. 704 (1947). *See also*, Khara Singer Mack, *Litigating Claims of Misclassification of Employees As Independent Contractors,* 133 AM. JURISPRUDENCE TRIALS 213 (2014).
[41] Darryll Halcomb Lewis, *Article: After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L.J. 249, 256 (1998).
[42] 29 U.S.C. § 203(e)(1)
[43] 29 U.S.C. § 203(d)
[44] 29 U.S.C. § 203(g)
[45] See United States v. Rosenwasser, 323 U.S. 362, 363 (1945); Tony & Susan Alamo Found. V. Sec'y of Labor, 471 U.S. 290 (1985).

finding of an employee/employer relationship hinges on whether the employer has control over the worker, the FLSA focuses on the economic realities of the working relationship.

Under the FLSA, the multi-factor "economic realities" is used determine whether a worker is an employee or an independent contractor. The FLSA covers all industries thus rendering employers liable for claims of misclassification claims against them.[46] Each factor is examined but no one factor being controlling. As noted above, these factors generally include, but are not limited to: "the extent to which the work performed is an integral part of the employer's business; the worker's opportunity for profit or loss depending on his or her managerial skill; the extent of the relative investments of the employer and the worker; whether the work performed requires special skills and initiative; the permanency of the relationship; and the degree of control exercised or retained by the employer.[47] Courts have been clear in acknowledging that a controlling factor here is whether or not a worker is economically dependent on the employer, not the label an employer uses to describe the working relationship, finding workers who are economically dependent on their employers are covered by the FLSA.[48]

In recent years, the Department of Labor (DOL) has focused specifically on the issue of misclassification, emphasizing that the same permits employers to evade tax and unemployment responsibilities and robs state and federal coffers. In 2014, the DOL gave $10.2 million to 19 states to combat contractor misclassification, the money to be dedicated to improving misclassification detection and enforcement initiatives.[49] The DOL has also begun to examine the rules defining employees and independent contractors anew. On July 15, 2015, the Department of Labor issued administrative interpretations regarding these FLSA rules and their application. In Administrator's Interpretation No. 2015-1, entitled "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors"[50] the Wage and Hour Division (WHD) reviewed FLSA's definition of "employ" as "to suffer or permit to work", as well as the "economic realities" test. While not a change in policy, the Interpretation provides the guidance for determinations of proper and improper classification under the FLSA, which "may be helpful to the regulated community in classifying workers and ultimately in curtailing misclassification."[51] The Interpretation emphasizes that the scope of the FLSA's definition of employee is broad, concluding that, "applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA."[52] The Interpretation highlights the significance of the "integral to the business" element of the economic realities test, noting that "if the work performed by a worker is integral to the

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[46] See 29 U.S.C. § 203(d) (2012) (defining broad range of people included as employers).

[47] Wage and Hour Division, *Fact Sheet 13: Am I an Employee?:Employment Relationship Under the Fair Labor Standards Act (FLSA),* U.S. DEP'T OF LAB. (May 2014), https://www.dol.gov/whd/regs/compliance/whdfs13.htm.

[48] Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008); Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1312 (11th Cir. 2013).

[49] Richard J. Reibstein, Labor Department's New Guidance on Independent Contractor Misclassification is Nothing New Legally, But will likely Reinvigorate the Crackdown on the use of Contractors, PEPPER LAW (July 15, 2015), http://www.pepperlaw.com/publications/labor-departments-new-guidance-on-independent-contractor-misclassification-is-nothing-new-legally-but-will-likely-reinvigorate-the-crackdown-on-the-use-of-contractors-2015-07-15/.

[50] David Weil, *Administrator's Interpretation No. 2015-1*, U.S. DEP'T OF LAB. (July 15, 2015), https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm.

[51] Id.

[52] Id.

employer's business, it is more likely that the worker is economically dependent on the employer."[53]

### *E. Divergent State Tests, Divergent Outcomes*

State efforts to address misclassification include the creation of state legislation that targets the misclassification and penalizes abuse of the independent contractor status, the subsequent targeting of those employers who misclassify employees by Attorneys General, and the creation of task forces and committees to research trends in misclassification.[54] The tests used to determine worker classification, and approaches to correct the ills of misclassification, vary from state to state. Still, for states, the three general categories of misclassification tests hold: the traditional or common law control test, which serves as the most dominant test; the economic realities test, also used widely, including by the U.S. Department of Labor as noted above[55]; and the hybrid tests or relative nature of work test. Most tests hold that employers bear the burden of proper worker classification, even where workers have agreed, verbally or through a written contract, to work as an independent contractor.[56] Also, the purpose for which an employer is classifying that individual will determine the test to be use, which in some cases can lead to a conflict, as is the case many times with respect to tax courts as compared to other courts.[57] As such, an employer could be found to have properly classified a worker for tax purposes, but simultaneously have been found to have violated an independent contractor statute that employs a stricter test than the Internal Revenue Service's test.[58]

The extent to which state tests can vary, can and does lead to differing outcomes even when presented with the same set of facts. However, even where tests are substantially similar, different jurisdictions have come to different conclusions regarding the same set of workers. Such has been the case thus far with rideshare workers. Last year, at the individual level, rideshare workers were recognized as employees in California and Oregon, while the Department of Economic Opportunity in Florida came to the opposite conclusion. While these cases do not set a binding legal standard and only directly impact the individual employee in each case, these decisions are illustrative of the way in which different tests can lead to divergent outcomes.

1) Oregon: On October 14, 2015, the Oregon Bureau of Labor and Industries Issued an Advisory Opinion on the employment status of Uber drivers in response to requests for clarification on the same.[59] The Advisory Opinion analyzes Uber drivers under the economic

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[53] Id., *citing* Rutherford Food Corp. v. McComb, 331, U.S. 722, 729 (1947).
[54] Deknatel, *supra* note 9, at 64.
[55] Julien M. Mudele, *Note- Everything that Glitters is Gold, Misclassification of Employees: The Blurred Line between Independent Contractors and Employees Under the Major Classification Tests*, Suffolk J. Trial & App. Advoc. 253, 262 (2015).
[56] *See* CAL. LAB. CODE § 3357 (2014) (stating any person rendering service is presumed to be employee unless otherwise expressly excluded); MASS. GEN. LAWS ch. 149 § 148B (2014) (stating individuals performing any services is considered to be employee).
[57] *See* Durban, supra note 36 ("One of the things that can make it difficult to properly classify workers as employees or independent contractors is that there are different statutory and common law tests which are applicable for different purposes").
[58] Id. (comparing IRS test with other applicable tests).
[59] Brad Avakian, *Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon*, OR. BUREAU LAB. AND INDUS. (October 14, 2015), http://www.oregon.gov/boli/SiteAssets/pages/press/101415%20Advisory%20Opinion%20on%20the%20Employment%20Status%20of%20Uber%20Drivers.pdf.

realities test used by the Oregon BOLI to determine employment status, ultimately finding that and employment relationships does indeed exist. The economic realities test used by BOLI requires an examination of six factors in the determination of employment status. These factors are: 1) the degree of control exercised by the alleged employer; 2) the extent of the relative investments of the worker and the alleged employer; 3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; 4) the skill and initiative required in performing the job; 5) the permanency of the relationship; and 6) the extent to which the work performed by the worker is an integral part of the alleged employer's business. No one factor here is determinative, but Oregon law required fact finders to evaluate the totally of circumstances as applied to the same.

As concerns the right to control, the BOLI found that Uber "exercises a significant degree of control over the driver's actual work," unilaterally dictating the fare charged, monitoring driver performance, and disciplining or terminating drivers who do not perform to standard.[60] The Advisory Opinion held that Uber maintains control in that it both hires and fires drivers, using selection, screening, and monitoring processes to determine hiring, firing, and disciplinary action. Further, the BOLI recognized Uber as controlling drivers in their provision of specific instructions to drivers concerning conduct, personal appearance, and methods for carrying out services.[61] In its review of each of the remaining factors of the economic realities test, the BOLI determined an employment relationship to exist, citing: significant investment of Uber as compared as compared to the minor investment of driver to support the business; the managerial role of Uber and drivers' inability to solicit business or earn additional income from passengers; the requirement of technical skills (driving) but not managerial and business skill and their dependence on Uber's application to perform any work; the permanency or indefinite basis on which drivers are hired; and the critical nature of driver work to Uber's business. The BOLI goes even further, noting that while the state's minimum wage laws exempt taxi drivers, the term "taxi operator" might not apply to Uber drivers as it is based on the traditional taxi industry model that did not consider rideshare work in its legal framework, clarifying that even if the exception did apply, "Uber drivers would still be covered by other important workplace protections as the right to be paid in full and on time, and the right to work free from discrimination and harassment."[62]

2) Florida: Plaintiffs Darrin McGillis and Melissa Ewers, both Uber drivers in Florida, had filed claims for Reemployment Assistance in April of 2015, their eligibility depending on whether they are classified as employees, as independent contractors do not qualify for unemployment insurance benefits. While the Department of Revenue originally issued determination findings indicating an employment relationship existed in both case, Uber filed a protest soon after, and then the Special Deputy recommended both McGillis and Ewers be classified as independent contractors. After both drivers filed exceptions to the Recommended Order, and Uber filed Counter Exceptions, the Executive Director of the Florida Department of Economic Opportunity reviewed the case and issued a Final Order on December 3rd, 2015. The Final Order upheld the findings of the Recommended Order which determined McGillis and Ewers to be independent contractors.

To determine whether an employment relationship existed, the Department of Economic Opportunity utilized the standard set forth in the Restatement (Second) of Agency, recognized as

[60] Id. at pg. 2.
[61] Id. at pg. 2-3.
[62] Id. at pg. 4.

the appropriate determinative test by Florida Supreme Court [63] which holds an employer's right to control at the center of the classification inquiry.[64] However, the Restatement goes beyond control to provide a list of ten factor courts must consider in such determinations. These factors are: (a) the extent of control which, by the parties' agreement, the employer exercises over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skills required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of 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 part of the regular business of the employer; (i) whether or not the parties believe that they are creating the relation of master and servant; and (j) whether the principal is or is not a business.[65]

In its review, the Department placed significant emphasis on the agreement between the parties, which stated McGillis and Ewers were independent contractors, citing The Florida Supreme Court as it said "courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that this is not a valid indicator of status."[66] The court sidestepped a factor by factor analysis of those contained in the Restatement by again citing *Keith,* which held that the Restatement should not "routinely be used to support any resolution of the issue by the factfinder simply because each side of the dispute has some factors in its favor."[67] The Executive Director emphasized that priority should be given to the contents of the contractual agreement between the parties and whether or not the right to control exists on the part of the potential employer. As to the nature of the relationship expressed in the contract, the Executive Director noted that the contractual language held McGillis and Ewers were independent contractors and not employers. As this is the case with all rideshare driver contracts, the finding is unsurprising. However, when reviewing whether or not Uber had the right to control the details of the drivers' work, the court adopted an exceedingly narrow view of control finding only a "minimal level of control" in the case of Uber, suggesting that Uber was "permitting work whenever the employee had a whim to work, demanding no particular work be done at all even if customers will go unserved, permitting just about any manner of customer interaction, permitting drivers to offer their own unfettered assessments of customers, engaging in no direct supervision, requiring only the most minimal conformity in the basic instrumentality of the job (the car), and permitting work for direct competitors."[68]

The Executive Director found that drivers retained the ability to: choose their own passengers via Uber's Driver App, or any other; decide what car to use and how to present it; be assigned for work based solely on distance from a potential passenger and not on performance measures or seniority; not follow Uber's recommendations on driver presentation, performance, or interaction with customers; decide when and if they will work for Uber; decide the manner in

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[63] *See* Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 172-73 (Fla. 1995); Cantor v. Cochran, 184 So. 2d 173, 174-75 (Fla. 1966); Miami Herald Publ'g Co. v. Kendall, 88 So. 2d 276, 278-79 (Fla. 1956); Magarian v. S. Fruit Distribs., 1 So. 2d 858, 860-61 (Fla. 1941).

[64] Restatement (Second) of Agency § 220(1) (1958).

[65] Id. at § 220(2).

[66] Keith, 667 So. 2d at 171; *See also* Fla. Pub. Co. v. Lourcey, 193 So. 847, 847 (Fla. 1940).

[67] Id. at 172.

[68] DEPARTMENT OF ECONOMIC OPPORTUNITY, Final Order 10, *available at* http://mcconnaughhay.com/files/uber-final-order-12-3-15.pdf.

which they perform the job and determining the route and speed they will drive; be free of direct supervision and evaluation by Uber; and take cash tips without having to reporting the same to Uber.[69] The court then analyzed the remaining restatement factors, concluded that most of the factors supported independent contractor status of the parties, and as a result, supported the findings of Recommended Order.[70] The Executive Director cited *La Grande,*[71] in which the court held that a taxi worker was determined to be an independent contractor not an employee, due to the fact that the taxi company was not found to have exercised any degree of control over the taxi worker, the Executive Director drawing specific attention to the fact that the taxi company in *La Grande* in fact "had *greater control* (emphasis by the court) over the drivers than Uber has over its drivers: there the company owned all the vehicles, maintained them, and required that they be stored in its facility each night".[72]

The Executive Director also criticized the recent decisions in California and Oregon, which found an employer-employee relationship to exist between Uber and drivers, arguing that the same were unpersuasive and "seem to misconstrue the nature of the Uber-driver relationship."[73] The Executive Director charged that the California Labor Commissioner's "overreliance on single factor—line of work—is not consistent with Florida law,"[74] further arguing that the Labor Commission's position was at odds with the Restatement's multi-factor analysis and emphasis on the right to control.[75] The Final Order scoffs at the California Labor Commissioner's finding that Uber is in business to provide transportation services to passengers, instead labeling Uber as a middleman or broker like Ebay or StubHub, likening Uber drivers to sellers on these platforms. The Executive Director then warns against the dangers of "transforming middlemen into employers", charging the same would "upend economic progress."[76]

3) California: Under California law, determinations of workers' employment status hinge on a multi-factor economic realities test from *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations*.[77] The most critical factor in the *Borello* test is which party has the right to control the manner and means by which the work is to be performed.[78] Importantly, the court has held that what matters is the existence of the right of control, not the existence of the same, that is indicative of an employer-employee relationship.[79] California courts have recognized that freedom of action inherent to the nature of the work being done does not transform an employee to an independent contractor where the employer has the general right to control,[80] nor does an employer need to control "every last detail" of work to be considered an employer under law.[81] Additionally, the right of the putative employer to discharge the work at will, without cause, is strong evidence of

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[69] Id. at 9-10.
[70] Id. at 6,15.
[71] La Grande v. B & L Servs., 432 So. 2d 1364 (Fla. Dist. Ct. App. 1983).
[72] Department of Economic Opportunity, *supra* note 69, at 16.
[73] Id.
[74] Id. at 18
[75] Id.
[76] Id. at 19.
[77] S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399 (Cal. 1989).
[78] Id.
[79] Empire Star Mines Co. v. Cal. Emp't Com., 168 P.2d 686, 692 (Cal. 1946), *overruled on other grounds by* People v. Sims, 651 P.2d 321 (Cal. 1982); Toyota Motor Sales U.S.A. v. Superior Court, 269 Cal. Rptr. 647 (1990); Perguica v. Indus. Acci. Com., 179 P.2d 812, 813-14 (Cal. 1947).
[80] Burlingham v. Gray, 137 P.2d 9, 16 (Cal. 1943).
[81] Id.

an employment relationship.[82] This is related to the element of control as the right to terminate indicates a significant amount of control over the work.

While the most critical factor in the *Borello* test is which party has the right to control the work control and right, to terminate are not entirely dispositive and courts may consider the following secondary indicia to determine employment status: (1) whether the one performing services is engaged in a distinct occupation or business; (2) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the services are to be performed; (6) the method of payment, whether by the time or by the job; (7) whether or not the work is a part of the regular business of the principal; and (8) whether or not the parties believe they are creating the relationship of employer-employee.[83] None of these factors are determinative and all must be assessed qualitatively and as they intertwine.[84] In order to determine the existence of an employer-employee relationship, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.

On June 16, 2015, Uber appealed a ruling by the California Labor Commissioner that Barbara Berwick, a former driver who filed an administrative action seeking reimbursement for business expenses she incurred in connection with her work as an Uber driver, was Uber's employee.[85] Using Borello, and as informed by Y*ellow Cab Cooperative v. Workers Compensation Appeals Board,* [86] the Labor Commissioner focused on the fact that Uber not only had the right to, but exercised, control over its drivers as Uber both obtained clients in need of services and provided workers to perform the same. The Labor Commissioner rejected the idea that a driver's use of their own vehicle for work precluded them from classification as an employer, citing that even previous to Borello, California had recognized a pizza delivery driver to be an employee despite the fact the individual used his own car, and paid for his own insurance and gasoline.[87] The Commissioner emphasized the integral nature of drivers' work to Uber; the involvement of Uber in all aspects of business operations; the hiring, firing, monitoring, and disciplinary activity of Uber with respect to its drivers; the lack of any performed or required managerial skill on the part of the plaintiff with respect to her work; the lack of investment by plaintiff in the business; and inability of the plaintiff to perform the work sans Uber's intellectual property, in determining that an employment relationship existed in Berwick's case.[88]

In September of 2015, California's Employment Development Department (EDD) determined that an ex-Uber driver was an employee and as such, should be entitled to

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[82] Angelotti v. Walt Disney Co., 121 Cal. Rptr. 3d 863, 870 (2011). *See also*, S.G. Borello & Sons, Inc., 769 P.2d; Varisco v. Gateway Sci & Eng'g Inc., 83 Cal. Rptr. 3d 393 (2008).; Empire Star Mines Co.,168 P.2d.

[83] Alexander v. FedEx Ground Package System, Inc., 765 F.3d 981 (9th Cir. 2014); Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165 (Cal. 2014); Dynamex Operations W., Inc. v. Superior Court, 179 Cal. Rptr. 3d 69 (2014).

[84] S.G. Borello & Sons, Inc., 769 P.2d; Gonzalez v. Workers' Comp. Appeals Bd., 54 Cal. Rptr. 2d 308 (1996); Ayala v. Leonardo, 20 F.3d 83 (2d Cir. 1994).

[85] Berwick v. Uber Technologies, Inc., No. CGC-15-546378 (Super. Ct. San Francisco County, June 16, 2015).

[86] Yellow Cab Coop. v. Workers' Comp. Appeals Bd., 277 Cal. Rptr. 434 (1991).

[87] Berwick, *supra* note 86, at *8 *citing* Toyota Motor Sales U.S.A., 269 Cal. Rptr. ("Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so").

[88] Id. at *8-9.

unemployment benefits. The EDD focused on the right to control,[89] and looked to the decisions in *Santa Cruz Transportation*[90] and *Air Couriers International*[91] to inform the decision. The EDD noted that in *Santa Cruz*, taxi drivers were found to be employees despite form agreements declaring them independent contractors, as "the company controlled the behavior of the drivers by retaining an implicit threat that it would make less work available if the drivers refused work too often," drawing reference to Uber's practice of terminating, disciplining, and disabling driver access to applications if drivers did not maintain specific customer review or ride acceptance ratings.[92] The EDD also cited *Air Couriers International*, noting that delivery drivers were found to be employees even as they used their own vehicles, paid their own driving expenses, used company dispatchers, selected their own routes, and could turn down jobs, much like Uber drivers.[93] In the beginning of 2016, the EDD recognized another Uber driver as an employee, awarding him unemployment compensation.

While these decisions apply only to that individual drivers in each case, they demonstrate not just that the tests for proper worker classification are varied, and the outcomes of misclassification cases are difficult to predict with certainty, but also that that these misclassification cases have merit and can be successful.

## III: RECENT SETTLEMENTS

Across the nation, rideshare drivers have filed multiple class-action lawsuits, charging companies with misclassifying them as independent contractors.[94] Rideshare companies have invested a tremendous amount in quashing these claims, investing resources, not just litigation but lobbying efforts, to gain public and legislative support, with Uber alone employing hundreds of lobbyists and lobbying firms across the country, with 250 lobbyists and 29 lobbying firms registered around the nation (a third more than Wal-Mart), not including those at the municipal level as of June 2015.[95] At least in some cases, Uber has come under fire for lobbying violations, accused of failing to register lobbyists and report their activity and having a pattern of non-compliance, non-cooperation, and incomplete disclosure.[96] It is in this context, and against these rideshare companies with deep (and ever expanding) pockets and political influence, that rideshare workers find themselves fighting for the recognition of rights.

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[89] CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, EDD Unemployment Appeal vs. Uber, Case No. 5371509 *7 (2015), *available at* https://www.scribd.com/doc/279230988/EDD-Unemployment-Appeal-vs-Uber-Case-No-5371509 *citing* Empire Star Mines, 168 P.2d.

[90] Santa Cruz Transp., Inc. v. Unemployment Ins. Appeals Bd., 1 Cal. Rptr. 2d 64 (1991).

[91] Air Couriers Internat. v. Emp't Dev. Dept., 59 Cal. Rptr. 3d 37 (2007).

[92] California Unemployment Insurance Appeals Board, *supra* note 90, at *8.

[93] Id. at *8-9

[94] *Supra* note 3.

[95] Karen Weise, *This is how Uber Takes Over a City- To Conquer America's Quirkiest City, the Company Unleashed its Biggest Weapon*, BLOOMBERG BUSINESSWEEK (June 23, 2015), http://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city.

[96] Jim Redden, *City Auditor Fines Uber $2,000 for Lobbying Violations*, PORTLAND TRIB. (Jan. 05, 2015, 10:33), http://portlandtribune.com/pt/9-news/287593-164621-city-auditor-fines-uber-2000-for-lobbying-violations.

This year, Uber and Lyft reached settlement in the country's leading driver cases, O'Connor v. Uber Techs. Inc. [97] and Cotter v. Lyft, Inc.,[98] although both settlements still have to get through a hearing in June before they are finalized. Petitioners in both cased filed putative class action lawsuits against the rideshare companies, alleging violations of the California Labor Code and seeking to be classified as employees.[99] (Under California law, employees receive many benefits and protections, while independent contractors receive almost none.) Ridesharing drivers in each case contended that they were employees being misclassified as independent contractors and thus denied protections provided under the California Labor Code, such as minimum wage and overtime pay,[100] reimbursement for all reasonable and necessary work-related expenses,[101] meal and rest breaks,[102] workers' compensation,[103] and employer contributions to unemployment insurance.[104] Rideshare drivers charged that they did not always receive minimum wage,[105] with companies unilaterally setting trip prices, and continually decreasing the rate drivers are paid per trip while increasing the companies' take of those wages.[106] Additionally, drivers claimed they did not receive any reimbursement for expenses and were required to pay for their own gas, vehicle maintenance and other expenses.[107]

In each of the two cases, both parties filed cross-motions for summary judgment on whether plaintiffs were employees or independent contractors. In California, and most other states, if someone performs a service for a company or individual, the person performing the service is generally presumed to be an employee and they are said to establish a prima facie case of an employer-employee relationship, the burden shifting to the putative employer to prove that workers were actually independent contractors.[108] Inasmuch, the courts recognized that the drivers performed a service for the companies and the motions for summary judgment were denied, with the O'Connor court holding that Uber drivers are "presumptive employees and the Cotter opining

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[97] O'Connor v. Uber Techs., 82 F. Supp. 3d 1133 (N.D. Cal. 2015). On September 1, 2015, the District Court for the Northern District of California granted the drivers' motion for class certification.

[98] Cotter v. Lyft Inc., 60 F. Supp. 3d 1067, 1080 (N.D. Cal. 2015). Class Action Settlement Agreement and Release, Cotter, 60 F. Supp. 3d (No. 13-cv-04065-VC), *available at* https://www.scribd.com/doc/296859430/Cotter-v-Lyft-Settlement-Agreement.

[99] O'Connor, 82 F. Supp. 3d at 1135 ("Plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections ... such as a requirement that an employer pass on the entire amount of any gratuity that is paid, given to, or left for an employee by a patron." (quoting CAL. LAB. CODE § 351 (2011)); Cotter, 60 F. Supp. 3d 1067 at 1074 (("[California e]mployees are generally entitled to, among other things, minimum wage and overtime pay, meal and rest breaks, reimbursement for work-related expenses, workers' compensation, and employer contributions to unemployment insurance. Employers are also required under the California Unemployment Insurance Code to withhold and remit to the state their employees' state income tax payments"). (citations omitted).

[100] CAL. LAB. CODE § 1194

[101] CAL. LAB. CODE § 2802

[102] CAL. LAB. CODE § 226.7

[103] CAL. LAB. CODE § 3700

[104] CAL. UNEMP. INS. CODE § 976.

[105] Cotter v. Lyft, Inc., No. 13-cv-04065-VC, 2016 U.S. Dist. LEXIS 50579, at *2 (N.D. Cal. Apr. 7, 2016).

[106] Christopher Mims, *How Everyone Gets the "Sharing" Economy Wrong*, WALL ST.J. (May 24, 2015, 3:32 PM), http://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921.

[107] Cotter, No. 13-cv-04065-VC, 2016 U.S. Dist. LEXIS 50579, at *2. It should be noted that while these issues are critical to drivers, misclassification goes beyond that suffered by workers. Misclassification also disadvantages companies that properly classify their workers, forcing them to compete with those companies who avoid taxes by misclassifying workers, as well as those state and local governments who lose those tax payments toward unemployment insurance, payroll, and workers' compensation.

[108] Narayan v. EGL, Inc., 616 F.3d 895 (9th Cir. 2010).

that "a reasonable jury could conclude that the plaintiff Lyft drivers were employees."[109] To determine whether the rideshare companies could rebut a prima facie showing of employment, the courts reviewed the indicators of an employment relationship set forth in *Borello*, discussed above.

Both courts recognized that drivers provided a service to the rideshare companies, with the O'Connor court outright rejecting Uber's claim to be "a 'technology company' that generates 'leads' for its transportation providers through its software,"[110] as "fatally flawed in numerous respects,"[111] holding that drivers unequivocally performed a service for Uber because "Uber simply would not be a viable business entity without its drivers."[112] With respect to the right to control work, both the O'Connor and Cotter courts place significant emphasis on the rights of Uber and Lyft to terminate at will and without cause.[113] Acknowledging that companies not only reserve this right in contractual language but also act on that right, both courts note that the California Supreme Court decided that the right to terminate at will and without cause, is the strongest evidence of the right to control.[114] The courts also recognized that the companies established control with established driver qualifications, performance standards backed up by customer reviews, and unilateral rate changing.

Prior to settlement in O'Connor, Uber argued that the limited extent to which it monitored drivers did not amount to control or warrant their classification as employees,[115] distinguishing its facts from Alexander v. FedEx Ground Package System, Inc.,[116] in which FedEx drivers were found to be employees, at least in part because management accompanied drivers in ride-alongs four times a year.[117] Uber reasoned that it never conducted driver performance inspections or ride-alongs, and thus did not monitor drivers.[118] However, the court was dismissed Uber's contention, noting that Uber drivers are monitored during every single ride by a customer rating system that could result in driver termination.[119] The customer rating system, the court maintained, gave Uber incredible control over the manner and means of its drivers' performance.[120]

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[109] Cotter, No. 13-cv-04065-VC, 2016 U.S. Dist. LEXIS 50579, at *13.
[110] O'Connor v. Uber Techs., 82 F. Supp. 3d at. 1141; *see also* Occupational Safety and Health Act of 1970, *supra* note 13.
[111] Id. at 1141.
[112] Id. at 1142. Lyft similarly asserted it was not an employer because its drivers provided services only to riders, not to Lyft. Cotter, 60 F. Supp. 3d 1067 at 1078. The court rejected this argument as "not a serious one." Id. (citing Yellow Cab, 277 Cal. Rptr. at 437. In Yellow Cab, the California Court of Appeal held taxi drivers were employees for workers' compensation purposes. Id. at 442. Yellow Cab stated: Contrary to Yellow's portrayal here, the essence of its enterprise was not merely leasing vehicles. It did not simply collect rent, but cultivated the passenger market by soliciting riders, processing requests for service through a dispatching system, distinctively painting and marking the cabs, and concerning itself with various matters unrelated to the lessor-lessee relationship[, such as service and courtesy]. Id. at 437; *see also* Schwann v. FedEx Ground Package Sys., No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 93509 (D. Mass. July 3, 2013) (it is "beyond cavil that the pick-up and delivery drivers are essential to FedEx's business .... FedEx cannot assert that it does not provide delivery services by simply refusing to recognize its delivery drivers as employees."), *aff'd in part and rev'd in part and remanded,* 813 F.3d 429 (1st Cir. 2016). (Federal Aviation Administration Authorization Act preempts Massachusetts' independent contractor classification statute, MASS. GEN. LAWS ch. 149, § 148B (2014), on which the court's earlier decision was based).
[113] Cotter, No. 13-cv-04065-VC, 2016 U.S. Dist. LEXIS 50579, at *5, *15; O'Connor, 82 F. Supp. 3d at. 1141-1142.
[114] Ayala, 327 P.3d at 170 (quoting S.G. Borello & Sons, Inc. 769 P.2d at 403). *See also* Narayan 616 F.3d at 900.
[115] O'Connor, 82 F. Supp. 3d at. 1151.
[116] Alexander, 765 F.3d.
[117] O'Connor, 82 F. Supp. 3d at. 1151 (citing Alexander, 765 F.3d. at 985).
[118] Id.
[119] Id.
[120] Id.

The O'Connor court drew specific emphasis on driver ratings while rejecting Uber's claim that it does not control its drivers, Judge Chen writing:

> "Uber drivers . . . are monitored by Uber customers (for Uber's benefit, as Uber uses the customer rankings to make decisions regarding which drivers to fire) during each and every ride they give, and Uber's application data can similarly be used to constantly monitor certain aspects of a driver's behavior. This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the 'manner and means' of its drivers' performance." [121]

Chen here cited Michel Foucault, Discipline and Punish: The Birth of the Prison 201 (Alan Sheridan ed., 1979), including the parenthetical "(a 'state of conscious and permanent visibility assures the automatic functioning of power')". Uber argued that its drivers retained flexible schedules and only worked when they wanted to,[122] and were under no obligation to accept Uber's leads.[123] Yet the drivers argued that Uber's Driver Handbook noted that Uber drivers were expected drivers to accept all ride requests, and those drivers who rejected too many trips would be investigated and potentially terminated.[124] The Cotter court rejected similar arguments made by Lyft, noting that a company did not need to have the right to control every single detail of the work for the worker to be classified as an employee,[125] acknowledging that employee status could indeed exist where freedom is an inherent part in the worker's job,[126] and declaring as concerns the the right of control, the facts tend to cut against Lyft.[127] Both courts concluded that the question of whether and employment relationship exists must go to a jury as reasonable people could differ on the ultimate determination.

Both the Uber and Lyft settlements have monetary and non-monetary components. The total monetary component of the Settlement from Uber, [128] which includes settlement of not just O'Connor v. Uber Techs. Inc. but also Massachusetts case Yucesoy, et al. v. Uber Technologies, Inc., et al., amounts to $84,000,000, plus an additional $16,000,000 conditional payment.[129]

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[121] Id. (citing Alexander, 765 F.3d. at 985).
[122] Uber drivers must give at least one ride every 180 days or every thirty days, depending on the program they use. Id. at 1149.
[123] Id.
[124] Id.
[125] Cotter, 60 F. Supp. 3d 1067 at 1075-76.
[126] Id. at 1078-79. Lyft prohibits its drivers from picking up non-Lyft passengers, having anyone else in the car, requesting tips, smoking or allowing the car to smell like smoke, and asking for a passenger's contact information. id. at 1078. Lyft also affirmatively instructs drivers "to wash and vacuum the car once a week, to greet passengers with a smile and a fist-bump, to ask passengers what type of music they'd like to hear, to offer passengers a cell phone charge, and to use the route given by a GPS navigation system if the passenger does not have a preference." id. at 1079. Lastly, "Lyft reserves the right to penalize (or even terminate) drivers who do not follow" its rules. id.
[127] Id. at 1079.
[128] Class Action Settlement and Release for O'Connor v. Uber Techs., Inc & Yucesoy v. Uber Techs., Inc at 13-14, O'Connor v. Uber Techs., Inc., No. 13-03826-KAW, 2013 U.S. Dist. LEXIS 120406 (N.D. Cal. Aug. 23, 2013) & Yucesoy v. Uber Techs., Inc., 109 F. Supp. 3d 1259 (N.D. Cal. 2015) (Case Nos: 3:13-cv-03826-EMC & 3:15-cv-00262-EMC), available at https://www.scribd.com/doc/310033204/Uber-Settlement.
[129] This conditional payment is triggered either "(i) the last day of any 90-day period within 365 days from the closing of the initial public offering of Uber Technologies, Inc. that yields an average valuation, to be determined by Uber, of at least 1 1⁄2 times the most recent valuation at which Uber Technologies, Inc. last sold stock to third party investors of or (ii) the date of the closing of a Change in Control of Uber Technologies, Inc. within 36 months of the

Although the settlement covers both California and Massachusetts drivers, the bulk of the settlement, around $93 million, is for California drivers). Certainly, the entire settlement amount does not go directly to drivers; the settlement includes, regular and enhanced payments drivers in the settlement class, fee and expense awards,[130] escrow fees, settlement fund taxes and expenses, employee and employer payroll taxes,[131] PAGA payment,[132] and all other costs and expenses relating to the settlement (including, but not limited to, administration costs and expenses, notice costs and expenses, and settlement costs and expenses).[133] Driver payments will not be uniform, with drivers who contributed meaningfully to the litigation before the NLRB receiving enhanced payments (no payments to exceed $73,000).[134]

The non-monetary portion of the settlement mandates certain revisions to Uber's Software Licensing Agreements and modifications to Uber's business practices. With regard to their deactivation policy, Uber will: 1) only deactivate driver accounts for sufficient cause, no longer deactivate drivers at will for low acceptance rates; 2) publish a comprehensive deactivation policy on-line that's easy to both read and access; 3) provide warning before deactivation result from something other than issues regarding safety, discrimination, fraud or illegal conduct, with a minimum of two warnings before deactivation on deactivation for any other matters; 4) provide drivers will explanations to deactivations; 5) ensure an appeal process for those drivers who have been deactivated (except in cases arising from excluded matters like "low star ratings, criminal activity, physical altercation, or sexual misconduct"); 6) provide quality improvement courses, with completion leading to reactivation, for drivers who have had their account deactivated (except in the event of excluded matters); 7) institute a formal appeals process for deactivation decisions, to include driver panels in major cities "that consists of high-quality, highly-rated active Drivers. For Drivers who initiate a formal appeals process, the panel will recommend whether Drivers should be reactivated in the event their user account was deactivated"[135]; and provide more information regarding star ratings.[136]

The settlement also holds that Uber will allow for the establishment of a driver an

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date on which the Court enters its Final Approval Order in which Uber Technologies, Inc.'s valuation, to be determined by Uber, is at least 1 1⁄2 times the most recent valuation at which Uber Technologies, Inc. last sold stock to third party investors of (redacted)." Uber Settlement at 13-14, O'Connor v. Uber Techs., Inc., No. 13-03826-KAW, 2013 U.S. Dist. LEXIS 120406 (N.D. Cal. Aug. 23, 2013) (No.3:13-cv-03826-EMC).

[130] Class Counsel Fee and Expense Award is not to exceed twenty-five percent of settlement award. id. at 35.

[131] Driver payments under the settlement will be treated as wages reported on IRS Form W-2, with remaining funds will be treated as non-wage income, not subject to payroll withholdings, and reported on an IRS Form 1099. id.

[132] "PAGA Payment" means a total payment of one million dollars ($1,000,000) to settle all claims under PAGA, the Private Attorney General Act of 2004 ("PAGA") codified in CAL. LAB. CODE § 2698 (2014), et seq. The law allows private citizens to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency ("LWDA") provided the formal notice and waiting procedures of the law are followed. Under PAGA, civil penalties are split between the LWDA and the employee with the LWDA receiving 75% of the penalties and the employee receiving 25%. CAL. LAB. CODE § 2699(i) (2015). From the PAGA Payment in the Uber settlement, seventy-five percent (75%), or seven hundred and fifty thousand dollars ($750,000), will be paid to the LWDA as civil penalties pursuant to PAGA and twenty-five percent (25%), or two hundred and fifty thousand dollars ($250,000), will be distributed to driver claimants. id. at 19.

[133] Id. at 31.

[134] Id. at 35.

[135] Id. at 37.

[136] Per the settlement, Uber is only required to "consider such changes as informing Drivers how they rank against their peers, providing Drivers with warnings when their rating slip below a certain threshold, and warning Drivers that their user accounts may be deactivated if their rating falls below a certain threshold, in California and Massachusetts." id.

association or committee of drivers in California and Massachusetts, specifying that the Driver Association will not be a union and will not have the right or capacity to bargain collectively with Uber. It also holds that drivers will have the opportunity to elect leaders of the association and that these elected leaders will meet quarterly with Uber management to discuss issues affecting drivers and the resolution of these issues. Uber is to pay for the association's for incidental expenses (e.g., phones, printing, meeting space) to enable it to carry out its basic functions.[137]

While the settlement upon first glance may seem, at least monetarily, like a large and sufficient win for drivers, it breaks down to about $218 per driver.[138] That said, those same drivers have been entitled to an estimated $730 million in expense reimbursements had they been recognized as employees rather than independent contractors.[139]

The Lyft settlement calls for $27 million dollars in monetary relief, including to cover the costs of claims administration, attorneys' fees and costs, and class representative enhancements, and $1 million to Plaintiffs' PAGA claim (California's Labor & Workforce Development Agency will receive $750,000, or approximately 3.7% of the gross settlement).[140] The funds will be allocated to drivers based on a points system that considers the amount of work performed for Lyft, with drivers working more than 30 hours per week in at least 50 percent of their weeks receiving an double the number of points (approximately 967 drivers fall into this category), resulting in an enhanced payment.[141] Drivers who worked for Lyft in the time period during which payments for ride were voluntary, during which Lyft took an "administrative fee" from such payments, will also receive enhanced points, amount in a 20 percent increase.[142]

The settlement requires revisions to Lyft's Terms of Service and business practices. With regard to their deactivation policy, Lyft will: 1) will no longer be able to deactivate drivers at will, and instead will only retain the right to deactivate drivers "for specific, delineated reasons and/or after providing notice and an opportunity to cure";[143] 2) provide drivers the ability to contend deactivation that constitutes breach of contract by Lyft, as well as an accessible avenue to challenge such breaches; 3) give drivers notice and opportunity to rectify issues prior to termination for deactivation for insufficient passenger ratings, excessive cancellations, safety reasons, or no longer qualifying to provide rides or to operate their vehicles; 4) pay all arbitration-specific fees for the drivers who want to challenge their termination claims before a neutral arbitrator; and 5) remove from the provision permitting deactivation for drivers who "create liability for us or cause us to become subject to regulation as a transportation carrier or provider of taxi service" from its Terms of Service.[144] In addition, Lyft will: pay all arbitration-specific fees for any misclassification or compensation claims brought by drivers; implement a pre-arbitration negotiation process so drivers can resolve minor disputes with Lyft without having to invoke the arbitration process (this is to be made available to all drivers, whether they have already been deactivated or not); and

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[137] Id. at 38-39.
[138] Madeline Johnson, *Forget Lawsuits, Uber Drivers' Days Are Numbered*, NASDAQ (May 20, 2016, 10:30:00 AM), http://www.nasdaq.com/article/forget-lawsuits-uber-drivers-days-are-numbered-cm624195.
[139] Dan Levine, *Uber Drivers Owed $730 Million More If Employees, According to Court Documents*, HUFFINGTON POST (May 09, 2016, 5:22 PM), http://www.huffingtonpost.com/entry/uber-drivers-owed-730-million-more-if-employees-according-to-court-documents_us_5730fe0fe4b016f37896bc1b.
[140] Revised Class Action Settlement, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059 (N.D. Cal. 2014) (No. 3:13-cv-04065-VC).
[141] Id. at 5.
[142] Id. at 6.
[143] Id.
[144] Id. at 7.

provide additional passengers information to drivers prior to drivers accepting any ride request (including passenger ratings, estimated time to passenger pickup, and more detailed passenger profile information), so drivers retain the information necessary to determine whether to accept or decline the ride request; and create a "favorite" driver option entitled favorite drivers to certain benefits.[145]

## IV: WHAT DOES ALL OF THIS MEAN? ARE RIDESHARE DRIVERS BEING MISCLASSIFIED OR NOT?

To be sure, the debate regarding the way in which rideshare drivers should be classified extends beyond the courtroom. In December of 2015, Alan Krueger and Seth Harris authored a paper arguing that rideshare workers belonged to a new category of employee, which they termed "independent workers" that were deserving of some workplace protections but not all.[146] One one side, they reason that as rideshare companies claim, drivers aren't employees because they set their own schedules. Yet, they also offer that as rideshare companies set driver pay rates and other conditions, drivers aren't independent contractors either. Thus, the authors argue, a new category of worker, the "independent worker", is necessary. While they contend that independent workers should qualify for freedom to organize and collectively bargain, civil rights protections, tax withholding, and employer contributions for payroll taxes,[147] they maintain that these workers should not qualify for any hours-based benefits, including overtime or minimum wage requirements, as they consider it "conceptually impossible" to attribute their work hours to any single company in those cases where drivers utilize multiple ride share applications simultaneously.[148]

Larry Mishel and Ross Eisenbrey argue to the contrary, noting that not only are rideshare companies capable of tracking hours in this way, but that the companies already do the same.[149] Using, Uber as the example, the authors argue that Uber already measures the time drivers have their apps on, and has a guaranteed wage program that evidences its capacity to ensure hours tracking and minimum-wage obligations can be administered effectively. They also cite Rosenblat and Stark, noting that drivers don't retain the capacity to ignore the app and tend to personal errands once it's turned on without risking potential termination or disciplinary action by the company. They also argue that that in the case of waiting time be compensated by that employer whose driver accepts the ride, the fluid nature of the same not serving to necessitate an alternative worker classification. Ultimately, Mishel and Eisenbrey reason that Uber drivers are employees.

With such divergent outcomes in worker classification decisions of ride-share drivers, the settlement of the two leading misclassification lawsuits, and active scholarly debates on the subject, it might seem like answering the question of worker misclassification is impossible.

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[145] Id. 7- 8.

[146] Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: "The Independent Worker",* HAMILTON PROJECT (December 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

[147] Id. at 2.

[148] Id.

[149] Ross Eisenbrey & Lawrence Mishel, *Uber Business Model does not Justify 'Independent Worker' Category*, ECON. POL'Y INST. (Mar. 17, 2016), http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/.

However, the substantial similarities between the major tests and essentially uniform company policies and practices applicable to each individual companies' workforce, allow for a meaningful review of the relevant facts which can guide courts, policymakers, and other stakeholders in those activities, decision-making processes, and research that concerns worker classification in the ridesharing sector. When reviewing the work of ride-share drivers in the context of the three major tests viewed comprehensively, it is helpful to focus on two core factors that exist in each of the three major tests: 1) control, freedom, and flexibility, and 2) the relationship and interaction between the parties. These two factors sit at the center of driver misclassification claims, and close examination of the same reveals that ride share drivers are indeed misclassified as independent contractors, when in fact they are employees.

### *A. Control, Freedom, & Flexibility*

Perhaps the most critical factor to determining if an employment relationship exists between rideshare workers and rideshare companies, is the issue of control, specifically whether or not rideshare companies in fact have the right to control the manner and means by with drivers' work is performed. Control is the primary factor of the common law text, a critical factor in the economic realities test and hybrid test, and a key factor in California's Borello[150] test, and Restatement Second and Third, Agency. Rideshare companies have repeatedly argued that they lack sufficient control over its drivers for them to be employees. This is unsurprising as rideshare companies market driver work opportunities by promising flexible employment. In fact, Uber advertisements claim that, "With Uber, you have total control. Work where you want, when you want, and set your own schedule" and "Freedom pays weekly."[151] In courts, the companies have argued that drivers are free to drive as much or as little as they wish, are under no obligation to accept company leads, and retain complete control of those fares drivers accept from companies.[152]

The recent Uber and Lyft settlements addressed certain elements of control, namely in disallowing termination without cause and deactivation for low acceptance rates. These detailed non-monetary terms of both settlements focus specifically on termination because the right of the putative employer to discharge the work at will, without cause, is strong evidence of an employment relationship.[153] This is related to the element of control as the right to terminate indicates a significant amount of control over the work.

Despite the changes to company policy and practice set forth in their settlements, both Uber and Lyft will retain control over the manner and means by which drivers perform their jobs, through continuous monitoring and the driver rating system, behavioral and performance rules and evaluations, scheduling management, and unilateral financial control over rates.[154] Both Uber and Lyft maintains real-time driver rating systems that allows customers to rate drivers on each

[150] S.G. Borello & Sons, Inc., 769 P.2d.
[151] ROSENBLAT, *supra* note 25, at 3.
[152] Uber drivers must give at least one ride every 180 days or every thirty days, depending on the program they use. O'Connor v. Uber Techs., 82 F. Supp. 3d at. 1149.
[153] Angelotti, 121 Cal. Rptr. 3d. *See also* S.G. Borello & Sons, Inc., 769 P.2d; Varisco, 83 Cal. Rptr. 3d; Empire Star Mines Co, 168 P.2d. *See* Alexander, 765 F.3d ("The right to terminate at will, without cause, is '[s]trong evidence in support of an employment relationship.'" (citations omitted)); Toyota Motor Sales U.S.A., 269 Cal. Rptr. ("Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so").
[154] ROSENBLAT, *supra* note 25, at 2.

transaction, which are used to not just measure customer satisfaction, but are determinative of ongoing employment. Although drivers have no way of removing the rating, even if received unfairly,[155] a suboptimal rating can results in driver termination. Alex Rosenblat and Luke Stark, in their report Uber's Drivers: Information Asymmetries and Control in Dynamic Work, find that the through the ratings system, Uber exercises significant control over drivers, noting that "Passengers are empowered to act as middle managers of their own drivers, whose ratings directly impact their employment eligibility. The redistribution of managerial oversight and power away from formalized middle management and towards consumers is part of a broader trend in flexible labor."[156] The authors go further, calling Uber's use of surveillance "soft control" saying, "Uber's digital platform mediates drivers' activities, performance, and locations, thus enabling constant monitoring even though their workplace is inherently mobile; the boundaries of workplace surveillance are effectively porous, even if they provide and incomplete view of all of the drivers non-digital interactions with customers, such as verbal communication."[157] The results of this constant monitoring and surveillance, the authors find, "acts as a remote threat and tangible nudge to drivers to be in compliance with workplace expectations. Data that workers produce and are monitored by creates affordances for managerial control."[158] Even if ride-share companies attempt to distance themselves from this ongoing monitoring and evaluative process, even as it has a direct impact on employability or income-potential of workers,[159] this type of interminable monitoring and surveillance amount function to control driver behavior and the manner and means in which drivers do their job and are indicative of an employment relationship.

Certainly, low ratings are not all Uber and Lyft drivers have been terminated for. Drivers also risk deactivation, or termination, for not accepting or cancelling unprofitable fares. While the Uber settlement notes that "low acceptance rates will not be grounds for deactivation"[160] and the Lyft settlement holds that Lyft "will not be able to deactivate drivers for declining ride requests," [161] there is no delineated protection from termination for drivers who cancel unprofitable fares, which leads drivers to accept fares would not pursue if they truly were independent contractors.[162] Inasmuch, although the settlements disallow deactivation for low acceptance rates, both companies still retain the capacity to terminate drivers over cancellations. So, while the settlement terms may make it such that drivers can reject rides without fear of deactivation, they are still at risk of deactivation for canceling fares after identifying the same as unprofitable or inconvenient. While Uber and Lyft frame this risk as fundamental to the entrepreneurial function, the ability to tolerate risk as central to the formation of new business, drivers are not entrepreneurs with the financial capacity to shoulder the risk of income loss, loss of time and opportunity, and potential loss of employment. Here, as Rosenblat and Stark expressed so fittingly, "this rhetoric of risk has effectively been retooled to suit a contingent of lower-income workers who are recruited to perform service labor, not highly-skilled technical work."[163]

Rideshare companies also exercise the right to discharge their drivers control through the threat of dismissal for unsatisfactory customer ratings and non-compliance with company policies,

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[155] Id. at 12.
[156] ROSENBLAT, *supra* note 25, at 11.
[157] Id. at 3.
[158] Id. at 6.
[159] Id. at 14.
[160] Uber Settlement, *supra* note 136, at 36.
[161] Revised Class Action Settlement, *supra* note 145, at 7.
[162] ROSENBLAT, *supra* note 25, at 9.
[163] Id. at 4.

which generally govern presentation, personal and vehicle cleanliness, interaction with customers, phone mounting, no street hails, greetings, no tips or cash, the companies giving drivers detailed instructions about how to conduct themselves. Under California law, as is applicable to both the O'Connor and Cotter, and also more more generally, a finding of employee status does not require a company to retain the right to control every last detail of work,[164] but whether it controls the means and methods of the relevant portions of work and operations,[165] which both Uber and Lyft do.

Although Uber and Lyft market driver work as defined by freedom and flexibility, the aforementioned practices run up against the same claim. This is a clear indicator of Uber's control over drivers' time. So too is the fact that the rideshare companies have incentive-based pay, which pays low rates for routine work, and better pay when drivers accommodate the stricter and less flexible conditions. Rosenblat and Stark offer up the follow example from Uber:

> "Uber sometimes offers select drivers guaranteed hourly pay at higher rates, such as $22/hour if they opt-in to guarantee. The conditions for receiving this guarantee could be: accept 90% of ride requests, complete one trip per hour, be online for at least 50 minutes of every hour, and receive a high rating for all of those trips. Thus, Uber leverages control over drivers' schedules, while simultaneously sustaining the idea that drivers enjoy total freedom from working flexible schedules. The regular occurrence of surge pricing along with heat maps of passenger activity and affective messaging all work as behavioral engagement tools that impact how drivers schedule their work, and their effect is amplified when low base rates result in unreliable income, undercutting the 'freedom' that drivers have to login and log-out at will."[166]

All in all, the flexibility and freedom often referenced by Uber and Lyft do not speak to the lived reality of drivers. However, even where such flexibility and freedom does exist for workers, with regard to flexible schedules, worker control over hours, and lack of direct supervision, the existence of the same do not automatically indicate and independent contractor relationship, but rather exist as "the expected and unsurprising reality of employees that work off site."[167] Thus, even if future settlements create real flexibility and freedom for drivers, that in and of itself will not necessary render them independent contractors, as an inherent freedom of action in the nature of work has been recognized by courts and lawmakers.[168]

### *B) Relationship and Interaction between the Parties*

The relationship and interaction between the parties is examined in all three major worker classification tests: the control test considers the level of integration of the worker's services in the business, the investments made by both parties, and the profit or lost realized by the worker; the economic realities test question whether a workers are economically dependent upon their companies, and whether the worker is an integral part of the business;[169] and the hybrid test

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[164] Air Couriers Internat., 59 Cal. Rptr. at 44.

[165] S.G. Borello & Sons, Inc., 769 P.2d. at 408. *See also*, Stephanie Sullivant, *Restoring the Uniformity: An Examination of Possible Systems to Classify Franchisees for Workers' Compensation Purposes*, 81 UMKC L. REV. 993, 1004 (2013).

[166] ROSENBLAT, *supra* note 25, at 9.

[167] Weil, *supra* note 50 citing Donovan v. Dialamerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985). *See also* Brock, 840 F.2d at 1060; Antenor v. D & S Farms, 88 F.3d 925, 933 (11th Cir. 1996); Dole v. Snell, 875 F.2d 802, 806 (10th Cir. 1989); Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984).

[168] Burlingham, 137 P.2d; Air Couriers Internat., 59 Cal. Rptr.

[169] Silk, 331 U.S.; *See also* Mack, *supra* note 40.

considers factors relevant to the nature of the work performed and relationship between the worker and the employer. In this context, the most relevant question we can ask ourselves when examining the relationship and interaction between the rideshare companies and their workers, is—can we consider the work of rideshare drivers to be separate operations from rideshare companies' businesses? That is to say, do drivers control a meaningful part of the business so that they stands as a separate economic entity?[170] Or, is the work performed by drivers an integral part of the business of ride share companies?

With regard the relationship between the worker and employer, courts consider whether work performed by the worker is a regular part of the employer's business, the permanency and regularity of the work performed, and whether the work performed could be considered continuing services or contracting for the completion of a specific jobs.[171] The courts in O'Connor and Cotter both recognized the work performed by drivers as a regular part of the employer's business. The court in O'Connor v. Uber Techs., Inc. noted that "Uber's revenues do not depend on the distribution of its software, but on the generation of rides by its drivers…Put simply, the contracts confirm that Uber only makes money if its drivers actually transport passengers."[172] Similarly, the court in Cotter v. Lyft, Inc., The Cotter Court, "the work performed by the drivers is 'wholly integrated' into Lyft's business—after all, Lyft could not exist without its drivers—and [t]he [riders] are [Lyft's] customers, not the drivers' customers."[173] Certainly, as courts have identified cake decorators to be "obviously integral" to the business of selling cakes,[174] and pickers to be integral to the pickle business,[175] it seems clear here that courts should recognize drivers as integral the transportation network businesses for which they work. As the recent Interpretation emphasizes that "work can be integral to a business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers", the integral nature of driver work to rideshare companies is not diminished by the fact that one driver's work is interchangeable with the work of others.

Establishing a driver's economic reliance on rideshare companies, does not require a showing that the ride share company in question is the a driver's sole or primary source of income.[176] What matters is "whether the lack of permanence or indefiniteness is due to operational characteristics intrinsic to the industry".[177] The transience of rideshare driver work, much like the nurses in the *Superior Care*[178] case, reflects the nature of the transportation network industry, rather than stemming from their degree of success in promoting and marketing their skills as drivers independent of the transportation network companies.[179] While drivers' working relationship with rideshare companies may last weeks or months, there exists a permanence in that they work continuously and repeatedly for an employer, and not on one project as do independent contractors.[180]

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[170] Weil, *supra* note 50 citing Scantland, 721 F.3d at 1313.
[171] Lewis; *supra* note 41, at 256.
[172] O'Connor, No. C-13-3826 EMC, 2015 U.S. Dist. LEXIS, at *11 and *26.
[173] Cotter, No. 13-cv-04065-VC, 2016 U.S. Dist. LEXIS 50579, at *16.
[174] Dole, 875 F.2d.
[175] Sec'y of Labor, United States Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1537-38 (7th Cir. 1987).
[176] Weil, *supra* note 50 citing Brock, 840 F.2d at 1060.
[177] Leslie Sammonal, *DOL Says Most Workers are Employees*, 24 NO. 9 WIS. EMP. L. LETTER 1 (2015).
[178] Brock, 840 F.2d at 1060.
[179] *See* Brock, 840 F.2d at 1060-61.
[180] Donovan, 757 F.2d at 1384-85. (correcting district court for ignoring fact that workers worked continuously for the employer and that such evidence indicates that workers were employees); Solis v. Cascom, Inc., No. 3:09-CV-257,

Rideshare drivers are not independent business person service providers with special skills and entrepreneurial control. They are employee-service providers, who at all turns are prohibited from exercising entrepreneurial control by their employers. It is the rideshare companies, not the drivers, who exercise complete control over the amount of revenue earned; rideshare companies unilaterally set fares and rates of commission they take from drivers.[181] Rideshare companies claim a proprietary interest in riders, prohibiting drivers from soliciting rides from passengers. The Uber handbook[182] provides that actively soliciting business from a current Uber client is categorized as a "Zero Tolerance" event that "may result in immediate suspension from the Uber network."[183] Even passive client solicitation in the form of business cards or branded equipment is considered a major issue resulting in action should the same activity be reported more than once every 180 trips.[184] Instead, drivers are instructed to direct passengers to use Uber to arrange all pickups.

Rideshare companies have attempted to argue that secondary factors, such as drivers using their own vehicles for work and signing agreements indicating no employment relationship is created, support an independent contractor classification. However, courts have recognized employment relationships can exist even where drivers provided their own vehicles,[185] and where an employer-employee relationship does indeed exist, as it does here, the fact that rideshare companies identify drivers as independent contractors does nothing to diminish that fact.

## VI: CONCLUSION

Even as the two leading rideshare driver misclassification cases have been settled, the issue of misclassification in the rideshare sector has not been resolved. Examining the realities of rideshare work through the core components of three major classification tests demonstrate that these workers, irrespective of the jurisdiction in which they work, are employees, not independent contractors. Rideshare companies control the manner and means by which drivers perform their jobs, through continuous monitoring and the driver rating system, behavioral and performance rules and evaluations, scheduling management, and unilateral financial control over rates. Rideshare workers do not retain separate operations from rideshare companies' businesses and do not stand as separate economic entities. In reality, they are employees, who perform the most integral part of ride share companies' business, without whom these companies would not be able to function,[186] and without whom these companies would have never been able amass such large amounts of wealth. They are employees, deserving of the access to worker protections and remedies to workplace harms that accompany the classification. If there is any silver lining in these recent developments, it is that the legal question as to whether rideshare drivers are being misclassified has not yet been answered, which means that courts and policymakers still have the opportunity to get it right, and not fail the very workers for whom these labor laws were passed.[187]

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2011 WL 10501391, at *6 (S.D. Ohio Sept. 21, 2011) (workers who "worked until they quit or were terminated" had relationship "similar to an at-will employment arrangement").

[181] O'Connor, 82 F. Supp. 3d at. 1142.

[182] Id. at 1151.

[183] Id.

[184] Id.

[185] Air Couriers Internat., 59 Cal. Rptr.

[186] JOHNSON, *supra* note 142. Uber's need for drivers might be fleeting, as Uber is preparing to launch autonomous vehicles in to its fleet by 2020. Id.

[187] Important to note here is the potential impact of recent developments analyzed by Katherine Stone, suggesting a trend toward courts finding Uber's arbitration clause enforceable and thus dismissing class actions brought by

rideshare drivers. Katherine V.W. Stone, Uber and Arbitration: A Lethal Combination, ECONOMIC POLICY INSTITUTE, WORKING ECONOMICS BLOG (Posted May 24, 2016, 11:33 am), http://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/#_ftn8.