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

*Pamela A. Izvanariu\**

## I. INTRODUCTION

The rideshare sector, a recent innovation, 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, all while discouraging cash tipping. As advertisements for the companies suggest that these drivers make anywhere between \$20–\$40 per hour,<sup>1</sup> it is 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 as 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 the privately owned and venture capital-funded corporations like Uber, Lyft, and Sidecar. For these companies, business is booming, employing a steadily growing global workforce and providing alluring economic opportunities to struggling workers in times of high underemployment and unemployment;<sup>2</sup> however, a worrisome picture of

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1. *How Much Do Uber Drivers Make?*, UBER, [www.uber.com/info/how-much-do-drivers-with-uber-make/](http://www.uber.com/info/how-much-do-drivers-with-uber-make/) (last visited Oct. 28, 2016).

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 (June 1, 2016, 5:12 PM), <http://www.forbes.com/sites/alexkonrad/2016/06/01/uber-raises-3-5-billion-from-saudi-sovereign-fund-at-62-5-billion-valuation>. Uber also received a \$258 million investment from Google in 2013, with the company being valued at about \$3.5 billion at the time of the investment. 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>. The District Court for the Northern District of California noted that Uber's most recent valuation is about \$93.75 billion. *O'Connor v. Uber Techs., Inc.*, No. 13-cv-

the direction of the rapidly growing rideshare sector has started to emerge. Collectively, cases filed by rideshare workers, research, media coverage, and worker-organizing efforts have revealed evidence of worker claims of low wages, nonpayment of wages, tip skimming, harassment from consumers, and misclassification.<sup>3</sup>

Perhaps the most significant issue currently facing rideshare workers is whether the growing cadre of rideshare workers are employees misclassified as independent contractors. 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 do nothing to resolve the underlying issue of worker misclassification, neither for the workers receiving said settlements nor for rideshare workers more generally.

This Article provides an explanation of the relevant legal framework concerning the misclassification of rideshare drivers, the recent administrative decisions in Oregon, California, and Florida, and the recent Uber and Lyft settlements. Part II provides a robust explanation of the legal framework for examining worker misclassification and the recent rideshare driver misclassification decisions.<sup>4</sup> Part III of this Article discusses the recent Uber and Lyft settlements and the various provisions of the settlements.<sup>5</sup> Part IV argues that rideshare drivers are employees and should accordingly be provided the protec-

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03826-EMC, 2016 WL 4398271, at \*4 (N.D. Cal. Aug. 18, 2016). Uber operates in 60 countries and over 300 cities worldwide. Anne Freier, *Uber Usage Statistics and Revenue*, BUS. OF APPS (Sept. 14, 2015), <http://www.businessofapps.com/uber-usage-statistics-and-revenue/>. In 2014, Lyft raised at least \$250 million from venture capitalists, and Lyft's valuation was at more than \$700 million. Jeff Bercovici, *Lyft Raises \$250 Million Series D to 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. Tomio Geron, *SideCar Raises \$10 Million from Google Ventures, Lightspeed*, FORBES (Oct. 10, 2012, 7:30 AM), <http://www.forbes.com/sites/tomiogeron/2012/10/10/sidecar-raises-10-million-from-google-ventures-lightspeed/#311c1213c026>. This kind of growth is especially impressive considering Uber launched in 2009, with Lyft and Sidecar only having been launched in 2012. Anisha Sekar, *Lyft Competitors: Top 3 Companies in the On-Demand Ridesharing Industry*, DATAFOX, <http://blog.datafox.com/3-top-lyft-competitors-on-demand-ridesharing/> (last visited Aug. 22, 2016). Uber saw a 209% growth in national sales as well as a 329% growth in the number of rides between 2013 and 2014. 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/2014/12/04/uber-saw-a-small-dip-in-growth-during-its-bad-press-week.html>. Similarly, Lyft saw a 401% growth in national sales as well as a 397% growth in the number of rides during the same period. *Id.*

3. See *infra* notes 9–12 and accompanying text (discussing cases filed against Uber and Lyft alleging improper driver classification as independent contractors).

4. See *infra* notes 9–132 and accompanying text.

5. See *infra* notes 133–201 and accompanying text.

tions that such classification affords.<sup>6</sup> Part V explains how recent arbitration decisions will further restrict rideshare drivers' ability to receive the wages, protections, and benefits to which they are entitled as employees.<sup>7</sup> Part VI concludes.<sup>8</sup>

## II. MISCLASSIFICATION

Part A of this Section clarifies that, while settlements have been reached, the issue is anything but resolved. Part B discusses what misclassification is and why it matters. Part C details the three tests used to determine whether a worker has been misclassified. Part D delves into the federal law governing worker protections and how the U.S. Department of Labor (DOL) has interpreted such provisions. Part E explains the several conflicting state administrative decisions.

### A. *Settled But Not Resolved*

The ongoing debate about whether the growing cadre of rideshare workers are employees or independent contractors is perhaps the most significant issue currently facing rideshare workers. Rideshare drivers have filed multiple class action lawsuits, alleging rideshare companies are misclassifying them as independent contractors.<sup>9</sup> Re-

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6. See *infra* notes 202–60 and accompanying text.

7. See *infra* notes 261–62 and accompanying text.

8. See *infra* notes 263–64 and accompanying text.

9. See, e.g., *Razak v. Uber Techs., Inc.*, No. 16-573, 2016 U.S. Dist. LEXIS 95086, at \*1-4 (E.D. Pa. July 21, 2016); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1149–50 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1060-61 (N.D. Cal. 2014); Class Action Complaint at 2, *Bonke v. Uber Techs., Inc.*, No. 16-cv-01534-SPL (D. Ariz. May 18, 2016); Complaint for Damages at 1, *Carey v. Uber Techs., Inc.*, No. 16-cv-01058 (N.D. Ohio May 2, 2016); Plaintiff's Original Class Action Complaint at 1-2, *Trosper v. Uber Techs., Inc.*, No. 16-cv-04842 (N.D. Ill. May 1, 2016); Collective Class Action Complaint for Violation of Fair Labor Standards Act, as Amended at 1-2, 4, *Lamour v. Uber Techs., Inc.*, No. 16-cv-21449-JEM (S.D. Fla. Apr. 22, 2016); Civil Class Action at 1, *Bradshaw v. Uber Techs., Inc.*, No. 16-cv-00388-R (W.D. Okla. Apr. 19, 2016); Application for Order Requiring Obedience to Subpoena Ad Testificandum and Subpoena Duces Tecum at 1-4, *Nat'l Labor Relations Bd. v. Uber Techs., Inc.*, No. 16-cv-00987 (N.D. Cal. Feb. 29, 2016); Class Action Complaint and Demand for Jury Trial at 1-2, *Suarez v. Uber Techs., Inc.*, No. 16-cv-00166-JSM-MAP (M.D. Fla. Jan. 22, 2016); Amended Class Action Complaint at 1-2, *Rimel v. Uber Techs., Inc.*, No. 15-cv-02191 (M.D. Fla. Jan. 19, 2016); Class Action Complaint at 4, *Berger v. Uber Techs., Inc.*, No. 16-cv-00041 (N.D. Cal. Jan. 5, 2016); Verified Complaint at 1-2, *Ortega v. Uber Techs., Inc.*, No. 15-cv-07387-ILG-JO (E.D.N.Y. Dec. 29, 2015); Complaint and Demand for Jury Trial at 1-2, *Varon v. Uber Techs., Inc.*, No. 15-cv-03650-MJG (D. Md. Nov. 30, 2015); Complaint and Demand for Jury Trial at 1, *Frederic v. Lyft, Inc.*, No. 15-cv-01608 (M.D. Fla. July 8, 2015); Collective and Class Action Complaint and Demand for Jury Trial at 1-2, *Zawada v. Uber Techs., Inc.*, No. 16-cv-11334 (E.D. Mich. Apr. 12, 2016); Complaint and Demand for Jury Trial at 1, *Ogunmokun v. Uber Techs., Inc.*, No. 15-cv-06143 (N.Y. Super. Ct. Sept. 9, 2015); Class Action Complaint at 1, *Bekele v. Lyft, Inc.*, No. 15-cv-11650-FDS (Mass. Super. Ct. Apr. 21, 2015).

cent settlements by 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 for rideshare workers more generally. Certainly, the heaving mass of discontented drivers speaks to this fact. Lead plaintiff in the Uber case, Douglas O'Connor, filed a declaration objecting to the proposed *O'Connor* class action settlement, citing that he had not been “informed and consulted contemporaneously on the details of the settlement agreement” and did not receive a copy of the settlement agreement until after it was publicly announced.<sup>10</sup> Mr. O'Connor 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.”<sup>11</sup> Additionally, since the initial class actions against Uber and Lyft, new class actions have been filed against both companies.<sup>12</sup> Clearly, this matter is anything but resolved.

*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 are not 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 gasoline.

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.<sup>13</sup> State and

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10. *Id.* at 3-4.

11. *Id.*

12. See Plaintiff's Original Class Action Complaint at 1-2, *Trosper v. Uber Techs., Inc.*, No. 16-cv-04842 (N.D. Ill. May 1, 2016); *Razak v. Uber Techs., Inc.*, No. 16-573, 2016 U.S. Dist. LEXIS 96086, at \*3-4 (E.D. Pa. July 21, 2016). For the lawsuit that led to Uber's settlement with drivers in California and Massachusetts, see generally *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

13. See NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2015) [hereinafter INDEPENDENT CONTRACTOR MISCLASSIFICATION], <http://www.nelp.org/content/uploads/Inde>

federal governments have acknowledged as much and responded with amplified investigative, legislative, and enforcement efforts to both understand the processes and costs of misclassification, and to protect workers.<sup>14</sup> Federal and state agencies have partnered to identify misclassification, facilitate the sharing of information among themselves, and increase enforcement. Labor and employment laws are based on the traditional employee-employer relationships. Misclassifying employees as independent contractors facilitates an employer's capacity to cut labor costs and evade their legal responsibilities to workers.<sup>15</sup> Over the last fifteen years, many states have altered their independent contractor statutes and have expanded both enforcement structures and penalties to hold employers accountable for the misclassification of workers.<sup>16</sup>

Workers classified as independent contractors are denied coverage by most labor and employment laws, such as Fair Labor Standards Act of 1938 (FLSA)<sup>17</sup> and the National Labor Relations Act (NLRA).<sup>18</sup> As a result, independent contractors are also denied the remedies to workplace harms. Deprived of coverage under these laws, employees classified as independent contractors are denied critical benefits, including but not limited to, minimum wage protections; overtime compensation; family and medical leave;<sup>19</sup> occupational health and safety laws;<sup>20</sup> anti-discrimination and sexual harassment

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pendent-Contractor-Costs.pdf; see also FRANÇOISE CARRÉ & RANDALL WILSON, CONSTR. POLICY RES. CTR., THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE MAINE CONSTRUCTION INDUSTRY 1-2 (2005), <http://www.law.harvard.edu/programs/lwp/Maine%20Misclassification%20Maine.pdf>.

14. See INDEPENDENT CONTRACTOR MISCLASSIFICATION, *supra* note 13, at 6 (explaining state enforcement actions to claw back unpaid taxes from employers who improperly classify workers as independent contractors).

15. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-859T, EMPLOYEE MISCLASSIFICATION: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 1, 7 (May 8, 2007), <http://www.gao.gov/new.items/d07859t.pdf>.

16. 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).

17. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2012)); see 29 U.S.C. § 203(r)(1) (excluding activities performed by independent contractors).

18. Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2012)); see 29 U.S.C. § 152(3) (excluding individuals that have an "independent contractor" status).

19. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (2012)); see 29 U.S.C. § 2611(2) (excluding employees not within a certain number of miles from a worksite).

20. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (2012)); see 29 U.S.C. §§ 652(6), 654 (explaining duties of employers to employees).

protections;<sup>21</sup> the right to union organizing and collective bargaining;<sup>22</sup> health insurance;<sup>23</sup> sick days and workers' compensation;<sup>24</sup> reimbursement of business-related expenses;<sup>25</sup> unemployment insurance and additional safety net benefits;<sup>26</sup> and Social Security and Medicaid payments credited to employees, and other retirement benefits.<sup>27</sup> 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.

Not only does misclassification affect payroll taxes or cover workers' compensation, but it also affects workers' income.<sup>28</sup> With research showing that misclassification can cut labor costs by twenty to forty percent, rideshare companies are reaping the financial benefits of classifying drivers as independent contractors.<sup>29</sup> Courts, scholars, and the public continue to debate the issue, and drivers continue to endure the pernicious income-based consequences of misclassification.<sup>30</sup>

Misclassification represents a tremendous amount of lost income to rideshare drivers, as a recent National Employment Law Project report noted that "misclassified workers' net income is often signifi-

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21. 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. See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 623–630 (2012)); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 253 (codified at 42 U.S.C. § 2000e-2 (2012)); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000(e) (2012)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified at 42 U.S.C. § 12112 (2012)).

22. Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)); see 29 U.S.C. § 157 (discussing the right of employees to engage in activities for the purpose of collective bargaining).

23. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 (2010)).

24. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at §§ 2601–2654 (2012)); FLSA, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

25. I.R.C. § 162 (2012).

26. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. § 1301 (2012)).

27. Protecting Access to Medicare Act of 2014, Pub. L. No. 113-93, 128 Stat. 1076 (codified as amended at 42 U.S.C. § 1396 (2014)); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.).

28. *Leveling the Playing Field: Protecting Workers and Businesses Affected by Misclassification: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 8–10 (2010) (statement of Seth D. Harris, Deputy Secretary, U.S. Dep't of Labor).

29. *Id.*

30. *Id.*

cantly less than for similar workers paid as employees.”<sup>31</sup> The same report stated that the lead plaintiff in the *O'Connor* class action case “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.”<sup>32</sup>

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 how drivers’ average hourly earnings in Los Angeles are between \$16.37 to \$17.07; Chicago \$15.60 to \$16.12; and New York \$26.03 to \$29.65),<sup>33</sup> 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.<sup>34</sup>

Additionally, rideshare companies have continued to drop fares in an effort to increase demand. In January 2016, Uber cut fares in more than one hundred cities,<sup>35</sup> in some cases by as much as forty-five percent.<sup>36</sup> As a result, some drivers have reported that they are making as little as \$2.89 per hour.<sup>37</sup> Drivers, who are being classified by

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31. SARAH LEBERSTEIN & CATHERINE RUCKELSHAUS, NAT’L EMP’T LAW PROJECT INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY INDEPENDENT CONTRACTOR MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT, 3 (2016), <http://www.nelp.org/publication/independent-contractor-vs-employee/>.

32. *Id.* (footnote omitted).

33. JONATHAN HALL & ALAN KRUEGER, AN ANALYSIS OF THE LABOR MARKET FOR UBER’S DRIVER-PARTNERS IN THE UNITED STATES 18, 23 (2015), [https://s3.amazonaws.com/uber-static/comms/PDF/Uber\\_Driver-Partners\\_Hall\\_Kreuger\\_2015.pdf](https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf). Depending on the number of hours worked, Uber finds that drivers in Los Angeles earn forty-five percent more per hour than taxi drivers and chauffeurs. *Id.*

34. 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 chauffeur 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. *Id.*

35. *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/>.

36. Sage Lazzaro, *Uber Drivers Plan Boycott After 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/>.

37. *Id.* 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

rideshare companies as independent contractors, must pay for costs of vehicle ownership, maintenance, and gasoline; drivers do not receive reimbursement for any business-related expenses.<sup>38</sup> Self-reported driver compensation data available on SherpaShare and NerdWallet<sup>39</sup> 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 forty-eight to fifty-nine percent of drivers) are receiving less than minimum wage and are unable to afford the costs of vehicle ownership and operation previously discussed. This data further indicates that even those drivers who work between twenty and thirty-four hours per week are still earning less than minimum wage.<sup>40</sup>

The consequences of misclassification that go beyond the workers themselves are tremendous. In 2009, a report estimated the cost of general misclassification to 2006 federal revenues was \$2.72 billion.<sup>41</sup>

numerous shifts, with one driver making \$2.89 an hour before expenses, and another making \$3.22 an hour before expenses. *Id.*

38. See 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/>.

39. See *id.*

40. While legal developments indicate that the central labor issue between drivers and transportation network companies is the potential misclassification of drivers as independent contractors, cases filed by rideshare workers also claim wage theft and tip skimming, which paints a worrisome picture of this rapidly growing industry. See, e.g., *Ehret v. Uber Techs., Inc.*, 68 F. Supp. 3d 1121, 1126-27 (N.D. Cal. 2014). 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* 8 (Oct. 15, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2686227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227). Surge pricing is an "algorithmic assessment of supply and demand [that] will temporarily raise fares for a particular geographic location." *Id.* at 7. 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 spent waiting for a ride request with their apps turned on. *Id.* at 8-9. Drivers have also claimed that while the company advertises that gratuity is charged with the fare, drivers do not receive gratuity paid. Maya Kosoff, *Here's How Uber's Tipping Policy Puts Drivers at a Disadvantage*, BUS. INSIDER (Oct. 29, 2014, 2:26 AM), <http://www.businessinsider.com/uber-tipping-policy-2014-10>.

41. MICHAEL PHILLIPS, U.S. DEP'T OF TREASURY, *WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED* 8 (2009), <https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf> (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, *EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION* 2 (2006), <http://www.gao.gov/new.items/d06656.pdf>). The authors arrived at this estimate using the most recent available data, from 1984, which suggested approximately fifteen percent of employers misclassified 3.4 million workers as independent contractors in 1984. *Id.* 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"). *Id.* "[T]he Government Accountability Office adjusted the \$1.6 billion estimate to \$2.72 billion in inflation-adjusted 2006 dollars." *Id.*; see Tom Crowley, *Effective Methods to Detect and Deter Worker Misclassification*, NAT'L ASS'N

This type of misclassification impacts local and state governments supported by payroll and income taxes.<sup>42</sup> Workers' compensation insurance carriers lose premium payments "tied to employee payroll."<sup>43</sup> Christopher Buscaglia, Professor of Business Law, acknowledges that 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 "leads to an unfair distribution of economic burdens, which in turn damages the business environment."<sup>44</sup>

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

Key to understanding the issue of misclassification is the lack of one determinative test concerning the classification of rideshare workers. Instead, both rideshare workers alleging misclassification as well as scholars and policymakers addressing the issue have to wrestle with the fact that different misclassification tests exist for different purposes in federal law, that states maintain their own employee and independent contractor statutes, and that similar common law classifications vary between jurisdictions.<sup>45</sup> 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 various immigration law.<sup>46</sup>

Despite the plethora of divergent classification tests, these can be grouped into three general categories: (1) the traditional or common law control test, which serves as the most dominant test; (2) the economic realities test, which is "used in circumstances where a potential employment relationship has been created by social legislation,"<sup>47</sup> and

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OF STATE WORKFORCE AGENCIES: 2012 UI DIR.'S NAT'L CONFERENCE (Oct. 24, 2012), [http://www.naswa.org/assets/utilities/serve.cfm?gid=86824dbe-575c-4edb-9e93-444cef85c837&dsp\\_meta=0](http://www.naswa.org/assets/utilities/serve.cfm?gid=86824dbe-575c-4edb-9e93-444cef85c837&dsp_meta=0) (providing a brief review of Questionable Employment Tax Practices Initiative (QETP) states' cumulative results for misclassification assessments).

42. See CARRÉ & WILSON, *supra* note 13, at 1-2.

43. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 112, 135-36 (2009) (listing which states use misclassification statutes and which states use common law factor tests).

44. *Id.* at 112, 116 (identifying additional costs shouldered by employers that properly classify employees).

45. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 6.

46. *Id.*

47. Julien M. Munde, *Not Everything that Glitters is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classifica-*

widely used by various jurisdictions and venues, including the DOL;<sup>48</sup> and (3) hybrid tests that combine the control and economic realities tests. As the common law control test remains the dominant one, the other two generally complement the control test, while overlapping one another.<sup>49</sup> Given these varying tests, it is possible for a worker to be considered an employee under one statute yet be considered an independent contractor under another.

The Internal Revenue Service (IRS), along with most government agencies considering worker classification, generally rely on some rendition of the common law test for employment.<sup>50</sup> Under the common law control test, an inquiry into whether rideshare drivers constitute employees centers on rideshare companies' right to control what and how rideshare workers do the work.<sup>51</sup> Important here is that the test does not focus on whether the rideshare companies actually control what and how the work is done, but specifically whether the companies reserve the right to control to do so—not whether they exercise the right.<sup>52</sup> While it focuses primarily on control, this test also considers twenty factors, including, among others, whether instructions and/or training are provided; the employer's business and contractors are integrated; the worker's services are rendered personally; whether the worker hires, supervises, and pays assistants; whether employer has the right to terminate the worker; and whether the worker has the right to terminate the work relationship.<sup>53</sup> Beyond the right to control, all factors need not be considered nor is one factor determinative.<sup>54</sup> In some cases, as with the IRS, the control test has been

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*tion Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 260 (2015); see U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 6.

48. See Mundele, *supra* note 47, at 260. This test is employed by many jurisdictions and venues, including the U.S. Department of Labor, the Social Security Administration, the Fifth Circuit Court, and the National Labor Relations Board (NLRB). *Id.*

49. See Mundele, *supra* note 47, at 261–62.

50. *Id.* at 267–68.

51. See 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).

52. See Tina Quinn, *Worker Classification Still Troublesome*, J. ACCOUNTANCY, March 2009, <http://www.journalofaccountancy.com/issues/2009/mar/workerclassification.html>.

53. See Debbie Whittle Durban, *Independent Contractor or Employee? Getting It Wrong Can Be Costly*, S.C. LAW., Jan. 2010, at 34. The other factors are whether 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; whether the employer pay business and or traveling expenses; whether worker realize a profit or loss; whether the worker can work for multiple firms; and whether the worker can make services available to the general public. *Id.*

54. *Id.*

further simplified to include three main categories: behavior control, financial control, and the relationship of the parties.<sup>55</sup>

Under the economic realities test, the question focuses on whether rideshare workers are economically dependent upon rideshare companies.<sup>56</sup> This test considers a variety of factors, including the control the employer exercised over the worker, the employer's capacity to discipline the worker, the worker's opportunity for profit or loss, the worker's 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.<sup>57</sup>

Under the hybrid test, the court will use the control test and consider additional factors relevant to the nature of the work performed and the relationship between the worker and the employer.<sup>58</sup> Here, courts will consider the skill required, 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.<sup>59</sup> With regard to the relationship between the worker and employer, courts consider whether work performed 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 specific jobs.<sup>60</sup>

#### D. Federal Law

The Fair Labor Standards Act (FLSA) is the primary federal law that establishes minimum wage, overtime pay, and record keeping.<sup>61</sup> The Family and Medical Leave Act (FMLA) defines "employee" as "any individual employed by an employer," with "employer" being defined as "any person acting directly or indirectly in the interest of

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55. *Id.* at 35; see Andrea M. Kirshenbaum, *Labor Department Targets Independent Contractor Misclassification*, LEGAL INTELLIGENCER (Jan. 31, 2013), <http://www.postschell.com/site/files/653.pdf> (stating that the U.S. Dep't of Labor 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 to three factors. *Id.*

56. See Khara Singer Mack, *Litigating Claims of Misclassification of Employees as Independent Contractors*, in 133 AM. JUR. TRIALS 213, § 13 (2016).

57. *United States v. Silk*, 331 U.S. 704, 716 (1947), *abrogated by* *Nationwide Mut. Ins. Co., v. Darden*, 503 U.S. 318, 325 (1992) (recognizing that Congress has amended the National Labor Relations Act and Social Security Act to interpret "employee" using common law principles); Mack, *supra* note 56, § 13.

58. Mack, *supra* note 56, § 18.

59. *Id.*

60. Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L.J. 249, 256 (1998).

61. 29 U.S.C. § 203(e)(1) (2012).

an employer in relation to an employee.”<sup>62</sup> The definition of “‘employ’ includes to suffer or permit to work,”<sup>63</sup> and such a broad definition allows for a wide scope of coverage,<sup>64</sup> which is integral to determinations of employee status and corresponding protections. Distinctly different from the common law test, which 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 test” determines whether a worker is an employee or an independent contractor.<sup>65</sup> The FLSA covers all industries thus rendering employers liable for misclassification claims against them.<sup>66</sup> Each factor is examined, but no one factor is controlling.<sup>67</sup> Courts have been clear in acknowledging that a controlling factor is whether a worker is economically dependent on the employer, not the label an employer uses to describe the working relationship, thereby finding workers who are economically dependent on their employers are covered by the FLSA.<sup>68</sup>

In recent years, the DOL has focused specifically on the issue of misclassification. The DOL has emphasized that the misclassification permits employers to evade tax and unemployment responsibilities and robs state and federal coffers. In 2014, the DOL gave \$10.2 million to nineteen states to combat contractor misclassification, dedicating the money to the improvement of misclassification detection and enforcement initiatives.<sup>69</sup> The DOL has also begun to examine the rules defining employees and independent contractors anew. In 2015, the DOL issued administrative interpretations regarding these FLSA

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62. *Id.* § 203(d).

63. *Id.* § 203(g).

64. See *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); see also *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 295 (1985), *superseded by statute*, 29 C.F.R. § 553.101, *as recognized in* *Purdham v. Fairfax Cty. Sch. Bd.*, 637 F.3d 421, 429 (4th Cir. 2011) (holding that for an individual to be considered a volunteer as opposed to an employee, his/her motivation to work need only be motivated in part by civic, charitable, or humanitarian reasons).

65. Munde, *supra* note 47, at 282; U.S. DEP’T OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA), (2014) [hereinafter FACT SHEET #13], <https://www.dol.gov/whd/regs/compliance/whdfs13.htm>.

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

67. See FACT SHEET #13, *supra* note 65; see also *supra* note 65 and accompanying text (enumerating economic realities test factors under the FLSA).

68. *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013); *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).

69. *\$10.2M Awarded to Fund Worker Misclassification Detection*, Enforcement Activities in 19 State Unemployment Insurance Programs, U.S. DEP’T OF LABOR (Sept. 15, 2014), <https://www.dol.gov/newsroom/releases/eta/eta20141708>.

rules and their application.<sup>70</sup> The DOL's Wage and Hour Division (WHD) reviewed both FLSA's definition of "employ" and the "economic realities" test.<sup>71</sup> WHD did not change its policy, but 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 curbing misclassification."<sup>72</sup> The WHD 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."<sup>73</sup> It also highlights a portion of the economic realities test, noting that "if the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer."<sup>74</sup>

### E. Divergent State Tests, Divergent Outcomes

State efforts to address misclassification include the creation and enforcement of state legislation both targeting and penalizing misclassification.<sup>75</sup> States have created task forces and committees to research trends in misclassification.<sup>76</sup> The tests used to determine worker classification and approaches to correct the ills of misclassification vary from state to state.<sup>77</sup> 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 widely used, including by the DOL;<sup>78</sup> and the hybrid tests or relative nature of work test. Most tests hold that employers bear the burden of showing proper worker classification, even where workers have agreed, verbally or through a written contract, to work as an independent contractor.<sup>79</sup> Also, the purpose for which an employer is classifying that individual will determine the test to be used,

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70. See David Weil, *Administrator's Interpretation No. 2015-1*, U.S. Dep't of Labor (July 15, 2015), [https://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.htm](https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm) (addressing the subject: "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors").

71. *Id.* at 1.

72. *Id.*

73. *Id.* at 2.

74. *Id.* at 6 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947)).

75. Deknatel, *supra* note 16, at 64.

76. *Id.*

77. Mundeley, *supra* note 47, at 253–54.

78. *Id.* at 261–62.

79. See, e.g., MASS. GEN. LAWS ch. 149, § 148B(a) (2013) (stating any individual performing a service is considered to be an employee).

which in some cases can lead to a conflict, as is the case many times with respect to tax courts.<sup>80</sup> 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.<sup>81</sup>

The extent to which state tests vary can and does lead to differing outcomes, even when presented with the same set of facts. 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. In 2015, individual rideshare workers challenging their personal classification were recognized as employees by state agencies in California and Oregon. The Florida Department of Economic Opportunity (FDEO) came to the opposite conclusion.<sup>82</sup> 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.<sup>83</sup>

### 1. Oregon

On October 14, 2015, the Oregon Bureau of Labor and Industries (OBOLI) issued an advisory opinion on the employment status of Uber drivers in response to requests for clarification.<sup>84</sup> The Advisory Opinion analyzed Uber drivers under the economic realities test to determine employment status, ultimately finding that employment relationships did indeed exist.<sup>85</sup> The economic realities test used by the OBOLI required an examination of six factors in the determination of employment status, including:

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;

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80. See Durban, *supra* note 53, at 32–34.

81. *Id.* at 31–35 (comparing the IRS' test with other applicable tests).

82. Brad Avakian, *Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon*, OR. BUREAU LABOR AND INDUS. (Oct. 14, 2015), <http://www.oregon.gov/boli/SiteAssets/pages/press/101415%20Advisory%20Opinion%20on%20the%20Employment%20Status%20of%20Uber%20Drivers.pdf>; see *Rasier LLC v. Fla. Dep't of Econ. Opportunity, Remp't Assistance Appeals*, at 1–2 (Dec. 3, 2015), <http://miamiherald.typepad.com/files/uber-final-order-12-3-15.pdf>; see *infra* notes 111–32 and accompanying text.

83. See *supra* note 82 and accompanying text.

84. Avakian, *supra* note 82.

85. *Id.* at 2.

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.<sup>86</sup>

No one factor was determinative, but Oregon law required fact finders to evaluate the totality of circumstances.

Concerning the right to control, the OBOLI found, "Uber exercises a significant degree of control over the driver's actual work" by unilaterally dictating the fare charged, monitoring driver performance, and disciplining or terminating drivers who do not perform to standard.<sup>87</sup> The advisory opinion concluded that Uber maintains control by using selection, screening, and monitoring processes to determine hiring, firing, and disciplinary action of drivers.<sup>88</sup> Further, the OBOLI recognized Uber as controlling drivers in their provision of specific instructions to drivers concerning conduct, personal appearance, and methods for carrying out services.<sup>89</sup> In its review of each of the remaining factors of the economic realities test, the OBOLI determined an employment relationship existed. The OBOLI cited the following: (1) significant investment to support the business as compared to the minor investment of the driver; (2) the managerial role of Uber and the drivers' inability to solicit business or earn additional income from passengers; (3) the requirement of technical skills (driving) but neither managerial nor business skills; (4) drivers' dependence on Uber's application to perform any work; (5) the permanency or indefinite basis on which drivers are hired; and (6) the critical nature of driver work to Uber's business. The OBOLI went even further, noting that while the state's minimum wage laws exempt taxi drivers, the term "taxicab 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. The OBOLI clarified that even if the exception did apply, "Uber drivers would still be covered by other important workplace protections, including the right to be paid in full and on time and the right to work free from discrimination and harassment."<sup>90</sup>

## 2. California

Under California law, determinations of workers' employment status hinge on a multi-factor economic realities test from *S.G. Borello &*

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Avakian, *supra* note 82, at 4.

*Sons, Inc. v. Department of Industrial Relations*.<sup>91</sup> 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 performed.<sup>92</sup> Importantly, the Supreme Court of California has held that what matters is the existence of the right of control.<sup>93</sup> California courts have recognized that freedom of action (inherent to the nature of the work being done) does not transform an employee into an independent contractor where the employer has the general right to control,<sup>94</sup> nor does an employer need to control every last detail of work to be considered an employer under law.<sup>95</sup> Additionally, the right of the putative employer to discharge the worker at will, without cause, is strong evidence of an employment relationship.<sup>96</sup> This at-will relationship 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, this inquiry is not entirely dispositive, and courts may consider the remaining nine factors of the *Restatement (Second) of Agency*.<sup>97</sup> None of these factors are determinative, and all must be qualitatively assessed as they intertwine.<sup>98</sup> 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.

In June 2015, Uber appealed a ruling by the California Labor Commissioner (Labor Commissioner) that Barbara Berwick, a former driver who filed an administrative action seeking reimbursement for

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91. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

92. *Id.*

93. *See, e.g., Perguica v. Indus. Accident Comm'n*, 179 P.2d 812, 813–14 (Cal. 1947); *Empire Star Mines Co. v. Cal. Emp't Comm'n*, 168 P.2d 686, 692 (Cal. 1946), *overruled by* *People v. Sims*, 651 P.2d 321 (Cal. 1982) (clarifying that an administrative agency can be judicial in nature even though it is prohibited from exercising “judicial power”); *Toyota Motor Sales U.S.A. v. Superior Court*, 269 Cal. Rptr. 647, 652 (Ct. App. 1990).

94. *Burlingham v. Gray*, 137 P.2d 9, 15–16 (Cal. 1943).

95. *Id.* at 16.

96. *Angelotti v. Walt Disney Co.*, 121 Cal. Rptr. 3d 863, 870 (Ct. App. 2011); *see Borello*, 769 P.2d 399 at 404; *Empire Star Mines Co.*, 168 P.2d at 692; *Varisco v. Gateway Sci. & Eng'g Inc.*, 83 Cal. Rptr. 3d 393, 398 (Ct. App. 2008).

97. *See infra* note 117 and accompanying text; *see also Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988–89 (9th Cir. 2014) (quoting *Borello*, 769 P.2d at 404); *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014) (quoting *Borello*, 769 P.2d at 404); *Dynamex Operations W., Inc. v. Super. Ct.*, 179 Cal. Rptr. 3d 69, 75 (Ct. App. 2014) (quoting *Borello*, 769 P.2d at 404), *vacated by Dynamex Operations W. v. S.C. (Lee)*, 341 P.3d 438 (Cal. 2015).

98. *Borello*, 769 P.2d at 404 (quoting *Germann v. Workers' Comp. Appeals Bd.*, 176 Cal. Rptr. 868, 871 (Ct. App. 1981)); *Gonzalez v. Workers' Comp. Appeals Bd.*, 54 Cal. Rptr. 2d 308, 311 (Ct. App. 1996) (quoting *Borello*, 769 P.2d at 404).

business expenses she incurred in connection with her work as an Uber driver, was Uber's employee.<sup>99</sup> Using *Borello*, and as informed by *Yellow Cab Cooperative v. Workers Compensation Appeals Board*,<sup>100</sup> the Labor Commissioner focused on the fact that Uber not only had the right to control, but exercised that right, over its drivers as Uber both obtained clients in need of services and provided workers to perform the services.<sup>101</sup> The Labor Commissioner rejected the idea that drivers' use of their own vehicle for work precluded them from classification as an employee, reasoning that even before *Borello*, California recognized a pizza delivery driver as an employee even though that individual used his own car and paid for his own insurance and gasoline.<sup>102</sup> In determining that an employment relationship existed in Berwick's case, the Labor 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.<sup>103</sup>

In September 2015, California's Employment Development Department (EDD) determined that an ex-Uber driver was an employee and should be entitled to unemployment benefits.<sup>104</sup> The EDD focused on the right to control,<sup>105</sup> and it looked to the decisions of *Santa Cruz Transportation*<sup>106</sup> and *Air Couriers International*<sup>107</sup> to inform the decision. The EDD noted that in *Santa Cruz*, taxi drivers were found to

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99. *Berwick v. Uber Techs., Inc.*, No. CGC-15-546378 (Cal. App. Dep't Super Ct. June 3, 2015) (order of the Labor Commissioner awarding reimbursable expenses to Plaintiff as an employee pursuant to the California Labor Code), *appeal docketed*, No. A146460 (Ct. App. June 16, 2015).

100. *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 277 Cal. Rptr. 434 (Ct. App. 1991).

101. *Id.* at 439–40 (citing *Borello*, 769 P.2d at 404).

102. *Berwick v. Uber Techs., Inc.*, No. 11-46739-EK, at \*8 (Cal. Labor Comm'r June 3, 2015); see *Toyota Motor Sales U.S.A.*, 269 Cal. Rptr. 647, 653 (Ct. App. 1990) ("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" (quoting *Press Pub. Co. v. Indus. Acc. Comm.*, 210 P. 820, 823 (Cal. 1922))).

103. *Berwick*, No. 11-46739-EK, at \*8–9.

104. *State of Cal. Unemp't Ins. Appeals Bd. v. Uber Techs., Inc.*, No. 5371509, at \*2 (June 1, 2015), <http://uberlawsuit.com/Uber%20Case%20No.%205371509.pdf>.

105. *Id.* at \*7 (quoting *Empire Star Mines Co. v. Cal. Emp't Comm'n*, 168 P.2d 680, 692 (Cal. 1946)).

106. *Santa Cruz Transp., Inc. v. Unemp't Ins. Appeals Bd.*, 1 Cal. Rptr. 2d 64 (Ct. App. 1991).

107. *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37 (Ct. App. 2007).

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 drivers’ access to Uber’s mobile application platform for drivers who do not maintain specific customer review or ride acceptance ratings.<sup>108</sup> The EDD also compared Uber drivers to the delivery drivers in *Air Couriers International*, who 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.<sup>109</sup> In the beginning of 2016, the EDD recognized yet another Uber driver as an employee, awarding him unemployment compensation.<sup>110</sup>

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

### 3. *Florida*

In contrast to Oregon and California, Florida recognizes drivers as independent contractors. Plaintiffs Darrin McGillis and Melissa Ewers, both Uber drivers in Florida, filed claims for Reemployment Assistance in April 2015. Their eligibility for unemployment insurance benefits depended on their worker classification because independent contractors do not qualify for such benefits.<sup>111</sup> While the Department of Revenue originally issued determination findings indicating an employment relationship existed in both cases, Uber filed a protest soon after, and then the Special Deputy recommended that both McGillis and Ewers be classified as independent contractors.<sup>112</sup> After both drivers filed exceptions to the Recommended Order, and after Uber filed Counter Exceptions, the Executive Director of FDEO reviewed the case and issued a Final Order in December 2015.<sup>113</sup> The Final

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108. State of Cal. Unemp’t Ins. Appeals Bd., No. 5371509, at \*8.

109. *Id.* at \*8–9.

110. Marisa Kendall, *Uber Driver Wins Unemployment Benefits*, SANTA CRUZ SENTINEL (Mar. 7, 2016, 3:51 PM), <http://www.santacruzsentinel.com/article/NE/20160307/NEWS/160309729>.

111. *Rasier LLC v. Fla. Dep’t of Econ. Opportunity, Remp’t Assistance Appeals*, at 3 (Dec. 3, 2015), <http://miamiherald.typepad.com/files/uber-final-order-12-3-15.pdf>.

112. *Id.* at 3–4.

113. *Id.* at 4, 26.

Order upheld the findings of the Recommended Order, which determined McGillis and Ewers were independent contractors.<sup>114</sup>

To determine whether an employment relationship existed, the FDEO utilized the standard set forth in the *Restatement (Second) of Agency*, recognized by Florida Supreme Court as the appropriate determinative test,<sup>115</sup> which places an employer's right to control at the center of the classification inquiry.<sup>116</sup> The *Restatement*, however, goes beyond mere control to provide a list of ten factors courts must consider in such determinations. These factors are:

- (a) the extent of control which, by the [parties'] agreement, the [employer] may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work . . . ;
- (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.<sup>117</sup>

In its review, the FDEO placed significant emphasis on the agreement between the parties, which stated McGillis and Ewers were independent contractors, citing *Keith v. News & Sun Sentinel Co.*, in which the Florida Supreme Court noted, "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, demonstrates that this is not a valid indicator of status."<sup>118</sup> The FDEO 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

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114. *Id.* at 26.

115. See *Cantor v. Cochran*, 184 So. 2d 173, 174–75 (Fla. 1966); *Keith v. News & Sun Sentinel Co.*, 667 So. 2d 167, 172–73 (Fla. 1995); *Miami Herald Publ'g Co. v. Kendall*, 88 So. 2d 276, 279 (Fla. 1956); *Magarian v. S. Fruit Distrib.*, 1 So. 2d 858, 860 (Fla. 1941).

116. RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958).

117. *Id.* § 220(2).

118. *Keith*, 667 So. 2d at 171.

some factors in its favor.”<sup>119</sup> The Executive Director emphasized that priority should be given to the contents of the contractual agreement between the parties and to whether the right to control exists on the part of the potential employer.<sup>120</sup> As to the nature of the relationship expressed in the contract, the FDEO noted that the contractual language stipulated that McGillis and Ewers were independent contractors and not employees.<sup>121</sup> As this is the case with all rideshare driver contracts, the finding is unsurprising; however, when reviewing whether Uber had the right to control the details of the drivers’ work, the court adopted an exceedingly narrow view of control. The court found only a “minimal level of control” in the case of Uber, suggesting that Uber was allowing drivers to work whenever they have a “whim to work, demanding no particular work be done at all even if customers will go unserved . . . 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.”<sup>122</sup>

The FDEO found that Uber drivers retained the ability to: (1) choose their own passengers via Uber’s Driver App; (2) decide what car to use and how to present it; (3) be assigned for work based solely on distance from a potential passenger and not on performance measures or seniority; (4) disregard Uber’s recommendations on driver presentation, performance, or interaction with customers; (5) decide if and when they will work for Uber; (6) decide the manner in which they perform the job and determining the route and speed they will drive; (7) be free of direct supervision and evaluation by Uber; and (8) take cash tips without having to reporting the same to Uber.<sup>123</sup> 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.<sup>124</sup> The FDEO cited *La Grande v. B&L Services, Inc.*,<sup>125</sup> 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

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119. *Rasier LLC v. Fla. Dep’t of Econ. Opportunity*, Nos. 0026-2834-68-02, 0026-2825-90-02, Final Order at 1–2 (Dec. 3, 2015), <http://miamiherald.typepad.com/files/uber-final-order-12-3-15.pdf>.

120. *Id.* at 7–8.

121. *Id.* at 8–9.

122. *Id.* at 11.

123. *Id.* at 9–10.

124. *Id.* at 15.

125. 432 So. 2d 1364 (Fla. Dist. Ct. App. 1983).

taxi worker.<sup>126</sup> The FDEO drew specific attention to the fact that “the [taxi] company in *La Grande* had *greater* control 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.”<sup>127</sup>

The FDEO also criticized the recent administrative decisions from California and Oregon that found an employer-employee relationship existing between Uber and drivers, arguing they were unpersuasive and “seem to misconstrue the nature of the Uber-driver relationship.”<sup>128</sup> The FDEO charged that the California Labor Commissioner’s “overreliance on that single factor—line of work—is not consistent with Florida law,”<sup>129</sup> further arguing that the Labor Commission’s position was at odds with the *Restatement’s* multi-factor analysis and emphasis on right to control.<sup>130</sup> FDEO’s 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.<sup>131</sup> The FDEO then warned against the dangers of “transforming middlemen into employers,” charging to do so would “upend economic progress.”<sup>132</sup>

### III. RECENT SETTLEMENTS

Across the nation, rideshare drivers have filed multiple class action lawsuits, claiming companies that misclassified them as independent contractors.<sup>133</sup> Rideshare companies have invested a tremendous amount in quashing these claims by investing resources, not just through litigation but also lobbying efforts, to gain public and legislative support.<sup>134</sup> As of June 2015, Uber alone has employed two hundred fifty lobbyists and twenty-nine lobbying firms registered around the nation (one third more than Wal-Mart), not including those at the municipal level.<sup>135</sup> At least in some cases, Uber has come under fire

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126. *Id.* at 1367–68.

127. *Rasier LLC v. Fla. Dep’t of Econ. Opportunity*, Final Order at 17 (Dec. 3, 2015), <http://miamiherald.typepad.com/files/uber-final-order-12-3-15.pdf>.

128. *Id.*

129. *Id.* at 18.

130. *Id.*

131. *Id.* at 18–19.

132. *Id.* at 19.

133. *See supra* note 9 and accompanying text.

134. Karen Weise, *This Is How Uber Takes Over a City: To Conquer America’s Quirkiest City, the Company Unleashed Its Biggest Weapon*, BLOOMBERG (June 23, 2015), <http://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city>.

135. *Id.*

for accused lobbying violations, failing to register lobbyists, failing to report their lobbying activities, and having a general pattern of non-compliance, noncooperation, and incomplete disclosure.<sup>136</sup> 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 their rights.

In 2016, Uber and Lyft reached settlements with their drivers in the country's two leading cases, *O'Connor v. Uber Technologies Inc.*<sup>137</sup> and *Cotter v. Lyft, Inc.*<sup>138</sup> The Lyft settlement received preliminary approval,<sup>139</sup> and the Uber settlement been denied the same.<sup>140</sup> While neither settlement has received final approval, recent developments cast a shadow of uncertainty as to whether the cases will be settled at all in the end. An examination of the settlements brings both clarity

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136. Jim Redden, *City Auditor Fines Uber \$2,000 for Lobbying Violations*, PORTLAND TRIB. (Jan. 5, 2016), <http://portlandtribune.com/pt/9-news/287593-164621-city-auditor-fines-uber-2000-for-lobbying-violations>.

137. *O'Connor v. Uber Techs. Inc.*, No. 13-cv-03826-EMC, 2016 U.S. Dist. LEXIS 110281 (N.D. Cal. Aug. 18, 2016).

138. *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2016 WL 3561742 (N.D. Cal. June 23, 2016) (Order Granting Motion for Preliminary Approval of Class Action Settlement), <http://hr.cch.com/ELD/CotterLyft062316.pdf>.

139. *Cotter*, No. 13-cv-04065, at \*1.

140. *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4398271, at \*1 (N.D. Cal. Aug. 18, 2016). On September 1, 2015, the District Court for the Northern District of California granted the drivers' motion for class certification. *O'Connor v. Uber Techs.*, No. 13-3826 EMC, at \*6-7 (N.D. Cal. Sept. 1, 2015) (Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification). On June 30, 2016, Judge Chen issued an order responding to Uber's Motion for Preliminary Approval, withholding approval for lack of sufficient information with which to determine whether the settlement was fair, reasonable, and adequate for drivers in California and Massachusetts. *O'Connor v. Uber Techs.*, No. C-13-cv-03826-EMC, 2016 U.S. Dist. LEXIS 85641, at \*9 (N.D. Cal. June 30, 2016) (Order RE Plaintiffs' Motion for Preliminary Approval). Particularly, Chen noted that more information was necessary to: evaluate the relative value of the proposed settlement; determine whether the named plaintiffs are appropriate class representatives for those new claims being added to the case; determine whether the calculation of the Private Attorney General Act of 2004 (PAGA) penalties is accurate and discount in potential PAGA recovery warranted; provide clarity to nonmonetary provisions; provide clarity as to whether the release applies only to those claims related to misclassification; provide clarity as to whether the Court should terminate its Rule 23(d) orders and thus allow Uber to issue a new arbitration agreement; provide clarity regarding an improved class action opt-out process. *Id.* at \*10-16. After ordering a supplemental briefing by the parties, Judge Chen denied preliminary approval of the settlement on August 18, 2016. *O'Connor*, 2016 WL 4398271, at \*1. John Cumming, lawyer for California's Labor and Workforce Development Agency, questioned the adequacy of the settlement in a letter submitted to the *O'Connor* court, detailing that should Uber go to trial, the penalties incurred for misclassification in the case could surpass one billion dollars, with the state being entitled to three-fourths of the amount and drivers being awarded the rest. Bob Egelko, *State Questions Its Share of Proposed Deal Between Uber, Drivers*, SF-GATE (July 29, 2016, 7:38 PM), <http://www.sfgate.com/bayarea/article/State-questions-its-share-of-proposed-deal-8680222.php>.

and context to key issues the courts and policymakers confront as they consider the labor issues facing workers in the rideshare sector.

Petitioners in both cases filed putative class action lawsuits against the rideshare companies, alleging violations of the California Labor Code and seeking classification as employees.<sup>141</sup> Rideshare drivers in each case contended that they were employees misclassified as independent contractors, and thus they were denied protections provided under the California Labor Code,<sup>142</sup> including minimum wage and overtime pay,<sup>143</sup> reimbursement for all reasonable and necessary work-related expenses,<sup>144</sup> meal and rest breaks,<sup>145</sup> workers' compensation,<sup>146</sup> and employer contributions to unemployment insurance.<sup>147</sup> Rideshare drivers claimed that they were not consistently paid minimum wage,<sup>148</sup> because companies unilaterally set trip prices and continually decrease the rate at which drivers were paid per trip while increasing the companies' take of that revenue.<sup>149</sup> Additionally, drivers claimed they did not receive any reimbursement for expenses and were required to pay for their own gasoline, vehicle maintenance, and other expenses.<sup>150</sup>

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141. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) ("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 (West 2011))); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) ("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)).

142. *O'Connor*, 2016 WL 4398271, at \*1; *Cotter*, 60 F. Supp. 3d at 1073.

143. CAL. LAB. CODE § 1194 (West 2011).

144. CAL. LAB. CODE § 2802 (West Supp. 2016).

145. CAL. LAB. CODE § 226.7 (West Supp. 2016).

146. CAL. LAB. CODE § 3700 (West 2011).

147. CAL. UNEMP'T INS. CODE § 976 (West 2013).

148. *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2016 U.S. Dist. LEXIS 50579, at \*5 (N.D. Cal. Apr. 7, 2016).

149. 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>.

150. *Cotter*, 2016 U.S. Dist. LEXIS 50579, at \*2, \*4. 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 by forcing them to compete with those companies that avoid taxes by misclassifying workers, as well as those state and local governments that lose those tax payments toward unemployment insurance, payroll, and workers' compensation. Benjamin E. Widener, *The Impact of the Uber Ruling and Issues of Employment Misclassification*, NAT'L L. REV. (July 2, 2015), <http://www.natlawreview.com/article/impact-uber-ruling-and-issues-employment-misclassification>.

In both cases, the 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, then the person performing the service is generally presumed to be an employee and deemed to have established a prima facie case of an employer-employee relationship; further, the burden shifts to the putative employer to prove that workers were actually independent contractors.<sup>151</sup> Inasmuch, the courts recognized that the drivers performed a service for the companies and denied the motions for summary judgment, with the *O'Connor* court holding that Uber drivers are “presumptive employees,”<sup>152</sup> and the *Cotter* court opining that “a reasonable jury could conclude that the plaintiff Lyft drivers were employees.”<sup>153</sup> To determine whether the rideshare companies could rebut a prima facie showing of employment, the courts reviewed the *Borello* indicators of an employment relationship.<sup>154</sup>

Both courts recognized that drivers provided a service to the rideshare companies. The *O'Connor* court outright rejected Uber’s argument that it is “a ‘technology company’ that generates ‘leads’ for its transportation providers through its software”<sup>155</sup> as “fatally flawed in numerous respects,”<sup>156</sup> ultimately holding that drivers unequivocally performed a service for Uber because “Uber simply would not be a viable business entity without its drivers.”<sup>157</sup> In examining the

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151. See *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).

152. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1143 (N.D. Cal. 2015).

153. *Cotter*, 2016 U.S. Dist. LEXIS 50579, at \*13.

154. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1075–77 (N.D. Cal. 2015) (citing S.G. *Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 406–07, 416 (Cal. 1989)); see *supra* notes 91–97 and accompanying text.

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

156. *Id.*

157. *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 at 1078. The court rejected this argument as “not a serious one.” *Id.* (citing *Yellow Cab v. Workers Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 437 (Ct. App. 1991)). In *Yellow Cab*, the California Court of Appeal held taxi drivers were employees for workers’ compensation purposes. *Yellow Cab*, 277 Cal. Rptr. at 435. *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, at \*18 (D. Mass. July 3, 2013) (stating 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, rev’d in part*, 813 F.3d 429, 432 (1st Cir. 2016) (holding that the Federal Aviation Administration Authorization Act preempts Massachusetts’

right to control work, both the *O'Connor* and *Cotter* courts placed significant emphasis on the rights of Uber and Lyft to terminate at will and without cause.<sup>158</sup> Acknowledging that companies contractually reserve and act on that right, both courts noted 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.<sup>159</sup> The courts also recognized that the companies established control by establishing driver qualifications, evaluating drivers' performance based on customer reviews, and retaining the ability to unilateral change service rates.

In *O'Connor*, Uber argued that the limited extent to which it monitored drivers did not amount to control or warrant drivers' classification as employees.<sup>160</sup> In this respect, Uber distinguished itself from *Alexander v. FedEx Ground Package System, Inc.*,<sup>161</sup> in which the court found that FedEx drivers were employees, at least in part, because management accompanied drivers in ride-alongs four times per year.<sup>162</sup> Uber reasoned that it never conducted driver performance inspections or ride-alongs, and thus did not monitor drivers.<sup>163</sup> The court dismissed Uber's contention, noting that Uber drivers were monitored during every single ride by a customer rating system that could result in driver termination.<sup>164</sup> The customer rating system, the court maintained, gave Uber incredible control over the manner and means of its drivers' performance.<sup>165</sup>

The *O'Connor* court placed 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

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independent contractor classification statute, MASS. GEN. LAWS ch. 149, § 148B (2013), on which the court's earlier decision was based).

158. *Cotter*, 2016 U.S. Dist. LEXIS 50579, at \*19; *O'Connor*, 82 F. Supp. 3d at 1142.

159. *Cotter*, 2016 U.S. Dist. LEXIS 50579, at \*19; *O'Connor*, 82 F. Supp. 3d at 1142; *see also* *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010); *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014) (citing *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)).

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

161. 765 F.3d 981 (9th Cir. 2014).

162. *Id.* at 985.

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

164. *Id.*

165. *Id.*

Uber a tremendous amount of control over the “manner and means” of its drivers’ performance.<sup>166</sup>

Uber argued that its drivers retained flexible schedules, only worked when they wanted to,<sup>167</sup> and were under no obligation to accept Uber’s leads;<sup>168</sup> yet Uber’s Driver Handbook noted that drivers were expected to accept all ride requests, and those who rejected too many trips would be investigated and potentially terminated.<sup>169</sup> 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,<sup>170</sup> acknowledging that employee status could indeed exist where freedom is an inherent part in the worker’s job,<sup>171</sup> and concerning the right of control, that the facts tended to cut against Lyft.<sup>172</sup> Both courts concluded that the question of whether an employment relationship exists must go to a jury as reasonable people could differ on the ultimate determination.<sup>173</sup>

Both the Uber and Lyft settlements have monetary and nonmonetary components. The total monetary component of the Uber settlement,<sup>174</sup> which included settlement of not just *O’Connor v. Uber Technologies Inc.* but also Massachusetts case *Yucesoy v. Uber Technologies, Inc.*,<sup>175</sup> amounted to \$84 million plus an additional \$16 million conditional payment.<sup>176</sup> Although the settlement covered both

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166. *Id.* at 1151–52 (citing MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 201 (Alan Sheridan Trans., Vintage Books 2d ed. 1991) (1977) (discussing a state of conscious and permanent visibility that assures the automatic functioning of power)).

167. Uber drivers must give at least one ride every 180 days or every 30 days, depending on the program they use. *O’Connor*, 82 F. Supp. 3d at 1149.

168. *Id.*

169. *Id.*

170. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1075–76 (N.D. Cal. 2015).

171. *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.* 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 don’t follow” its rules. *Id.*

172. *Id.* at 1079.

173. *O’Connor*, 82 F. Supp. 3d at 1152; *Cotter*, 60 F. Supp. 3d at 1078.

174. Class Action Settlement and Release at 13–14, *O’Connor v. Uber Techns., Inc.*, No. 13-cv-03826-EMC, 2013 U.S. Dist. LEXIS 120406 (N.D. Cal. Aug. 23, 2013) [hereinafter *Uber Class Action*].

175. No. 15-cv-00262-EMC, 2016 U.S. Dist. LEXIS 110281 (N.D. Cal. Aug. 18, 2016).

176. *Id.* at 21. 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 deter-

California and Massachusetts drivers, the bulk of the settlement, around \$93 million, was for California drivers.<sup>177</sup> Certainly, the entire settlement amount would not have gone directly to drivers; the settlement included regular and enhanced payments to drivers in the settlement class, fee and expense awards,<sup>178</sup> escrow fees, settlement fund taxes and expenses, employee and employer payroll taxes,<sup>179</sup> PAGA payment,<sup>180</sup> 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).”<sup>181</sup> Driver payments were not calculated to be uniform. Drivers who contributed meaningfully to the litigation before the NLRB received enhanced payments, with no one payment to exceed \$73,000.<sup>182</sup>

The nonmonetary portion of the settlement mandated certain revisions to Uber’s Software Licensing Agreements and modifications to Uber’s business practices. With regard to their deactivation policy, Uber agreed to (1) only deactivate driver accounts for sufficient cause and no longer deactivate drivers at will for low acceptance rates (although Uber retains the ability to deactivate drivers for high rates of cancellation); (2) publish to the Internet a comprehensive deactivation policy that is easy to both read and access; (3) provide at least two warnings before deactivation resulting from something other than issues regarding safety, discrimination, fraud, or illegal conduct; (4) provide drivers with explanations for deactivations; (5) ensure an appeal

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mined by Uber, of at least 1 ½ times the most recent valuation at which Uber Technologies, Inc. last sold stock to third party investors of [redacted] or (ii) the date of the closing of a Change in Control of Uber Technologies, Inc. within 36 months of the 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 ½ times the most recent valuation at which Uber Technologies, Inc. last sold stock to third party investors of [redacted].

*Id.* at 13–14.

177. *O’Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4398271, at \*4 (N.D. Cal. Aug. 18, 2016).

178. The Class Counsel Fee and Expense Award is not to exceed twenty-five percent of settlement award. *Id.* at \*35.

179. *Id.* at \*31. Driver payments under the settlement will be treated as wages reported on IRS Form W-2, with remaining funds treated as non-wage income, which is not subject to payroll withholdings and reported on an IRS Form 1099. *Id.* at \*33–35.

180. “‘PAGA Payment’ means a total payment of one million dollars (\$1,000,000) to settle all claims under PAGA.” See PAGA, CAL. LAB. CODE § 2699 (West Supp. 2016). The law allows private citizens to pursue civil penalties on behalf of the State of California LWDA provided that formal notice and waiting procedures are followed. *Id.* § 2699(i). 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%. *Id.* From the PAGA, payment in the Uber settlement, 75% or \$750,000 will be paid to the LWDA as civil penalties pursuant to PAGA and 25% or \$250,000 will be distributed to driver claimants. Uber Class Action, *supra* note 174, at 19.

181. Uber Class Action, *supra* note 174, at 31.

182. *Id.* at 35.

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, including 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”;<sup>183</sup> (8) and provide more information regarding star ratings.<sup>184</sup>

The settlement also provided that “Uber will allow for the establishment of an 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.”<sup>185</sup> It also provided that drivers will have the opportunity to elect leaders of the Association who will meet on a quarterly basis with Uber management to discuss and resolve issues affecting drivers.<sup>186</sup> Uber is required to pay the Association for incidental expenses (e.g., phones, printing, meeting space) so as to enable it to carry out its basic functions.<sup>187</sup>

While the settlement, upon first glance, may seem like a large and sufficient win for drivers, it is far from it. Certainly, the *O'Connor* court recognized this in denying plaintiffs’ motion for preliminary approval. If all eligible drivers submitted claims, on average drivers would collect between \$24 to \$1,950; California drivers would receive between \$10 to \$836, and Massachusetts drivers would receive between \$12 to \$979. The majority of drivers, however, would receive no more than \$100 each.<sup>188</sup> That said, those same drivers would be collectively entitled to an estimated \$730 million in expense reimbursements if recognized as employees rather than independent contractors.<sup>189</sup>

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183. *Id.* at 36–37.

184. *Id.* at 37. 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.* at 37–38.

185. *Id.* at 38.

186. *Id.* at 39.

187. *Id.* at 38–39.

188. *O'Connor*, 2016 WL 4398271, at \*4.

189. Dan Levine, *Uber Drivers Owed \$730 Million More If Employees, According to Court Documents*, HUFFINGTON POST (May 9, 2016, 5:22 PM), <http://www.huffingtonpost.com/entry/>

Perhaps most importantly, the settlement contained a provision requiring settlement class members—all drivers in both California and Massachusetts—to release any and all claims based on or reasonably related to the employment misclassification claim, including those related to overtime, minimum wage, meal and rest breaks, and workers' compensation.<sup>190</sup> The settlement would result in the immediate and effective termination of a number of pending driver lawsuits against Uber in federal and California state courts, as well as any pending claims before the NLRB.<sup>191</sup> The agreement also provides final settlement of all civil penalties potentially due under PAGA, thus terminating any pending PAGA lawsuits against Uber as well.<sup>192</sup>

The Lyft settlement calls for \$27 million in monetary relief, including costs of claims administration, attorneys' fees and costs, class representative enhancements, and \$1 million to plaintiffs' PAGA claim (California's LWDA will receive \$750,000, or approximately 3.7% of the gross settlement).<sup>193</sup> The funds will be allocated to drivers based on a points system that considers the amount of work performed for Lyft. Drivers who work more than thirty hours per week (in at least fifty percent of the weeks in that time period) receive double the points, thereby resulting in an enhanced payment.<sup>194</sup> Drivers who

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uber-drivers-owed-730-million-more-if-employees-according-to-court-documents\_us\_5730fe0fe4b016f37896bc1b.

190. Uber Class Action, *supra* note 174, at 22–23. The agreement specifically required that drivers file amended complaints expanding the causes of action to include all claims regarding the alleged misclassification of drivers as independent contractors. *Id.*

191. *O'Connor*, 2016 WL 4398271, at \*5–6. The court detailed a list of impacted suits in the Order itself, including:

(1) Price v. Uber Technologies, Inc., Case No. BC554512; (2) Del Rio v. Uber Technologies, Inc., Case No. 3:15-cv-3667-EMC; (3) Berger v. Uber Technologies, Inc., Case No. 3:16-cv-41-MEJ; (4) In re Uber FCRA Litigation, Case No. 3:14-cv-5200-EMC; (5) Ghazi v. Uber Technologies, Inc., Case No. CGC-15-545532; (6) Richardson v. Uber Technologies, Inc., Case No. RG15775562; (7) Zine v. Uber Technologies, Inc., Case No. BC591351; (8) Narsi v. Uber Technologies, Inc., Case No. BC599027; (9) Tabola v. Uber Technologies, Inc., Case No. CGC-16-550992; (10) Barajas v. Uber Technologies, Inc., Case No. CGC-16-550198; (11) Aquino v. Uber Technologies, Inc., Case No. BC608873; (12) Adzhemyan v. Uber Technologies, Inc., Case No. BC608874; (13) Gollnick v. Uber Technologies, Inc., Case No. CGC-15-547878; (15) Mokeddas v. Uber Technologies, Inc., Case No. RG16807483; and (15) Berwick v. Uber Technologies, Inc., Case No. CGC-15-546378 (appeal of Labor Commissioner award).

*Id.* at 11 n.6. The settlement may also affect proceedings before administrative agencies, such as the NLRB. *See, e.g.,* NLRB v. Uber Tech., Inc., Case No. 16-80057-KAW (N.D. Cal. Aug. 18, 2016).

192. *Id.* at 11.

193. Cotter v. Lyft, Inc., No. 13-cv-04065, at \*3 (N.D. Cal. June 23, 2016) (Order Granting Motion for Preliminary Approval of Class Action Settlement), <http://hr.cch.com/ELD/CotterLyft062316.pdf>.

194. Notice of Motion and Motion and Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Approval of Revised Class Action Settlement at 5–6, Cotter v.

worked for Lyft in the time period during which payments for rides were voluntary and during which Lyft took an “administrative fee” from such payments will receive enhanced points amounting in a twenty percent increase.<sup>195</sup>

The settlement requires revisions to Lyft’s Terms of Service and business practices. With regard to their deactivation policy, Lyft will no longer deactivate drivers at will, and instead will only retain the right to deactivate drivers “for specific delineated reasons and after notice and an opportunity to cure”;<sup>196</sup> provide drivers the ability to contend deactivation constitutes breach of contract by Lyft, as well as an accessible avenue to challenge such breaches; 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 either rides or operate their vehicles; pay all arbitration-specific fees for the drivers who want to challenge their termination claims before a neutral arbitrator; and remove from its Terms of Service the provision permitting deactivation for drivers creating liability for Lyft or causing Lyft to become subject to regulation as a transportation carrier or provider of taxi service.<sup>197</sup> 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 all drivers (deactivated or not) can resolve minor disputes with Lyft without having to invoke the arbitration process; provide additional passenger information to drivers prior to drivers accepting any ride request, so drivers retain the information necessary to determine whether to accept or decline the ride request; and create a “favorite” driver option which entitles favorite drivers to certain benefits.<sup>198</sup>

Drivers under the settlement will collect an average of \$141.98 each; however, 90,000 drivers will be awarded no more than \$42 each and only eighty or so will receive an average of \$5,556 or more each.<sup>199</sup> Like the Uber settlement, the Lyft settlement also releases all employment claims related to the alleged misclassification of drivers prior to

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Lyft, No. 13-cv-04065-VC, 2016 WL 1394236 (N.D. Cal. April 7, 2016) [hereinafter Revised Class Action Settlement].

195. *Id.* at 6.

196. *Id.* at 1.

197. *Id.* at 1–2.

198. *Id.* at 7–8. The additional passenger information includes passenger ratings, estimated time to passenger pickup, and more detailed passenger profile information. *Id.*

199. Joel Rosenblatt, *Lyft’s Revised Pay Accord with Drivers Questioned by Judge*, BLOOMBERG (June 2, 2016, 10:37 AM), <http://www.bloomberg.com/news/articles/2016-06-02/lyft-pay-settlement-with-drivers-seen-by-judge-needing-work>.

the date of preliminary approval. Unlike the *O'Connor* settlement, drivers do not release any claims against Lyft that arise after preliminary approval and are not prohibited from making future challenges alleging misclassification.<sup>200</sup> Both Uber and Lyft settlements will impact other pending driver litigation.<sup>201</sup> All in all, when the full context of these settlements are considered, even if final settlement is achieved, the underlying issues of worker misclassification remain unresolved.

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

The debate regarding the way in which rideshare drivers should be classified extends beyond the courtroom. In December 2015, Alan Krueger<sup>202</sup> and Seth Harris<sup>203</sup> argued that rideshare workers belonged to a new category of employee, which they termed “independent workers,” deserving of some workplace protections but not all.<sup>204</sup> On one side, they reason that just as rideshare companies claim, drivers are not employees because drivers set their own schedules; yet, the authors also offer that drivers are not independent contractors either because rideshare companies set driver pay rates and other conditions.<sup>205</sup> Thus, the authors argue, a new category of worker, the “in-

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200. Notice of Motion and Motion and Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary Approval of Revised Class Action Settlement at 9, *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC (N.D. Cal. May 11, 2016), <https://www.scribd.com/doc/312306496/Lyft-Revised-Settlement-Mtn>.

201. Plaintiffs in *Zamora v. Lyft, Inc.*, filed a motion to intervene in *Cotter*. No. 16-cv-02558-VC 2016 U.S. Dist. LEXIS 155027. The *Zamora* suit alleged tip stealing and misclassification, with drivers pursuing a PAGA claim. *Cotter v. Lyft, Inc.*, No. 13-cv-04065, at \*3–4 (N.D. Cal. June 23, 2016) (Order Granting Motion for Preliminary Approval of Class Action Settlement), <http://hr.cch.com/ELD/CotterLyft062316.pdf>. Because the *Cotter* settlement requires the release all gratuity claims for the class, any driver who is part of the *Cotter* class settlement automatically foregoes the PAGA gratuity claim in the *Zamora* case. *Id.* at \*4. The *Cotter* court permitted counsel for the *Zamora* plaintiffs appeared at the hearing on the motion for preliminary approval, whereupon *Zamora* plaintiffs posited that *Cotter* should “(i) carve out these claims from the release language of the settlement agreement; or (ii) add money to the settlement total to account for the value of these claims for the class.” *Id.* at \*5, \*9. The *Cotter* court remained unpersuaded, and noting that “the gratuity claims asserted by the *Zamora* plaintiffs do not seem very strong” approved the settlement as proposed. *Id.* at \*11.

202. Professor, Department of Economics and Woodrow Wilson School, Princeton University; Ph.D. in Economics 1987, Harvard University.

203. Distinguished Scholar, School Industrial & Labor Relations, Cornell University; Deputy, U.S. Sec’y of Labor; Member, President Obama’s cabinet.

204. SETH D. HARRIS & ALAN B. KRUEGER, HAMILTON PROJECT, A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker” 5 (2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

205. *Id.*

dependent worker,” is necessary.<sup>206</sup> 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,”<sup>207</sup> they maintain that these workers “would not qualify for hours-based benefits, including overtime or minimum wage requirements.”<sup>208</sup> Krueger and Harms consider it “conceptually impossible to attribute [rideshare drivers’] work hours to any single [company]” in those cases where drivers utilize multiple rideshare applications simultaneously.<sup>209</sup>

Larry Mishel<sup>210</sup> and Ross Eisenbrey<sup>211</sup> argue to the contrary, noting that not only are rideshare companies capable of tracking hours in this way, but that the companies already do that tracking.<sup>212</sup> The authors argue that Uber already measures the time drivers have their apps running, and Uber has a guaranteed wage program that evidences its capacity to ensure hours tracking and minimum wage obligations can be effectively administered.<sup>213</sup> They also cite Alex Rosenblat and Luke Stark, noting that drivers do not retain the capacity to ignore the app and tend to personal errands once it is turned on without risking potential termination or disciplinary action by the company.<sup>214</sup> They argue that drivers may be compensated for the time spent waiting for a new fare by that employer whose driver accepts the ride, the fluid nature of which does not necessitate an alternative worker classification.<sup>215</sup> Ultimately, Mishel and Eisenbrey reason that Uber drivers are employees.<sup>216</sup>

With such divergent outcomes in worker classification decisions of rideshare 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; however, the substantial similarities between the major tests and essentially uniform company policies and practices allow for a meaningful review of the relevant facts. This review can guide courts,

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206. *Id.*

207. *Id.* at 2.

208. *Id.*

209. *Id.*

210. President, Econ. Pol’y Inst.; Ph.D. in Economics, Univ. of Wis. at Madison.

211. Vice-President, Econ. Pol’y Inst.; J.D., Univ. of Mich. Law School.

212. Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New ‘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/>.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

policymakers, researchers, and other stakeholders in decision-making process. When comprehensively reviewing the work of rideshare drivers in the context of the three major tests, 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 rideshare drivers are indeed misclassified as independent contractors. Rideshare drivers are in fact employees.

### A. Control, Freedom, and Flexibility

The most critical factor to determining if an employment relationship exists between rideshare workers and rideshare companies is the issue of control—specifically whether rideshare companies have the right to control the manner and means by which drivers’ work is performed. Control is the primary factor of the common law test, a critical factor in both the economic realities test and hybrid test, a key factor in California’s *Borello*<sup>217</sup> test, as well as in both the *Restatement (Second)* and *(Third) of Agency*. Rideshare companies have repeatedly argued that they lack sufficient control over drivers for drivers to be employees. This is unsurprising as rideshare companies frequently market driver work opportunities by promising flexible employment. In fact, Uber advertisements claim, “With Uber, you have total control. Work where you want, when you want, and set your own schedule” and “Freedom pays weekly.”<sup>218</sup> In multiple 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.<sup>219</sup>

The recent Uber and Lyft settlements address certain elements of control, namely in disallowing termination without cause and deactivation for low acceptance rates.<sup>220</sup> Both settlements focus specifi-

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217. See *supra* notes 56–57 and accompanying text (discussing the economic realities test); *supra* notes 58–60 and accompanying text (discussing the hybrid test); *supra* notes 91–98 and accompanying text (discussing *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989)).

218. Rosenblat & Stark, *supra* note 40, at 3.

219. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015) (noting that Uber drivers must give at least one ride every 180 days or every 30 days, depending on the program they use).

220. Notice of Motion and Motion and Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary Approval of Revised Class Action Settlement at 22, *Cotter v. Lyft*, No. 13-cv-04065-VC, 2016 WL 1394236 (N.D. Cal. Apr. 7, 2016); Class Action Settlement

cally on termination because the right of the putative employer to discharge the worker at will, without cause, is strong evidence of an employment relationship.<sup>221</sup> 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 settlements allow the companies to 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.<sup>222</sup> Both Uber and Lyft maintain real-time driver rating systems that allow customers to rate drivers on each transaction, which are used not just to measure customer satisfaction, but are also determinative of ongoing employment. Although drivers have no way of removing the rating, a suboptimal rating can result in driver termination.<sup>223</sup> Rosenblat and Stark, in their report *Uber's Drivers: Information Asymmetries and Control in Dynamic Work*, find that through the ratings system, Uber exercises significant control over drivers and note that "passengers are empowered to act as middle managers over drivers, whose ratings directly impact their employment eligibility. This redistribution of managerial oversight and power away from formalized middle management and towards consumers is part of a broader trend in flexible labor."<sup>224</sup> 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 an incomplete view of all of the drivers non-digital interactions with customers, such as verbal communications."<sup>225</sup> The results of this constant monitoring

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and Release at 8, *O'Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2013 U.S. Dist. LEXIS 120406 (N.D. Cal. Aug. 23, 2013).

221. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (acknowledging the right to terminate at will, without cause, as strong evidence of the existence of an employment relationship); *Toyota Motor Sales U.S.A. v. Superior Court*, 269 Cal. Rptr. 647, 653 (1990) ("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" (quoting *Press Pub. Co. v. Industrial Acc. Comm'n*, 210 P. 820, 823 (Cal. 1922))); see *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989); *Varisco v. Gateway Sci. & Eng'g, Inc.*, 83 Cal. Rptr. 3d 393, 398 (Ct. App. 2008).

222. See Rosenblat & Stark, *supra* note 40, at 2–4, 11–12 (discussing Uber).

223. *Id.* at 12.

224. *Id.* at 11 (citation omitted).

225. *Id.* at 3.

and surveillance “acts as a remote threat and tangible nudge to drivers to be in compliance with workplace expectation . . . . [D]ata that workers produce and are monitored by creates affordances for managerial control.”<sup>226</sup> Even if rideshare 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—this type of interminable monitoring and surveillance function to control driver behavior, as well as the manner and means in which drivers do their job. Ultimately, it is indicative of an employment relationship.<sup>227</sup>

Certainly, low ratings are not the only cause of termination for Uber and Lyft drivers. Drivers also risk deactivation, or termination, for either not accepting or cancelling unprofitable fares. While the Uber settlement noted that “[l]ow acceptance rates will not be grounds for deactivation,”<sup>228</sup> and the Lyft settlement provides that Lyft “will not be able to deactivate drivers for declining ride requests,”<sup>229</sup> these settlements lack delineated protection from termination for drivers who cancel unprofitable fares. This encourages drivers to accept fares they would likely not pursue if they truly were independent contractors.<sup>230</sup> Inasmuch, although the settlements disallow deactivation for low acceptance rates, the agreements allow both companies to retain the capacity to terminate drivers over cancellations.<sup>231</sup> 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 fare as unprofitable or inconvenient. While Uber and Lyft frame this risk of unprofitable fares as fundamental to the entrepreneurial function, drivers are not entrepreneurs with the financial capacity to shoulder the risk of lost income, lost time and opportunity, and potentially even the loss of employment.<sup>232</sup> 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.”<sup>233</sup>

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226. *Id.* at 6.

227. *Id.* at 13–14.

228. Uber Class Action, *supra* note 174, at 36.

229. Revised Class Action Settlement, *supra* note 194, at 7.

230. Rosenblat & Stark, *supra* note 40, at 8–9.

231. *Cotter v. Lyft, Inc.*, No. 13-cv-04065, at \*6 (N.D. Cal. June 23, 2016) (Order Granting Motion for Preliminary Approval of Class Action Settlement), <http://hr.cch.com/ELD/CotterLyft062316.pdf>.

232. Rosenblat & Stark, *supra* note 40, at 4.

233. *Id.* at 4.

Rideshare companies also exercise the right to discharge their drivers' control through the threat of dismissal for unsatisfactory customer ratings and noncompliance with company policies, which generally govern presentation, personal and vehicle cleanliness, interaction with customers, phone mounting, restricting drivers from accepting street hails, greetings, disallowing tips or cash, and other detailed instructions about how to conduct themselves.<sup>234</sup> Under California law, as is applicable to both *O'Connor* and *Cotter*, a finding of employee status does not require a company to retain the right to control every last detail of work,<sup>235</sup> but more generally, whether it controls the means and methods of the relevant portions of work and operations.<sup>236</sup> Both Uber and Lyft retain this right to control.

Although Uber and Lyft market driver work as defined by freedom and flexibility, these practices demonstrate the contrary. 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/h if they opt-in to the guarantee. The conditions for receiving this guarantee could be: accept 90% of ride requests, complete 1 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.<sup>237</sup>

All in all, the flexibility and freedom often referenced by Uber and Lyft do not speak to the reality experienced by drivers. Even where such flexibility and freedom do exist for workers—specifically with regard to flexible schedules, worker control over hours, and lack of direct supervision—their existence does not automatically indicate an independent contractor relationship, but rather it exists as the ordi-

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234. *Cotter*, No. 13-cv-04065, at \*1–2; *Fired from Uber: Why Drivers Get Deactivated, and How to Get Reactivated*, RIDESHARINGDRIVER (Apr. 21, 2016), <http://www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/>.

235. *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 44 (Ct. App. 2007).

236. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989).

237. Rosenblat & Stark, *supra* note 40, at 9.

nary and unremarkable reality of those employees to work offsite.<sup>238</sup> Thus, even if future settlements create real flexibility and freedom for drivers, that in and of itself will not necessarily render them independent contractors because the inherent freedom of action in the nature of work has been recognized by courts and lawmakers.<sup>239</sup>

### B. Relationship and Interaction Between the Parties

The relationship and interaction between the parties are examined in all three major worker classification tests: the control test considers the level of integration of the workers' services in the business, the investments made by both parties, and the profit or loss realized by the worker; the economic realities test questions whether a worker is economically dependent upon their companies, and whether the worker is an integral part of the business; and the hybrid test considers factors relevant to the nature of the work performed and the relationship between the worker and the employer.<sup>240</sup> In this context, the most relevant question we can ask is whether the work of a rideshare driver can be considered a separate operation from a rideshare company's business.<sup>241</sup> That is to say, do drivers control a meaningful part of the business so that they stand as a separate economic entity?<sup>242</sup> Or is the work performed by drivers an integral part of the business of rideshare companies?<sup>243</sup>

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 specific jobs.<sup>244</sup> The courts in *O'Connor* and *Cotter* both recognized the work performed by drivers as a regular part of the employer's business. In *O'Connor v. Uber Technologies, Inc.*, the court 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."<sup>245</sup> Similarly, in *Cotter v. Lyft, Inc.*, the court noted, "the work

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238. *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984); *Burlingham v. Gray*, 137 P.2d 9, 16 (Cal. 1943).

239. *Burlingham*, 137 P.2d at 16; *Air Couriers Int'l.*, 59 Cal. Rptr. at 44.

240. See Mack, *supra* note 56, §§ 1, 13, 18.

241. U.S. DEP'T OF LABOR, *supra* note 70.

242. *Id.* (citing *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311–12 (11th Cir. 2013)).

243. See FACT SHEET #13, *supra* note 65.

244. Lewis, *supra* note 60, at 255–57.

245. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015).

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.’”<sup>246</sup> Certainly, as courts have identified cake decorators to be “obviously integral” to the business of selling cakes,<sup>247</sup> and pickers to be integral to the pickle business,<sup>248</sup> it seems clear here that courts should recognize drivers as integral to the transportation network businesses for which they work. As the recent WHD Interpretation emphasizes, 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.<sup>249</sup> 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 rideshare company in question is the driver’s sole or primary source of income.<sup>250</sup> What matters is “whether the lack of permanence or indefiniteness is due to operational characteristics intrinsic to the industry.”<sup>251</sup> The transience of rideshare driver work, much like the nurses in the *Superior Care*<sup>252</sup> case, reflects the nature of the transportation network industry, rather than their degree of success in promoting and marketing their skills as drivers independent of the transportation network companies.<sup>253</sup> While the 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, rather than on one project as do independent contractors.<sup>254</sup>

Rideshare drivers 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

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246. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1079–80 (N.D. Cal. 2015) (quoting *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 334, 336 (2007)).

247. *Dole v. Snell*, 875 F.2d 802, 811–12 (10th Cir. 1989).

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

249. U.S. DEP’T OF LABOR, *supra* note 70.

250. *Id.*

251. *Id.*

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

253. *Id.* at 1059–61 (following an analysis of five economic reality factors, the court held that nurses are employees).

254. *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1384–85 (3d Cir. 1985) (correcting the 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. 09-cv-257, 2011 WL 10501391, at \*6 (S.D. Ohio Sept. 21, 2011) (explaining that workers who “worked until they quit or were terminated” had relationship “similar to an at-will employment arrangement”).

complete control over the amount of revenue earned; rideshare companies unilaterally set fares and rates of commission they take from drivers.<sup>255</sup> In addition, rideshare companies claim a proprietary interest in riders, prohibiting drivers from soliciting rides from passengers. The Uber Driver Handbook 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.”<sup>256</sup> 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 one hundred eighty trips.<sup>257</sup> Instead, drivers are instructed to direct passengers to use the Uber application to arrange all pickups.<sup>258</sup>

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.<sup>259</sup> Courts, however, have recognized employment relationships can exist even where drivers provided their own vehicles, 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.<sup>260</sup>

## V. ARBITRATION, LITIGATION, AND LEGISLATION

On September 7, 2016, the United States Court of Appeals for the Ninth Circuit held in *Mohamed v. Uber* that the majority of Uber drivers—those who did not opt out of the arbitration clause in Uber’s driver agreement—are required to resolve all legal disputes through private arbitration and have no right to pursue legal action against the company, including as part of class actions or in arbitration.<sup>261</sup> The impact of this decision and the extension of the trend in favor of compelling arbitration into the rideshare sector, on rideshare workers, is tremendous. Compelling arbitration here effectively collapses multiple pending lawsuits by drivers against Uber, places the previously dis-

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255. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015).

256. *Id.*

257. *Id.*

258. *Id.*

259. John Rogers, *Uber, Lyft “Employee or Independent Contractor” Cases Provide Classification Lessons for All Employees*, JD SUPRA BUS. ADVISOR (Mar. 18, 2015), <http://www.jdsupra.com/legalnews/uber-lyft-employee-or-independent-cont-75906/>.

260. *Air Couriers Int’l v. Emp’t Dev. Dep’t*, 59 Cal. Rptr. 3d 37, 38–39, 48 (Ct. App. 2007).

261. *Mohamed v. Uber Techs., Inc.*, No. 14-cv-05200-EMC, at \*7–8 (9th Cir. Sept. 7, 2016).

cussed settlements in jeopardy,<sup>262</sup> works to undercut the capacity of rideshare workers to assert their employment rights, and incentivizes rideshare companies to altogether skirt the legal system and ignore the labor and employment rights of their workers.

In foreclosing the options of litigation and class action, we create a situation in which individual rideshare workers are left to suffer the loss of critical wages, protections, and benefits. They are made to shoulder the burden and demands of individual arbitration, without the aggregate power and resources of collective action, against companies' worth, at least in Uber's case, a cool \$93.5 billion. These companies are advantaged in litigation, which serves as an ill-fitting tool in the vindication of rideshare workers' rights, as the slow, costly, and divisive progression of the *O'Connor* and *Cotter* cases exemplify. These recent developments, coupled with the inaction of policymakers to address these issues in the rideshare sector, have created a situation in which low-wage workers' claims are silenced, all while multibillion dollar rideshare companies are advantaged.

## VI. CONCLUSION

While for a moment it may have seemed like issues for rideshare workers were settled, the issues of misclassification and access to justice in the rideshare sector are anything but resolved. Examining the realities of rideshare work through the core components of three major classification tests demonstrates 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 rideshare companies' business, without whom these companies would not be able to function and never would have been

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262. While *Mohamed* does not directly address the *O'Connor* case, the holding that the court had no authority to decide whether the arbitration agreements were enforceable, directly addresses the rationale the *O'Connor* court used to strike the arbitration clause and move forward. As such, should the case proceed, it would be restricted to only those drivers who opted out of the arbitration agreements, leaving only a few thousand of the 385,000 drivers are included in the class action. Chris Morran, *Appeals Court: Sorry Uber Drivers, You Signed Away Your Right to Sue Company*, CONSUMERIST (Sept. 8, 2016, 11:20 AM), <https://consumerist.com/2016/09/08/appeals-court-sorry-uber-drivers-you-signed-away-your-right-to-sue-company/>.

able to amass such large amounts of wealth.<sup>263</sup> 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 definitively answered, meaning the opportunity for courts and policy-makers to get it right, and not fail the very workers for whom these labor and employment laws were passed, still exists.<sup>264</sup>

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263. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015). *But see* Madeleine Johnson, *Forget Lawsuits, Uber Drivers' Days Are Numbered*, NASDAQ (May 20, 2016, 10:30 AM), <http://www.nasdaq.com/article/forget-lawsuits-uber-drivers-days-are-numbered-cm624195> (discussing how Uber's need for drivers might be fleeting, as Uber is preparing to launch autonomous vehicles in to its fleet by 2020).

264. Important to note here is the potential impact of recent developments analyzed by Katherine Stone, who suggests 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*, ECON. POLICY INST. (May 24, 2016, 11:33 AM), [http://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/#\\_ftn8](http://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/#_ftn8).

