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Driving Courts Crazy: A Look at How Labor and Employment Laws Do Not Coincide with Ride Platforms in the Sharing Economy

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Note*

Driving Courts Crazy: A Look at How Labor and Employment Laws Do Not Coincide with Ride Platforms in the Sharing Economy

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I. INTRODUCTION

Uber Technologies, Inc.¹ (Uber) makes finding a ride easy: open the Uber app, set a pick-up location, request the Uber, and the ride arrives in a matter of minutes with payment made entirely through the application. This simplicity transformed Uber from a ten-by-ten-foot cubicle to one of the fastest growing startup companies in history—reaching a \$51 billion valuation in only five years.² Despite Uber's initial success, litigation regarding whether its drivers are independent contractors or employees threatens its current model.

According to the California District Court, Uber is not off the hook because the drivers are not independent contractors as a matter of law. Further, another ride platform in the sharing economy, Lyft, has encountered similar misclassification litigation, and the California District Court reached the same result—Lyft drivers are not necessarily independent contractors. Importantly, courts have noted the difficulties in applying the current labor laws to the drivers of Uber and

1. UBER, <https://www.uber.com> [<https://perma.unl.edu/VT5N-YCGV>].

2. Max Chafkin, *What Makes Uber Run*, FAST COMPANY, Oct. 2015, at 110, 115.

Lyft and suggest new rules may need to be developed exclusively for the “sharing economy.”³

This Note discusses whether ride platform drivers are employees or independent contractors and further illustrates the difficulty in answering this question in light of the sharing economy. Classifying these drivers into the categories of “employee” or “independent contractor” is no easy feat—workers in the sharing economy do not clearly fit within the traditional definitions of these two categories. While Uber and Lyft drivers do not clearly fit the traditional definition of employee, the difficult question for the sharing economy is whether they should be classified as such. In view of this difficulty, a new classification category should be developed for these workers to provide some protections without hindering innovation.

Part II of this Note provides a background on the sharing economy in relation to the increasing dilemma of worker misclassification and discusses the legal framework in determining whether a worker is an employee under both California law and the Fair Labor Standards Act. Part III provides background on the litigation that ride platforms in the sharing economy have encountered, discussing first the California Labor Commission decision in *Berwick v. Uber Technologies, Inc.*, which addresses the misclassification issues pertaining to Uber. Part III also discusses *O'Connor v. Uber Technologies, Inc.*, another Uber misclassification case and *Cotter v. Lyft, Inc.*, which involves the alleged misclassification of the Lyft platform’s drivers. Part IV explores the difficulties associated with attempting to classify these drivers within the current framework under California and federal law and argues a new test should be developed in light of the sharing economy. Part V concludes Uber and Lyft drivers should not be considered employees or independent contractors, but rather a new classification should be developed—giving these drivers some of the protections provided to employees without hindering innovation in the sharing economy.

II. BACKGROUND

A. The “Sharing Economy”

As a result of the economic downturn in recent years, “values such as collaboration and sharing have been embraced and celebrated, and new technologies, especially social media and smartphones, have reinforced these developments.”⁴ This change in economic values has been referred to as the sharing economy and is highly centered on the

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

4. Ethan Katsh & Orna Rabinovich-Einy, *Technology and Dispute System Design: Lessons from the “Sharing Economy”*, DISP. RESOL. MAG., Winter 2015, at 8, 10.

use of technology⁵ in fostering collaboration.⁶ More specifically, the sharing economy is defined as entailing:

(1) a latent or otherwise underutilized supply of a good or service that is put to productive use by an independent workforce that does not fit within the traditional employer–employee relationship; (2) a relationship of trust that is difficult to regulate; and (3) a need for a degree of freedom to experiment and innovate within the relationship of trust and beyond.⁷

The sharing economy promotes community ownership, sharing, collaboration, small-scale enterprise, and the regrowth of economic prosperity.⁸ It has been referred to as “the next wave of economic growth.”⁹ Uber, a ridesharing service, is one of the many innovative companies that define this economy.

While the sharing economy has its technological and collaborative advantages, there are a number of distinct disadvantages as well.¹⁰ In this new economy, perceived drawbacks include legal gray areas and uncertainty resulting from blurred traditional legal boundaries.¹¹

However, as one commentator has noted, “the very fact that activities in the sharing economy cannot be put into traditional legal boxes tells us something very powerful and hopeful: these activities are radically different from what we have been doing for the past century.”¹² The unique and innovative approaches to the new economy make it increasingly difficult to classify the relationships into the legal frameworks that currently exist.¹³ One legal gray area greatly impacting the sharing economy is whether the drivers for ride platforms, such as Uber and Lyft, are employees or independent contractors.¹⁴ Imposing a classification upon drivers of these platforms “with too heavy a hand would undermine the ability of sharing economy providers and platforms to take advantage of their critical strategic advantages: direct, peer-to-peer ease of access, and relatively low cost.”¹⁵ Therefore, whether these drivers are independent contractors or em-

5. Josh Krauss, *The Sharing Economy: How State and Local Governments Are Failing and Why We Need Congress to Get Involved*, 44 SW. L. REV. 365, 367 (2014).

6. Katsh & Rabinovich-Einy, *supra* note 4, at 10.

7. Raymond H. Brescia, *Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy*, 95 NEB. L. REV. 87, 94 (2016) (citation omitted).

8. Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 2 (2012).

9. Krauss, *supra* note 5, at 366.

10. Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 466 (2015).

11. *Id.* at 420.

12. Kassan & Orsi, *supra* note 8, at 13.

13. *Id.*

14. *Id.* at 14.

15. Brescia, *supra* note 7, at 100.

ployees is one crucial question looming over both the companies and workers in this economy.¹⁶

B. Who Is an Employee?

The Fair Labor Standards Act (FLSA), the National Labor Relations Act (NLRA), Employee Retirement Income Security Act (ERISA), and the Family and Medical Leave Act (FMLA), to name a few, are federal laws which provide certain protections to workers classified as employees. In defining which workers of an employer are employees, misclassification as independent contractors can occur. This section examines the role of misclassification in the sharing economy, explains the test for whether a worker is an employee under one of the federal laws listed above, the FLSA, and further describes the test under California wage and hour laws.

1. *Misclassification of Employees as Independent Contractors*

Companies—in order to comply with the many different federal and state laws regulating labor and employment—must classify their workers as independent contractors or employees.¹⁷ According to the U.S. Department of Labor, misclassification of workers has been found in a vast number of workplaces throughout the United States.¹⁸ When employers misclassify their workers as independent contractors, they evade protections afforded to employees under federal and state laws. For instance, the Fair Labor Standards Act (FLSA) requires the payment of minimum wage and overtime to employees;¹⁹ the National Labor Relations Act (NLRA) provides certain rights to employees, such as the right to self-organize, join labor organizations, bargain collectively through representatives, and engage in concerted activities;²⁰ the Employee Retirement Income Security Act (ERISA) protects the interests of employees in their pension and welfare benefit plans;²¹ and the Family and Medical Leave Act (FMLA) entitles some employees to take leave for medical reasons, the birth or adoption of a child, or for the care of a child, spouse, or parent.²² Any employee misclassified as an independent contractor would be without the protections under each one of these federal laws.

16. Michael Malloy, *Independent Contractors and the 'Sharing Economy': Court Sends Uber Drivers' Case to Jury*, 20 ME. EMP. L. LETTER 2 (2015).

17. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 138 (2015).

18. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR'S INTERPRETATION NO. 2015-1, at 1 (July 15, 2015) [hereinafter INTERPRETATION No. 2015-1].

19. Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (2012).

20. National Labor Relations Act, 29 U.S.C. § 157 (2012).

21. Employee Retirement Income Security Act, 29 U.S.C. § 1001 (2012).

22. Family and Medical Leave Act, 29 U.S.C. § 2601(b) (2012).

Misclassification is defined “as a purposeful and intentional action that results in illegally depriving employees of employment protections along with tax evasion that correlates to a loss of federal and state revenue.”²³ While misclassification sometimes occurs as a result of uncertainty, many companies misclassify intentionally in order to gain a competitive edge.²⁴

The classification categories have grown murkier as a result of the sharing economy.²⁵ Many companies in the sharing economy rely on classifying workers as independent contractors.²⁶ Classification as an independent contractor allows startup companies in the sharing economy to avoid traditional labor costs, such as employee benefits and insurance.²⁷ Although classifying workers as independent contractors has its benefits, misclassifying workers is a “problematic trend”²⁸ because it leaves employees without protections. Litigation involving Uber and Lyft arose when drivers alleged that they had been misclassified as independent contractors.²⁹ Therefore, in the sharing economy, determining who is an employee becomes a challenging, but important, question.

2. *The Fair Labor Standards Act (FLSA)*

This subsection examines one federal law, the FLSA, and its test for whether a worker is an employee or independent contractor. Many of the other federal labor and employment laws have tests similar to the one delineated in the FLSA.

In 1938, Congress enacted the FLSA³⁰ following the Great Depression.³¹ President Franklin D. Roosevelt urged for legislation on labor standards³² as part of the New Deal—a series of legislation aimed at

23. Bauer, *supra* note 17, at 140–41.

24. *Id.* at 141.

25. Gillian B. White, *In the Sharing Economy, No One's an Employee*, ATLANTIC (JUNE 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/> [https://perma.unl.edu/TX23-LC5R].

26. Lauren Doroghazi, *States Targeting Employee Misclassification*, MULTISTATE INSIDER (July 23, 2015), <https://www.multistate.com/insider/2015/08/states-targeting-employee-misclassification/> [https://perma.unl.edu/6R5S-TVLC].

27. Ellen Hurt, *Contractor or Employee? Silicon Valley's Branding Dilemma*, FORBES (Nov. 18, 2014, 11:00 AM), <http://www.forbes.com/sites/ellenhuet/2014/11/18/contractor-or-employee-silicon-valleys-branding-dilemma/>.

28. INTERPRETATION No. 2015-1, *supra* note 18, at 1.

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

30. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2012).

31. GERALD MAYER, BENJAMIN COLLINS & DAVID H. BRADLEY, *THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 1* (2013). It was during this time that President Franklin D. Roosevelt endorsed the New Deal. *Id.*

32. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939).

stimulating the United States economy.³³ The Senate Committee on Education and Labor stated the purpose of the FLSA was to “protect [the] Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.”³⁴ The express congressional intent in enacting the FLSA was to protect workers from low wages, excessive hours, and child labor.³⁵

Under the FLSA, every employer shall pay its employees the designated minimum wage.³⁶ Further, employees must be paid overtime wages if they work more than forty hours a week.³⁷ An employer is defined under the FLSA as “any person acting directly or indirectly in the interest of an employer in relation to an employee,”³⁸ while employee is defined as “any individual employed by an employer.”³⁹ Lastly, “employ” means “to suffer or permit to work.”⁴⁰

As stated by the Supreme Court, the FLSA should be liberally construed in favor of broad coverage to effectuate the purposes of the Act.⁴¹ Congress—by explicitly defining all aspects of employment under the FLSA—rejected the common law’s definition of employment under the common-law control test.⁴² The definitions under the FLSA provide protections to a broader class of workers than under the common law.⁴³ Because of Congress’s expansive definition of the word “employ” as “to suffer or permit to work,”⁴⁴ the meaning of employee under the Act is stretched beyond the limits of the common law definitions.⁴⁵

The Supreme Court and the federal circuit courts adopted the economic-realities test to determine who is classified as an employee

33. MAYER, COLLINS & BRADLEY, *supra* note 31.

34. S. 2475, S. REP. NO. 75-884 (1937).

35. *See* Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 (1945).

36. Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (2012).

37. *Id.* § 207.

38. *Id.* § 203(d).

39. *Id.* § 203(e)(1).

40. *Id.* § 203(g).

41. Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959); Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 296 (1985).

42. *See* Walling v. Portland, 330 U.S. 148, 150–51 (1947) (“[I]n determining who are ‘employees’ under the Act, common law employee categories or employer-employee classifications under other states are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”).

43. *Id.*

44. 29 U.S.C. § 203(g).

45. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (analyzing the definition of ‘employee’ under the Employee Retirement Income Security Act of 1974 (ERISA) and finding the definition to be more broad under FLSA than ERISA).

under the FLSA.⁴⁶ The economic-realities test looks at multiple factors—with no one factor being determinative—when evaluating an employment relationship:⁴⁷

[C]ourts generally look at (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.⁴⁸

If these factors favor the conclusion that the worker is economically dependent on the employer, they will be considered an employee.⁴⁹

Although the FLSA should be liberally construed, it is not broad enough to bring independent contractors within its reach.⁵⁰ An independent contractor is a worker that is economically “in business for himself [or herself]”⁵¹ or economically independent from that of the alleged employer. The classification of the worker as an independent contractor is not determinative. Courts should not limit themselves to the mere terminology of the parties—instead, courts should analyze the relationship through the economic-realities test.⁵² Therefore, “the economic realities of the relationship, and not the label the employer gives it, are determinative.”⁵³

3. *California Wage and Hour Laws*

The California wage-and-hour laws are explained in this Note because litigation regarding the classification of Uber and Lyft drivers has occurred mainly in California. While California courts are the first to take on this issue, it is likely other state courts will tackle the issue in the future, applying their own wage-and-hour laws to the problem.

Under § 218(a) of the FLSA, “[n]o provision of [the] chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage

46. *Tony & Susan Alamo Found.*, 471 U.S. at 301; *see also* *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961) (holding the home workers were employees under the economic reality test for employment—rather than the common law test).

47. INTERPRETATION NO. 2015-1, *supra* note 18, at 4.

48. *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998).

49. INTERPRETATION NO. 2015-1, *supra* note 18, at 4.

50. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (“We have decided that it is not so broad as to include those ‘who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.’” (quoting *Walling v. Portland*, 330 U.S. 148, 152 (1947))).

51. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008); *Baker*, 137 F.3d at 1440.

52. *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989).

53. INTERPRETATION NO. 2015-1, *supra* note 18, at 5.

higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter”⁵⁴ With this provision, the FLSA explicitly provided for regulation by the states of labor conditions⁵⁵ and did not entirely preempt state law.⁵⁶ The federal statute does not occupy the entire field of labor conditions.⁵⁷ Instead, FLSA leaves room for states to supplement the law regarding working conditions and wages as they see fit.⁵⁸ Therefore, “if states enact minimum wage, overtime, or child labor laws that are more protective of employees than what is provided by the FLSA, the state law applies.”⁵⁹ This results in multiple wage and hour laws throughout the United States with differing tests for employment.⁶⁰

For instance, in determining whether a worker is an independent contractor or an employee under California law,⁶¹ the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* developed a multifactor test.⁶² *Borello* established the common-law control test: whether the alleged employer has the right to control the manner and means of accomplishing the result desired.⁶³ However, this test in isolation is of little use in evaluating the employment relationship⁶⁴ because it does not consider other factors that can establish the existence of an employment relationship. Therefore, the court set out a number of secondary factors to be evaluated in conjunction with the common-law control test.⁶⁵ One important secondary

54. 29 U.S.C. § 218(a) (2012).

55. *Maccabees Mut. Life Ins. Co. v. Perez-Rosado*, 641 F.2d 45, 46 (1st Cir. 1981) (“In a preemption case . . . one must first determine whether the federal statute prohibits any and all state regulation on that particular activity. The FLSA does not expressly prohibit state legislation in the area of wages and working conditions.”).

56. *Chandler v. Cheesecake Factory Rests., Inc.*, 239 F.R.D. 432, 436 (M.D.N.C. 2006).

57. *Maccabees*, 641 F.2d at 46.

58. *Id.*

59. MAYER, COLLINS & BRADLEY, *supra* note 31, at 3.

60. *Id.*

61. CAL. LAB. CODE § 1 (West 2016).

62. *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989). Although the *Borello* court set out the test for ascertaining an employment relationship in the context of California’s workers’ compensation laws, this is the test that has been applied by the courts while analyzing the employment relationship under the California Labor Code and other employment statutes. See *O’Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133, 1139 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1076 (N.D. Cal. 2015) (discussing the *Borello* court’s multifactor test for whether a worker is an independent contractor or employee as applied to the California Labor Code).

63. *Borello*, 769 P.2d at 403.

64. *Id.* at 404.

65. *Id.*

factor is the right to terminate the employment relationship at will.⁶⁶ Other secondary factors—derived from agency law—include:

- (a) [W]hether the one performing the services is engaged in a distinct occupation or business; (b) the kind of occupation[;] . . . (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.⁶⁷

These individual factors should not be employed as separate tests—the result in any case will depend on the weight of all factors in combination.⁶⁸ The *Borello* court also found the six-factor economic-realities test applied in the FLSA context was relevant to the determination of whether a worker is an employee or independent contractor under California law.⁶⁹

III. LITIGATION FOR RIDE PLATFORMS IN THE SHARING ECONOMY

Uber and Lyft, the main ride platforms in the sharing economy, have been plagued by litigation regarding whether their drivers are independent contractors or employees.

A. Trouble for Uber Begins in *Berwick v. Uber Technologies, Inc.*

In *Berwick v. Uber Technologies, Inc.*, a California labor commission held one Uber driver was misclassified as an independent contractor.⁷⁰ Although this opinion applied only to the one driver and was a non-binding labor commission decision, it could have major implications in the sharing economy.⁷¹ A successful ruling on a misclassification allegation for one driver could entice other drivers to challenge their classification as independent contractors. The *Berwick* decision sparked the hurdle of misclassification to innovation and growth in the sharing economy.

66. *Id.*

67. *Id.* (explaining the factors “are intertwined, and their weight depends on particular combinations”).

68. *Id.*

69. *Id.* at 406–07.

70. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at *1 (Cal. Dept. Lab. June 3, 2015).

71. Sam Sanders, *California Labor Commissions Rules Uber Driver is an Employee, Not a Contractor*, NPR (June 17, 2015, 4:58 PM), <http://www.npr.org/sections/thetwo-way/2015/06/17/415262801/california-labor-commission-rules-uber-driver-is-an-employee-not-a-contractor> [<https://perma.unl.edu/2RA3-MUT3>].

1. *Facts*

Plaintiff Barbara Ann Berwick worked as a driver for Uber Technologies, Inc. in San Francisco.⁷² Uber's written agreement imposed many requirements on Berwick as a driver.⁷³ For instance, the pertinent provisions of the agreement required drivers to maintain a model-approved vehicle, receive payment as a service fee predetermined by Uber, undergo Uber's screening process, attend an informational session regarding the Uber application, and not accept any tips from passengers.⁷⁴

The court outlined a number of other requirements Berwick was subject to at the time she was a driver for Uber. If a driver was inactive for 180 days, the smartphone application expired.⁷⁵ The driver was required to pay a fee and obtain a permit from the California Public Utilities Commission in order to carry passengers, and the driver must have had liability insurance coverage.⁷⁶ Uber also performed background checks on its prospective drivers.⁷⁷ Uber had quality control measures in place—a driver received star ratings based on the passenger's total experience during the ride.⁷⁸ A driver must have maintained a star rating of 4.6 stars or higher (out of a possible 5) in order to continue driving for Uber.⁷⁹ Lastly, Uber did not reimburse its drivers for any expenses related to their transportation services.⁸⁰

Barbara Berwick filed a claim against Uber Technologies, Inc. with the Labor Commissioner's office in California alleging she was owed unpaid wages and reimbursement of her expenses while driving for Uber.⁸¹ Uber asserted Berwick was not an employee, but rather an independent contractor because they exercised little control over when and how Berwick drove for Uber.⁸² Therefore, they argued she was "not entitled to recover any claimed wages or to be reimbursed for her expenses."⁸³

2. *California Labor Commission Finds Uber Driver Is Employee*

The labor commissioner analyzed the factors set out in *S.G. Borello & Sons, Inc. v. Department Of Industrial Relations*⁸⁴ and determined

72. *Berwick*, 2015 WL 4153765, at *8.

73. *Id.* at *2.

74. *Id.* at *2–4.

75. *Id.* at *3.

76. *Id.*

77. *Id.* at *4.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at *4–5; see *infra* subsection IV.B.3.

83. *Id.* at *4.

84. 769 P.2d 399 (Cal. 1989).

Berwick was an employee of Uber—rather than an independent contractor.⁸⁵ Uber argued in the alternative that Berwick was not an employee because Uber lacked the requisite control of an “employer”—the principle test for employment under California law.⁸⁶ However, *Borello* does not require complete control over a worker’s activities.⁸⁷ All *Borello* requires is that Uber, “[b]y obtaining the clients in need of the [ride] service and providing the workers to conduct it, retained all necessary control over the operation as a whole.”⁸⁸ Therefore, the Commissioner held there was a presumption of employment⁸⁹—and Uber failed to satisfy its burden of proving that Berwick was an independent contractor. Further, the Labor Commissioner found Berwick’s work was integral to Uber’s business of “providing transportation services to passengers.”⁹⁰ Without the drivers’ transportation of passengers, Uber would not exist.⁹¹

Although Uber asserted they are nothing more than a technological platform, the commissioner found they were involved in every part of the transaction between the drivers and the passengers.⁹² For instance, Uber requires all prospective drivers to pass a background check before they commence use of Uber’s application.⁹³ It has certain specifications requiring the type of automobile that can be used by an Uber driver.⁹⁴ Passengers of Uber pay a certain fee directly to Uber—with Uber then remitting a non-negotiable service fee to their drivers,⁹⁵ and drivers are discouraged from accepting passenger tips.⁹⁶ Lastly, drivers without a personal smartphone receive an iPhone from Uber so they may perform their work.⁹⁷

Therefore, the California Labor Commissioner held Berwick was an employee of Uber and she was entitled to the expenses she incurred as an Uber driver.⁹⁸

85. *Berwick*, 2015 WL 4153765, at *6.

86. *Id.* at *5.

87. *Id.*

88. *Id.*

89. *Id.* at *6.

90. *Id.*

91. *Id.* at *6.

92. *Id.* at *9.

93. *Id.* at *6.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *8.

B. California District Court Weighs in: *O'Connor v. Uber Technologies, Inc.*

1. Facts

Plaintiffs Douglas O'Connor and Thomas Colopy drove for Uber's "UberBlack"—the premium Uber service.⁹⁹ Both O'Connor and Colopy rented limousines for UberBlack from third-party limousine companies.¹⁰⁰ Plaintiffs Matthew Manaham and Elie Gurfinkel drove for the low cost Uber service, "UberX."¹⁰¹ Manaham and Gurfinkel transported passengers in their own personal vehicles.¹⁰² Manaham was a self-employed screenwriter who drove for UberX in Los Angeles.¹⁰³ Gurfinkel was employed full time when he began driving for Uber, but he soon after left his job and drove for Uber full time.¹⁰⁴

These plaintiffs filed a class action on behalf of themselves and other Uber drivers in the State of California.¹⁰⁵ They claimed they are employees of Uber and thus eligible for the statutory protections provided to employees in the California Labor Code.¹⁰⁶ The drivers argued that Uber must provide certain protections to its drivers, including the 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.'"¹⁰⁷

Before becoming drivers for Uber, plaintiffs and other prospective drivers had to first complete Uber's application process.¹⁰⁸ This process entails uploading a driver's license, providing information about vehicle registration and insurance, and passing a background check.¹⁰⁹ Further, prospective drivers are required to pass a "city knowledge test" and attend an interview with an Uber employee.¹¹⁰ Lastly, all drivers must sign a contract¹¹¹ stating they are independent contractors—not employees—of Uber in order to begin transporting passengers.¹¹² Under the terms of the contract, the entire amount

99. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

100. *Id.*

101. *Id.* at 1136.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1135

106. *Id.*

107. *Id.* (quoting CAL. LAB. CODE § 351 (West 2016)).

108. *O'Connor*, 82 F. Supp. 3d at 1136.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The relevant provisions of the contract provided that the relationship between the drivers and Uber "is solely that of independent contracting parties." The parties "expressly agree that this Agreement is not an employment agreement or employment relationship." *Id.* (citation omitted).

of the passenger's payment first goes to Uber, with Uber remitting payment less Uber's fees to the drivers thereafter.¹¹³ The amount paid to drivers usually amounts to around 20% of the total amount billed to a passenger.¹¹⁴

Uber contended it is not a transportation company, but rather, a technology company—providing a “lead generation platform,” which connects drivers with those individuals desiring rides.¹¹⁵ Uber does not own any of the vehicles and argued that it does not “employ” drivers. Instead, Uber characterized the drivers as its “partners.”¹¹⁶

Plaintiffs described their relationship with Uber differently. While Uber contended it is not a transportation company, it previously referred to itself as such,¹¹⁷ by using the marketing tagline, “Everyone's Private Driver.”¹¹⁸ Additionally, Uber was deeply involved in all aspects of the driver's operations—from marketing to selecting drivers, regulating and monitoring their performance, and setting prices.¹¹⁹

Throughout the litigation, Uber continued to assert the drivers were independent contractors and, therefore, not entitled to the protections afforded to employees provided in the California Labor Code.¹²⁰ In support of its theory, Uber argued it does not exercise significant control over its transportation providers. For instance, the drivers “set their own hours and work schedules, provide their own vehicles, and are subject to little direct supervision.”¹²¹ Plaintiffs disputed these contentions and argued that they were employees under the legal standard set out in *Borello*.¹²²

2. *The California District Court Weighs in on Uber's Alleged Misclassification*

Uber moved for summary judgment regarding the employment classification of the plaintiffs and all other drivers represented in the class as independent contractors. The parties conceded that the analysis of whether the drivers are employees consisted of two stages.¹²³ The first stage entailed the plaintiffs producing evidence that they

113. *Id.*

114. *Id.*

115. *Id.* at *3.

116. *Id.*

117. *Id.*

118. *Id.* Further, Uber has also marketed itself as an “On-Demand Car Service.” *Id.* When Uber decided to expand into untapped international markets, the CEO, Travis Kalanick stated, “we're rolling out a *transportation system* in a city near you.” *Id.*

119. *Id.*

120. *Id.* at 1138.

121. *Id.*

122. *Id.*

123. *Id.*

provided services for Uber.¹²⁴ If the plaintiffs produced such evidence, a rebuttable presumption arises that the plaintiffs are employees and the relationship is that of employee/employer.¹²⁵ The second stage occurs once this presumption arises—“the burden then shifts to the employer to prove, if it can, that the ‘presumed employee was an independent contractor.’”¹²⁶ In determining whether an employer can overcome the presumption, courts in California look to the *Borello* multifactor test.¹²⁷

As to the first stage of the inquiry, the court held because plaintiffs and other Uber drivers provide a service to Uber, they are Uber’s presumptive employees.¹²⁸ Uber’s assertion that it is a technology company and not a transportation company was flawed in the court’s eyes because it focused on the mechanics of its technology rather than on what Uber actually does.¹²⁹ Uber’s business consists of selling rides to customers, not selling software.¹³⁰ The court found that, without the drivers, Uber would not be able to function as a transportation company, because Uber is dependent on revenue generated from rides provided by those drivers.¹³¹ This established that the drivers perform an essential service to Uber by giving rides to customers.¹³² While drivers are essential for Uber to obtain revenue, only Uber controls the amount of revenue it earns by setting the fare rates.¹³³ This control over the fare charged to a rider “further demonstrates that Uber acts as more than a mere passive intermediary between riders and drivers.”¹³⁴ The court further reasoned that Uber exercises substantial control over the selection and retention of its drivers by requiring prospective drivers to pass a background check, city knowledge exam, vehicle inspection, and personal interview.¹³⁵ Uber has terminated drivers unable to perform at the level that Uber deems satisfactory.¹³⁶ The drivers provided an “indispensable service”¹³⁷ to

124. *Id.* (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)).

125. *O’Connor*, 82 F. Supp. 3d at 1138.

126. *Id.* (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 901 (9th Cir. 2010)).

127. *Id.* at 1138.

128. *Id.* at 1141.

129. *Id.* (“Uber’s self-definition as a mere ‘technology company’ focuses exclusively on the mechanics of its platform (*i.e.*, the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually *does* (*i.e.*, enable customers to book and receive rides).”).

130. *Id.* at 1142.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1143. (“We will be deactivating Uber accounts regularly of drivers who are in the bottom 5% of all Uber drivers and not performing up to the highest standards We believe that the removal of underperforming drivers will lead to more opportunities for our best drivers.”).

Uber,¹³⁸ and therefore, the court found the drivers were Uber's presumptive employees.¹³⁹

Since the employees proved they provided a service to Uber, and are thereby Uber's presumptive employees, the burden shifted to Uber to rebut the presumption of an employment relationship.¹⁴⁰ The court held Uber failed to meet the summary judgment standard—that Uber's drivers are independent contractors as a matter of law.¹⁴¹ In deciding whether Uber satisfied the standard for summary judgment, the court looked to the *Borello* multifactor test. The court found the principal factor of whether Uber controlled the “manner and means of accomplishing the result desired” (the “control factor”) was in dispute.¹⁴² In looking at the control factor in isolation, the court found summary judgment to be inappropriate.¹⁴³ Because this primary factor was in dispute, the court did not analyze the other factors in *Borello*. The court maintained that “a reasonable jury could find that numerous secondary factors cut in favor of finding an employment relationship.”¹⁴⁴ As a matter of law, the court could not conclude the drivers were independent contractors, and not employees of Uber.¹⁴⁵ Therefore, Uber's motion for summary judgment was denied.¹⁴⁶

C. Lyft Encounters Misclassification Litigation in *Cotter v. Lyft*

1. Facts

Lyft, another ride platform, functions very similarly to Uber—it operates a smartphone application, which connects passengers need-

137. *Id.*

138. *Id.* (“Uber's drivers provide an ‘indispensable service’ to Uber, and the firm ‘could no more survive without them’ than it could without a working smartphone app. Or, put more colloquially, Uber could not be ‘Everyone's Private Driver’ without the drivers.”).

139. *Id.* at 1145 (“This court holds, as a matter of law, that Uber's drivers render service to Uber, and thus are Uber's presumptive employees.”).

140. *Id.*

141. *O'Connor*, 82 F. Supp. 3d at 1149. The court, in discussing the standard on a motion for summary judgment, reasoned:

Uber may only maintain summary judgment if all facts and evidentiary inferences material to the employee/independent contractor determination are undisputed, and a reasonable jury viewing those undisputed facts and inferences could reach but one conclusion—that Uber's drivers are independent contractors are a matter of law [This standard] is one that Uber has failed to meet here.

Id.

142. *Id.*

143. *Id.* at 1149.

144. *Id.* at 1152.

145. *Id.* at 1153.

146. *Id.*

ing a ride to nearby drivers.¹⁴⁷ In order to become a driver for Lyft, a person “must download the app, submit his car for inspection, undergo some form of background check, and submit to an in-person interview with a Lyft representative.”¹⁴⁸ Lyft requires that its drivers maintain a ride acceptance rate above 75%.¹⁴⁹ A driver’s account will be deactivated if its acceptance rate does not improve above 75% after receiving three warnings.¹⁵⁰ Further, passengers provide ratings of drivers on a scale of one to five stars.¹⁵¹ A driver whose star rating falls below a certain threshold is subject to termination.¹⁵² Lastly, Lyft requires drivers to agree to its terms of service, which provides in part:

[E]ach driver agrees that:

- he is at least 23 years old
- he has a valid driver’s license
- he owns or has the legal right to operate the vehicle and is named on the insurance policy covering the vehicle
- he will only use the vehicle that has been registered with Lyft
- his vehicle is in good operating condition
- he will not “offer or provide transportation services for profit, as a public carrier or taxi service, charge for rides or otherwise seek non-voluntary compensation from Riders, or engage in any other activity in a manner that is inconsistent with such Driver’s obligations under this Agreement”
- he will not offer rides exceeding 60 miles[.]¹⁵³

The terms of service also provided that either Lyft or the driver could terminate the driver’s participation in the Lyft platform.¹⁵⁴

Further, Lyft gave drivers a guide, which entailed a list of rules that stated:

- Phone should always be mounted and plugged into charger
- No talking on the phone (unless it’s the passenger)
- Only pick up Lyft passengers, don’t pick up passengers who hail from the street or who use other mobile apps
- You should be the only non-passenger in the car (no friends, children or pets can ride along with you)
- Greet every passenger with a big smile and fist bump
- Keep your car clean on the inside and outside
- Keep your seats and trunk clear for use by your passengers
- Do not request tips. If asked by the passenger, let them know that the app will suggest a price
- Do not accept any cash
- Go above and beyond with good service such as helping passengers with luggage or holding an umbrella for passengers when it’s raining

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

148. *Id.*

149. *Id.* at 1071.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1072.

154. *Id.*

- If you ever need to cancel a Lyft, call support first.¹⁵⁵

Lyft eventually replaced the drivers' guide with a list of frequently asked questions on the Lyft website that outlined the requirements in the drivers' guide as well as numerous other issues not addressed in the guide.¹⁵⁶

The two plaintiffs in this case were former Lyft drivers who contended they should have been paid as employees, not independent contractors. The two drivers filed a lawsuit in California against Lyft on behalf of all drivers in California since Lyft began operating in 2012.¹⁵⁷ They alleged, "because Lyft misclassifies its drivers as independent contractors, the drivers have been deprived of California's minimum wage, reimbursement for work-related expenses, and other protections that California law confers upon employees."¹⁵⁸

2. *The California District Court Addresses Lyft's Alleged Misclassification*

The court applied the *Borello* multifactor test, outlined in subsection I.B.3 of this Note, to determine whether Lyft's motion for summary judgment on the issue of misclassification should be granted. The court held "a reasonable jury could conclude that the plaintiff Lyft drivers were employees[,] but "because a reasonable jury could also conclude they were independent contractors, there must be a trial."¹⁵⁹

First, the court noted that the drivers performed services for Lyft.¹⁶⁰ Second, the court discussed how Lyft retained a significant amount of control over how drivers operated.¹⁶¹ The instructions provided by Lyft in its drivers' guide and FAQs are not merely suggestions as Lyft asserts, but are written as commands or prohibitions.¹⁶² Further, Lyft could terminate the drivers for cause or for any other possible reason without cause.¹⁶³ The court reasoned, "[i]t would be difficult to rule as a matter of law that the plaintiffs were independent contractors when the most important factor for discerning the relationship under California law, namely, the right of control, tends to cut the other way."¹⁶⁴ Beyond the right-of-control factors, several of the other *Borello* factors cut in both directions.¹⁶⁵ Therefore, the court denied Lyft's summary judgment motion because the relationship be-

155. *Id.*

156. *Id.* at 1072-73.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1079.

163. *Id.*

164. *Id.*

165. *Id.*

tween Lyft and the drivers entailed “at the very least sufficient indicia of an employment relationship . . . such that a reasonable jury could find the existence of such a relationship.”¹⁶⁶

IV. ANALYSIS

Drivers of ride platforms in the sharing economy are likely to be classified as employees under California law because California is a pro-employee state that offers greater protections to workers than those required by the FLSA.¹⁶⁷ It is probable the same result follows under the FLSA because it is construed liberally to provide protections to a broad class of workers.¹⁶⁸ While the drivers may be classified as employees under both frameworks, the question still remains: should they be?

A. Drivers for Ride Platforms Are Likely Employees Under Existing California Multifactor Test

The district courts in *O'Connor*, the Uber misclassification case, and *Cotter*, the Lyft misclassification case were correct in denying the ride platforms’ motions for summary judgment because there were factual disputes regarding whether the drivers in California were employees under the *Borello* test.¹⁶⁹ Absent a clear finding that the factors favored an independent contractor relationship,¹⁷⁰ and because of the numerous factual disputes, the courts held that the question of employment should go to a jury.¹⁷¹ Weighing the factors should prove to be rather difficult for a jury because the *Borello* multifactor test cannot be easily applied to Uber and Lyft drivers.¹⁷²

1. *Berwick Does Not Establish that All Uber Drivers Are Employees*

The California Labor Commissioner ruled in *Berwick*¹⁷³ that a driver for Uber was an employee under California’s test for employment set out in *Borello*.¹⁷⁴ The Hearing Officer found the primary

166. *Id.* at 1081 (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 904 (9th Cir. 2010)).

167. *In re United Parcel Serv.*, 118 Cal. Rptr. 3d 834, 839 (Cal. Ct. App. 2010) (“The FLSA does not preempt state law and ‘explicitly permits greater employee protection under state law.’ In many respects, California law provides broader protection of employee rights, and in such instances, California law controls.” (quoting *Ramirez v. Yosemite Water Co.*, 978 P.2d 2, 8 (1999))).

168. INTERPRETATION NO. 2015-1, *supra* note 18, at 3.

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

170. *Id.*

171. *Id.* at 1146.

172. *See infra* section IV.A.

173. *See supra* section II.C.

174. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Dep’t Labor June 3, 2015).

“right to control” factor weighed heavily in favor of an employment relationship between Berwick and Uber because Uber controlled every aspect of the operation.¹⁷⁵ Although Uber argued it lacked significant control over Berwick’s activities, the Hearing Officer stated, “the *Borello* court found that it was not necessary that a principal exercise complete control over a worker’s activities in order for that worker to be an employee.”¹⁷⁶

Based on *Berwick*, it is possible the Uber drivers in *O’Connor* could be found to be Uber’s employees. The contracts and requirements imposed by Uber in both cases were substantially the same. But there is also the possibility that the conclusions of the Hearing Officer are incorrect. The Hearing Officer is not an appointed judge, and there was no jury at the hearing to determine the weight of the factors in light of the many factual disputes. Further, in 2012, a different California Labor Commission ruling held an Uber driver was not an employee,¹⁷⁷ highlighting the difficulty in classifying these drivers—the same labor commission found an independent contractor relationship, and later an employment relationship, between Uber and its drivers.

In *O’Connor*, Uber attempted to reference this 2012 decision as support for a finding that these Uber drivers are not employees. The court stated there was no cited case law “suggesting this Court owes the Hearing Officer’s conclusion any deference, and his conclusion appears to warrant none.”¹⁷⁸ The decision of the Hearing Officer contained only one paragraph, and the court in *O’Connor* held that it was wrong.¹⁷⁹ In ruling on the issue of employment in *O’Connor*, no deference will necessarily be given to *Berwick*. There remains the possibility *Berwick* correctly applied the multifactor test for employment in California. Although one driver’s success in *Berwick* may entice more drivers to bring claims of misclassification, it fails to provide the definitive answer as to whether Uber drivers are employees under California law. The question still remains, even if these drivers are employees, should they be?

2. *Other California Misclassification Cases Suggest Uber and Lyft Drivers Are Employees*

FedEx similarly found itself in misclassification litigation that resulted in a finding of employee status of its drivers under California

175. *Id.* at *5.

176. *Id.*

177. Claire Zillman, *California’s Uber Driver Decision Could Throw a Wrench into the Sharing Economy*, FORTUNE (June 17, 2015, 5:05 PM), <http://fortune.com/2015/06/17/uber-drivers-are-employees-sharing-economy/> [https://perma.unl.edu/CM9W-W5SW].

178. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1144 n.14 (N.D. Cal. 2015).

179. *Id.*

law. In *Alexander v. FedEx Ground Package Systems*,¹⁸⁰ the court held FedEx drivers were employees despite their classification and label as independent contractors.¹⁸¹ FedEx contracted with drivers to deliver packages.¹⁸² The drivers were required to wear uniforms, drive their own FedEx approved vehicles, and groom themselves according to FedEx standards.¹⁸³

The Ninth Circuit found the primary factor in the *Borello* multifactor test of “whether [FedEx] had the right to control the manner and means of accomplishing the result desired”¹⁸⁴ favored a finding of employment.¹⁸⁵ In establishing that FedEx had the right to control the drivers, the court reasoned, “FedEx can and does control the appearance of its drivers and their vehicles[,] . . . [t]he times its drivers can work . . . [and] aspects of how and when drivers deliver their packages.”¹⁸⁶ FedEx required drivers to dress and look a certain way, have their vehicles painted white, and comply with FedEx vehicle specifications.¹⁸⁷ FedEx structured workdays so that drivers worked 9.5–11 hours each working day and required drivers to follow certain procedures at the beginning and end of each workday.¹⁸⁸ Lastly, drivers were assigned a specific area to deliver packages and had to deliver them within a certain window of time to customers predetermined by FedEx.¹⁸⁹ This was sufficient evidence to establish FedEx controlled the manner and means of accomplishing the result desired.

The *Borello* secondary factors did not sufficiently favor a finding that the drivers were either independent contractors or employees.¹⁹⁰ The factors regarding the right to terminate at will, the provision of tools and equipment, and the parties’ beliefs all slightly favored FedEx.¹⁹¹ Other factors—the distinct occupation or business, whether the work is performed under the principal’s direction, the skill required in the occupation, the length of time for performance of services, and whether the work is part of the principal’s regular busi-

180. *Alexander v. FedEx Ground Package Sys.*, 753 F.3d 981 (9th Cir. 2014).

181. *Id.* at 988.

182. *Id.* at 984.

183. *Id.*

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

185. *Alexander*, 753 F.3d at 989–90.

186. *Id.* at 990.

187. *Id.* at 989–90.

188. *Id.* at 990.

189. *Id.*

190. *Id.* at 994. The court analyzed each secondary factor under *Borello* but found that the secondary factors, when considered together, did not point strongly in favor of either employment status or independent contractor status. *Id.* at 997.

191. *Id.* at 994–96.

ness—all favored the drivers.¹⁹² The last factor—the method of payment—was neutral and did not favor either party.¹⁹³ Although the secondary factors when considered in combination did not favor an employment relationship, the primary “right to control” factor did.¹⁹⁴ Therefore, the court held the drivers were FedEx’s employees.¹⁹⁵

Alexander can be contrasted to *Arnold v. Mutual of Omaha Insurance Co.*,¹⁹⁶ where the court upheld a finding of independent contractor status under California law. The *Borello* primary ‘right to control’ factor was not satisfied because numerous aspects of the relationship between Arnold and Mutual of Omaha (Mutual) favored a finding of independent contractor status.¹⁹⁷ For instance, Arnold controlled all aspects pertaining to the solicitation of customers, her position with Mutual was nonexclusive, and her work was not evaluated, supervised, or monitored.¹⁹⁸ Further, training was entirely voluntary, she had to submit one customer application every 180 days in order to avoid termination, and if she wanted an office, she had to pay a fee.¹⁹⁹

The secondary factors of *Borello* also weighed in favor of independent contractor status.²⁰⁰ Although the relationship could be terminated at will—which usually points toward a finding of employment—this “is not by itself a basis for changing that relationship to one of an employee.”²⁰¹ In finding the secondary factors pointed toward Arnold being an independent contractor, the court noted Arnold’s occupation was distinct, and she provided her own instrumentalities.²⁰² Further, she had to pay a fee in order to use the office space, her payment was based upon commissions, not hours, and both parties believed Arnold was an independent contractor.²⁰³

The Lyft and Uber drivers fall somewhere in between *Alexander* and *Arnold*. In *O’Connor* and *Cotter*, there were a number of factual disputes regarding the *Borello* right-to-control test.²⁰⁴ This factor did not firmly establish the drivers were independent contractors as a matter of law.²⁰⁵ The courts noted several alleged facts that, if true, may favor a finding that the ride platforms had a significant right to

192. *Id.* at 995–96.

193. *Id.* at 996.

194. *Id.* at 997.

195. *Id.*

196. 135 Cal. Rptr. 3d 213, 215 (Cal. Ct. App. 2011).

197. *Id.* at 221.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 220.

202. *Id.* at 221.

203. *Id.*

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

205. *Id.* at 1153.

control the drivers,²⁰⁶ including Uber and Lyft's rights to terminate drivers at any time.²⁰⁷ Moreover, Uber instructs drivers on what to wear, how to carry out tasks, and monitors their performance,²⁰⁸ and Lyft provides similar instructions.²⁰⁹ The actions of Uber and Lyft are very similar to the actions of FedEx in *Alexander*, where FedEx controlled the appearance of its drivers and their vehicles, the times its drivers could work, and aspects of how and when drivers deliver their packages.²¹⁰ Therefore, Uber and Lyft appear to be more closely related to *Alexander* than *Arnold* because Uber and Lyft have the sufficient right to control their drivers.

In *O'Connor* some of the *Borello* secondary factors favored an employment relationship, while others supported an independent contractor relationship.²¹¹ "[T]he secondary factors [did] not clearly cut in one direction,"²¹² toward a finding of independent contractor status—like in *Arnold*. Therefore, the ride platforms appear to be more closely related to *Alexander* because the secondary factors, when considered together, do not strongly favor either employee status or independent contractor status.

The court in *O'Connor* noted that "rarely does any one factor dictate the determination of whether a relationship is one of employment or independent contract."²¹³ All factors, both primary and secondary, in the aggregate would have to strongly favor a finding of employment in order for a jury to hold these drivers are Uber's employees. For the drivers of Uber and Lyft, it is not definitively clear whether the secondary factors favor employee status or independent contractor status. Based on the holding in *Alexander*, the more likely result is that the primary right-of-control factor is satisfied because Uber and Lyft exercised a significant right to control their drivers, strongly favoring a finding of employment.

This finding, while likely correct under California law for employment established in *Borello*, contradicts most general common sense conclusions. Uber and Lyft drivers are not the typical workers that one would think of as "employees." While the law may classify Uber

206. *Id.* at 1148–53. For instance, Uber instructed drivers to "make sure you are dressed professionally; send the client a text message when 1–2 minutes from the pickup location ('This is VERY IMPORTANT'); 'make sure the radio is off or on soft jazz or NPR;' and 'make sure to open the door for your client.'" *Id.* at 1149 (citations to plaintiffs' documents omitted). Further, "there [was] evidence of drivers being admonished (or terminated) by Uber for failing to comply with its 'suggestions.'" *Id.* at 1150.

207. *Id.* at 1149.

208. *Id.* at 1151.

209. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1072 (N.D. Cal. 2015).

210. *Alexander v. FedEx Ground Package Sys.*, 753 F.3d 981, 989–90 (9th Cir. 2014).

211. *O'Conner*, 82 F. Supp. 3d at 1152–53.

212. *Id.* at 1153.

213. *Id.*

and Lyft drivers as employees, these drivers fall “in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”²¹⁴²¹⁵

B. Uber and Lyft Drivers are Likely Employees Under the Expansive View of the FLSA

California law offers greater protections for employees than those provided in the FLSA, which is why the California test for employment was applied to the relationship between the drivers and the ride platforms.²¹⁶ However, when the state’s protections are less than those provided to employees by the FLSA, then the FLSA governs, not state law.²¹⁷ Many state laws also mirror the provisions of the FLSA.²¹⁸ Uber and Lyft not only have to defend against misclassification allegations like *O’Connor* and *Cotter* in the courts, but the Department of Labor (DOL) may also investigate companies suspected of misclassification.²¹⁹ The FLSA provides the DOL with the power to investigate and remedy wage-and-hour violations, and the DOL can initiate FLSA enforcement lawsuits against a company.²²⁰ Because “companies must be careful to comply with both the FLSA test and any applicable state or local test[,]”²²¹ an analysis of the relationship under the FLSA is relevant.

In evaluating whether an employment relationship exists, the FLSA follows the economic-realities test, not the common law “right to control” test.²²² This test focuses on “whether the worker is economically dependent on the employer or in business for him or herself.”²²³ According to the Department of Labor Wage and Hour Division, “most workers are employees under the FLSA . . . [and] the scope of the employment relationship is very broad.”²²⁴ Therefore, a court should analyze the economic realities of the situation under the multifactor

214. NLRB v. Hearst Publ’ns, 322 U.S. 111, 121 (1944).

215. See *infra* section IV.C.

216. *In re* United Parcel Serv., 118 Cal. Rptr. 3d 834, 839 (Cal. Ct. App. 2010).

217. *Id.*

218. Leonora M. Schloss & Aaron N. Colby, *An Ounce of Prevention: Avoiding Wage-and-Hour Claims*, 23 ANDREWS EMP. LITIG. REP., no. 19, Apr. 21, 2009, at 3.

219. Fair Labor Standards Act of 1938, 29 U.S.C. § 211 (2012).

220. *Id.*

221. Thomas McInemey & Justin Scott, *Expert Q&A: Labor and Employment Issues in the On-demand Economy*, PRACTICAL L. (Aug. 4, 2015), <http://us.practicallaw.com/7-617-8705?q=&qp=&qo=&qe=> [<https://perma.unl.edu/8B9F-FSDD>].

222. See INTERPRETATION NO. 2015-1, *supra* note 18, at 1; see also *supra* subsection II.B.3 (providing background of the common law right to control test). The common law right to control test is the primary factor established in *Borello* when analyzing whether an employment relationship exists under California law. *Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399 (Cal. 1989).

223. See INTERPRETATION NO. 2015-1, *supra* note 18, at 2.

224. *Id.*

test in deciding whether a worker is an employee or independent contractor.

1. *The Extent to Which the Work Performed Is an Integral Part of the Employer's Business*

If the employee's work is not integral to the business of the employer, then this factor favors an independent contractor relationship.²²⁵ In *Secretary of Labor v. Lauritzen*, to determine if migrants' harvesting of pickles was integral, the court stated, "[i]t does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business."²²⁶ The court in *O'Connor* found Uber was a transportation company, not a technology company.²²⁷ Under the logic of *Lauritzen*, providing transportation is a necessary and integral part of the transportation business of Uber and Lyft. Therefore, this factor favors an employment relationship.

2. *The Worker's Opportunity for Profit or Loss Depending on His or Her Managerial Skill*

If the worker's managerial skill affects profit or loss, then the worker is more likely to be an independent contractor.²²⁸ While a worker can increase profits by working more hours and doing his or her job well, that is not considered a managerial skill affecting profit or loss.²²⁹ Activities of a worker that reflect managerial skill include "a worker's decision to hire others, purchase materials and equipment, advertise, rent space, and manage time tables."²³⁰ This factor favors an employment relationship—Uber and Lyft drivers do not use their managerial skills to affect profit or loss.

3. *The Extent of the Relative Investments of the Employer and the Workers*

In order for a worker to be an independent contractor, the worker must have taken some investment.²³¹ The size of the workers investment is relevant and "should not be relatively minor compared with

225. *Id.* at 6.

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

227. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015) ("Uber is most certainly a transportation company, albeit a technologically sophisticated one."). Uber even referred to itself as "Everyone's Private Driver" and the "best transportation service in San Francisco," thus adding to the court's conclusion that Uber is not solely a technology company. *Id.* at 1142.

228. INTERPRETATION No. 2015-1, *supra* note 18, at 7.

229. *Id.*

230. *Id.*

231. *Id.* at 9.

that of the employer.”²³² If it is, the worker is more likely to be an employee. In *Baker*, rig welders provided their own welding rigs costing the welders \$35,000–\$40,000.²³³ When comparing the welder’s investment to the alleged employer’s investment in the overall business, the welder’s investment was “disproportionately small.”²³⁴ While some drivers investment in new cars is significant,²³⁵ under the *Baker* formulation this is “relatively minor” in comparison to Uber and Lyft’s significant investment in the overall business.

4. *Whether the Work Performed Requires Special Skills and Initiative*

In order for a worker to be an independent contractor, the worker must exercise “business skills, judgment, and initiative.”²³⁶ The possession of a specialized skill does not automatically classify the worker as an independent contractor.²³⁷ The skills of the worker should be used in an independent way for the worker to be classified as an independent contractor.²³⁸ Uber drivers do not utilize skills in an independent way such that they should be classified as independent contractors. An Uber or Lyft driver does not need to exercise “business skills, judgment, or initiative” to drive passengers once they receive a ride request through the platforms’ mobile applications. Therefore, this factor favors an employment relationship between Uber or Lyft and their drivers.

5. *The Permanency of the Relationship*

A true independent contractor will not allow a relationship with an alleged employer that is permanent or indefinite.²³⁹ If the relationship between the worker and the alleged employer is indefinite, the likely result is that the worker is an employee.²⁴⁰ In *O’Connor*, whether Uber could terminate its drivers at will was disputed.²⁴¹ However, the language of the contract between Uber and its drivers seemed to allow Uber to fire drivers for any reason. Although Uber may deactivate a driver’s application if inactive for 180 days—suggesting there is not permanence to the relationship—a driver can eas-

232. *Id.*

233. *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1439 (10th Cir. 1998).

234. *Id.* at 1442.

235. Benjamin Sachs, *New DOL Guidance on Employee Status: News for Uber or Lyft?*, ONLABOR (July 15, 2015), <http://onlabor.org/2015/07/15/new-dol-guidance-on-employee-status-news-for-uber-or-lyft/> [https://perma.unl.edu/J5ME-ZWEB].

236. INTERPRETATION No. 2015-1, *supra* note 18, at 10.

237. *Id.*

238. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988).

239. INTERPRETATION No. 2015-1, *supra* note 18, at 11–12.

240. *Id.* at 12.

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

ily reactivate the application and begin driving again. Further, the driver need only log into the application every so often to prevent deactivation. Lyft imposes similar requirements for the termination of drivers from the Lyft platform. Therefore, this factor likely favors an employment relationship because there is no defined end to the relationship between the ride platforms and their drivers.

6. *The Degree of Control Exercised or Retained by the Employer*

If the worker is an independent contractor, and thus, “conducting his or her own business,”²⁴² the worker must control “meaningful” aspects of how the work is performed.²⁴³ Further, the flexibility of work schedules is not significant by itself.²⁴⁴ Whether Uber exercised or retained control over the drivers in *O'Connor*²⁴⁵ was a notably disputed issue.²⁴⁶ The court noted several details supporting the conclusion that Uber both exercised and retained control.²⁴⁷ However, “no single factor, including control, should be over-emphasized”²⁴⁸ or determinative. All factors of the economic-realities test, when analyzed in the aggregate, favor a finding that Uber and Lyft drivers are employees protected under the FLSA. Under the FLSA, it is probable for an employment relationship to exist between the ride platforms and their drivers.

C. Existing Labor Laws Should Not Apply to Workers in the Sharing Economy

Whether a worker is an employee or an independent contractor is difficult to distinguish in this new crowd-sourced, sharing economy. In *Cotter v. Lyft*, the court looked to the general understanding of the terms “independent contractor” and “employee” and reasoned that “[a]t first glance, Lyft drivers don’t seem much like employees . . . [b]ut Lyft drivers don’t seem much like independent contractors either.”²⁴⁹ Both state and federal laws do not appropriately address the worker in this new economy. These workers are functioning somewhere in the middle—they do not seem to fit the general understanding of either an employee or an independent contractor.

242. INTERPRETATION NO. 2015-1, *supra* note 18, at 13.

243. *Id.*

244. *Dole v. Snell*, 875 F.2d 802, 806 (10th Cir. 1989).

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

246. *See supra* subsection III.B.2.

247. *See supra* section IV.A.

248. INTERPRETATION NO. 2015-1, *supra* note 18, at 15.

249. *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015). Lyft, being one of Uber’s competitors, has a similar business model to Uber’s—both are ride-sharing applications and rely on the classification of their drivers as independent contractors.

The FLSA was passed in 1938.²⁵⁰ At this time, the workforce primarily went to their employer's place of business for work.²⁵¹ The test for whether a worker is an employee easily applied to these workers, and there was no question these workers were entitled to the protections under the FLSA.²⁵² But over seventy years later, the workforce and technologies have changed,²⁵³ and the same laws that so easily applied seventy-eight years ago do not apply without difficulty to a worker in the new sharing economy. Today, these workers can generate an income without ever having to step inside of an office. In 1938, Congress could not have envisioned an economy composed of sharing and on demand labor, and the FLSA "was not written with crowdwork in mind."²⁵⁴

While hearing cases regarding misclassification, courts have expressed their frustrations with applying existing labor laws to these workers. For instance, in *O'Connor*, Judge Chen expressed his opinion that the traditional employment test creates significant challenges when applied to business models like Uber's because this test "evolved under an economic model very different from the new 'sharing economy'" and "many of the factors in that test appear outmoded in this context."²⁵⁵ Until the legislature enacts new rules applicable to the sharing economy in particular, the courts have the difficult task of applying the *Borello* multifactor test to these workers.²⁵⁶

Further, in *Cotter v. Lyft*, Judge Chhabria also expressed concerns of the application of the current test to workers in this economy.²⁵⁷ In allowing the question of employment to go to a jury, he stated: "[a]s should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th century for classifying workers isn't very helpful in addressing this 21st century problem."²⁵⁸ The judge discussed how these factors either point in different directions or are ambiguous in this context.²⁵⁹ He stressed that without "legislative intervention, California's outmoded test for classifying workers

250. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

251. Miriam Cherry, *A Minimum Wage for Crowdwork?*, DIGITAL LAB., <http://digital-labor.org/participants/miriam-cherry> [<https://perma.unl.edu/JAN8-Z88K>].

252. *Id.*

253. *Id.*

254. *Id.*

255. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

256. *Id.*

257. *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).

258. *Id.* at 1081.

259. *Id.*

will apply in cases like this”²⁶⁰ and it will be left to juries to weigh the factors and make the difficult decision.²⁶¹

In *Cotter*, the court contemplated that perhaps workers in the sharing economy should be considered a new category of worker altogether.²⁶² While these cases emphasized the necessity for an updated test under California law, this reasoning also applies in the context of the FLSA—where the law was developed decades ago and could not possibly have been created with these types of workers in mind. Technological advances and social media platforms have changed society, and the law seems to fall further behind each day.²⁶³ The laws addressing employment should be adapted in light of the new economy composed of mobile applications and platforms like Uber.²⁶⁴ While there is not currently a clear answer under the current law, one thing is certain: a new classification for these sharing economy workers is necessary.²⁶⁵

A new classification must be developed to provide these workers with some of the needed protections without burdening innovation, increasing the price of these ride services for consumers, and placing a great deal of liability on the companies.²⁶⁶ The conflict in the sharing economy falls between the interests of stimulating innovation and the need for protecting the workers from potential harms.²⁶⁷ While some academics believe the FLSA and other labor and employment laws can adequately classify these workers if applied broadly,²⁶⁸ this would burden innovation by conferring the protections of the FLSA and other labor and employment laws to workers who should not necessarily be deemed employees. Judges encountering the misclassification question in this context often burden innovation by extending the existing legal framework of both the FLSA and state laws to the sharing economy.²⁶⁹

It is clear that “[i]nnovation is a difficult phenomenon to understand, promote, and regulate within and beyond the sharing economy.”²⁷⁰ Despite this difficulty, changing the laws should be at the top of the to-do list in order to avoid legal barriers to innovation.²⁷¹ Broad legislation specifically tailored to the sharing economy will be

260. *Id.* at 1082.

261. *Id.*

262. *Id.*

263. Malloy, *supra* note 16.

264. *Id.*

265. White, *supra* note 25.

266. *Id.*

267. Ranchordás, *supra* note 10, at 420.

268. Cherry, *supra* note 251.

269. Ranchordás, *supra* note 10, at 470.

270. *Id.* at 422.

271. Kassan & Orsi, *supra* note 8, at 13.

more innovation-friendly than the current legal framework.²⁷² Legislators should begin formulating specific rules with the sharing economy in mind. “The sharing economy needs a new legal framework. Current legal frameworks do not suffice.”²⁷³

These Uber and Lyft drivers are not employees, but they are not independent contractors either. These workers fall somewhere in the middle of being an employee and an independent contractor. Courts attempting to construe laws to accommodate these workers could burden innovation by providing employee protections to workers who do not clearly fit the definition of an “employee.” Therefore, future legislation will need to adapt to the sharing economy in order to clarify this gray area.²⁷⁴

V. CONCLUSION

While Uber and Lyft provide simplicity to customers when a ride is desired, the changes to the business model of these ride platforms will be anything but simple if the drivers are classified as employees. The question of whether these drivers are employees is a multibillion dollar question for Uber. Uber’s \$51 billion valuation will suffer a dramatic blow if these drivers are classified as employees. The ride platforms will be required to provide the benefits and protections that it has avoided due to classifying its drivers as independent contractors.

The *O’Connor* and *Cotter* opinions rightfully expressed frustrations with the application of the *Borello* multifactor test for employment in California to these drivers in the sharing economy. While these drivers do not fit neatly into the categories of independent contractor or employee, it is likely they are employees under existing law because the factors in the *Borello* multifactor test—when considered in the aggregate—favor an employment relationship. Under the Federal Fair Labor Standards Act’s economic-realities test, an employment relationship between Uber or Lyft and the drivers is also likely. Post-*O’Connor* and *Cotter*, employers in this economy should beware. Classifying workers as independent contractors when there is evidence favoring a sufficient right to control or the ability to terminate at will is a costly move—especially after the court in *O’Connor* and *Cotter* held a jury could reasonably find the drivers are employees.

As the sharing economy continues to grow, our labor laws should grow as well, and adapt to this new economy composed of sharing, collaboration, and on-demand labor. In order to avoid legal barriers to innovative companies, such as Uber and Lyft, our labor laws should

272. Ranchordás, *supra* note 10, at 472.

273. *Id.* at 475.

274. Malloy, *supra* note 16.

change—providing a new classification for employees in the sharing economy. A new classification would provide some of the protections these workers desire, without hindering innovation. Until then, workers and employers in this economy will continue to be plagued with the question of who is an employee.

