

Cornell International Law Journal


Volume 51
Number 1 *Winter 2018*

Article 8

E-hailing and Employment Rights: The Case for an Employment Relationship Between Uber and its Drivers in South Africa

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Recommended Citation

Marcano, Isaiah J. (2018) "E-hailing and Employment Rights: The Case for an Employment Relationship Between Uber and its Drivers in South Africa," *Cornell International Law Journal*: Vol. 51 : No. 1 , Article 8.
Available at: <https://scholarship.law.cornell.edu/cilj/vol51/iss1/8>

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E-hailing and Employment Rights: The Case for an Employment Relationship Between Uber and its Drivers in South Africa

Isaiah J. Marcano[†]

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Introduction

Since the end of apartheid, South African freedom fighters have worked to remedy the former regime’s legacy of discrimination and violence. Their efforts have afforded South Africans access to a constitution steeped in the ideals of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.”¹ Nevertheless, there is much more to be done to heal the Rainbow Nation’s wounds. Questions related to labor and employment remain particularly contentious, espe-

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1. S. AFR. CONST., 1996, ch. 1, § 1(a).

cially as taxi and Uber drivers clash over the e-hailing company's controversial business model,² and Uber drivers strive to secure their rights as employees.³

August 2018 marks Uber's fifth anniversary in Africa.⁴ Since it launched on the continent, Uber has established itself in more than a dozen African metropolitan areas.⁵ Uber's African subsidiaries also boast more than 60,000 drivers,⁶ and roughly 1.8 million commuters enjoy the company's services.⁷ Uber's operations in sub-Saharan Africa are especially impressive, and the South African market dominates in the region.⁸ In fact, South Africa lies far ahead of Kenya, the second largest sub-Saharan African market, with nearly one million active users recorded in 2017 compared to Kenya's 363,000 active users.⁹

Unsurprisingly, Uber's innovative business model has consistently challenged the ways in which jurists envision labor relationships. In particular, courts across the globe have disagreed over whether to classify Uber drivers as employees, independent contractors, or something entirely different.¹⁰ Having deciphered similar dilemmas in the past, South

2. See Jason Burke, *Violence Erupts between Taxi and Uber Drivers in Johannesburg*, THE GUARDIAN (Sept. 8, 2017), <https://www.theguardian.com/world/2017/sep/08/violence-erupts-taxi-uber-drivers-johannesburg> [https://perma.cc/J4W2-LVTW]; see also Loni Prinsloo, *South African Metered-Taxi Operators Attacking Uber Drivers*, BLOOMBERG (July 17, 2017), <https://www.bloomberg.com/news/articles/2017-07-17/south-africa-meter-taxi-operators-attacking-uber-drivers> (reporting on attacks against Uber drivers) [https://perma.cc/ESE8-84HG]; *South African Taxis Block Roads to Main Airport in Uber Protest*, REUTERS, (Mar. 10, 2017), <https://www.reuters.com/article/us-safrica-uber-tech/south-african-taxis-block-roads-to-main-airport-in-uber-protest-idUSKBN16H1PB> (reporting on a protest at the main airport in Johannesburg) [https://perma.cc/93JX-VDSL].

3. See Dewald Van Rensburg, *False Start for Uber Drivers' Employee Claim*, NEWS24 (Jan. 21, 2018), <https://www.fin24.com/Tech/Companies/false-start-for-uber-drivers-employee-claim-20180119> [https://perma.cc/SVC3-XQ5L].

4. See Abdi Latif Dahir, *Uber's Four-Year Journey through Africa's Fast-Changing Cities Has Been Bumpy, but Disruptive*, QUARTZ (Sept. 30, 2017), <https://qz.com/1090738/uber-is-marking-four-years-in-africa/> [https://perma.cc/SF85-75NJ]; see also Toby Shapshak, *South African Politician Attacked, Beaten by Anti-Uber Taxi Drivers*, FORBES (May 16, 2016), <https://www.forbes.com/sites/tobysapshak/2016/05/16/south-african-politician-attacked-beaten-by-anti-uber-taxi-drivers-2/#22a804bb6dba> ("Johannesburg was Uber [sic] first city in Africa—which began operating in August 2013—and now it operates in five cities in South Africa, including Cape Town, Durban, Port Elizabeth and Pretoria.") [https://perma.cc/25EJ-RFDK].

5. See Burke, *supra* note 2.

6. Tom Jackson, *Blocked Traffic, Immolated Cars: Uber's Problems in Africa*, FORTUNE (Apr. 24, 2017), <http://fortune.com/2017/04/24/uber-problems-africa-expansion/> [https://perma.cc/TA59-LSTF].

7. See Annie Njanja, *Uber Ranks Kenya Second Biggest Market in Africa*, BUSINESS DAILY (Sept. 28, 2017), <http://www.businessdailyafrica.com/corporate/companies/Uber-ranks-Kenya-second-biggest-market-in-Africa/4003102-4116644-uo5cq1/index.html> [https://perma.cc/ZGR6-BE26].

8. See Dahir, *supra* note 4.

9. Njanja, *supra* note 7.

10. See Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN (Aug. 11, 2016), <http://money.cnn.com/2016/08/11/technology/uber-lawsuits/index.html> [https://perma.cc/6EQE-7YAQ].

Africa's labor courts boast an array of common law tests to differentiate between labor classifications.¹¹ In July 2017, the Commission for Conciliation, Mediation and Arbitration ("CCMA")¹² turned to its arsenal of tests to rule on Uber SA's relationship with its drivers in South Africa.¹³

Ultimately, the CCMA Senior Commissioner determined that Uber SA and South African drivers did, in fact, enjoy an employment relationship.¹⁴ Soon after, Uber SA petitioned the Labour Court to review the CCMA ruling.¹⁵ After identifying a technical error in the Senior Commissioner's decision, among other factors, Judge Van Niekerk of the Labour Court set the CCMA ruling aside, leaving pressing questions about Uber and its controversial operations in South Africa open for future adjudication.¹⁶

This Note aims to demonstrate two points. First, although the Labour Court set the CCMA ruling aside on a technicality, the CCMA ruling still offers a great deal to learn about South African labor and employment jurisprudence. Second, because some factors in this case conflict with an independent contractor classification, as well as crucial policy concerns, South African courts should, at the very least, classify Uber drivers as employees of Uber BV (the international parent company).

The Note will proceed as follows: Section I provides a brief overview of the South African taxi industry. Section I also illustrates the drivers' increasing dissatisfaction with Uber. Next, Section II maps out the bodies that adjudicate labor disputes, as well as the CCMA ruling and Labour Court's review. To better illustrate the values that inform South African jurisprudence and whether an employee classification for Uber drivers aligns with these values, Section III then embarks on a comparative analysis between South African and U.S. policies. Beginning with the aforementioned Uber dilemma in South Africa and a related appeals court case in Florida, Section III also analyzes some of the broader factors that characterize these jurisdictions' diverging labor and employment interests.¹⁷ Sec-

11. See INT'L LAB. ORG. [ILO], REPORT V(1): THE EMPLOYMENT RELATIONSHIP 8 (2006), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> [<https://perma.cc/J3TQ-GPMV>].

12. The CCMA is one of several bodies responsible for adjudicating labor disputes in South Africa. Paul Benjamin, *Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)* 6 (ILO, Working Paper No. 47, 2013).

13. See *Uber South Africa Tech. Servs. Ltd v. NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 40-41, available at <http://www.saflii.org/za/cases/ZACCMA/2017/1.html> [<https://perma.cc/CU76-AWAL>].

14. See *id.* at para. 52. Uber SA is Uber BV's subsidiary in South Africa. See *id.* at para. 13. Uber BV is the international parent company, based in the Netherlands, which concludes contracts with drivers. *Id.*

15. *Uber South Africa Tech. Servs. Ltd v. Nat'l Union of Pub. Serv. & Allied Workers (NUPSAW) & Others* [2018] ZALCCT 1 at para. 3, 2018 (4) BLLR 299 (LC), available at <http://www.saflii.org/za/cases/ZALCCT/2018/1.html> [<https://perma.cc/Q5AQ-L3JR>].

16. *Id.* at para. 98. As a result of the Labour Court decision, Uber drivers plan to follow with a new lawsuit. Dewald Van Rensburg, *Uber Drivers Fight Back*, FIN24 (Feb. 2, 2018), <https://www.fin24.com/Tech/Companies/uber-drivers-fight-back-20180202> [<https://perma.cc/BQ3Q-V38W>].

17. Despite implementing a common law test similar to the tests endorsed in South Africa, the appeals court judges in Florida classified Uber drivers as independent con-

tion IV follows by assessing how an employee classification might impact South African drivers and Uber. Finally, Section IV ends with an argument against a new classification for Uber drivers, given that a classification outside of the traditional employee-independent contractor dichotomy would further muddy our understanding of labor relationships and effectively threaten the drivers' hopes for securing their rights.

I. An Ongoing Uber-Taxi War

A. Brief Overview

Prior to the commencement of e-hailing services in Johannesburg, transportation options in South Africa—other than personal vehicles—included the following: minibuses, metered taxis, city buses, and trains.¹⁸ Of this group, minibuses (or kombis) and metered taxis comprised South Africa's taxi industry.¹⁹ Currently, a minority of taxi drivers organize under two national trade unions—the South African Transport and Allied Workers' Union and the National Taxi Drivers' Organization.²⁰ The South African National Taxi Council also functions as a business association for taxi-owners.²¹

Even after Uber has launched in South Africa, kombis remain the most popular means of public transportation.²² In fact, kombis provide roughly sixty-five percent of all public transportation trips.²³ Serving mostly low-income, black commuters,²⁴ kombis function as affordable shared taxis.²⁵ Additionally, kombi-owners tend to purchase multiple vehicles for hired drivers to operate,²⁶ and although kombi-owners and drivers obtain

tractors. See *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 225-27 (Fla. 3d Cir. Ct. 2017).

18. See Jane Barrett, *Organizing in the Informal Economy: A Case Study of the Minibus Taxi Industry in South Africa* 2 (ILO, Working Paper No. 39, 2003).

19. See *id.* at 2.

20. *Id.* at 3.

21. *Id.* at 23.

22. See *id.* at 2.

23. *Id.*

24. *Id.* at 1. In addition, the vast majority of drivers and kombi-owners are black. *South Africa's Rattletrap Taxis Move Millions—and an Economy*, REUTERS (Mar. 10, 2014), <https://www.reuters.com/article/safrica-taxis/south-africas-rattletrap-taxis-move-millions-and-an-economy-idUSL6N0LQ3BL20140310> [<https://perma.cc/HL7U-P3WY>]. The proliferation of kombis as a popular means of transportation for black South Africans, as well as the largest black-owned sector, is mostly due to policies implemented during the apartheid regime. *Id.* These policies restricted black Africans from living in the cities where they worked; thus, minibuses developed as part a low-cost transportation system to and from distant townships. See Bill Keller, *Deadly Free Market: South Africa's Warrior Taxis*, N.Y. TIMES (Aug. 17, 1993), <http://www.nytimes.com/1993/08/17/world/deadly-free-market-south-africa-s-warrior-taxis.html?pagewanted=all> [<https://perma.cc/92V3-MCQ9>].

25. See Rosita Armytage & Markus Bell, *What the Violent 'Uber Wars' Tell Us About Zuma's South Africa*, THE INDEPENDENT (Sept. 16, 2017), <http://www.independent.co.uk/news/world/africa/what-the-violent-uber-wars-tell-us-about-zumas-south-africa-a7948496.html> [<https://perma.cc/92V3-MCQ9>]. The average kombi carries about fifteen commuters, and local taxi associations fix kombi fares. See Barrett, *supra* note 18, at 2.

26. Barrett, *supra* note 18, at 2.

licenses to provide their services, they make up a large portion of the informal economy.²⁷ Historically, conflicts have also arisen between kombi-owners and metered taxi drivers, especially as individuals within each group compete for customers and profitable routes—sometimes at the cost of human lives.²⁸

With regard to metered taxis, drivers typically transport commuters in sedans.²⁹ Provincial governments also require metered taxi owners to acquire licenses for their operations.³⁰ Like yellow cabs in U.S. cities, fares fluctuate depending on the distance that a meter records.³¹ Also, many metered taxi drivers operate within the informal sector, avoiding municipal control.³² Moreover, because metered taxi rides are costly, they lack a regular commuter base, and their hold on the transportation market is difficult to ascertain.³³ Still, some figures estimate that metered taxis only account for about ten percent of the taxi transportation market in South Africa.³⁴

By the time Uber SA launched in August 2013,³⁵ many commuters were frustrated with a taxi industry characterized as unreliable, expensive, and unsafe.³⁶ Fierce competition between sectors, rival taxi cartels, and taxi associations had already turned violent.³⁷ In fact, some estimates place the number of deaths from past “taxi wars” at somewhere between 1500 to 3000 individuals.³⁸ Accordingly, Uber’s reputation as a reliable and affordable service constituted a saving grace for many South Africans. Because of their aversion to over-crowded minibuses and overpriced metered taxis, middle-class commuters have especially enjoyed Uber’s services.³⁹ Foreign nationals, many of whom are unable to find employment in their home countries and South Africa, have also capitalized on Uber’s rapid growth,⁴⁰ and today, they form a sizable demographic within the

27. *Id.* at 1 (stating that the majority of kombi-owners do not pay taxes, nor do they adhere to employment standards). Kombis are also infamous for high accident rates, accounting for fifteen percent of the road deaths in South Africa in 1998. *Id.* at 12.

28. See Keller, *supra* note 24 (describing conflicts between drivers in the 1990s).

29. Barrett, *supra* note 18, at 2.

30. See *How Do I Start a Private Metered Taxi Business*, ENTREPRENEUR (Nov. 8, 2009), <https://www.entrepreneurmag.co.za/ask-entrepreneur/start-up-industry-specific-ask-entrepreneur/how-do-i-start-a-private-metered-taxi-business/> [hereinafter *Metered Taxi Business*] [<https://perma.cc/5MXQ-DBKG>].

31. See Barrett, *supra* note 18, at 2. In contrast, minibuses operate on “fixed commuter corridors” and fares are set by taxi associations. See *id.*

32. See Mbongiseni Dladla, *Role of Metered Taxis in the Integrated and Sustainable Public Transportation System in Durban* 37, 69 (Apr. 9, 2015) (unpublished MEng dissertation, University of Johannesburg) (on file with the Faculty of Engineering and the Built Environment, University of Johannesburg).

33. See Barrett, *supra* note 18, at 2.

34. See *Metered Taxi Business*, *supra* note 30.

35. See Shapshak, *supra* note 4.

36. See Armytage & Bell, *supra* note 25.

37. See *id.*

38. See Barrett, *supra* note 18, at 8.

39. See Armytage & Bell, *supra* note 25.

40. See *id.* (referring to Zimbabweans in South Africa after the collapse of their home country’s economy).

South African Uber driver population.⁴¹ Despite Uber's success, however, not everyone is a fan. Metered taxi drivers have been particularly vocal about their objections to Uber's presence in South Africa.⁴²

B. Violence and Driver Dissatisfaction

2017 saw an increase in violence between metered taxi and Uber drivers.⁴³ One statistic estimates that there were more than 200 violent attacks between July and September of 2017.⁴⁴ Reported tactics include petrol bombs and acid throwing,⁴⁵ and because of these violent attacks, several locations have been declared "no-go zones" for Uber drivers.⁴⁶ South African authorities have also developed a special task force to address increases in violent attacks from both sides of the conflict.⁴⁷

With no end to these attacks in sight, Uber drivers have become increasingly dissatisfied with the e-hailing app.⁴⁸ Accordingly, Uber representatives have contacted injured drivers and issued multiple statements.⁴⁹ Still, several drivers in South Africa criticize Uber for not doing enough.⁵⁰ Others argue that Uber's policies have placed drivers in precarious situations; for example, drivers have voiced concerns about Uber's regional cash-payment option, which might increase the likelihood of violent robberies.⁵¹ Moreover, although drivers are free to create their own work

41. See *Uber Driver Dies in Taxi 'War' in South Africa*, VOICE OF AMERICA (July 18, 2017), <https://www.voazimbabwe.com/a/uber-meter-taxi-drivers-clash-in-south-africa/3948870.html> [<https://perma.cc/HVL7-KU3T>].

42. See *South African Taxis Block Roads to Main Airport in Uber Protest*, REUTERS (Mar. 10, 2017), <https://www.reuters.com/article/us-safrica-uber-tech/south-african-taxis-block-roads-to-main-airport-in-uber-protest-idUSKBN16H1PB> [<https://perma.cc/4MY2-QX5A>].

43. See Burke, *supra* note 2.

44. Queenin Masuabi, *Uber Customers: Screw Petitions, We Want to Be Protected*, HUFFINGTON POST (Sept. 11, 2017), http://www.huffingtonpost.co.za/2017/09/11/uber-customers-screw-petitions-we-want-to-be-protected_a_23203925/ [<https://perma.cc/AN9E-D6E5>].

45. Queenin Masuabi, *Drivers Under Attack: Uber and Police Are 'Letting Us Down'*, HUFFINGTON POST (Aug. 9, 2017), http://www.huffingtonpost.co.za/2017/09/08/drivers-under-attack-uber-and-police-are-letting-us-down_a_23201289/ [<https://perma.cc/9M33-ALW8>].

46. *No-Go Zones Declared as Attacks on Uber Drivers Intensifies*, HUFFINGTON POST (July 18, 2017), http://www.huffingtonpost.co.za/2017/07/18/no-go-zones-declared-as-attacks-on-uber-drivers-intensifies_a_23034863/ [<https://perma.cc/4UF3-XJFX>].

47. Ernest Mabuza, *Task Team Formed to Address Uber-Meter Taxi Conflict: Makhura*, TIMES LIVE (Sept. 17, 2017), <https://www.timeslive.co.za/news/south-africa/2017-09-17-task-team-formed-to-address-uber-meter-taxi-conflict-makhura/> [<https://perma.cc/93VD-V89M>].

48. See Lynsey Chutel, *Uber Drivers in South Africa Are the Latest to Be Recognized as Employees*, QUARTZ (July 14, 2017), <https://qz.com/1029485/south-african-labor-com-mission-rules-uber-drivers-should-be-regarded-as-employees/> [<https://perma.cc/KSZ3-YTRQ>].

49. See Bafana Nzimande, *Uber Driver Blames Company for Acid Attack*, TIMES LIVE (Aug. 22, 2017), <https://www.timeslive.co.za/news/south-africa/2017-08-22-uber-driver-blames-company-for-acid-attack/> [<https://perma.cc/Q3AF-FNND>].

50. See *id.*

51. See Gabriele Steinhauser & Alexandra Wexler, *Uber's Cash Service Fuels Tension in South Africa*, WALL ST. J. (Aug. 12, 2017), <https://www.wsj.com/articles/ubers-cash->

schedules, this supposed advantage has led to long hours and low wages.⁵² Some drivers have even reported being unjustly deactivated from the e-hailing app.⁵³ Ultimately, these are the very conditions that prompted Uber drivers to seek justice via the CCMA.⁵⁴

II. The Courts and Uber

A. Adjudicatory Bodies in South Africa

The following bodies are responsible for adjudicating labor disputes in South Africa: the CCMA; the Labour Court; and the Labour Appeal Court.⁵⁵

The CCMA functions as an independent dispute resolution body.⁵⁶ As such, it hears all disputes related to “unfair dismissals, trade union organizational rights, the interpretation of collective agreements and certain individual unfair labor practices, as well as interest disputes arising from collective bargaining.”⁵⁷ Moreover, since it launched in 1995, the CCMA has worked to provide affordable, accessible, expeditious, and informal dispute resolution for all South Africans.⁵⁸ With arbitrations constituting the CCMA’s preferred route for unresolved rights disputes and dismissals,⁵⁹ the CCMA has also enjoyed an impressive national settlement rate of seventy percent and higher.⁶⁰

service-fuels-tensions-in-south-africa-1470994202 [https://perma.cc/H9AS-VHBZ]. After significant pressure from South African drivers, Uber now allows its drivers to decide whether they should offer services to cash-paying commuters. Bafana Nzimande, *Uber’s New Payment System Lets Drivers Reject Cash Trips*, TIMES LIVE (Aug. 10, 2017), <https://www.timeslive.co.za/news/south-africa/2017-08-10-ubers-new-payment-system-lets-drivers-reject-cash-trips/> [https://perma.cc/M3FU-YNEM].

52. See Yomi Kazeem, “*They’re Treating Us Like Rubbish*”: *Uber Drivers in South Africa Have Joined a Union*, QUARTZ (July 6, 2016), <https://qz.com/724310/theyre-treating-us-like-rubbish-uber-drivers-in-south-africa-have-joined-a-union/> [https://perma.cc/KU9J-H5DD].

53. See Chutel, *supra* note 48. Uber drivers in South Africa operate under the company’s sub-Saharan Africa deactivation policy. Kylie, *Driver Deactivation Policy—Sub-Saharan Africa Only*, UBER BLOG (Sept. 7, 2016), <https://www.uber.com/en-ZA/blog/johannesburg/driver-deactivation-policy/> [https://perma.cc/MLQ9-5REH]. Under this regional deactivation policy, Uber scrutinizes drivers according to several factors, including, but not limited to, the following: star ratings, ride cancellation rates, and safe-driving. *Id.* If a driver’s rating falls below a certain performance level, Uber provides suggestions for improvement; nevertheless, Uber retains the right to deactivate drivers when drivers fail to improve their rating. *Id.*

54. See *Uber South Africa Tech. Servs. Ltd v. NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 9–10, available at <http://www.saflii.org/za/cases/ZACCMA/2017/1.html> [https://perma.cc/CU76-AWAL].

55. See Labour Relations Act (LRA) 66 of 1995 §§ 115, 158, 167 (S. Afr.).

56. *Vision, Mission & Values*, COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION, <https://www.ccma.org.za/About-Us/Vision-Mission-Values> [https://perma.cc/G6EV-EDH6]. The CCMA also functions as a juristic person. LRA 66 of 1995 § 112 (S. Afr.).

57. See Benjamin, *supra* note 12, at 6.

58. See *id.*

59. See *id.*

60. See *Our History*, COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION, <https://www.ccma.org.za/About-Us/Our-History> [https://perma.cc/K9U3-HPM9].

The Labour Court constitutes the next body that adjudicates labor disputes, sharing the same status as South Africa's High Courts.⁶¹ Unlike the high courts, however, the Labour Court has exclusive jurisdiction over disputes about operational requirements, strike dismissals, alleged discriminatory dismissals, and unfair discrimination.⁶² In addition, the Labour Court is responsible for reviewing CCMA arbitration awards.⁶³ These reviews now compose a large part of the Labour Court's work.⁶⁴ The Labour Court also has exclusive jurisdiction over the interpretation of the Labour Relations Act 66 of 1995 (the "LRA").⁶⁵ Finally, the Labour Court is led by a Judge President, Deputy Judge President, and however many other judges the Judge President deems necessary for the court to function efficiently.⁶⁶

Following a decision by the Labour Court, parties can turn to the Labour Appeal Court for review.⁶⁷ Generally, the authors of the LRA intended for the Labour Appeal Court to serve as the court of final instance for deciding labor disputes and interpreting the LRA.⁶⁸ As such, a Judge President and a Deputy Judge from the Labour Court act in these same capacities when they sit on the Labour Appeal Court.⁶⁹ Interestingly, however, the Labour Appeal Court's decisions are not necessarily final.⁷⁰ Rather, under special circumstances, the Supreme Court of Appeal may intervene and overturn the Labour Appeal Court's decisions.⁷¹ In an increasing number of cases, the Constitutional Court has also resolved matters about the interpretation of labor legislation.⁷²

B. Recent Decisions and Unanswered Questions

The CCMA ruling in question centers on Uber SA's motion in limine.⁷³ In this motion, Uber SA challenged the CCMA's jurisdiction over the deactivated drivers' claims.⁷⁴ These claims, which were consolidated for the purposes of the motion, centered on the premise that Uber SA wrongfully deactivated the drivers from the e-hailing company's services.⁷⁵

61. Benjamin, *supra* note 12, at 6.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 6-7. Nevertheless, the Labour Court's exclusive jurisdiction does not apply to all employment matters. *Id.* at 7.

66. See LRA 66 of 1995 § 152 (S. Afr.).

67. See Benjamin, *supra* note 12, at 7.

68. *Id.* at 7.

69. See LRA 66 of 1995 § 168 (S. Afr.).

70. See Benjamin, *supra* note 12, at 7.

71. *Id.*

72. *Id.*

73. *Uber South Africa Tech. Servs. Ltd v. NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 1-3, available at <http://www.saflii.org/za/cases/ZACCMA/2017/1.html> [<https://perma.cc/CU76-AWAL>].

74. *Id.* at paras. 9-10.

75. See *id.* at paras. 3, 9-10. For the purposes of deciphering Uber's business model, it is important to understand the difference between driver-partners and drivers-only. See *infra* note 105.

In addition, because the Senior Commissioner determined that it would have been unreasonable for the drivers to direct their claims at Uber BV (the international parent company that concluded their contracts), the CCMA ruling only concerns Uber's subsidiary in South Africa, Uber SA.⁷⁶ According to the Senior Commissioner, "Uber SA is, for all intents and purposes, Uber in South Africa," and the drivers' relationship with Uber BV was of "no relevance."⁷⁷

In their initial claims, the respondents to the motion referred to their deactivations as "unfair dismissal[s]."⁷⁸ Their choice of language invoked the LRA, which states the following: "Every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice."⁷⁹ Hence, the drivers presented their cases as wronged employees, not independent contractors,⁸⁰ and they demanded the various remedies codified by the LRA, which include reinstatement and compensation.⁸¹ Ultimately, Uber SA challenged the CCMA's jurisdiction on the basis that the drivers were never Uber SA employees.⁸² In fact, Uber BV's contract with the respondents explicitly identified them as independent contractors.⁸³

In the CCMA ruling, the Senior Commissioner emphasized that her role was "limited to determining whether Uber drivers are employees for the purposes of the Labour Relations Act, in particular the right not to be unfairly dismissed."⁸⁴ Nevertheless, the LRA does not describe the factors

76. See *NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 32. Therefore, the Senior Commissioner rejected the drivers' joinder to include Uber BV. Shazia Ebrahim, *Uber SA Runs Into the 'Worker vs Innovation' Tension*, THE DAILY VOX (Jan. 19, 2018), <https://www.thedailyvox.co.za/uber-sa-runs-into-the-worker-vs-innovation-tension-shazia-ebrahim/> [<https://perma.cc/7V8C-28ZU>].

77. *NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 59.

78. *Id.* at para. 10.

79. LRA 66 of 1995 § 185 (S. Afr.) (emphasis added).

80. See *NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 12.

81. See LRA 66 of 1995 § 193 (S. Afr.).

82. Uber SA's argument in support of an independent contractor classification relied on six points, as follows: (1) drivers are not legally obligated to drive Uber registered vehicles or use Uber's e-hailing application; (2) Uber does not retain any right to instruct a driver to drive his/her vehicle, and the driver is free to choose where he/she will drive and which passenger he/she will allow into his/her vehicle; (3) a partner-driver is free to hire another person to drive; (4) drivers are not restricted to working for Uber, and they may work for competitors; (5) a driver-partner supplies a vehicle and is responsible for all "associated expenses"; and (6) a driver-partner bears the risks of profits or loss as an independent contractor, and a driver is free to move from one partner to another. See *NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 24-26. The drivers countered these points by arguing the following: (1) riders contract Uber, not drivers, and Uber issues receipts for its services; (2) Uber controls drivers via its rating system, pricing, power to deactivate drivers, and by limiting the number of drivers in given areas; (4) Uber maintains incentive schemes to control performance; (5) a driver cannot have another person drive on his/her account, and driving must be "performed personally." See *id.* at paras. 27-31. Moreover, according to the Senior Commissioner, the respondents appear to deal directly with Uber SA, not Uber BV, regardless of whether Uber BV is the party responsible for concluding their contracts. See *id.* at para. 32.

83. *Id.* at para. 14.

84. *Id.* at para. 35 (emphasis added). According to Section 213 of the LRA, an employee is defined as follows: "(a) [A]ny person, excluding an independent contractor,

that separate an employee from an independent contractor.⁸⁵ Thus, the Senior Commissioner explored a series of common law tests to differentiate between the two labor classifications.⁸⁶

The Senior Commissioner specifically turned to the tests that South African jurists have endorsed in the “Code of Good Practice: Who is An Employee” (the “Code”).⁸⁷ Out of the many tests that South African courts have developed, these guidelines explicitly endorse the “dominant impression” test,⁸⁸ which encourages jurists to examine labor relationships based on a variety of factors.⁸⁹ Interestingly, however, the Senior Commissioner identified another comprehensive test in the Code, which she deemed the “reality of the relationship” test.⁹⁰ This implicit test—and not the Code’s dominant impression test *per se*—would serve as the cornerstone of her analysis.

who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and ‘employed’ and ‘employment’ have meanings corresponding to that of ‘employee.’” LRA 66 of 1995 § 213 (S. Afr.) (emphasis added). Regarding Part (a), the Senior Commissioner emphasized that it is “the line between independent contractors and employees that . . . courts and arbitrators have grappled with.” *NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 38. Accordingly, the respondents’ relationships with Uber fit better within the broader definition in Part (b). *See id.* at para. 37.

85. *See* LRA 66 of 1995 § 213 (S. Afr.).

86. *See NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 39–41.

87. *See id.*

88. *See* NAT’L ECON. DEV. & LAB. COUNC. [NEDLAC], CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE ¶ 32, at 17 (2006).

89. The Code lists six factors that are crucial, but not exhaustive, for distinguishing a contract of employment from a contract for services, as follows: (1) whether the object of the contract is to render personal services or produce a specified result; (2) whether the individual performs services personally or through others; (3) whether an employer may choose when to make use of the individual’s services or whether the individual is required to perform work or produce results within a period fixed by a contract; (4) whether the individual is subservient to the lawful commands of an employer or a contract, not under supervision or control; (5) whether a contract ends when the individual dies; and (6) whether a contract ends once the period of service in a contract expires or when work or production is completed. *Id.*

90. *See NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 41. The Senior Commissioner highlighted the language of “real relationships” in Item 52 of the Code, which reads: “Courts . . . must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the *realities of the parties’ relationship*.” NEDLAC, *supra* note 88, ¶ 52, at 24 (emphasis added). In the Labour Court’s review of the CCMA ruling, however, Judge Van Niekerk referred to the reality of relationships test as “no more than the assertion that where the parties have concluded an agreement to structure the relationship between [sic] in a particular form, that does not preclude the court from enquiring into the substance of the agreement and to determine that despite the terms of the contract, an employment relationship exists.” *Uber South Africa Tech. Servs. Ltd v. Nat’l Union of Pub. Serv. & Allied Workers (NUPSAW) & Others* [2018] ZALCCT 1 at para. 75, 2018 (4) BLLR 399 (LC), available at <http://www.saflii.org/za/cases/ZALCCT/2018/1.html> [https://perma.cc/PGV5-EY39]. Ultimately, Judge Van Niekerk of the Labour Court doubted whether the Senior Commissioner identified a new test at all, given that her approach “bear[ed] close resemblance to the dominant impression test.” *Id.* at para. 77.

According to the Senior Commissioner, the reality of the relationship test, like the dominant impression test, draws from a series of common law tests.⁹¹ Nevertheless, the reality of the relationship test takes the analysis a step further, urging jurists to look beyond a contract's language and examine the relationship between the parties as it exists in real time and space.⁹² After applying this test, the Senior Commissioner concluded that Uber SA's relationship with its drivers was direct enough and marked by sufficient control to classify the drivers as employees.⁹³

After the CCMA ruling, it appeared that South African jurists had finally resolved the Uber dilemma. Upon review, however, the Labour Court in Cape Town saw otherwise.⁹⁴ Judge Van Niekerk of the Labour Court argued that the Senior Commissioner made a fatal error of law by denying Uber SA's jurisdictional challenge, given that the parties lacked any contractual arrangement that would render the drivers' initial claims judicable.⁹⁵ Ultimately, however, Judge Van Niekerk overturned the CCMA ruling based on a technicality,⁹⁶ arguing that even if there was no need for a contractual agreement between the parties, the Senior Commissioner failed to distinguish Uber SA from Uber BV and recognize their unique relationships with the drivers.⁹⁷

As it stands, the drivers will petition for a new hearing to secure their rights as employees.⁹⁸ Based on Judge Van Niekerk's reasoning, it appears that some of the claims the drivers made against Uber SA may be better suited in an action against Uber BV.⁹⁹ For example, driver-partners actually conclude electronic agreements with Uber BV.¹⁰⁰ Uber BV also

91. See *NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 41.

92. See *id.*

93. See *id.* at paras. 41–59 (demonstrating several factors that speak to an employment relationship, including Uber's control over the drivers' performance and work conditions, as well as their economic dependency on Uber).

94. See *Nat'l Union of Pub. Serv. & Allied Workers (NUPSAW) & Others* [2018] ZALCCT 1 at para. 97–98.

95. See *id.* at para. 72. Judge Van Niekerk pointed to a Labour Appeal Court decision that determined a party must “establish the existence of a contractual relationship between that party and any putative employer.” *Id.* at para. 70 (citing *Universal Church of the Kingdom of God v. Myeni & Others* [2015] ZALCCT 31 at para. 49, 2015 (9) BLLR 918 (LC), available at <http://www.saflii.org/za/cases/ZALAC/2015/31.html> [<https://perma.cc/9KD6-UJXL>]).

96. See *id.* at paras. 97–98.

97. *Id.* Considering the Senior Commissioner never joined Uber BV to the proceedings, Judge Van Niekerk's decision only ruled on Uber SA's relationship with the drivers. See *id.* at para. 98. Accordingly, Judge Van Niekerk left any issues related to Uber BV's relationship with the drivers open for future adjudication. See *id.*

98. *South African Uber Drivers Fight Back*, MYBROADBAND (Feb. 4, 2018), <https://mybroadband.co.za/news/motoring/247518-south-african-uber-drivers-fight-back.html> [<https://perma.cc/ZWA6-NEE5>].

99. See Ebrahim, *supra* note 76. According to Judge Van Niekerk: “Each of the building blocks of the drivers' case pertains to Uber BV and not Uber SA.” *Nat'l Union of Pub. Serv. & Allied Workers (NUPSAW) & Others* [2018] ZALCCT 1 at para. 97.

100. *Id.* at para. 83. An electronic agreement could potentially satisfy the need for a contractual relationship between parties, which Judge Van Niekerk cited as precedent. See *id.* at para. 70 (citing *Myeni & Others* [2015] ZALCCT 31 at para. 49).

devises and implements the deactivation policy and rating system,¹⁰¹ and an Uber BV response team currently handles rider complaints about drivers in South Africa.¹⁰² Furthermore, Uber BV licenses individuals to use the e-hailing app.¹⁰³ Some of these factors certainly suggest an employment relationship,¹⁰⁴ while other factors are unclear and require further investigation.¹⁰⁵ Surely, courts will have to consult more resources to identify the reality of the relationships between Uber BV and drivers in South Africa.¹⁰⁶

III. From the Rainbow Nation to the Sunshine State—A Comparative Analysis

To better demonstrate why an employee classification for Uber drivers in the Rainbow Nation is not as far-fetched as some would think, it is helpful to compare South African law with American ideas about labor relationships and employment rights. This section begins with *McGillis v. the Department of Economic Opportunity*, where, despite the Florida appeals court's reliance on tests similar to those endorsed in South Africa, the court in *McGillis* envisioned Uber's relationship with a driver quite differently.¹⁰⁷ Specifically, the *McGillis* case centered on a former Uber driver's

101. *Id.* at para. 90–91.

102. *Id.* at paras. 91.

103. *Id.* at para. 92.

104. Under the dominant impression test, “[a]n employee is subject to the employer’s right of control and supervision while an independent contractor is notionally on a footing equal with the employer and . . . [t]he right of control by an employer . . . can be seen in an employer’s right to instruct or direct an employee to do certain things and then to supervise how those things are done.” NEDLAC, *supra* note 88, ¶ 39, at 20 (emphasis added). As demonstrated prior, Uber exercises control over drivers via its deactivation policy, where drivers are regularly scrutinized under various criteria, including star ratings, ride cancellation rates, and safe-driving, and Uber retains the right to deactivate drivers if their performance level fails to improve. See *Kylie*, *supra* note 53.

105. The dominant impression also identifies an employer requiring an employee to perform services personally as a defining feature of employment. NEDLAC, *supra* note 88, ¶ 36, at 18–19. One outstanding issue related to this factor concerns so-called driver-partners versus drivers-only. See *Nat’l Union of Pub. Serv. & Allied Workers (NUPSAW) & Others* [2018] ZALCCT 1 at para. 92. In essence, driver-partners may conclude contracts with drivers-only to operate other vehicles, providing for another layer of labor relationships. See *id.* This additional layer of labor relationship also implies a potential co-employment relationship where Uber BV and a driver-only lack substantial contact with each other, except through the driver-partner. See *id.* at paras. 92, 98. In this type of case, a driver-partner can function as a middle-person that provides the driver-only with a registered vehicle and remuneration. See *id.* According to the guidelines in the Code, however, it is feasible for both the sub-contractor and the workers that he or she has contracted to be employees of the principal contractor—the principal contractor in this case being Uber BV. NEDLAC, *supra* note 88, ¶ 37, at 19.

106. The courts can also turn to Section 200(a) of the LRA and Section 83(a) of the Basic Conditions of Employment Act (BCEA) for other factors to consider when “assessing whether an employment relationship exists.” *Id.* ¶ 44, at 21.

107. See 210 So.3d 220, 225–26 (Fla. 3d Cir. Ct. 2017); see also Douglas Hanks, *Uber Wins Big in Court After Miami Driver Denied Unemployment Benefits*, MIAMI HERALD (Feb. 1, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/article130050824.html> (summarizing Uber’s victory in this case) [https://perma.cc/X6Z4-H2E3].

appeal of a decision by the Florida Department of Economic Opportunity (the “Department”).¹⁰⁸ After Uber deactivated the driver from its services, the Department denied his request for unemployment benefits.¹⁰⁹ The driver then filed an appeal, declaring that he was entitled to unemployment benefits as a former Uber employee.¹¹⁰ Ultimately, the Florida appeals court upheld the Department’s decision, underlining the independence that the driver enjoyed and the driver’s contract with Uber, which explicitly disclaimed any employment relationship.¹¹¹

A. Similar Tests Across Jurisdictions

Although the Florida judges and CCMA Senior Commissioner ruled differently, the precedents and guidelines they consulted are somewhat similar. First, when distinguishing between an employment relationship and a contract with an independent contractor, Florida courts emphasize the importance of contractual language; indeed, courts tend to honor contractual provisions unless there are indicators that suggest some sort of misclassification.¹¹² Similarly, in South Africa, the Code recognizes that “[i]n certain cases, the legal relationship between the parties may be gathered from . . . the contract that the parties have concluded.”¹¹³

Additionally, Florida courts may look to the reality of the parties’ relationship, given that a contract does not always accurately depict a labor relationship.¹¹⁴ Like adjudicatory bodies in South Africa, these courts evaluate ill-defined labor relationships based on multiple factors, including control, remuneration, and the length of time one party has worked for the other.¹¹⁵ Of these factors, Florida courts highlight “control” as the most important factor in their analyses.¹¹⁶ Although the Code in South Africa does not necessarily identify control as the single most important factor, it does state that an “employer’s right of control is . . . a very significant indicator of an employment relationship.”¹¹⁷

B. Values and Points of Divergence

Given these factors, it is reasonable to assume that South African and Florida adjudicatory bodies might envision labor relationships similarly. Nevertheless, common law tests are not perfect.¹¹⁸ Moreover, the factors

108. 210 So.3d at 221.

109. *Id.*

110. *Id.* at 221–22.

111. *Id.* at 225–26.

112. *See id.* at 224.

113. NEDLAC, *supra* note 88, ¶ 28, at 14.

114. *See McGillis*, 210 So.3d at 224–25.

115. *Compare id.*, with *Uber South Africa Tech. Servs. Ltd v. NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 42–52, available at <http://www.saflii.org/za/cases/ZACCMA/2017/1.html> [<https://perma.cc/7DWA-WKSN>].

116. *See McGillis*, 210 So.3d at 224–25.

117. NEDLAC, *supra* note 88, ¶ 40, at 20 (emphasis added).

118. *See Martin Brassey, The Nature of Employment*, 11 *INDUS. L.J.* 889, 920 (1990).

listed in these decisions are not exhaustive.¹¹⁹ Finally, as this Note will demonstrate below, South Africa and the United States have unique experiences regarding organized labor movements and fundamental rights, and these experiences help us understand why an employee classification for Uber drivers might make more sense for jurists in one jurisdiction as opposed to the other.

Although the Labour Court set the CCMA ruling aside, it is still useful for a discussion about South African labor and employment jurisprudence. In her decision, the Senior Commissioner focused her attention on the LRA and its legislative history,¹²⁰ providing a glimpse into some of the most profound factors that inform post-apartheid jurists. From the LRA's text, it is possible to gather the following three factors: (1) the fundamental labor and employment rights enshrined in the Constitution of 1996; (2) South Africa's public international law obligations, especially as a member of the International Labour Organization; and (3) a pro-union culture born from the labor movement's contributions to ending apartheid.¹²¹

During the apartheid era, the minority-led government implemented a series of discriminatory labor policies, which denied black South Africans and other non-whites livable wages and social mobility.¹²² To dismantle this system, the Constitution's drafters created a document infused with ideals such as equality and positive labor rights.¹²³ The Senior Commissioner keenly addressed these ideals in her interpretation of the LRA,¹²⁴ arguing that, in an effort to promote social justice and remain faithful to the Constitution, it was crucial—in the case of Uber and its drivers—to interpret the law in a way that “favour[s] the drivers, who are in a considerably weak position when compared to Uber.”¹²⁵

Where, then, does the point of divergence exist between South African and Florida jurists, at least with regard to constitutional values and pro-labor interests? First, the Florida appeals court did not couch its decision in constitutional terms nor did the decision mention any need to protect wronged members of society from those with greater resources.¹²⁶ Additionally, the U.S. Bill of Rights lacks any mention of positive labor rights.¹²⁷ Moreover, although rights like the right to strike are limited in both South Africa and Florida, Florida's state constitution places broader

119. See NEDLAC, *supra* note 88, ¶ 32, at 17.

120. See NUPSAW & SATAWU *obo* Morekure & Others [2017] ZACCMA 1 at paras. 52–54.

121. See LRA 66 of 1995 §§ 1, 3 (S. Afr.).

122. See ILO, APARTHEID AND LABOUR: A CRITICAL REVIEW OF THE EFFECTS OF APARTHEID ON LABOUR MATTERS IN SOUTH AFRICA 18–19 (1983).

123. S. AFR. CONST., 1996., ch. 2, §§ 9, 23. For example, the drafters ensured that the Constitution would protect everyone's right to fair labor practices, regardless of a person's classification as an employee or independent contractor. See *id.* § 23(1).

124. See NUPSAW & SATAWU *obo* Morekure & Others [2017] ZACCMA 1 at paras. 52–56.

125. *Id.* at para. 56.

126. See *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 225–27 (Fla. 3d Cir. Ct. 2017).

127. Compare S. AFR. CONST., 1996, ch. 2, § 23, with U.S. CONST. amends. I–X, XIV.

limitations on the right to strike by prohibiting all public employees from going on strike.¹²⁸

The status of at-will employment in each jurisdiction also highlights how most South African and U.S. lawmakers think of labor and employment rights. At-will employment systems effectively empower businesses, especially because employers in these systems can dismiss employees without providing just cause.¹²⁹ In South Africa, at-will employment does not exist.¹³⁰ In contrast, employment is presumed to be at-will in forty-nine U.S. states.¹³¹ Some states, like Florida, tip the scale even further by failing to provide extensive exceptions to at-will employment relationships.¹³²

As a member of the International Labour Organization (“ILO”), South Africa also has several international law obligations that inform its labor policy and jurisprudence.¹³³ To date, South Africa has incorporated twenty-three ILO Conventions into municipal law.¹³⁴ These twenty-three conventions are indicative of a generally pro-employee legal system; for example, the Right to Organise and Collective Bargaining Convention 98 of 1949 “protect[s] workers and their representatives against victimization by their employers on account of their trade union activities.”¹³⁵ The Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 also protects workers and their representatives from employers that

128. Compare S. AFR. CONST., 1996, ch. 2, § 23(2)(c), with FLA. CONST. art. 1, § 6. In South Africa, limitations on the right to strike exist for essential or maintenance service workers. LRA 66 of 1995 § 65(1)(d). An “essential service” is a service that, if interrupted by a strike or other event, “would endanger the life, personal safety or health of the whole or any part of the population.” *Essential Services—Application, Investigation and Dispute Resolution*, CCMA, <https://www.labourguide.co.za/download-top/95-info-sheetsessential20services20-20info2/file> [<https://perma.cc/XH4L-SECJ>]. A maintenance service concerns working areas, plants, or machinery that would be “physically destroyed” if the service is interrupted. *Basic Guide to Maintenance Service Workers*, DEP’T OF LAB., <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-maintenance-service-workers> [<https://perma.cc/X7K4-JDPL>].

129. See *The At-Will Presumption and Exceptions to the Rule*, NAT’L CONF. STATE LEGIS., <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [hereinafter *At-Will Employment*] [<https://perma.cc/R3Q2-B4MW>].

130. See LRA 66 of 1995 § 185 (S. Afr.).

131. See *At-Will Employment*, *supra* note 129.

132. See Laura Hendrick, *At Will Employment Doctrine: How It Works & 4 Big Exceptions*, FITSMALLBUSINESS (Jan. 8, 2018), <https://fitsmallbusiness.com/at-will-employment-doctrine/> [<https://perma.cc/PZP8-GLFA>]. One significant exception to Florida’s at-will employment system lies in its whistleblower laws, which protect employees from employer retaliation when they report or refuse to participate in an employer’s illegal or unethical activities. Compare FLA. STAT. § 112.3187 (2017), with FLA. STAT. § 448.102 (2017).

133. See DARCY DU TOIT ET AL., *LABOUR RELATIONS LAW: A COMPREHENSIVE GUIDE* 64 (3d ed. 2000).

134. See *Ratifications for South Africa*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 [<https://perma.cc/QU2X-62KX>]. It is important to remember that ILO conventions do not become law upon ratification. DU TOIT ET AL., *supra* note 133, at 64–65. Rather, in order for ILO conventions to become binding, South African legislators must incorporate conventions into an act of “legislative transformation,” such as “an Act of Parliament.” Id.

135. DU TOIT ET AL., *supra* note 133, at 65.

act adversely to trade union interests.¹³⁶

In contrast, ILO conventions do not have the same force in the United States. Although the United States is a member-state and donor of the ILO,¹³⁷ the United States has only ratified fourteen of the 189 ILO conventions and two of the ILO's eight core conventions.¹³⁸ Generally speaking, U.S. law and the ILO conventions provide similar protections against anti-union discrimination; nevertheless, the ILO has surpassed U.S. law in the protections it provides for women, children, and noncitizen workers.¹³⁹ Thus, U.S. states like Florida are not necessarily bound by the same public international law obligations as South Africa and its provinces.¹⁴⁰

Finally, South Africa emerged from the embers of apartheid resistance with a highly organized labor movement and relatively pro-union culture.¹⁴¹ As stated prior, the Constitution preserves several labor and employment rights, which include the right to form and join a trade union and engage in collective bargaining with employers' organizations.¹⁴² The LRA also refers to the rights that organizations enjoy when engaging in collective bargaining,¹⁴³ and in 2014, Parliament amended the LRA in an attempt to ameliorate an institutional bias against minority trade unions.¹⁴⁴ Furthermore, although courts have yet to resolve the Uber

136. See *id.*

137. See *The US: A Leading Role in the ILO*, ILO, <http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang-en/index.htm> [<https://perma.cc/8UG2-6MP7>].

138. See Davis Weissbrodt, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1842-43 (2014).

139. *Id.* at 1871-78.

140. See *id.* at 1878. To empower American workers nationwide, the United States would have to ratify more of the conventions that South Africa has ratified and incorporate these conventions into municipal law. See *id.*

141. The organized labor movement in South Africa is one of Africa's most powerful labor movements, having played a significant role in the democratization process. Steve L. Gordon, *Individual Trust and Distrust in South Africa Trade Unions: A Qualitative Analysis, 2011-2013*, 42 POLITIKON 325, 327-28 (2015). Interestingly, however, researchers have identified dwindling levels of trust in trade unions in recent years, as well as a need to increase engagement with disheartened working-class communities. *Id.* at 336, 340. Events in 2012, such as the Marikana Massacre, as well as public discontent with the government since the end of apartheid, may have contributed to these trends. *Id.* at 335-36, 338-39.

142. S. AFR. CONST., 1996, ch. 2, § 23(2)(a), (5).

143. LRA 66 of 1995 §§ 11-22 (S. Afr.).

144. See LRA 66 of 1995 § 8(a) as amended by LRA Amendment Act 6 of 2014 (S. Afr.); see also *South Africa—2015*, ILO IRLEX, http://www.ilo.org/dyn/irlex/en/?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_SUBCODE_CODE,P1100_YEAR:ZAF, 2015 (“[T]he 2014 Amendment Act allows for a Commissioner to grant collective bargaining rights to unions that are not sufficiently representative.”) [<https://perma.cc/7H5U-T25T>]. It is important to note that union members have not always agreed with Parliament's proposed amendments to the LRA, especially those proposed in November 2017. See Pavan Kulkarni, *South Africa: Trade Unions Call for General Strike on April 25 against Anti-Labour Reforms*, NEWSCLICK (Mar. 22, 2018), <https://newsclick.in/south-africa-trade-unions-call-general-strike-april-25-against-anti-labour-reforms> (“[The] South African Federation of Trade Unions (SAFTU) has called for a general strike on [the] 25th of April against . . . the amendments proposed to [the] Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA).”) [<https://perma.cc/4PAH-T4LJ>].

dilemma, several Uber drivers have already organized under independent labor organizations and trade unions, including the Guild and the Movement.¹⁴⁵

Although U.S. workers also enjoy the right to join unions, union membership in the United States lags behind other developed nations.¹⁴⁶ In 2016, only 10.7% of the U.S. workforce was organized.¹⁴⁷ Furthermore, approval ratings for American labor unions have yet to reach the record highs they enjoyed in decades past,¹⁴⁸ and the proliferation of right-to-work laws nationwide continues to negatively impact unions.¹⁴⁹ For example, Florida first passed right-to-work legislation in the 1940s.¹⁵⁰ These laws effectively disempowered unions by providing workers with blanket access to benefits acquired via negotiations without obligating workers to join a union or to pay crucial service fees.¹⁵¹ Today, right-to-work proponents argue that “these laws create jobs, lead to higher wages, improve union accountability, and are morally right because they do not compel individuals to support a cause in which they do not believe.”¹⁵²

145. *Uber South Africa Tech. Servs. Ltd v. NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at para. 61, available at <http://www.saflii.org/za/cases/ZACCMA/2017/1.html> [<https://perma.cc/G29E-57LG>]; see also Kazeem, *supra* note 52 (“Around 500 of the 4,000 Uber drivers in South Africa have joined the South African Transport and Allied Workers’ Union (SATAWU) with a view to possibly initiate legal action against Uber, Zanele Sabela, the union’s spokesperson says.”).

146. Robert Gebelhoff, *Why Are Unions in the U.S. So Weak?*, WASH. POST (Aug. 1, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/08/01/why-are-unions-in-the-u-s-so-weak/?utm_term=.C0cdb18c22bd [<https://perma.cc/5XXB-GYRM>].

147. See Jeff Cox, *Disorganized: Union Membership Hit an All-Time Low in 2016*, CNBC (Jan. 26, 2017), <https://www.cnbc.com/2017/01/26/disorganized-union-membership-hit-an-all-time-low-in-2016.html> [<https://perma.cc/GHV4-4CK9>]. Since 1970, American union membership in the private sector has particularly seen a decline. *A Brief History of Unions: How Unions Have Fought for Fairness at Work Over the Years*, UNION PLUS, <https://www.unionplus.org/page/brief-history-unions> [<https://perma.cc/E2XT-PHFP>]. Although South Africa has seen a decline in union density in the private sector, union members as a percentage of the workforce in the public and private sectors in 2013 were still at roughly sixty-nine percent and twenty-four percent, respectively. Haroon Bhorat et al., *Trade Unions in an Emerging Economy: The Case of South Africa* 5 (DPRU, Working Paper No. 2, 2014).

148. Art Swift, *Labor Union Approval Best Since 2003, at 61%*, GALLUP (Aug. 30, 2017), <http://news.gallup.com/poll/217331/labor-union-approval-best-2003.aspx> [<https://perma.cc/BBU7-67ZD>].

149. Victor G. Devinatz, *Right-to-Work Laws, the Southernization of U.S. Labor Relations and the U.S. Trade Union Movement’s Decline*, 40 LAB. STUDIES J. 297, 300, 305 (2015) (illustrating state action against private and public sector unionism).

150. *Id.* at 297–98. Florida’s right-to-work law can be found in its state constitution. FLA. CONST. art. I § 6 (“The right of persons to work shall not be denied or abridged by membership or non-membership in any labor union or organization.”).

151. See *Employer/Union Rights and Obligations*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> [<https://perma.cc/9EFL-MC4M>].

152. Ozkan Eren & Serkan Ozbeklik, *What Do Right-to-Work Laws Do? Evidence from a Synthetic Control Method Analysis*, 35 J. POL’Y ANALYSIS & MGMT 173, 173 (2015). In their study, Eren and Ozbeklik demonstrate that right-to-work laws in Oklahoma resulted in decreased private sector unionization rates, while also noting that their research does not necessarily speak to the effects that right-to-work laws would have in states with much higher private sector union densities. See *id.* at 191–93. Still, Eren and

Unfortunately, right-to-work proponents forget that much of what we understand to be right-to-work legislation is historically rooted in racist, anti-Semitic, and anti-communist movements.¹⁵³ In fact, Jim Crow apologists, such as Vance Muse—a Texas businessman credited with beginning the push for right-to-work legislation in the United States—championed these policies as a way to maintain a separation of the races in U.S. workplaces.¹⁵⁴ Because of these laws’ racist origins, civil rights leaders like Dr. Martin Luther King, Jr. urged U.S. workers to remain vigilant and “guard against being fooled by false slogans, such as ‘right to work.’”¹⁵⁵ Dr. King recognized that right-to-work laws were merely attempts at “rob[bing] us of our civil rights and job rights.”¹⁵⁶ Although right-to-work advocates today may not entertain the same overtly racist ideas as their predecessors, right-to-work legislation can still upset the balance of power between employers and employees.¹⁵⁷

IV. An Employee Classification in Practice

Given the aforementioned factors, South African courts can reasonably identify an employment relationship between Uber BV and local drivers. Once the courts classify Uber drivers as employees, however, two questions remain: (1) How will this decision affect drivers, especially in the midst of an ongoing Uber-Taxi war? And, (2) how might this decision affect Uber’s operations in South Africa?

A. Benefits to Drivers

After the courts classify South African drivers as Uber employees, drivers can finally hold Uber accountable for its lukewarm response to their needs. As employees, drivers will enjoy the rights that the LRA and Basic Conditions of Employment Act (“BCEA”) confer to South African work-

Ozbeklik recognize that their findings “may still shed light on the effects of RTW policies on local labor market outcomes.” *Id.* at 193.

153. Michael C. Pierce, *The Racist Origins of Right to Work*, LAB. NOTES (Aug. 3, 2017), <http://www.labornotes.org/blogs/2017/08/racist-who-pioneered-right-work-laws> [<https://perma.cc/8JYH-K3JL>].

154. *Id.* Vance Muse was quoted saying, “From now on, white women and white men will be forced into organizations with black African apes whom they will have to call ‘brother’ or lose their jobs.” Roger Bybee, *Right-to-Work Laws Built on Racist Foundations*, PROGRESSIVE (Mar. 4, 2015), <http://progressive.org/dispatches/right-to-work-laws-built-racist-foundations/> [<https://perma.cc/Y6HZ-PJZW>].

155. Martin Luther King Jr. *On ‘Right to Work’: ‘We Demand This Fraud Be Stopped’*, HUFFINGTON POST (Dec. 11, 2012), https://www.huffingtonpost.com/2012/12/11/martin-luther-king-jr-right-to-work_n_2277023.html [<https://perma.cc/CK62-B5HT>].

156. *Id.*

157. See Andy Schmookler, *The “Right -to-Work Con.”* HUFFINGTON POST: THE BLOG (July 6, 2016, 10:39 AM), https://www.huffingtonpost.com/andy-schmookler/the-right-to-work-con_b_10831994.html (“The evidence shows that right-to-work laws reduce the earnings of workers by a bit more than 3%, and that workers in right-to-work states are also less likely to benefit from employer-sponsored health care and pension coverage.”) [<https://perma.cc/6Q6Q-AX37>].

ers.¹⁵⁸ As stated previously, the LRA codifies several rights, including an employee's right to freedom of association and the right to not be unfairly dismissed.¹⁵⁹ As for the BCEA, its purpose is to "to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution" and "to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."¹⁶⁰

Nevertheless, the extent to which the BCEA can offer full protection to Uber drivers as employees will depend on their annual earnings.¹⁶¹ Particularly, the Minister of Labour sets an annual earnings threshold amount that determines Chapter Two's reach.¹⁶² If an employee earns below the threshold amount—currently set at R205,433.30—that employee will receive full protection under Chapter Two.¹⁶³ On the other hand, if an employee earns over the threshold amount, the BCEA excludes the employee from certain provisions.¹⁶⁴ Hence, drivers whose earnings exceed the threshold amount would not have the legal right and entitlement to demand payment for overtime at a rate of one and a half times the normal wage rate.¹⁶⁵ Still, drivers would retain the legal right to negotiate with Uber.¹⁶⁶ Moreover, regardless of their annual earnings, the BCEA would require that Uber regulate work hours in accordance with the provisions dealing with occupational health and safety, among other factors.¹⁶⁷

A ruling in favor of an employee classification would also entitle drivers to protections under the Compensation for Occupational Injuries and Diseases Act ("COIDA").¹⁶⁸ Although Uber has implemented a series of features to improve driver safety in South Africa,¹⁶⁹ drivers that have suffered attacks continue to face high medical care costs.¹⁷⁰ According to the Department of Labour, COIDA would apply if Uber drivers are injured or killed as a result of physical intimidation and attacks on the job.¹⁷¹ If a driver is killed as the result of an accident on the job, COIDA also confers a

158. See Amanda Arumugam, *The Gig Economy—A Silent Revolution that is Set to Change the Face of Employment Law*, GOLEGAL (Nov. 6, 2017), <https://www.golegal.co.za/gig-economy-employment-law/> [<https://perma.cc/W6U4-3ZY3>].

159. See LRA 66 of 1995 § 4, 185 (S. Afr.).

160. BCEA 75 of 1997 § 2 (S. Afr.).

161. See Andre Claassen & Jan Du Toit, *The Basic Conditions of Employment Act: Threshold Earnings*, S. AFR. LAB. GUIDE, <http://www.labourguide.co.za/conditions-of-employment/643-the-earnings-threshold> [<https://perma.cc/BA7Y-6FKS>].

162. BCEA 75 of 1997 § 6 (S. Afr.).

163. See Claassen & Du Toit, *supra* note 161.

164. See *id.*

165. See *id.*

166. See *id.*

167. See BCEA 75 of 1997 § 7 (S. Afr.).

168. See Compensation for Occupational Injuries and Diseases Act [COIDA] 130 of 1993 § 22 (S. Afr.).

169. Burke, *supra* note 2; see also *Why Uber Is Here to Stay—Despite the Taxi Violence*, BUSINESSTECH (Nov. 7, 2017), <https://businesstech.co.za/news/mobile/209555/why-uber-is-here-to-stay-despite-the-taxi-violence/> (discussing Uber's efforts to protect drivers) [<https://perma.cc/PNV9-MQDY>].

170. See Nzimande, *supra* note 49.

171. See Lloyd Ramutloa, *Department of Labour's Position in Terms of Uber Drivers and CCMA Ruling*, DEP'T OF LAB. (July 18, 2017), <http://www.labour.gov.za/DOL/media->

right to the victim's family to be compensated for their loss.¹⁷²

Even so, in the event of a driver's injury or death on the job, the right to compensation for drivers and their families is not absolute. In fact, COIDA codifies the following exception: if an employee acted illegally, against an employer's orders, or without any orders from an employer at the time of injury or death, then the event is not an accident as defined by COIDA, and the employee and the employee's family are no longer entitled to compensation.¹⁷³ Why is this exception important? The increase in urban violence has seen attacks on both sides of the Uber-Taxi conflict.¹⁷⁴ If courts recognize Uber drivers as employees, Uber might challenge requests for compensation by arguing that a driver acted against Uber's orders when the driver suffered injury or died on the job. Moreover, Uber does not place any limits on drivers' work schedules—drivers can easily switch on and off the app over the course of one day.¹⁷⁵ Therefore, if a driver or the driver's family seeks compensation under COIDA, courts will have to decide what it means for a driver to "act[] for the purposes of or in the interests of or in connection with the business of his employer."¹⁷⁶ Will COIDA protections only apply when a driver is transporting a customer? Or, will it be enough for a driver to activate the Uber app before an attack or retaliation?

B. Uber's Business Model

Those who are opposed to classifying Uber drivers as employees point to the effects that this decision might have on Uber's operations in South Africa. One thing is certain: if Uber drivers are identified as employees, Uber will have to rethink its business model.¹⁷⁷ Still, the extent to which Uber's business model will have to change and the costs of an employment relationship in general remain unclear. Changes that Uber might have to consider include reductions to the drivers' direct pay from trips, as well as retaining a smaller, more centralized group of full-time drivers.¹⁷⁸

desk/media-statements/2017/department-of-labour2019s-position-in-terms-of-uber-drivers-and-ccma-ruling [https://perma.cc/FA3E-WJXK].

172. See COIDA 130 of 1993 § 22(1) (S. Afr.).

173. See *id.* § 22(4) (S. Afr.).

174. See Masuabi, *supra* note 45.

175. See *Drive with Uber Earn Money on Your Schedule*, UBER, https://www.uber.com/a/us/?var=org2&exp=70622_t2 [https://perma.cc/YP6A-UTF8].

176. COIDA 130 of 1993 § 22(4) (S. Afr.).

177. See Stephen Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay its Drivers as Employees*, FORTUNE (Sept. 17, 2015), <http://fortune.com/2015/09/17/ubernomics/> [https://perma.cc/WJV9-BRYJ].

178. See Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/omribenshar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/2/#31c180fc2cd2> [https://perma.cc/MX63-TYUD]. Nevertheless, under the BCEA, Uber will be unable to implement deductions in remuneration unless the deduction "is required or permitted in terms of a law, collective agreement, court order or arbitration award," or the drivers provide consent. BCEA 75 of 1997 § 34 (S. Afr.). Also, Uber can only take so much from its drivers before they begin to disconnect from the e-hailing app's services. See Gandel, *supra* note 177.

From a business-interest standpoint, many people see this shift in worker classification as economically disastrous. One estimate places the cost of an employment relationship and increased benefits for drivers at roughly \$4.1 billion dollars.¹⁷⁹ Opponents of an employee classification also argue that it will constitute a stab at the gig economy and its success as a secondary or temporary source of income for workers.¹⁸⁰ Additionally, opponents have expressed concerns over whether Uber will still be able to offer its drivers the flexibility that has made the e-hailing company successful.¹⁸¹

Although an employee classification will come at a price to Uber, increased costs are no reason to misclassify drivers and ignore their basic needs.¹⁸² For many drivers, Uber is their main or only source of income, and employment protections are crucial for their financial wellbeing.¹⁸³ As one writer put it: “While imposing employment duties will increase fares for riders and cut into profits, that is a fair price to pay for a more egalitarian political economy.”¹⁸⁴ Additionally, like most start-ups, Uber relies on investments for its longevity; hence, Uber may be able to afford these changes as long as its investors remain faithful to the company.¹⁸⁵

C. No Need for a New Labor Classification

To mitigate losses within the gig economy and decipher nebulous labor relationships, some scholars suggest creating a new classification for Uber drivers. In fact, well before the rise of Uber and its competitors, countries worldwide experimented with labor classifications outside of the employee-independent contractor dichotomy.¹⁸⁶ Now, with increasing litigation and accusations of misclassification, scholars are debating whether a hybrid or new classification is the right choice for Uber drivers.¹⁸⁷

It is important to remember that when envisioning new ways to classify Uber drivers, every jurist balances a worker’s needs and an employer’s interests differently. For example, some jurists propose classifications that would provide drivers with basic protections, such as base-level pay; never-

179. See Gandel, *supra* note 177. Uber has yet to confirm this estimate. See *id.*

180. Easton Saltsman, Comment, *A Free Market Approach to the Rideshare Industry and Worker Classification: The Consequences of Employee Status and a Proposed Alternative*, 13 J.L. ECON. & POL’Y 209, 222 (2017).

181. See *id.* at 223.

182. See Gillian B. White, *In the Sharing Economy, No One’s an Employee*, THE ATLANTIC (Jun. 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/> [<https://perma.cc/ND2K-4BXC>].

183. See *id.*

184. See Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 484 (2016).

185. See Gandel, *supra* note 177. Just how long investors will have to stick by Uber before it begins making money again is unclear. See *id.*

186. See Miriam A. Cherry, “*Dependent Contractor*” In *The Gig Economy: A Comparative Approach*, 66 AM. U.L. REV. 635, 675-76 (2017).

187. See Andre Andoyan, Comment, *Independent Contractor or Employee: I’m Uber Confused! Why California Should Create an Exception for Uber Drivers and the “On-Demand Economy,”* 47 GOLDEN GATE U. L. REV. 153, 168-69 (2017).

theless, they do not go as far as including healthcare or worker's compensation.¹⁸⁸ At least within the United States, others have proposed a classification where workers would enjoy select freedoms, like collective bargaining and the freedom to organize, while employers would be free to pool independent workers and provide medical insurance and other benefits at group rates.¹⁸⁹ Generally, the end goal for these new classifications is to provide workers with some protection without (1) hindering innovation, (2) increasing the price of ride services, and (3) adding to company liability.¹⁹⁰ Across the board, jurists also agree that employers will require some legislative backing for this ideas to manifest real change.¹⁹¹

Unsurprisingly, critics have argued that a hybrid or new classification might actually complicate an already puzzling situation.¹⁹² Tests for hybrid classifications differ substantially across international jurisdictions, and their criteria—including what percentage of a driver's business comes from the same principal—are difficult to measure within the context of the gig economy.¹⁹³ This difficulty leads to a significant amount of unpredictability regarding non-traditional forms of employment.¹⁹⁴ Furthermore, problems with misclassification are not unique to the gig economy, and “providing for a specific category of worker in this sector would artificially segment the labour market and employment regulation.”¹⁹⁵ Accordingly, one wonders whether jurisdictions will have to create more classifications as the labor market and gig economy diversify, and to what extent these new classifications will rob workers of even more rights?

Several gig economy companies have already classified their workers as employees,¹⁹⁶ and as litigation against Uber increases worldwide, courts should not make Uber drivers the exception. Only when courts enforce these employers' obligations to their employees will companies like Uber begin to recognize their drivers' common humanity.¹⁹⁷ When the Senior Commissioner expressed her responsibility to protect weaker members of society from those with greater resources,¹⁹⁸ she reinforced an ongoing

188. *Id.*

189. See Seth D. Harris & Alan B. Kruger, *The Gig Economy: How to Modernize the Rules of Work to Fit the Times*, MILKEN INST. REV. (May 2, 2016), <http://www.milkenreview.org/articles/the-gig-economy> [<https://perma.cc/2AM3-92N5>].

190. See Alyssa M. Stokes, Note, *Driving Courts Crazy: A Look at How Labor and Employment Laws Do Not Coincide with Ride Platforms in the Sharing Economy*, 95 NEB. L. REV. 853, 881 (2017).

191. See *id.*

192. See Valero De Stefano, *The Rise of the “Just-In-Time Workforce”: On-Demand Work, Crowdsourcing and Labour Protection in the “Gig-Economy,”* 19 (ILO, Working Paper No. 71, 2016).

193. See *id.*

194. See *id.*

195. *Id.* at 21.

196. *Id.* at 22.

197. See Rogers, *supra* note 184, at 484.

198. See *Uber South Africa Tech. Servs. Ltd v. NUPSAW & SATAWU obo Morekure & Others* [2017] ZACCMA 1 at paras. 55-56, available at <http://www.saflii.org/za/cases/ZACCMA/2017/1.html> [<https://perma.cc/G6LG-4P96>].

concern about excessive power in labor relationships.¹⁹⁹ In many ways, this issue forms part of a greater cultural campaign to ensure that companies like Uber understand that Uber drivers are more than just “extensions of platforms, apps, and IT devices” or “a new group invisible workers.”²⁰⁰

Conclusion

South Africa’s Uber dilemma has forced jurists to answer important questions about the country’s largest black-owned sector: the taxi industry. Since the days of apartheid, taxi drivers have struggled to secure their livelihoods. Lamentably, they have found themselves restricted by a legacy of oppression that, despite significant progress, lingers on. As of late, Uber has exploded onto the transportation market, and labor courts must decide whether Uber drivers fit within a system that never contemplated the emergence of gig economy companies. If future jurists continue to draw inspiration from South Africa’s highly progressive constitution, international agreements, and pro-union culture, it is likely that Uber drivers will soon see the day that a labor court classifies them as employees.

Accordingly, a hybrid or new labor classification for drivers is not a viable solution for the Uber dilemma. These classifications give equal weight to corporate interests and disadvantaged workers’ needs, and they fail to recognize the importance of protecting workers from businesses with far more capital and power. Moreover, although Uber claims that its business model has provided drivers with an avenue for entrepreneurship, these success stories ignore most drivers’ realities, which are characterized by long, grueling workdays and unsustainable wages. Hence, it is crucial for jurists to understand that hybrid or new classifications unfairly compromise the rights and needs of historically oppressed groups.

Ultimately, the struggle for labor and employment rights in the gig economy does not end here. Not all Uber drivers are vehicle-owners, and some vehicle-owners function as middle-persons between Uber BV and hired drivers. This situation raises questions about the existence of co-employment relationships and whether an employee classification only extends to some Uber drivers. An employee classification also complicates the situation for many foreign nationals who cannot find employment elsewhere. At some point, lawmakers will have to reconsider immigration and naturalization laws that have made it difficult for foreign workers to make a living in South Africa. Finally, there are countless issues related to driver and commuter safety that the State has yet to resolve. Recognizing drivers’ rights as Uber employees, however, is a step in the right direction.

199. See Rogers, *supra* note 184, at 501-04.

200. See De Stefano, *supra* note 192, at 21.

