



Volume 119 | Issue 3

Article 10

April 2017

Square Pegs Do Not Fit in Roun Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers

Carl Shaffer

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Labor and Employment Law Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Carl Shaffer, *Square Pegs Do Not Fit in Roun Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers*, 119 W. Va. L. Rev. (2017).

Available at: <https://researchrepository.wvu.edu/wvlr/vol119/iss3/10>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

**SQUARE PEGS DO NOT FIT IN ROUND HOLES:
THE CASE FOR A THIRD WORKER
CLASSIFICATION FOR THE SHARING ECONOMY
AND TRANSPORTATION NETWORK COMPANY
DRIVERS**

I.	INTRODUCTION.....	1032
II.	BACKGROUND	1033
	A. <i>The Sharing Economy and Transportation Network Companies</i>	1033
	1. The Sharing Economy	1034
	2. Transportation Network Companies	1037
	B. <i>Worker Classification</i>	1039
	1. Worker Classification Tests	1041
	2. Worker Classification in Case Law	1044
	i. <i>Taxi Cab Drivers</i>	1044
	ii. <i>FedEx Drivers</i>	1046
	C. <i>Current Litigation Involving the Worker Classification of TNC Drivers</i>	1048
III.	ANALYSIS.....	1049
	A. <i>Worker Classification of TNC Drivers: How Might a Court Resolve This Issue?</i>	1050
	1. Indications of Employee or Independent Contractor Status of Uber Drivers.....	1050
	2. Classifying Uber’s Drivers: An Attempt to Fit the Square Peg into a Round Hole	1053
	B. <i>Policy Dictates that the Current Worker Classification Law Is Unfit to Describe TNC Drivers</i>	1055
	C. <i>Proposed Solutions to the Worker Classification of TNC Drivers</i>	1057
	1. Dependent Contractor	1057
	2. A Worker Classification for the Sharing Economy and Transportation Network Companies—the Platform Contractor	1058
IV.	CONCLUSION	1059

I. INTRODUCTION

Out of the ashes of the Great Recession has risen a new, burgeoning area of economic growth: the sharing economy. The idea is that any individual can generate income by marketing to others their otherwise idle assets and skills.¹ New companies are capitalizing on that idea by providing electronic platforms that connect these parties.² Perhaps the biggest names in the sharing economy are transportation network companies (“TNCs”), most notably Uber³ and Lyft.⁴ TNCs are companies that “provide prearranged transportation services for compensation using an online-enabled application or platform (such as smart phone apps) to connect drivers using their personal vehicles with passengers.”⁵ Both Uber and Lyft have experienced a meteoric rise in both prominence and valuation.⁶ Starting in California, these companies have expanded across the country and into cities all around the globe.⁷

Such growth has not come without obstacles. One such obstacle is how to classify the working relationship between TNCs and their drivers—courts must decide if the drivers are employees or independent contractors.⁸ The problem is that courts must apply the already murky standard found in worker classification case law.⁹ The standard—which has proved unsatisfactory even when applied to more traditional working relationships—presents significant

¹ See Christopher Koopman, *What Is the Sharing Economy?*, MERCATUS CTR. (Feb. 27, 2015), <http://mercatus.org/publication/what-sharing-economy>.

² See *id.*

³ See, e.g., UBER, <https://www.uber.com/> (last visited Mar. 22, 2017).

⁴ See, e.g., LYFT, <https://www.lyft.com/> (last visited Mar. 22, 2017).

⁵ *Transportation Network Companies*, CAL. PUB. UTIL. COMM’N, www.cpuc.ca.gov/tncinfo/ (last visited Mar. 22, 2017).

⁶ See Eric Newcomer, *GM Invests \$500 Million in Lyft*, BLOOMBERG TECH. (Jan. 4, 2016, 8:30 AM), www.bloomberg.com/news/articles/2016-01-04/gm-invests-500-million-in-lyft-to-bolster-alliance-against-uber; Sara Ashley O’Brien, *Uber Gets \$3.5 Billion from Saudi Arabia*, CNNTECH (June 1, 2016, 11:26 AM), <http://money.cnn.com/2016/06/01/technology/uber-saudi-arabia-investment/index.html> (stating that Uber has a \$62.5 billion valuation).

⁷ *Available Lyft Cities*, LYFT, <https://www.lyft.com/cities> (last visited Mar. 22, 2017) (listing all the cities where Lyft is available); *Find a City*, UBER, <https://www.uber.com/cities> (last visited Mar. 22, 2017) (listing all the cities where Uber is available).

⁸ See, e.g., Heather Somerville, *Uber Has Lost Again in the Fight Over How to Classify Its Drivers*, BUS. INSIDER (Sept. 10, 2015, 12:37 AM), <http://www.businessinsider.com/uber-independent-contractors-or-employee-2015-9>.

⁹ See *NLRB v. Hearst Publ’n Inc.*, 322 U.S. 111, 121 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009); see also RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (describing factors that differentiate servant and independent contractor); N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 261.06(1)–(2)(a) (2016) (describing the prohibition of “misclassification of employees as independent contractors” and the vagueness of the term “employee”).

challenges when applied to new, 21st-century working relationships.¹⁰ Confronted with TNCs, courts will likely arrive at uncertain and conflicting results. Consequently, public policy should dictate that worker classification law unacceptably stifles innovation and wealth creation. Existing alternatives to the employee-independent contractor dichotomy are found abroad, but these do not adequately define the relationship between TNCs and their drivers. Therefore, this Note argues that Congress and state legislatures should enact a new, third worker classification called the platform contractor that suits the realities of the working relationships created by the sharing economy and TNCs.

Part II.A defines the sharing economy and puts it into context with the economy as a whole. Part II.A also describes TNCs and TNC drivers. Part II.B provides background on worker classification law and how it is applied in the courts. Within that section are various worker classification tests and a group of cases involving workers who could serve as useful comparisons to TNC drivers. Part II.C discusses the current litigation on the worker classification of TNC drivers. Then, Part III.A attempts to classify TNC drivers as a court would, evaluating the relationship between TNCs and their drivers and drawing on precedent discussed in Part II.B. Part III.A shows that courts already struggle with classifying ambiguous working relationships and that the case of TNC drivers will be no different, if not worse. Part III.B will argue that public policy should dictate this result unacceptable and will look abroad for potential solutions before arguing that lawmakers should enact a new, third worker classification for sharing economy and TNC workers that is reflective of their relationships and adequately protects the parties involved.

II. BACKGROUND

Before discussing worker classification of TNC drivers, this Note will discuss the sharing economy in general and worker classification law as it stands today.¹¹ Part II.A will provide background on the sharing economy and TNCs to aid in understanding this new area of development. Then, Part II.B will discuss current worker classification law and how it is applied by courts. Lastly, Part II.C will discuss current litigation involving the worker classification of TNC drivers.

A. *The Sharing Economy and Transportation Network Companies*

The sharing economy is one name for a growing new market of startup companies that use the Internet to connect individuals who wish to “share” their

¹⁰ See Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 609–10 (2012).

¹¹ See *infra* Part II.A; *infra* Part II.B.

underutilized assets.¹² The idea is that individuals can create wealth for themselves by sharing their otherwise idle assets, such as a personal vehicle or spare bedroom, with other individuals in exchange for a fee.¹³ Although the sharing economy experienced rapid growth in recent years, only 44% of consumers in the United States are familiar with the sharing economy and only 19% of adults have actually been a consumer in the sharing economy.¹⁴ Because of this unfamiliarity, Part II.A will define and describe the sharing economy. Part II.A.1 will discuss the sharing economy as a whole and its place in and impact on the United States economy. Part II.A.2 will focus on TNCs, such as Uber and Lyft, and will explain what they are and how they work.

1. The Sharing Economy

The term “sharing economy” is one attempt to label an industry with “the potential to increase global revenues from roughly \$15 billion [in 2015] to around \$325 billion by 2025”;¹⁵ other attempts at labeling this industry include “the ‘collaborative economy,’ the ‘peer-production economy,’ or the ‘peer-to-peer economy.’”¹⁶ There is no universally accepted definition of the sharing economy, but it can adequately be described as follows: “any marketplace that uses the Internet to connect distributed networks of individuals to share or exchange otherwise underutilized assets.”¹⁷ Whatever term is used, the growth and size of the sharing economy means it should become a fixture in the marketplace into the future.¹⁸

The sharing economy is a relatively new market, and one way to better wrap one’s head around its concept is to look at what some of its companies do. Sharing economy companies operate in a variety of industries; consumers can now turn to the sharing economy for many traditional products and services, like

¹² Koopman, *supra* note 1.

¹³ *Id.*

¹⁴ PRICEWATERHOUSECOOPERS, THE SHARING ECONOMY 8 (2015), <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf>.

¹⁵ *Id.* at 14.

¹⁶ CHRISTOPHER KOOPMAN ET AL., THE SHARING ECONOMY AND CONSUMER PROTECTION REGULATION: THE CASE FOR POLICY CHANGE 4 (Dec. 2014) [hereinafter THE SHARING ECONOMY], <https://www.mercatus.org/system/files/Koopman-Sharing-Economy.pdf>.

¹⁷ Koopman, *supra* note 1.

¹⁸ See PRICEWATERHOUSECOOPERS, *supra* note 14, at 14.

lodging,¹⁹ car rides,²⁰ meals,²¹ storage,²² loans,²³ and labor.²⁴ For example, Airbnb operates in the same field as traditional hotels.²⁵ Users of Airbnb's website can list extra space in their apartment or home, and other users can book a temporary stay.²⁶ Since the company's inception in 2008, over 50 million users have booked a stay through Airbnb.²⁷ Another example is Lending Club, which is a peer-to-peer lending network.²⁸ Borrowers can apply for loans through Lending Club, and any individual can make an offer to invest in the loan.²⁹ Nearly \$24.6 billion in loans have been funded through the company as of December 31, 2016.³⁰ The common denominator in these companies is that people are connecting directly to "share" their otherwise underutilized assets with others—for a fee, of course.³¹

Of consumers who are familiar with the sharing economy, PricewaterhouseCoopers found that, compared to traditional industries, 86% believe it is more affordable, 83% believe it is more efficient and convenient, and 76% believe it is better for the environment.³² The demand for these companies is not only based upon competitive price and quality,³³ but also a shift in mindset when it comes to ownership.³⁴ A survey conducted by B&U Consulting in 2011 found that 66% of consumers, and 77% of millennials, prefer

¹⁹ See AIRBNB, <https://www.airbnb.com/> (last visited Mar. 22, 2017).

²⁰ See LYFT, *supra* note 4; UBER, *supra* note 3. Uber and Lyft connect riders with drivers who provide transportation using their personal vehicle.

²¹ See MEAL SHARING, <https://www.mealsharing.com/> (last visited Mar. 22, 2017). Meal Sharing allows people to book a gourmet home-cooked meal at another person's house. *Id.*

²² See SHAREMYSTORAGE.COM, <http://www.sharemystorage.com/> (last visited Mar. 22, 2017). Sharemystorage allows people to list extra storage space for rent. *Id.*

²³ See LENDING CLUB, <https://www.lendingclub.com/> (last visited Mar. 22, 2017).

²⁴ See TASKRABBIT, <https://www.taskrabbit.com/> (last visited Mar. 22, 2017). TaskRabbit allows people to list their services for everyday tasks. *Id.*

²⁵ See AIRBNB, *supra* note 19.

²⁶ *How Does Airbnb Work?*, TECHBOOMERS, <https://techboomers.com/t/how-does-airbnb-work> (last visited Mar. 22, 2017).

²⁷ Sarah Buhr, *Airbnb Hosted Nearly 17 Million Guests This Summer*, TECHCRUNCH (Sept. 7, 2015), <http://techcrunch.com/2015/09/07/airbnb-hosted-nearly-17-million-guests-this-summer/>.

²⁸ See LENDING CLUB, *supra* note 23.

²⁹ *How Does an Online Credit Marketplace Work?*, LENDING CLUB, <https://www.lendingclub.com/public/how-peer-lending-works.action> (last visited Mar. 22, 2017).

³⁰ *What We Do*, LENDING CLUB, <https://www.lendingclub.com/public/about-us.action> (last visited Mar. 22, 2017).

³¹ See THE SHARING ECONOMY, *supra* note 16, at 4.

³² PRICEWATERHOUSECOOPERS, *supra* note 14, at 9.

³³ See THE SHARING ECONOMY, *supra* note 16, at 14.

³⁴ See PRICEWATERHOUSECOOPERS, *supra* note 14, at 14 ("The way we lived, the way we consumed, this whole ownership economy much of it emerged out of driving our cars . . .").

less possessions, likely as a result of emerging from the most recent recession.³⁵ Additionally, 81% of people who are familiar with the sharing economy believe consuming in the sharing economy is cheaper than the traditional form of ownership.³⁶

Despite its novelty, people have quickly accepted and praised sharing economy companies.³⁷ Proponents claim that the sharing economy adds value to consumers and eliminates inefficiencies in traditional transactions.³⁸ Specifically, the sharing economy utilizes assets that would otherwise be “dead capital.”³⁹ Additionally, it increases competition by adding both supply and demand, cutting transaction costs, reducing “the problem of asymmetrical information between producers and consumers,” and providing value to some consumers who have been underserved by traditional businesses and industries.⁴⁰

The sharing economy also has vocal critics. Some critics point to the fact that many people are purchasing assets for the sole purpose of using them in the sharing economy and that the word “sharing” really does not apply to what the sharing economy has become.⁴¹ Other detractors in traditional industries claim the lack of regulatory oversight on sharing economy companies leads to an unfair competitive advantage and increases risk for consumers.⁴² Additionally, advocates of workers’ rights claim sharing economy companies are exploiting their labor forces with low wages and unfair business practices.⁴³ For example, former Secretary of Labor Robert Reich argues that the sharing economy is actually the “share-the-scrap” economy.⁴⁴ He claims that workers in the sharing economy perform menial tasks for minimal pay while the third-party

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ See THE SHARING ECONOMY, *supra* note 16, at 4; PRICEWATERHOUSECOOPERS, *supra* note 14, at 9 (citing statistics regarding the acceptance and benefit of these companies).

³⁸ See THE SHARING ECONOMY, *supra* note 16, at 4.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 5. The authors explain how the sharing economy accomplishes these ends, respectively: adding more buyers and sellers; decreasing “the cost of finding willing traders, haggling over terms, and monitoring performance”; compiling consumer reviews and presenting them to other consumers; and evading existing regulatory measures. *Id.*

⁴¹ Christopher Mims, *How Everyone Gets the “Sharing” Economy Wrong*, WALL STREET J. (May 24, 2015, 3:32 PM), <http://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921>.

⁴² See Dean Baker, *Don’t Buy the “Sharing Economy” Hype: Airbnb and Uber Are Facilitating Rip-offs*, GUARDIAN (May 27, 2014, 7:30 AM), <http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation> (discussing how Airbnb and Uber are free from taxes and regulations that face the traditional hotel and taxi industries, giving them an unfair competitive advantage and putting consumers at risk).

⁴³ *Id.*; see also Robert B. Reich, *The Share-the-Scraps Economy*, ROBERTREICH.ORG (Feb. 2, 2015), <http://robertreich.org/post/109894095095>.

⁴⁴ Reich, *supra* note 43.

corporations that own the platforms receive the bulk of the fee.⁴⁵ He also argues that sharing economy companies are exploiting their status and nature to “eliminate[] minimal [working] standards completely” and return workers’ legal protections to “the nineteenth century—when workers had no power and no legal rights, took all the risks, and worked all hours for almost nothing.”⁴⁶

Central in the sharing economy debate is transportation.⁴⁷ Companies like Uber and Lyft have dominated headlines with multi-billion dollar valuations⁴⁸ and complex legal battles that could severely affect each companies’ viability.⁴⁹ This area of the sharing economy and the legal battles it has faced and is currently facing will be described in Part II.A.2.

2. Transportation Network Companies

TNCs, like Uber and Lyft, were first defined in California as companies that “provide prearranged transportation services for compensation using an online-enabled application or platform (such as smart phone apps) to connect drivers using their personal vehicles with passengers.”⁵⁰ In essence, TNCs perform the same function of taxi companies.⁵¹ Uber and Lyft are the two largest TNCs, with valuations of approximately \$62.5 and \$5.5 billion, respectively.⁵² Additionally, Uber is available in over 521 cities across the globe, and Lyft is available in 347 cities in the United States.⁵³

Perhaps the best way to understand the nature of TNCs is to walk through the process of getting a ride through a TNC’s platform.⁵⁴ Passengers log on to

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See, e.g., Anna Gallegos, *The Four Biggest Legal Problems Facing Uber, Lyft and Other Ridesharing Services*, LXBN (June 4, 2014), <http://www.lxbn.com/2014/06/04/top-legal-problems-facing-uber-lyft-ridesharing-services/> (describing the legal consequences that have made Uber and similar companies the center of debate).

⁴⁸ See O’Brien, *supra* note 6; Newcomer, *supra* note 6.

⁴⁹ See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁵⁰ *Transportation Network Companies*, *supra* note 5.

⁵¹ Mary Beth Quirk, *How Do Uber and Lyft Work and Why Should I Even Care?*, CONSUMERIST (Sept. 18, 2014, 4:22 PM), <http://consumerist.com/2014/09/18/how-do-uber-and-lyft-work-and-why-should-i-even-care/>.

⁵² Newcomer, *supra* note 6; O’Brien, *supra* note 6.

⁵³ *Available Lyft Cities*, *supra* note 7 (listing all the cities where Lyft is available); *Find a City*, *supra* note 7 (listing all the cities where Uber is available).

⁵⁴ See Quirk, *supra* note 51.

Uber's phone platform then enter their current location and desired destination.⁵⁵ Next, an Uber driver in the area claims the ride on the driver's own platform, and a notification is sent to the passenger.⁵⁶ The notification includes the "driver's name and license plate number" and "also display[s] the driver's route and estimated time of arrival."⁵⁷ The driver picks up the passenger and follows GPS directions to the destination.⁵⁸ The passenger is automatically billed for the ride through the platform, and both the passenger and the driver rate each other based on their experience.⁵⁹ This rating system provides incentive to be a good passenger and driver.⁶⁰

It is also important to understand the role of TNC drivers and why so many are willing to work for these companies.⁶¹ According to Uber's own survey, most drivers enjoy the independence of driving through the company's platform: 87% of drivers replied that they drive for Uber in order "to be their own boss and set their own schedule," 85% of drivers replied that they enjoy the flexibility in their schedule and work-life balance driving for Uber provides, and 73% of drivers replied that they preferred "choos[ing] their own schedule and . . . [being] their own boss" over a traditional work relationship.⁶² The survey also found that drivers enjoyed working variable hours, with 50% driving "fewer than [ten] hours a week" on average and 65% "chang[ing] the number of hours worked per week by more than 25% from one week to the next."⁶³ Additionally, many drivers do not rely on using Uber's platform as their primary source of income: 61% "have full-time or part-time careers outside of Uber," and 33% "us[e] Uber to make extra spending money."⁶⁴

The relationship between Uber and its drivers is governed by the Technology Services Agreement ("Services Agreement").⁶⁵ The Services

⁵⁵ *Id.* The experiences for users of Lyft are nearly identical to those of Uber with the most notable addition to the Lyft experience being a big purple mustache attached to the front of Lyft drivers' vehicles. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *Id.* (describing how payment goes directly to Uber rather than the driver and the driver receives an online receipt).

⁶⁰ *Id.*

⁶¹ *See* Kate, *The Top 10 Facts You May Not Know About Uber Driver Partners*, UBER NEWSROOM (Aug. 5, 2015), <http://newsroom.uber.com/2015/08/the-top-10-facts-you-may-not-know-about-uber-driver-partners/> (describing the benefits of driving for Uber).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Kate, *supra* note 61.

⁶⁵ TECHNOLOGY SERVICES AGREEMENT BETWEEN UBER AND ITS DRIVERS, (Dec. 11, 2015), <https://s3.amazonaws.com/uber-regulatory->

Agreement is the contract Uber's drivers must sign in order to use Uber's platform.⁶⁶ Of importance to worker classification, the Services Agreement explicitly states that Uber's drivers are independent contractors.⁶⁷ However, it also contains provisions that grant Uber a degree of control of its drivers.⁶⁸ The Services Agreement and other aspects of the relationship between TNCs and their drivers will be discussed in more detail in Part III.

Although Uber and Lyft are young companies, both face major legal battles that could alter the way they conduct business with their drivers.⁶⁹ Related to the Services Agreement, cases such as *O'Connor v. Uber Technologies, Inc.*⁷⁰ and *Cotter v. Lyft, Inc.*⁷¹ are deciding on one major legal battle in the industry—whether TNC drivers are employees or independent contractors of the TNC.⁷² However, proponents of TNCs view them as the future of transportation and fear over-regulating such a booming and innovative industry.⁷³ Thus, this issue sparked a contentious debate that hinges on applying traditional legal principles to newly-created working relationships.⁷⁴ Part II.B will discuss these legal principles.

B. Worker Classification

The concept of worker classification for purposes other than vicarious liability is a product of industrialization.⁷⁵ William Blackstone believed the relationship between master and servant to be one of “three great relations in

documents/country/united_states/RASIER%20Technology%20Services%20Agreement%20December%2010%202015.pdf [hereinafter SERVICES AGREEMENT].

⁶⁶ *Id.*

⁶⁷ *Id.* § 13.1.

⁶⁸ *See, e.g., id.* § 2.3.

⁶⁹ *See* Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers About Their Insurance Coverage*, 56 B.C.L. REV. 1097, 1105–06 (2005) (listing some of the legal challenges Uber has faced, such as challenges to its practice of surge pricing, classification of drivers as independent contractors, charging mandatory gratuities, and whether it provides adequate insurance coverage); *infra* Part III.C.

⁷⁰ 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁷¹ 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

⁷² *O'Connor*, 82 F. Supp. 3d at 1133; *Cotter*, 60 F. Supp. 3d at 1067.

⁷³ *See* Richard A. Epstein, *Don't Strangle Uber. Or Lyft. Or Airbnb*, NEWSWEEK (Aug. 12, 2015, 11:22 AM), <http://www.newsweek.com/dont-strangle-uber-or-lyft-or-airbnb-362135> (discussing the futility and danger of applying current regulatory frameworks to the sharing economy for fear of impacting the viability of companies like Uber, Lyft, and Airbnb).

⁷⁴ *Id.*

⁷⁵ *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 304–07 (2001).

private life.”⁷⁶ According to Blackstone, a master was liable for the actions of his servant where that servant was acting under the control of the master.⁷⁷ Over time, American lawmakers adopted this vicarious liability standard for classifying workers in a variety of legal fields as employees or independent contractors.⁷⁸

Recently, TNC drivers brought suit against Uber and Lyft disputing their classification by both companies as independent contractors.⁷⁹ The employee-independent contractor issue is not uncommon: the most recent study by the Bureau of Labor Statistics in 2005 found that there were approximately 10.3 million independent contractors in the United States, which constituted 7.4% of the workforce.⁸⁰ Despite the prevalence of independent contractors in the American economy, courts struggle to apply current law in worker classification cases.⁸¹ The Supreme Court has noted that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing.”⁸²

This section will discuss the worker classification tests used by the courts and provide examples of their application. Part II.B.1 discusses tests courts use to determine worker classification. It will also venture abroad to discuss tests courts of other countries use in their determinations. Part II.B.2 will expand on these tests by analyzing cases involving the worker classification of taxi cab and FedEx drivers.

⁷⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 422 (1753). The other two: husband and wife, and parent and child. *Id.*

⁷⁷ *See id.* at 429–30.

⁷⁸ Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329, 334 (1998) (citing RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958)) (“The distinction was developed as a principle of tort law to determine whether a firm has vicarious liability for the wrongs committed by those who may be advancing the firm’s interests.”); Rubinstein, *supra* note 10, at 610 (“[T]he definition of ‘employee’ that employer status is heavily dependent upon, developed from common law tort principles involving vicarious liability of employers—not employment law dogma.”).

⁷⁹ *O’Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *Cotter v. Lyft Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

⁸⁰ BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, FEBRUARY 2005 4 (July 27, 2015, 10:00 AM), <http://www.bls.gov/news.release/pdf/conemp.pdf>. Of these 10.3 million individuals, 82.3% preferred their independent contractor arrangement over a traditional employment arrangement, 5.2% of respondents responded with “[i]t depends” concerning their employment arrangement preference, and 3.4% were listed as “[n]ot available.” *Id.* at Table 11.

⁸¹ *See, e.g., NLRB v. Hearst Publ’ns*, 322 U.S. 111, 121 (1944).

⁸² *Id.* This is certainly not aided by the fact that most statutory definitions of “employee” are circular, such as “any individual employed by an employer.” *E.g., Employee Retirement Income Security Program*, 29 U.S.C. § 1002(2)(B)(6) (2012); *Fair Labor Standards Act of 1938*, 29 U.S.C. § 203(e)(1) (2012).

1. Worker Classification Tests

Most modern employee classification decisions begin with some form of the common law test of master-servant.⁸³ Today, federal courts follow an iteration of the definition of a servant defined by the Restatement (Second) of Agency when analyzing whether a worker is an employee or an independent contractor.⁸⁴ Under this test, the United States Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*⁸⁵ focused primarily on an employer's "right to control" the way a worker performs a job.⁸⁶ The Court also considered a set of secondary factors:

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is a business; the provision of employee benefits; and the tax treatment of the hired party.⁸⁷

The Court held that none of these factors were decisive by itself and considered and weighed them all individually when making the determination of worker

⁸³ LAREAU, *supra* note 9, at Ch. 261, § 1.06.

⁸⁴ RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958). The Restatement lists ten factors in making this distinction:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Id.

⁸⁵ 503 U.S. 318 (1992).

⁸⁶ *Id.* at 323–24.

⁸⁷ *Id.* (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

classification.⁸⁸ From this holding and others, courts and agencies have developed their own tests that fall in line with the factors outlined by the Court.⁸⁹

One such test has emerged under the National Labor Relations Act (“NLRA”).⁹⁰ Dubbed by scholars such as Professor Mitchell H. Rubinstein as the “common law entrepreneurial control test,”⁹¹ this test views the common law factors through the lens of the workers’ ability to pursue entrepreneurial opportunities.⁹² Articulated in *FedEx Home Delivery v. NLRB*,⁹³ the United States Court of Appeals for the District of Columbia evaluated the common law factors through the “more accurate proxy” of a worker’s “entrepreneurial opportunity for gain or loss.”⁹⁴ The court did not believe it created a new test; on the contrary, it stated that the common law factors were still considered.⁹⁵ The court merely believed the common law entrepreneurial control test to be less unwieldy, particularly in cases where the line between employee and independent contractor was blurred.⁹⁶

⁸⁸ *Id.* (citing *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

⁸⁹ *See, e.g.*, LAREAU *supra* note 9, at Ch. 261, § 1.06(b) (listing the 16 factors defined by the Equal Employment Opportunity Commission that fall in line with the Court’s list of primary and secondary factors in *Darden*).

⁹⁰ *See FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). Another common test developed under the Fair Labor Standards Act focuses on the “economic reality” of the relationship between employer and worker. For more information on this test, see *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 804 (6th Cir. 2015) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947)); LAREAU *supra* note 9, at Ch. 177, § 1.02(1); John C. Becker & Robert G. Haas, *The Status of Workers as Employees or Independent Contractors*, 1 *DRAKE J. AGRIC. LAW* 51, 57 (1996). In addition, states developed their own tests and statutes for the purposes of state regulation. While most of the state tests vary in language, they all are rooted in the common law right-to-control test. *See* Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 *U.C. DAVIS BUS. L.J.* 111, 135 (2009) (listing the test used by each state); *see also* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 *U. PA. J.L. & SOC. CHANGE* 53, 64 (2015) (discussing recent changes to and enforcement of state statutory schemes); Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 *N. ILL. U.L. REV.* 67, 85 (2013) (stating that a worker who classifies as an independent contractor under a test at the federal level may very well classify as an employee under a state test).

⁹¹ Rubinstein, *supra* note 10, at 619.

⁹² *See FedEx*, 563 F.3d at 497.

⁹³ *Id.* at 492.

⁹⁴ *Id.* at 497.

⁹⁵ *Id.* (“[A]ll the considerations at common law remain in play.”); *see* Rubinstein, *supra* note 10, at 619.

⁹⁶ *FedEx*, 563 F.3d at 497.

Other countries have expanded beyond the dichotomy of employee-independent contractor.⁹⁷ For example, Canadian law evolved to form a third worker classification between employee and independent contractor: the dependent contractor.⁹⁸ The dependent contractor is intended to reflect the reality that contractors vary in their dependence on the employer.⁹⁹ Canadian courts first determine whether the worker is an employee or a contractor.¹⁰⁰ For this determination, Canadian courts consider

whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.¹⁰¹

Only upon a finding of contractor status does the court then decide whether the worker is a dependent or independent contractor.¹⁰² The relevant portion of Canada's statute defines a dependent contractor as

any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.¹⁰³

⁹⁷ See Andrei Hagiu & Rob Biederman, *Companies Need an Option Between Contractor and Employee*, HARV. BUS. REV. (Aug. 21, 2015), <https://hbr.org/2015/08/companies-need-an-option-between-contractor-and-employee> (discussing the inefficiencies of the employee-independent contractor dichotomy and proposing a dependent contractor classification); see also Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J., <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831> (last updated Jan. 28, 2015).

⁹⁸ *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, para. 29–30 (Can. Ont.).

⁹⁹ *Id.* at para. 35–36.

¹⁰⁰ *Id.* at para. 34.

¹⁰¹ *Id.* at para. 38.

¹⁰² *Id.* at para. 34.

¹⁰³ Canada Labour Code, R.S.C. 1985, c L-2, s.3.

Courts employ an exclusivity test to determine economic dependence, holding that workers who show “near-complete exclusivity” satisfy the definition of a dependent contractor.¹⁰⁴

2. Worker Classification in Case Law

Worker classification of drivers in general is not an issue of first impression in the case law: for example, courts have considered the worker classification of taxi cab and FedEx drivers.¹⁰⁵ Such cases could be useful analogs when predicting how a court will decide on future worker classification of drivers’ cases.¹⁰⁶ This section will first analyze cases involving taxi cab drivers.¹⁰⁷ Then, it will focus on cases involving FedEx drivers.¹⁰⁸

i. Taxi Cab Drivers

In *Yellow Taxi Co. v. NLRB*,¹⁰⁹ the United States Court of Appeals for the District of Columbia found that the taxi drivers at issue were independent contractors, not employees.¹¹⁰ In this case, taxi cab drivers leased their vehicles from Suburban Yellow Taxi Company.¹¹¹ Suburban offered many different leasing options, and drivers were furnished with a “fully equipped, licensed cab.”¹¹² Each cab bore Suburban’s logo, and drivers had the right to use Suburban’s name to market their services.¹¹³

The drivers kept all of their revenue from driving the leased taxi cab.¹¹⁴ Suburban could not dictate drivers’ performance or require drivers to pick up passengers, but Suburban did make recommendations to drivers, such as encouraging drivers to be courteous and prompt, describing how to handle automobile accidents, reminding drivers not to congregate together, and telling

¹⁰⁴ *McKee*, 2009 ONCA 916, at para. 30.

¹⁰⁵ See *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 366 (D.C. Cir. 1983).

¹⁰⁶ See *infra* Section III.A.

¹⁰⁷ See *Yellow Taxi*, 721 F.2d at 366; *Friendly Cab*, 512 F.3d at 1090.

¹⁰⁸ See *Alexander*, 765 F.3d at 981; *FedEx Home Delivery*, 563 F.3d at 492.

¹⁰⁹ *Yellow Taxi*, 721 F.2d at 366.

¹¹⁰ *Id.* at 384.

¹¹¹ *Id.* at 368–69 (“A wider selection of leases can scarcely be imagined.”).

¹¹² *Id.* at 369 (Cabs came with “a meter and radio dispatch equipment . . . , liability insurance, tires, anti-freeze, free towing service . . . , and repair service for all damages determined not to be the driver’s fault and for all damages in excess of the driver’s posted bond.”).

¹¹³ *Id.*

¹¹⁴ *Id.*

drivers to take the shortest possible route.¹¹⁵ Drivers had no hours requirement, could use their leased cab for personal use, and picked up the majority of their passengers though Suburban's radio dispatch.¹¹⁶

Originally, the NLRB held that the drivers leasing taxi cabs from Suburban were employees.¹¹⁷ However, on petition by Suburban, the Court of Appeals for the District of Columbia reversed.¹¹⁸ The court found that "[a]t practically all times . . . [the] drivers are not controlled" by Suburban¹¹⁹ and that the drivers had an "entrepreneurial contribution" in their work.¹²⁰ Therefore, the Court of Appeals for the District of Columbia held that, under the NLRA, the drivers who leased taxi cabs from Suburban were independent contractors, not employees.¹²¹

On the other hand, in *NLRB v. Friendly Cab Co.*,¹²² the Ninth Circuit affirmed the NLRB's decision that the taxi cab drivers at issue were employees.¹²³ Unlike the taxi company in *Yellow Taxi*, Friendly Cab Co. ("Friendly") could tell drivers where to work and what car to drive.¹²⁴ Drivers were subject to a policy manual and standard operating procedures that gave Friendly certain degrees of control over its drivers.¹²⁵ The policy manual imposed a dress code and dictated how drivers should drive,¹²⁶ and the operating procedures prohibited drivers from conducting independent business.¹²⁷

Given these facts, the Ninth Circuit reached the opposite result of *Yellow Taxi* and found that the drivers in question were Friendly's employees.¹²⁸ The court believed that the facts listed above restricted the drivers' "ability to . . .

¹¹⁵ *Id.* at 371–72.

¹¹⁶ *Id.* at 369–70.

¹¹⁷ *Id.* at 372.

¹¹⁸ *Id.* at 384.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 380.

¹²¹ *Id.* at 384 ("At practically all times in the conduct of their operations, the physical activities of Suburban's lessee drivers are not controlled by the lessor.").

¹²² 512 F.3d 1090 (9th Cir. 2008).

¹²³ *Id.* at 1103.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1093.

¹²⁶ *Id.* at 1094 (instructing drivers to accelerate smoothly, "[a]void abrupt stops," "not stop next to puddles or in front of obstacles such as signs, trees or hydrants," "stop either right next to curb or our away from the curb[.]" and "maintain good personal hygiene and dress appropriately and professionally").

¹²⁷ *Id.* (requiring drivers to conduct all service calls over Friendly's communications system, prohibiting drivers from distributing private business cards or phone numbers to customers "as these constitute an interference in company business and a form of competition not permitted," and mandating drivers to take all service calls from dispatchers).

¹²⁸ *Id.* at 1097.

develop entrepreneurial opportunities.”¹²⁹ Therefore, the Ninth Circuit held that under the NLRA the drivers who leased taxi cabs from Friendly were employees, not independent contractors.¹³⁰

ii. *FedEx Drivers*

In *FedEx Home Delivery v. NLRB*,¹³¹ the United States Court of Appeals for the District of Columbia held that FedEx drivers were independent contractors under the NLRA.¹³² In this case, drivers signed an operating agreement that outlined the relationship between FedEx and its drivers.¹³³ Per this agreement, FedEx could not dictate how much drivers worked, whether or when drivers could take breaks, the routes drivers should follow, or any other detail of performance.¹³⁴ Drivers used their own vehicles and were required to remove FedEx insignia when not in use for FedEx.¹³⁵ Additionally, drivers could hire their own employees or assign their contractual rights to serve their routes.¹³⁶

The court acknowledged that some factors appeared to weigh in favor of employee status.¹³⁷ FedEx required drivers to wear a uniform and display FedEx’s logo, imposed vehicle size and color specifications, and performed two in-person performance audits per year, among other factors.¹³⁸ Nonetheless, the court held that the FedEx drivers were independent contractors.¹³⁹ It believed that the record at hand showed the drivers had enough “entrepreneurial opportunity” to “clearly outweigh[]” a finding of employee status.¹⁴⁰ Therefore, the Circuit Court of Appeals for the District of Columbia held that the FedEx drivers were independent contractors, not employees.¹⁴¹

On the other hand, in *Alexander v. FedEx Ground Package System, Inc.*,¹⁴² the Ninth Circuit Court of Appeals found that the same type of FedEx

¹²⁹ *Id.* at 1098.

¹³⁰ *Id.* at 1103.

¹³¹ 563 F.3d 492 (D.C. Cir. 2009).

¹³² *Id.* at 495.

¹³³ *See id.* at 498.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 499.

¹³⁷ *See id.* at 500–01 (detailing the specific factors in this case that appear to weigh in favor of employee status).

¹³⁸ *See id.*

¹³⁹ *Id.* at 504 (“We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status.”).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 765 F.3d 981 (9th Cir. 2014).

drivers were employees.¹⁴³ In its decision, the Ninth Circuit expressly rejected the *FedEx Home Delivery* decision.¹⁴⁴ While *FedEx Home Delivery* was under the NLRA, *Alexander* was under California state employment law.¹⁴⁵ California's right-to-control test, like the NLRB's entrepreneurial opportunity test, is an iteration of the common law right-to-control test.¹⁴⁶

In contrast to *FedEx Home Delivery*, in *Alexander* the court held that FedEx "unambiguously . . . exercise[s]" control over its drivers.¹⁴⁷ The court reasoned that FedEx effectively controls how much its drivers work and how and when its drivers deliver packages.¹⁴⁸ The court also pointed to FedEx's appearance requirements for drivers and vehicles in reaching its decision.¹⁴⁹ While the court found the secondary factors under California's test leaned in favor of neither worker classification, the primary right-to-control factor weighed in favor of employee status.¹⁵⁰ Therefore, the Ninth Circuit held that FedEx drivers were employees, not independent contractors.¹⁵¹

¹⁴³ *Id.* at 984.

¹⁴⁴ *Id.* at 993.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 989 (quoting *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 977 (Cal. 1970)). California's right-to-control test contains nine secondary factors to be considered along with an employer's right to control. *See id.* The first factor is the right to "terminate at will," which weighs in favor of employee classification. *Id.* at 988 (quoting *Tieberg*, 471 P.2d at 979). The eight additional factors include:

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by 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.

Id. at 989 (quoting *Tieberg*, 471 P.2d at 977).

¹⁴⁷ *Id.* at 989.

¹⁴⁸ *See id.* at 989–90 (finding that FedEx controlled drivers' hours by assigning certain workloads and that FedEx assigned drivers to service areas and time windows to deliver packages).

¹⁴⁹ *Id.* at 989.

¹⁵⁰ *Id.* at 997.

¹⁵¹ *Id.* (holding that FedEx's "broad right to control . . . its drivers' perform[ance] . . . strongly favors employee status").

C. Current Litigation Involving the Worker Classification of TNC Drivers

The two most prominent TNCs, Uber and Lyft, currently face litigation concerning the worker classification of their drivers.¹⁵² In *O'Connor v. Uber Techs.*,¹⁵³ the Northern District of California denied Uber's motion for summary judgment that asserted Uber's drivers were independent contractors.¹⁵⁴ In this case, a group of Uber drivers filed suit claiming that they were Uber employees.¹⁵⁵ Uber filed a motion for summary judgment, arguing that its drivers should be judged independent contractors.¹⁵⁶ Finding that the drivers are presumptively employees and that the facts remain in dispute, the court denied Uber's motion.¹⁵⁷

The court stated that the facts cut both ways—some in favor of employee and some in favor of independent contractor.¹⁵⁸ The court admitted that resolving this issue “creates significant challenges” since the common law right-to-control test was created for an economic model “very different from the new ‘sharing economy.’”¹⁵⁹ It also hypothesized that the legislature may create law to govern the sharing economy.¹⁶⁰ Nevertheless, given the ambiguity in the case, the Northern District of California denied Uber's motion for summary judgment.¹⁶¹

In *Cotter v. Lyft, Inc.*,¹⁶² the Northern District of California denied Lyft's and its drivers' motions for summary judgment on the question of worker classification.¹⁶³ In this case, former Lyft drivers claimed they were Lyft employees rather than independent contractors.¹⁶⁴ The parties filed cross-

¹⁵² See generally *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *Cotter v. Lyft*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015). As of the writing of this Note, the parties in each case have attempted to settle. In both instances, the motions for approval were denied. See *O'Connor v. Uber Techs.*, 13-cv-03826-EMC, 2016 WL 3548370, at *1 (N.D. Cal. June 30, 2016); *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 931 (N.D. Cal. 2016).

¹⁵³ 82 F. Supp. 3d 1133 (2015).

¹⁵⁴ *Id.* at 1135.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at 1153.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

¹⁶³ *Id.* at 1070.

¹⁶⁴ *Id.*

motions for summary judgment.¹⁶⁵ The court denied both motions, finding that the evidence on worker classification “point in decidedly different directions.”¹⁶⁶

Like *O’Connor*, the court here could not decisively say whether the Lyft drivers were employees or independent contractors.¹⁶⁷ The court lamented that resolving this issue is like being “handed a square peg and asked to choose between two round holes” and that the common law right-to-control test developed in the Twentieth Century “isn’t very helpful in addressing this [Twenty First] Century problem.”¹⁶⁸ Also like in *O’Connor*, the court hinted at legislative intervention in resolving this problem.¹⁶⁹ But, absent a clear answer to the issue, the Northern District of California denied both motions for summary judgment.¹⁷⁰

III. ANALYSIS

When asked to classify workers with ambiguous working relationships, courts produce unpredictable results.¹⁷¹ Current law, focused on the right-to-control test or one of its proxies,¹⁷² requires an intensive factual inquiry that can prove difficult even against traditional working relationships.¹⁷³ Now, consider the instance of prominent sharing economy companies, such as TNCs, which present a new business model and working relationship.¹⁷⁴ Already these companies are challenging the existing law, causing some judges to lament its application to TNCs in the first place and suggest lawmakers take action.¹⁷⁵ Lawmakers could look abroad for support, like Canada’s iteration of dependent contractor,¹⁷⁶ but this would not likely provide clarity for courts nor would it adequately reflect the reality of these new working relationships. Therefore,

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1078.

¹⁶⁸ *Id.* at 1081.

¹⁶⁹ *Id.* at 1082.

¹⁷⁰ *Id.*

¹⁷¹ See Carlson, *supra* note 75, at 335.

¹⁷² See RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958); Rubinstein, *supra* note 10, at 619.

¹⁷³ See, e.g., Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 988 (9th Cir. 2014); FedEx Home Delivery v. NLRB, 563 F.3d 492, 495–96 (D.C. Cir. 2009); NLRB v. Friendly Cab Co., 512 F.3d 1090, 1096–97 (9th Cir. 2008); Yellow Taxi Co. v. NLRB, 721 F.2d 366, 383 (D.C. Cir. 1983).

¹⁷⁴ *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015); see Koopman, *supra* note 1.

¹⁷⁵ *Cotter*, 60 F. Supp. 3d at 1081; *O’Connor*, 82 F. Supp. 3d at 1153.

¹⁷⁶ Canada Labour Code, R.S.C. 1985, c L-2, s.3.

Congress and state legislatures should enact a new, third worker classification that suits the reality of the sharing economy and TNCs.

Part III.A below attempts to classify Uber's drivers—to fit the square peg into a round hole¹⁷⁷—by considering the Services Agreement and other aspects of the relationship between Uber and its drivers in light of the cases discussed in Part II.B. Ultimately, this analysis results only in further ambiguity. Part III.B will then argue that public policy should dictate the employee-independent contractor dichotomy unacceptable in the case of TNC drivers. Lastly, Part III.C will discuss potential solutions, first looking at Canada's dependent contractor law before arguing that Congress and state legislatures should enact a new, third worker classification for the sharing economy and TNC drivers.

A. Worker Classification of TNC Drivers: How Might a Court Resolve This Issue?

Part II.C looked at two ongoing worker classification cases involving TNCs. In those cases, the Northern District of California faced motions for summary judgment arguing that the TNC drivers were either employees or independent contractors.¹⁷⁸ These decisions relied on the agreements and relationship between the TNCs and their drivers and whether these granted the TNCs control.¹⁷⁹ This section will attempt to provide finality to that determination in the case of Uber's drivers. First, Part III.A.1 will look at the Services Agreement and the relationship between Uber and its drivers and will draw conclusions as to whether these are indicative of employee or independent contractor status. Then, Part III.A.2 will analyze these findings in light of the cases discussed in Part II.B before concluding that none of this analysis yields even a probable result.

1. Indications of Employee or Independent Contractor Status of Uber Drivers

Certain provisions of the Services Agreement appear to lean toward employee status for Uber drivers. First, some provisions of the Services Agreement grant Uber degrees of control over its drivers.¹⁸⁰ Uber dictates who

¹⁷⁷ *Cotter*, 60 F. Supp. 3d at 1081.

¹⁷⁸ *See Cotter*, 60 F. Supp. 3d at 1081; *O'Connor*, 82 F. Supp. 3d at 1135.

¹⁷⁹ *Cotter*, 60 F. Supp. 3d at 1071 (“Lyft’s relationship with its drivers is governed . . . by its Terms of Service . . .”); *O'Connor*, 82 F. Supp. 3d at 1136 (“Once a prospective driver successfully completes the application and interview stages, the driver must sign contracts with Uber . . .”).

¹⁸⁰ *See SERVICES AGREEMENT*, *supra* note 65, at Sections 2.3, 2.5, 4.3, 12.2.

drivers are allowed to have in their vehicles while driving for the company.¹⁸¹ The driver rating system ensures that Uber's drivers maintain a minimum level of decorum with riders under penalty of having their Uber account deactivated.¹⁸² If drivers perform poorly on a given job, Uber has the right to adjust the driver's fare.¹⁸³ Both Uber and its drivers have the ability to terminate the Services Agreement at-will with only seven days' notice.¹⁸⁴

Second, other provisions indicate employee status in ways other than a right to control.¹⁸⁵ Uber acts as the payment collection agent for its drivers, which Uber acknowledges in the Services Agreement indicates employee status.¹⁸⁶ Uber does not generate any revenue without its drivers transporting riders.¹⁸⁷ In addition, the relationship between Uber and its drivers has no set term; it is indefinite in duration absent termination.¹⁸⁸

Considering the realities outside the Services Agreement, other factors point toward employee status for Uber drivers as well. Driving for Uber (or any

¹⁸¹ *Id.* at Section 2.3. Section 2.3 of the Services Agreement states that “unless specifically consented to by a User, you may not transport or allow inside your Vehicle individuals other than a User and any individuals authorized by such User” Additionally, this section states “all Users should be transported directly to their specified destination, as directed by the applicable User, without unauthorized interruption or unauthorized stops.” *Id.*

¹⁸² *Id.* at Section 2.5. This section explains to drivers that Uber requires riders to rate their driver. Then, it mandates that drivers “maintain an average rating by Users that exceeds the minimum average acceptable rating established by [Uber] for your Territory” If a driver's rating falls below the minimum within a specified time, “[Uber] reserves the right to deactivate [the driver's] access to the Driver App and Uber Services.” *Id.*

¹⁸³ *Id.* at Section 4.3. Section 4.3 gives Uber the right to “(i) adjust the Fare for a particular instance of Transportation Services . . . ; or (ii) cancel the Fare for a particular instance of Transportation Services” Section 4.3 provides examples of instances where Uber may adjust a fare, one of which being “[the driver] took an inefficient route” In addition, Section 4.3 provides examples of instances where Uber may cancel a fare, such as “in the event of a User complaint” *Id.*

¹⁸⁴ *Id.* at Section 12.2. Section 12.2 allows that “[e]ither party may terminate this Agreement . . . without cause at any time upon seven (7) days prior written notice to the other party” *Id.*

¹⁸⁵ *See id.* at Sections 4.1, 4.4, 12.1.

¹⁸⁶ *Id.* at Section 4.1. Section 4.1 states that “[the driver] . . . appoint[s] [Uber] as [the driver's] limited payment collection agent.” The link to employee status is stated in Section 13.1: “[e]xcept as otherwise expressly provided herein with respect to [Uber] acting as the limited payment collection agent . . . , the relationship between the parties under this Agreement is solely that of independent contracting parties.” *Id.*

¹⁸⁷ *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992); SERVICES AGREEMENT, *supra* note 65, at Section 4.4. Section 4.4 requires drivers “to pay [Uber] a service fee on a per Transportation Services transaction basis” This provision, in other words, provides that Uber does not receive revenue if its drivers do not transport riders. *Id.*

¹⁸⁸ *See Darden*, 503 U.S. at 323–24; SERVICES AGREEMENT, *supra* note 65, at Section 12.1. Section 12.1 of the Agreement states that “[t]his Agreement shall commence on the date accepted by you and shall continue until terminated as set forth herein.” *Id.*

TNC for that matter) does not require any special skills.¹⁸⁹ Drivers perform the work that is the “regular business” of Uber: transporting riders for a fee.¹⁹⁰ And the hiring party, Uber, is a business.¹⁹¹

Provisions of the Services Agreement appear to lean toward independent contractor status for Uber drivers. First, Uber denies in the Services Agreement the ability to control its drivers while they transport riders.¹⁹² Uber grants drivers sole discretion in transporting riders.¹⁹³ Additionally, Uber details ways that it refuses to dictate its drivers’ performance.¹⁹⁴

Second, provisions in the Services Agreement indicate independent contractor status according to the secondary factors in the common law test.¹⁹⁵ The Services Agreement requires drivers to provide their own work materials,¹⁹⁶ including their own vehicle,¹⁹⁷ although Uber will provide drivers with a mobile device and data plan upon request provided that drivers reimburse Uber for these expenses.¹⁹⁸ Drivers have no hour requirements or geographic restrictions,¹⁹⁹ but

¹⁸⁹ Cotter v. Lyft, 60 F. Supp. 3d 1067, 1080 (N.D. Cal. 2015) (“And driving for Lyft requires no special skill—something we often expect independent contractors to have.”).

¹⁹⁰ See *Darden*, 503 U.S. at 323–24.

¹⁹¹ See *id.*

¹⁹² SERVICES AGREEMENT, *supra* note 65, at Sections 2.2, 2.4.

¹⁹³ *Id.* at Section 2.2. Section 2.2 of the Agreement states “[the driver] shall be solely responsible for determining the most effective, efficient and safe manner to perform each instance of Transportation Services” *Id.*

¹⁹⁴ *Id.* at Section 2.4. Section 2.4 states that “[Uber] does not, and shall not be deemed to, direct or control you generally or in your performance under this Agreement specifically” More specifically, this section gives drivers the following powers:

[The driver] retain[s] the option . . . to attempt to accept or to decline or ignore a User’s request for Transportation Services . . . or to cancel an accepted request for Transportation Services . . . subject to [Uber’s] then-current cancellation policies. With the exception of any signage required by local law or permit/license requirements, [Uber] shall have no right to require you to: (a) display [Uber’s] . . . name[], logo[] or colors on your Vehicle(s); or (b) wear a uniform or any other clothing displaying [Uber’s] . . . name[], logo[] or colors. You . . . have complete discretion to provide services or otherwise engage in other business or employment activities.

Id.

¹⁹⁵ See *Darden*, 503 U.S. at 323–24.

¹⁹⁶ SERVICES AGREEMENT, *supra* note 65, at Section 2.2. Section 2.2 of the Agreement states that “[the driver] shall provide all necessary equipment, tools and other materials, at your own expense” *Id.*

¹⁹⁷ *Id.* at Section 3.2.

¹⁹⁸ *Id.* at Section 2.6. Section 2.6 “encourages” drivers to use their own devices for Uber’s platform at their own expense. However, a driver can “elect to use any Company Devices,” and “[Uber] will supply [the driver] upon request with Company Devices and provide the necessary wireless data plan” so long as the driver reimburses Uber for the associated costs. *Id.*

¹⁹⁹ *Id.* at Section 2.4. Section 2.4 states that drivers have “the sole right to determine when, where, and for how long you will utilize the Driver App or the Uber Services.” *Id.*

Uber will deactivate a driver's account if it is not activated once in a given month.²⁰⁰ Uber pays its drivers on a per-job basis as opposed to a regular wage²⁰¹ and requires drivers to maintain their own car insurance²⁰² and workers' compensation insurance, where applicable.²⁰³ In addition, Uber puts its drivers on notice that it does not consider them employees; rather, Uber plainly states that it considers its drivers independent contractors.²⁰⁴

2. Classifying Uber's Drivers: An Attempt to Fit the Square Peg into a Round Hole

Analyzing the findings in Part III.A.1 yields no obvious answer. On its face, the Services Agreement does not heavily support either employee or independent contractor status; many provisions and factors cut in either direction. In some respects, one could argue that Uber drivers have a high degree of entrepreneurial opportunity. At the same time, Uber indeed controls its drivers in some respects. Despite this difficulty, *Yellow Taxi* and *Friendly*, two cases discussed in Part II.B.2.c involving worker classification of taxi cab drivers, are useful in predicting how a court would answer whether Uber drivers are employees or independent contractors.

On the one hand, Uber drivers resemble the taxi cab drivers in *Yellow Taxi*. There, the taxi company, Suburban, could not dictate drivers' performance or require drivers to pick up passengers.²⁰⁵ However, Suburban did make recommendations to its drivers in how to conduct themselves in different situations.²⁰⁶ Also, like Uber drivers, Suburban's drivers had no hours requirement and picked up the majority of their passengers through Suburban's

²⁰⁰ *Id.* at Section 2.1. Section 2.1 of the Agreement states "[Uber] reserves the right to deactivate your Driver ID if you have not fulfilled a request for Transportation Services using the Driver App at least once a month." *Id.*

²⁰¹ *Id.* at Section 4.1. Section 4.1 of the Agreement provides that a driver receives "a fare for each instance of completed Transportation Services provided to a User . . ." *Id.*

²⁰² *Id.* at Section 8.1. Section 8.1 requires drivers to maintain "automobile liability insurance that provides protection against bodily injury and property damage to third parties at levels . . . that satisfy the minimum requirements." *Id.*

²⁰³ *Id.* at Section 8.2. Section 8.2 requires drivers to maintain "workers' compensation insurance as required by all applicable laws." *Id.*

²⁰⁴ *Id.* at Section 13.1. Section 13.1 states that

[T]he relationship between the parties under this Agreement is solely that of independent contracting parties. The parties expressly agree that: (a) this Agreement is not an employment agreement, nor does it create an employment relationship, between [Uber] and [the driver]; and (b) no joint venture, partnership, or agency relationship exists between [Uber] and [the driver].

Id.

²⁰⁵ *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 371–72 (D.C. Cir. 1983).

²⁰⁶ *Id.* at 372.

dispatch system.²⁰⁷ The Court of Appeals for the District of Columbia found that Suburban did not control its drivers and that the drivers had entrepreneurial opportunities.²⁰⁸ Thus, the court held that Suburban's drivers were independent contractors.²⁰⁹ The same result could be expected for Uber's drivers.

On the other hand, Uber drivers resemble the taxi cab drivers in *Friendly*. In *Friendly*, the taxi company, Friendly, subjected drivers to a policy manual and standard operating procedures that granted Friendly a degree of control over its drivers.²¹⁰ Also, like Uber drivers, Friendly restricted its drivers' ability to conduct independent business while driving for Friendly.²¹¹ The Ninth Circuit found that Friendly's drivers lacked the entrepreneurial opportunities one would expect of independent contractors.²¹² Therefore, the court held that Friendly's drivers were employees.²¹³ Again, one could expect this outcome for Uber's drivers.

Applying these conflicting cases to Uber drivers, the answer to the worker classification question remains ambiguous.²¹⁴ In some instances, Uber drivers have a lot in common with Suburban's drivers. Uber denies control over its drivers' performance,²¹⁵ and Uber drivers have discretion on which riders to transport, have no hours requirement, and conduct their business through Uber's platform.²¹⁶ In other respects, Uber drivers appear to resemble Friendly's drivers. Most notably, Uber subjects its drivers to control provisions in the Services Agreement.²¹⁷

This issue is further confounded when considered in light of *FedEx Home Delivery* and *Alexander*. In those cases, two different courts came to opposite conclusions when faced with the same type of FedEx drivers.²¹⁸ While the Circuit Court of Appeals for the District of Columbia found that FedEx

²⁰⁷ *Id.* at 369–70.

²⁰⁸ *Id.* at 384.

²⁰⁹ *Id.*

²¹⁰ *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1093 (9th Cir. 2008).

²¹¹ *Id.* at 1094.

²¹² *Id.* at 1098.

²¹³ *Id.* at 1103.

²¹⁴ Uber drivers are also different from the taxi cab drivers in both *Yellow Taxi* and *Friendly*. For example, Suburban's drivers kept all of their earned revenue. *Yellow Taxi Co.*, 721 F.2d at 369. And Friendly required its drivers to conform to a dress code and to service a particular geographic area. *Friendly Cab*, 512 F.3d at 1094, 1103.

²¹⁵ See SERVICES AGREEMENT, *supra* note 65, at Section 2.4.

²¹⁶ *Id.* at Sections 2.4, 2.6.

²¹⁷ *Id.* at Sections 2.3, 2.5, 4.3, 12.2.

²¹⁸ See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009); *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 984 (9th Cir. 2014).

drivers had the entrepreneurial opportunities of independent contractors,²¹⁹ the Ninth Circuit found that FedEx exercised sufficient control over its drivers to make them employees.²²⁰ Thus, even when faced with a more traditional worker relationship than that of TNC drivers, the courts cannot come to a unanimous decision as to the classification of drivers. It is not a stretch of the imagination to infer that the same could happen in different courts confronting the worker classification of TNC drivers.

This uncertain outcome is unsatisfactory, and it is doubtlessly true that any legal opinion would leave readers with no less questions than they had before. As Judge Edward M. Chen stated in *O'Connor*, “many of the factors in [the common law] test appear outmoded in this context.”²²¹ And, much is at stake with this determination. Uber’s viability, and thus its drivers’ ability to work, could be significantly affected.²²² Part III.B will further this analysis by arguing that policy renders the traditional worker classification dichotomy unfit in the case of TNC drivers.

B. Policy Dictates That the Current Worker Classification Law Is Unfit to Describe TNC Drivers

Some fundamental issues are inherent with the current worker classification test and dichotomy of employee-independent contractor. This is especially true in the case of TNC drivers. As Judge Vince Chhabria lamented in his conclusion to *Cotter*,

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. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California’s outmoded test for classifying workers will apply in cases like this. And, because the test provides

²¹⁹ *FedEx Home Delivery*, 563 F.3d at 504.

²²⁰ *Alexander*, 765 F.3d at 997.

²²¹ *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015).

²²² See text accompanying notes 68–74.

nothing remotely close to a clear answer, it will often be for juries to decide.²²³

The current test is a muddled collection of abstract yet fact-intensive elements. As discussed in Part III.A above, even when applied to traditional working relationships, it can produce unpredictable and conflicting results.²²⁴ Further, the employee-independent contractor dichotomy creates an all-or-nothing outcome that often does a disservice to the working relationships it is forced to describe.

These issues are compounded in the case of TNC drivers. Worker classification law developed in a period where an analog to the relationship between TNCs and their drivers did not exist.²²⁵ TNC drivers not only create a large deal of uncertainty under current worker classification law,²²⁶ they present challenges that the current law is simply unequipped to address. A survey of Uber drivers found that 87% drive for Uber to be their own boss, 85% enjoy the flexibility Uber allows, and 73% prefer setting their own schedule as opposed to having a nine-to-five job.²²⁷ Further, most Uber drivers were found to work low, variable hours, and many simply drive for Uber to make extra spending money.²²⁸ These qualities are not indicative of a traditional employee or independent contractor relationship.²²⁹ Yet, the current law mandates that this decision be made.

Looking beyond how TNC drivers fit within existing worker classification law, public opinion appears heavily in favor of the advent of the sharing economy. Eighty-six percent of consumers familiar with the sharing economy believe it to be more affordable, 83% believe it to be more efficient, and 76% believe it to be better for the environment.²³⁰ Further, advocates claim it creates a more efficient market, increases competition and transparency, and reaches traditionally underserved consumers.²³¹ This is not to say the sharing

²²³ *Cotter v. Lyft Inc.*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015); *see also O'Connor*, 82 F. Supp. 3d at 1133, 1135 (“The application of the traditional test of employment—a test which evolved under an economic model very different from the new ‘sharing economy’—to Uber’s business model creates significant challenges.”).

²²⁴ *See, e.g., FedEx Home Delivery*, 563 F.3d at 495; *Alexander*, 765 F.3d at 981.

²²⁵ *See O'Connor*, 82 F. Supp. 3d at 1153; *Cotter*, 60 F. Supp. 3d at 1081–82.

²²⁶ *See supra* Part III.B.

²²⁷ *Kate, supra* note 61.

²²⁸ *Id.*

²²⁹ *See O'Connor*, 82 F. Supp. 3d at 1153 (“Arguably, many of the factors in [the common law] test appear outmoded in this context.”); *Cotter*, 60 F. Supp. 3d at 1081–82 (“The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous.”).

²³⁰ *See PRICEWATERHOUSECOOPERS, supra* note 14, at 9.

²³¹ *See THE SHARING ECONOMY, supra* note 16, at 4–5.

economy may not have any drawbacks. Critics raise concerns over unfair competition and labor exploitation.²³² In particular, critics argue that sharing economy companies provide little to no protection for their users and retain the bulk of the fee that is charged.²³³

These are some of the reasons why the sharing economy deserves tailored regulation. The sharing economy opens up avenues of wealth creation to individuals who did not have such access before, and reduces costs charged to consumers. At the same time, third parties could potentially siphon away the bulk of the fee in sharing economy transactions. It is incumbent on lawmakers to ensure this industry thrives while providing adequate protection to the people involved.

Despite strong policy considerations, a decision under the current law must be made. With this decision comes an all-or-nothing approach to whether TNC drivers are employees or independent contractors. At one end, a finding of employee status could greatly hinder the viability of TNC's business models. At the other end, a finding of independent contractor status allows TNCs to take advantage of labor that without which, TNCs would not exist. Both ends leave major, justifiable policy arguments unfulfilled and probably create a legal opinion that leaves most people scratching their heads. For this reason, Part III.C will analyze solutions to this problem in the form of a third worker classification.

C. *Proposed Solutions to the Worker Classification of TNC Drivers*

Parts III.A and III.B pointed out some of the problems with applying worker classification law to TNC drivers. In short, the current law would not produce a clear holding, and public policy should find that result unacceptable. This section attempts to solve this problem by discussing potential legislative solutions to the issue. Part III.C.1 will look at the dependent contractor relationship, which already exists in some countries. Then, Part III.C.2 will argue that lawmakers should enact a new, third classification that suits the sharing economy and the new work relationships it creates.

1. Dependent Contractor

One proposal for solving the problem of worker classification in the sharing economy is the creation of a dependent contractor classification.²³⁴ Canadian dependent contractors, a status between employee and independent contractor on the classification scale,²³⁵ could serve as a model for lawmakers. This third category was created to reflect realities evidenced by relationships

²³² Baker, *supra* note 42; Reich, *supra* note 43.

²³³ Reich, *supra* note 43.

²³⁴ See Hagi & Biederman, *supra* note 97; see also Weber, *supra* note 97.

²³⁵ *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, para. 30 (Can. Ont.).

similar to that of TNCs and their drivers—that contractors do not all depend economically on their employers to the same degree.²³⁶

However, the dependent contractor relationship, as it appears in countries like Canada, has its shortcomings when applied to TNC drivers. In Canada, the difference between an employee and a contractor is determined by analyzing the traditional common law right-to-control test factors similar to that in the United States.²³⁷ Then, if contractor status is found, the difference between an independent contractor and a dependent contractor hinges on “economic dependency in the work relationship.”²³⁸

One issue with the dependent contractor distinction in Canada is that it may not even address the issues facing TNCs and their drivers. A court will not consider the distinction between dependent and independent contractors unless it finds the workers to be contractors under what is essentially the common law right-to-control test.²³⁹ While a third employment classification would undoubtedly be helpful in assigning the varying rights of any set of workers, under Canadian law, TNC drivers may never have the opportunity for this consideration because the analysis may never be reached in the first place.

Another issue under this distinction is that some TNC drivers could be dependent contractors while others could be independent contractors (assuming the drivers are contractors at all). This is because not all TNC drivers are economically dependent to the same degree on the TNC.²⁴⁰ This would surely create additional confusion and costs in litigating yet another hotly contested distinction in worker classification.

2. A Worker Classification for the Sharing Economy and Transportation Network Companies—the Platform Contractor

The sharing economy—and TNCs in particular—have put a strain on traditional worker classification law. Additionally, possible alternatives, such as a Canadian dependent contractor classification, are insufficient in fixing this problem. The best solution is to craft a new worker classification that adequately encompasses participants in the sharing economy and specifically TNC drivers.

The sharing economy can be described as “any marketplace that uses the Internet to connect distributed networks of individuals to share or otherwise exchange underutilized assets.”²⁴¹ Within the sharing economy are TNCs. TNCs can be defined as companies that “provide prearranged transportation services

²³⁶ *Id.* at para. 25–36.

²³⁷ *Id.* at para. 38.

²³⁸ *Id.* at para. 22.

²³⁹ *Id.* at para. 34, 38.

²⁴⁰ See text accompanying notes 68–71.

²⁴¹ See THE SHARING ECONOMY, *supra* note 16, at 4.

for compensation using an online-enabled application or platform (such as smart phone apps) to connect drivers using their personal vehicles with passengers.”²⁴² Essentially, sharing economy companies and TNCs provide a platform that allows individuals to easily exchange assets or skills. In return, the platform deducts a portion of the fee charged between the individuals, which itself is sometimes set by the platform.

The definition of sharing economy companies and TNCs should be the starting point to a new statutory worker classification. Other factors should be considered as well. As shown by Uber’s drivers, people have different motivations and participation rates when working in the sharing economy.²⁴³ Additionally, the degree to which TNCs and other companies exert control over their drivers may vary.²⁴⁴ And, of course, the new worker classification should be accompanied with protections adequate to safeguard the workers who provide the services essential to sharing economy companies.

With these factors in mind, this Note recommends that Congress and state legislatures adopt a new, third worker classification for TNC drivers, and similar sharing economy workers, called the “platform contractor.” A platform contractor should be defined as any worker who, through a third-party electronic platform with the purpose of connecting platform contractors with consumers, uses their own assets to provide a service for an individual. At a bare minimum, the third party should owe the platform contractor minimum wage for the work performed and liability insurance for actions performed in furtherance of the parties’ mutual business objectives. More protection may be deemed necessary upon further inquiry, such as workers’ compensation protection. In addition, the amount of control exercised by the third party over the platform contractor should not exceed what is required to maintain the good will of the individual seeking use of the platform contractor’s assets.

IV. CONCLUSION

Current worker classification law often feels more like an academic exercise than a reliable standard which to apply. Its application often produces contradictory results,²⁴⁵ and can even produce the opposite result for the same workers.²⁴⁶ It should be no surprise that applying this standard to the new working relationship between TNCs and their drivers proves confounding and

²⁴² *Transportation Network Companies*, *supra* note 5.

²⁴³ See text accompanying notes 61–64.

²⁴⁴ Compare *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015), with *Cotter v. Lyft Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

²⁴⁵ See *supra* Part II.B.2.i.

²⁴⁶ See *supra* Part II.B.2.ii.

unsatisfactory.²⁴⁷ Congress and state legislatures should act now to add a third worker classification—ideally, the “platform contractor” classification proposed in Part III.C.2—that suits the new working relationships created by the sharing economy and TNCs.

Such a classification would encompass a growing number of workers whose status would otherwise be unclear under the existing worker classification law. The current law is unsuitable for these workers—it was developed in a time when the reality of TNC workers did not exist.²⁴⁸ Judges who have attempted to analyze the worker classification of TNC drivers have expressed their frustration in “be[ing] handed a square peg and asked to choose between two round holes.”²⁴⁹ If classified under the employee-independent contractor dichotomy, the parties’ rights and obligations would surely not reflect the reality of their situation.

The sharing economy enables a new method of creating wealth for individuals through the marketing of otherwise idle assets and skills.²⁵⁰ Organizations such as TNCs have emerged with platforms that connect these individuals with others for the benefit of all involved.²⁵¹ However, existing worker classification law threatens the future of this business model. Therefore, to suit the new working relationships created by the sharing economy, Congress and state legislatures should enact a new, third worker classification targeted toward this new industry.

*Carl Shaffer**

²⁴⁷ See *supra* Part III.A.

²⁴⁸ See *O'Connor*, 82 F. Supp. 3d at 1153; *Cotter*, 60 F. Supp. 3d at 1081–82.

²⁴⁹ *Cotter*, 60 F. Supp. 3d at 1081; see also *O'Connor*, 82 F. Supp. 3d at 1135.

²⁵⁰ Koopman, *supra* note 1.

²⁵¹ See *UBER*, *supra* note 3; *LYFT*, *supra* note 4.

* J.D. Candidate, West Virginia University College of Law, 2017; M.B.A., West Virginia University, 2015; B.S. in Chemical Engineering, West Virginia University, 2013; Executive Research Editor, Volume 119 of the *West Virginia Law Review*. The Author thanks his peers on the *West Virginia Law Review* for their work on this Note and on Volume 119; his Notes Editor, Francesca Miller, for providing invaluable feedback at each step along the way; and his friends and family for all of their love and support throughout his life. The Author takes responsibility for any errors contained within his Note.