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The Statutory Death of the Gig Economy: How California Policy Incentivizes the Automation of Five Million Jobs

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With the advent of the gig economy, many have benefited from the availability of flexible work, particularly in the service industry. Since then, whether these workers are independent contractors or employees—entitled to certain rights and benefits—has been intensely debated. This Note examines the different legal approaches used in worker classification and the ramifications an employee designation could have on the estimated five million jobs the gig economy currently supports. Accordingly, this Note advocates the current state of the law is inept as applied to the gig economy and examines a potential framework to align the benefits of the gig economy while protecting against employee misclassification.

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INTRODUCTION

Just four years after the inception of Uber in 2009,[1] giving rise to what is now known as Transportation Network Companies ("TNCs"), the fight over driver classification has ensued.[2] TNCs operate under a business model that has been coined the "gig economy."[3] Since then, TNCs have continued to vigorously fight to

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[1] Uber Techs., Inc., Registration Statement (Form S-1) 13 (Apr. 11, 2019).

[2] *See* O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1090–91 (9th Cir. 2018) (finding Uber's arbitration agreement with its drivers enforceable, preventing drivers from certifying as a class in their 2013 alleged state and federal violation claims resulting from misclassification as independent contractors rather than employees).

[3] *See* John Frazer, *How the Gig Economy Is Reshaping Careers for the Next Generation*, FORBES (Feb. 15, 2019, 9:40 PM), https://www.forbes.com/sites/johnfrazer1/2019/02/15/how-the-gig-economy-is-reshaping-careers-for-the-next-generation/#3afe253349ad. The "gig economy" describes the

classify drivers as independent contractors while many drivers advocate for employee designation.[4] Independent contractors are generally individuals that offer their services for hire but are free from the control of the hiring party in the manner in which they perform their work.[5] The issue has surfaced internationally and carries huge financial implications for TNCs in the form of mandated employee benefits abroad and in the United States.[6] Several states have statutorily recognized TNC drivers as independent contractors under their motor vehicle statutes.[7] Today, all states have some form of motor vehicle TNC regulation on their books, with the exception of Oregon, which expressly designates drivers as independent contractors, implies an independent contractor relationship, or is silent on the issue altogether and simply addresses insurance requirements.[8]

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independent business model employed by corporations like Uber, Lyft, and Door Dash. *Id.* These business models depend on attracting willing workers to engage in the service they respectively provide by offering flexibility in scheduling, oversight, and a relatively low level of prerequisite skill. *See id.* This business model has allowed many workers to leave otherwise necessary jobs by providing an alternative means of income while these workers pursue other desired career paths. *See id.*

[4] *See* Andrew J. Hawkins, *Uber Settles Driver Classification Lawsuit for $20 Million*, VERGE (Mar. 12, 2019, 11:59 AM), https://www.theverge.com/2019/3/12/18261755/uber-driver-classification-lawsuit-settlement-20-million; Peter Blumberg & Erin Mulvaney, *Uber's Arch Nemesis on Driver Pay Sues Before New Law Even Inked*, BLOOMBERG (Sept. 13, 2019), https://www.bloomberg.com/news/articles/2019-09-13/uber-s-arch-nemesis-on-driver-pay-sues-before-new-law-even-inked.

[5] INTERNAL REVENUE SERV., INDEPENDENT CONTRACTOR DEFINED, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined (last updated Dec. 3, 2020).

[6] *See* Jacob Passy, *Uber Doesn't Want Its Drivers to Be Employees—Here's Why That Matters*, MARKETWATCH (Apr. 15, 2019, 7:30 PM), https://www.marketwatch.com/story/uber-doesnt-want-its-drivers-to-be-employees-heres-why-that-matters-2017-11-13; *see also* Sam Schechner, *Uber Drivers Entitled to Workers Rights Including Minimum Wage, U.K. Supreme Court Rules*, WALL ST. J (Feb. 19, 2021, 5:55 PM), https://www.wsj.com/articles/uber-faces-setback-as-u-k-court-rules-drivers-are-entitled-to-worker-rights-11613729882?st=flktym4x6fnh7vn&reflink=article_email_share.

[7] *See* Eduardo Munoz, *Three US States Have Already Blessed Uber's Independent Contractor Employment Model*, QUARTZ (Dec. 10, 2015), https://qz.com/571249/three-us-states-have-already-blessed-ubers-independent-contractor-employment-model/.

[8] *See infra* Part II.D.2.

The National Labor Relations Board (the "NLRB") has also provided input on the issue, determining drivers to be independent contractors by applying a version of the common-law agency test.[9]

One of the most significant threats to Uber's independent contractor business model came in September of 2019 when the California legislature passed Assembly Bill No. 5 ("AB 5"), which codified the California Supreme Court's decision in *Dynamex Operations W. v. Superior Court*.[10] The effect of AB 5 is to place the burden on employers to demonstrate that their workers are not employees under the "ABC" test.[11] As of November 2020, TNCs prevailed on Proposition 22, a California ballot measure exempting them from AB 5.[12] Prior to AB 5's passage, however, TNCs came to the table with a rejected $21 per hour offer as long as they could maintain an independent contractor relationship.[13]

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[9] Advice Memorandum from Jayme L. Sophir, Assoc. Gen. Couns. Div. of Advice, Nat'l Lab. Rels. Bd., to Jill Coffman, Reg'l Dir. Region 20, Nat'l Lab. Rels. Bd. (Apr. 16, 2019) [hereinafter NLRB Advice Memorandum], https://www.nlrb.gov/case/13-CA-163062.

[10] *See generally* Assemb. B. 5, 2019–20 Sess. § 1 (Cal. 2019); Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 35–42 (Cal. 2018). In *Dynamex,* the California Supreme Court applied a three-part "ABC" test and determined a delivery company's drivers could be legally classified as employees for the commonality inquiry under class certification. *Id*. The three-part test consisted of: (A) whether the worker was free from control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact; (B) whether the worker performs work outside the usual course of the hiring entity's business; and (C) whether the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. *Id.*

[11] *See* Carolyn Said, *AB5 Gig Work Bill: All Your Questions Answered*, S.F. CHRON. (Feb. 26, 2020, 3:10 PM), https://www.sfchronicle.com/business/article/AB5-gig-work-bill-All-your-questions-answered-14441764.php.

[12] *See* LEGIS. ANALYST'S OFF., PROPOSITION 22 EXEMPTS APP-BASED TRANSPORTATION FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS, at 1 (2020), https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020.

[13] Preetika Rana, *California Voters Exempt Uber, Lyft, DoorDash from Reclassifying Drivers*, WALL ST. J. (Nov. 4, 2020, 7:29 AM) [hereinafter Rana, *Reclassifying Drivers*], https://www.wsj.com/articles/california-voters-exempt-uber-lyft-doordash-from-having-to-reclassify-drivers-11604476276?st=uvuof3hifxf5pak&reflink=article_email_share; Cyrus Farivar, *'Gaming the System' – Uber and Lyft Face a Driver Reckoning in California*, NBC NEWS (June

The $21 per hour offer comes as no surprise as the cost of classifying drivers as employees in California alone is estimated to be $500 million per year for Uber and $290 million per year for Lyft.[14] Lyft, already operating at nearly a $1 billion net loss in 2018,[15] has acknowledged the extreme financial burden it would endure based on an employee designation, and many have suggested Lyft will likely not see a profit for years to come.[16] Lyft has also raised the fact that many part-time drivers would no longer benefit from extra income simply because Lyft would be forced to create driving schedules under an employee model that would likely conflict with other full-time employment.[17] Although Proposition 22 shields TNCs in California for the time being, a look at AB 5's effect on the gig economy nationwide is warranted, especially as the economy recovers from the COVID-19 pandemic.

Part I of this Note will begin with a look at the limited empirical data available that places into perspective driver demographics, complaints, pay, and expenses. In Part II, this Note will discuss the TNC driver relationship as analyzed under the common-law agency test, the *Dynamex* "ABC" test, and the "entrepreneurial opportunity" approach utilized by the NLRB in determining employment relationships. It will also provide an overview of legislation passed in each state on TNC liability. In Part III, this Note turns to an overview of some state and federally mandated employee benefits and

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2, 2019, 5:35 AM), https://www.nbcnews.com/tech/tech-news/gaming-system-uber-lyft-face-driver-reckoning-california-n1012376; *see also* Alexandria Sage, *California Senate Passes Bill to Tighten 'Gig' Worker Rule*, REUTERS (Sept. 11, 2019, 2:45 AM), https://www.reuters.com/article/us-employment-california/california-senate-passes-bill-to-tighten-gig-worker-rule-idUSKCN1VW0M7.

[14] Marco della Cava, *Uber Drivers and Other Gig Workers in California Could See Improved Lifestyle Under Proposed Law*, USA TODAY (July 18, 2019, 8:16 PM), https://www.usatoday.com/story/news/nation/2019/07/17/lyft-uber-drivers-center-california-employment-bill/1715578001/.

[15] Lyft, Inc., Registration Statement (Form S-1) 73 (Mar. 1, 2019).

[16] Johana Bhuiyan, *If Lyft Can't Keep its Drivers as Independent Contractors, It May Never Be Profitable*, L.A. TIMES (Mar. 9, 2019, 5:00 AM), https://www.latimes.com/business/technology/la-fi-tn-lyft-ipo-drivers-20190309-story.html.

[17] Alejandro Lazo & Eliot Brown, *Uber, Lyft Poised to Lose Fight Against California Bill to Label Drivers Employees*, WALL ST. J. (Sept. 9, 2019, 8:42 PM), https://www.wsj.com/articles/uber-lyft-poised-to-lose-fight-against-california-bill-to-label-drivers-employees-11568069041.

the associated costs of such benefits. TNC costs for these benefits are illustrated through a look at the Ford Motor Company and estimates by the Department of Labor.

Part IV of this Note explores the response TNCs will take from a proactive stance in order to minimize the financial exposure of employee benefits by aiming to eliminate the need for drivers—most significantly, the research and development of autonomous vehicle capability. Part IV will also glance at how the COVID-19 pandemic has exacerbated the tensions between TNCs, drivers, and State Legislators. This Note concludes that the current state of agency law is inapt for gig economy[18] application and should incorporate, what the author has termed, the "pragmatic effect" approach to driver classification. This approach will enable true gig economy corporations to operate and provide workers the capability to earn supplemental income and minimize incentives to reduce costs, or ultimately, the workforce itself, through automation. The "pragmatic effect" principle looks at (1) whether the industry necessarily depends on an independent contractor status at its finding and (2) whether an employee designation would essentially destroy the industry and disincentivize future endeavors in the gig economy.

Without a look towards the practical consequences of designating TNC drivers as employees, the ridesharing business model is certain to disappear along with the five million jobs it has created.[19] As later discussed in further detail, if all TNC drivers were designated as employees, Uber and Lyft would incur a $23 billion and $6 billion employee expense, respectively.[20] This expense would represent more than double Uber's 2018 $11 billion revenue and almost three times Lyft's 2018 $2.2 billion revenue.[21]

I. SUMMARY OF THE LYFT & UBER DRIVER 2019 SURVEY

A significant obstacle in the TNC driver debate is the lack of empirical data available. A look at the limited available data seems

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[18] *See* Frazer, *supra* note 3.

[19] *See* Uber Techs., Inc., *supra* note 1, at 5 (reporting 3.9 million Drivers on the Uber platform as of December 2018); Lyft, Inc., *supra* note 15, at 2 (reporting 1.1 million Drivers on the Lyft platform as of December 2018).

[20] *See infra* Part III.B.

[21] *See id.*

to undermine the frequent argument that more TNC drivers are turning to ridesharing as full-time employment and should be treated like traditional employees.[22] Uber and Lyft have a combined five million drivers on their network as reported in their S-1 filings.[23] The latest internal study conducted by Uber on driver demographics was released in 2015.[24] The Uber study was limited in sample size and only consisted of 833 driver interviews.[25] Uber reports that 50% of its drivers drive less than ten hours per week.[26] While the Uber report did not capture driver age, an independent 2016 survey reported that 26% of Uber's drivers were over fifty-years-old.[27] Similarly, Lyft, with much more recent data, reported that 23% of its drivers are over the age of fifty.[28] Lyft reports that 90% of its drivers work less than twenty hours per week.[29] The Lyft study relied on responses from 166,540 drivers.[30]

Between August and September 2019, nearly 70,000 e-mail surveys were sent out to subscribers of The Rideshare Guy.[31] The e-mail surveys generated 948 responses and the following results are based on 947 of these responses.[32] Of those taking the survey, 911 answered that the most important thing to them as a driver was pay

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[22] *See* della Cava, *supra* note 14.

[23] *See* Uber Techs., Inc., *supra* note 1, at 5; Lyft, Inc., *supra* note 15, at 2.

[24] *New Survey: Drivers Choose Uber for its Flexibility and Convenience*, UBER (Dec. 7, 2015), https://www.uber.com/newsroom/driver-partner-survey/.

[25] *Id.*

[26] *Id.*

[27] Mike Sonders, *These Latest Uber Statistics Show How It's Dominating Lyft*, SURVEYMONKEY INTEL. (Dec. 7, 2016), https://medium.com/@sm_app_intel/these-latest-uber-statistics-show-how-its-dominating-lyft-53f6b255de5e.

[28] *2020 Economic Impact Report: Drivers*, LYFT, https://www.lyftimpact.com/stats/national [https://web.archive.org/web/20200604103203/https://www.lyftimpact.com/stats/national] (last visited May 15, 2021).

[29] *Id.*

[30] LYFT POL'Y RSCH, ECONOMIC IMPACT REPORT, 2020 METHODOLOGICAL SUPPLEMENT 3 (2020).

[31] *See* HARRY CAMPBELL, THE RIDESHARE GUY 2019 READER SURVEY 1, 3 (2019). The Rideshare Guy consists of a blog, YouTube channel and podcast utilized by the rideshare community since 2013 and is self-described as one of the largest third-party independent sources of rideshare information. *See* RIDESHARE GUY, https://therideshareguy.com/ (last visited May 15, 2021).

[32] CAMPBELL, *supra* note 31, at 3, 13. One response was determined to be a duplicate and not every response answered each survey question. *Id* at 13.

(52.9%), followed by flexibility (36.7%).[33] The remaining 10.4% of responses consisted of safety, company culture, and pay, followed by employee benefits.[34] Approximately 55.2% of drivers considered themselves part-time, while a surprising 72.4% of drivers reported their age to be between 51 and 71 years old.[35] An additional 16.7% reported they fell within the 41 to 50 age group.[36] Only 10.9% reported they fell within the 18 to 40 age group.[37]

From 911 responses, drivers indicated that 19.8% have only signed up for one ride-sharing service, while 76.6% have signed up for two or more.[38] 50.8% of drivers reported primarily driving for Uber, followed by 19.9% for Lyft and another 22.9% indicated they drive for Uber and Lyft equally.[39]

Only 463 responses were received for questions about pay with Uber.[40] 36.1% of Uber drivers reported earning between $20 and $29.99 per hour, *before* expenses.[41] 21% of Uber drivers reported earning $10 to $14.99 per hour while another 26.1% reported $15 to $19.99 per hour.[42] Uber drivers reported an hourly cost of $6.26 per hour due to vehicle expenses.[43] On average and after expenses, Uber drivers reported pay of $13.47 per hour,[44] while Lyft drivers reported $11.55 per hour.[45] Interestingly, a 2020 survey revealed that even during the middle of the pandemic, a majority of drivers (71%) reported they wanted to remain independent contractors.[46]

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[33] *Id.* at 4.

[34] *Id.*

[35] *Id.* at 4, 11.

[36] *Id.* at 11.

[37] *Id.*

[38] *Id.* at 8.

[39] *Id.* at 7.

[40] *Id.* at 5.

[41] *Id.*

[42] *Id.* From 181 responses, 25.4% of Lyft drivers reported they earned $20 to $29.99 per hour and 28.7% reported they earned $10 to $14.99 per hour before expenses. *Id.* at 6.

[43] *Id.* at 5.

[44] *Id.* This represents a 17% pay increase from the results of the 2018 survey conducted. *See id.*

[45] *Id.*

[46] Harry Campbell, *Everything You Should Know About AB5 & Its Impact on Uber*, RIDESHARE GUY (Oct. 7, 2020), https://therideshareguy.com/ab5-end-of-

The results indicate that a majority of survey respondents are at or near retirement age (according to the The Ride Share Guy survey) or are university age (according to the Uber and Lyft disclosures) and driving part-time. A primary concern for drivers is pay, followed by flexibility in the work schedule which makes sense in the context of both the retiree and college student. Additionally, employee benefits are of low concern, at least to the surveyed group. This also makes sense for the retired group as they are likely drawing benefits from other sources like traditional employment avenues and for the college-aged group which may still be receiving health benefits through their parents or school. The reported after-expenses pay further suggests that a majority of drivers are seeking supplementary rather than primary income from their driving activity.

If similar results were observed in a more comprehensive and statistically significant survey, the results would strongly undercut the argument that ridesharing is a primary source of income for most drivers. Many may assume that a majority of drivers are at the younger end of the workforce or rely on ridesharing as a primary means of income. Even though this may be the case in some instances, it does not appear to represent a majority of rideshare drivers who responded to the survey. The gig economy in this context appears to primarily enable retirees and college students to supplement their income without a need for additional employee benefits. The threat of losing work flexibility and supplemental income in exchange for traditional employee benefits may explain why a majority of drivers wish to remain independent contractors, even during the COVID-19 pandemic.[47] With this limited data in mind, this Note now turns to a discussion of the law as it relates to the various approaches found within the employee versus independent contractor debate.

II. THE COMPETING RELATIONSHIP TESTS

Determining whether an independent contractor or employee relationship exists differs not just amongst the several states but also

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rideshare/. The survey results were based on 734 responses and revealed a pre-pandemic-survey of the same question. *Id.* The pre-pandemic-survey revealed 81% of respondents favored independent contractor status. *Id.*

[47] *See id.*

amongst several agencies involved in employee benefits.[48] Even though some elements of the tests are in common agreement, a much more significant similarity is that the analysis requires a fact-intensive inquiry.[49] Courts and commentators have acknowledged that this fact-intensive inquiry leads to opposite conclusions on similar fact patterns.[50]

At the outset, it is important to highlight a legal distinction adopted by some jurisdictions, including California, when determining a worker's status.[51] When the classification is pertinent to the issue of liability, the common-law agency test, as articulated by the Second Restatement of Agency in section 220 ("Restatement

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[48] *See* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FSLA) (2008) [hereinafter U.S. DEP'T OF LAB. FACT SHEET], https://www.dol.gov/whd/regs/compliance/whdfs13.htm (expressly stating the employer-employee relationship *is not* "determined by the common law standards relating to master and servant"); 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, 211–12 (2017).

[49] *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968) (noting facts of relationship were necessary to establish in applying common-law agency test); Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 7–9 (Cal. 2018) (noting specifically what attire drivers were required to wear, what cellular phone drivers were required to obtain to perform on-demand work, and other delivery restrictions); Cantor v. Cochran, 184 So. 2d 173, 174 (Fla. 1966) (noting that an employer-employee relationship does not merely rest on the contractual agreement but rather "upon all the circumstances of their dealings with each other").

[50] *Dynamex*, 416 P.3d at 14 ("Few 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." (citing NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1994))); Richard B. Keeton, *An Uber Dilemma: The Conflict Between the Seattle Rideshare Ordinance, the NLRA, and For-Hire Driver Worker Classification*, 52 GONZ. L. REV. 207, 216 (2017); Benjamin Powell, *Identity Crisis: The Misclassification of California Uber Drivers*, 50 LOY. L.A. L. REV. 459, 468–69 (2017); Mark Macmurdo, Comment, *Hold the Phone! "Peer-To-Peer" Ridesharing Services, Regulation, and Liability*, 76 LA. L. REV. 307, 328 (2015).

[51] *See infra* Part II.A.

§220"), is generally utilized by courts.[52] On the other hand, when the classification bears on the question of whether a worker is entitled to some sort of benefit grounded in a statutory right, a much more liberal framework applies in some jurisdictions.[53]

This Part will examine the competing analyses among two states and one federal agency, followed by a look at how these entities have specifically resolved or addressed the issue as to TNCs and their drivers. In doing so, this Part will first discuss California's approach, then Florida's, and end with an examination of the NLRB's analysis on TNC driver employment status. This analysis is not done with an eye towards determining which classification is correct or should be utilized. Rather, it is to demonstrate that these classifications depend not just on the common-law agency test but, more importantly, on distinct jurisdictional guiding principles which have not aptly developed to handle the gig economy.

A. *The California Approach and Liberal Public Policy Model*

In its most recent significant decision pertaining to independent contractor and employee designation—and giving rise to AB 5—the California Supreme Court engaged in a lengthy discussion of the history and purpose of its "suffer or permit to work

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[52] Florida has also applied the Restatement §220 to determine that a wholesale grocery store's merchandise loader, who only received tips as compensation from customers, was an independent contractor rather than an employee for purposes of Workers' Compensation. *See Cantor*, 184 So. 2d at 174–75. The factors under the Restatement §220 include: (i) extent of control, by the agreement, the master may exercise over the details of the work; (ii) whether or not the one employed is engaged in a distinct occupation or business; (iii) whether the work is done under the direction of the employer or by a specialist without supervision; (iv) the required skill; (v) the supplier of tools or instrumentalities utilized; (vi) the length of the employment; (vii) the method of payment; (viii) whether the work is part of the regular business of the employer; (ix) whether the belief of a master-servant relationship exists; and (x) whether the principal is or is not in business. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958); *Cantor*, 184 So. 2d at 174–75; *see also* Miami-Dade Cty v. State Dep't of Labor and Emp't Sec., 749 So. 2d 574, 577 (Fla. Dist. Ct. App. 2000) (noting the applicability of *Cantor* and the Restatement §220 but reversing employment designation by the Unemployment Board on grounds that county poll workers were "public officers" and therefore statutorily exempt).

[53] *See infra* Part II.A.

standard," before tempering the standard with the "ABC" test.[54] The *Dynamex* court was faced with determining whether sufficient commonality in interest existed to justify class certification of drivers who alleged that Dynamex mischaracterized them as independent contractors and denied them employee benefits under California's Labor Code.[55] The relevant provisions of the Labor Code defined "employ" to mean "to engage, suffer, or permit to work"; "employee" to mean "any person employed by an employer"; and "employer" to mean any entity that "directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."[56]

Dynamex previously classified its drivers as employees until a 2004 policy change reclassified the drivers as independent contractors.[57] Subsequently, Dynamex entered into contracts with its drivers declaring them as such.[58] The drivers continued to perform the same duties as they did prior to the 2004 policy change, making fulfillment deliveries between private customers and large businesses like Office Depot and Home Depot.[59] Drivers were paid by either a flat fee or a percentage of the delivery fee and could set their own schedules but would have to notify Dynamex of when they planned to work.[60] Drivers made deliveries using their own vehicles, were required to wear Dynamex shirts, and utilized Dynamex equipment purchased with their own funds.[61]

The *Dynamex* court had to determine which test would apply to the employment classification under either the *Borello* or *Martinez* framework.[62] Dynamex urged the court to apply the *Borello* framework while contending that *Martinez* was inapplicable.[63] Both of these standards will be discussed in turn.

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54 *See Dynamex*, 416 P.3d at 35.

55 *Id.* at 5.

56 *Id.* at 13 (quoting CAL. CODE REGS. tit. 8, § 11090, subdiv. 2(D)–(F)).

57 *Id.* at 6.

58 *Id.*

59 *See id.* at 8.

60 *Id.*

61 *Id.*

62 *Id.* at 25 (first citing Martinez v. Combs, 231 P.3d 259 (Cal. 2010); and then citing S.G. Borello & Sons v. Dep't of Indus. Rels., 769 P.2d 399 (Cal. 1989)).

63 *Id.* at 25–26.

Recognizing its previous precedent applying the Restatement §220 in the context of social welfare benefits,[64] the *Dynamex* court presented justifications for departing from those Restatement §220 factors as articulated in its decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*:

> [F]ederal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting "employees" and that "a number of state courts have agreed that in worker's compensation cases, the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose."[65]

The "remedial statutory purpose" analysis was further supplemented by six factors the *Borello* court adopted from other jurisdictions—which closely resemble the Restatement §220 factors[66]—applying a similar framework in deciding employment classification in the context of statutory benefits.[67]

The *Borello* court noted that the workers' compensation statute at issue served the purposes of (1) ensuring industrial injuries would be part of the cost of goods rather than a societal burden, (2) guaranteeing limited compensation to injured employees, (3) incentivizing increased safety standards, and (4) insulating employers from

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[64] *Id*. at 14–15 (first citing Tieberg v. Unemployment Ins. App. Bd., 471 P.2d, 975, 979 (Cal. 1970); and then citing Empire Star Mines Co. v. Cal. Emp. Comm'n, 168 P.2d 686, 692 (Cal. 1946)); *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

[65] *Dynamex*, 416 P.3d at 16 (citation omitted) (quoting *Borello*, 769 P.2d at 405).

[66] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

[67] *See Dynamex*, 416 P.3d at 18 n.12. These factors include: (i) the right to control the worker; (ii) the employee's opportunity for profit or loss based on managerial skill; (iii) the employee's investment in equipment to complete the task; (iv) the requisite level of skill; (v) the permanency of the working relationship; and (vi) whether the service rendered is an integral part of the employer's business model. *Id.*

tort liability.[68] The *Borello* court ultimately held that supplemented with the "remedial statutory purpose" and examined against the common-law agency test, the functional nature of the relationship between the farmer and the agricultural laborers were that of employer-employee.[69]

Interestingly enough, the *Dynamex* court noted that federal courts have declined to apply the "remedial statutory purpose" analysis to federal statutes and have instead required adherence to the traditional common law test absent a specific "statutory standard or definition of employment."[70] The court nevertheless pointed to the lack of interference by the California Legislature as approval of the "remedial statutory purpose" principle—an approval that later manifested itself into AB 5.[71]

Although the *Borello* framework, which encompassed a "remedial statutory purpose" principle, may have seemed unfavorable to Dynamex, the *Martinez* framework would likely have been a much harsher obstacle for Dynamex to overcome. The *Dynamex* court addressed its decision, *Martinez v. Combs*, where it found a similar wage order defined "employ" and "employer" broadly.[72]

The *Martinez* court examined a wage order from the Industrial Welfare Commission, which described employers as "those entities who 'employ or suffer or permit' persons to work for them.'"[73] The "suffer or permit" standard was "derived from statutes regulating and prohibiting child labor that were in use . . . in 1916."[74] The *Martinez* court explained that an entity that "knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it."[75] Further, the wage order defined "employer" to include a person or entity that "employs or exercises control over the wages, hours, or working conditions of

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[68] *Borello*, 769 P.2d at 406.

[69] *See id.* at 410.

[70] *Dynamex*, 416 P.3d at 20.

[71] *See id.* Accordingly, as this Note later discusses, AB 5 recognizes *Borello* as the appropriate test for classification when the "ABC" test is not applicable or where such occupations are expressly exempt from its reach. *See infra* Part II.A.2.

[72] *Id.* at 20 (citing Martinez v. Combs, 231 P.3d 259 (Cal. 2010)).

[73] *Id.* at 21 (quoting *Martinez*, 231 P.3d at 273).

[74] *Id.* (citing *Martinez*, 231 P.3d at 273).

[75] *Id.* at 23 (quoting *Martinez*, 231 P.3d at 281).

any person."[76] Ultimately, the *Martinez* court found that "employ," under the wage order, had three alternative definitions: (1) to exercise control over the wages, hours or working conditions (per the plain language of the wage order); (2) to "suffer or permit to work," as construed in its use in child labor laws; or (3) to "engage" in work as understood in the common-law agency context.[77]

Dynamex claimed that strict application of *Martinez*'s "suffer or permit" standard would *practically* render all workers directly hired to provide services as employees because businesses can "always be said to knowingly 'suffer or permit' such an individual to work for the business."[78] Accordingly, Dynamex argued, *Martinez* was inadequate to distinguish employees from true independent contractors such as plumbers.[79]

The *Dynamex* court agreed, and after noting how far-reaching the "suffer or permit to work" standard would apply, the court tempered the standard by adopting the "ABC" test employed by other jurisdictions.[80] The court explained that the "suffer or permit to work" standard imposed a rebuttable presumption of an employer-employee relationship unless the hiring party could establish the worker as an independent contractor.[81] In order to overcome this presumption, the hiring party would have to establish *each* element in the three-factor "ABC" test which consists of (A) establishing the worker was free from the hiring party's control, both by contract and in fact; (B) establishing the worker performs work "outside the usual course" of the hiring party's business; and (C) establishing the worker is independently engaged in the same type of work provided to the hiring party.[82]

The *Dynamex* court then found that sufficient commonality of interest existed for class certification under prongs B and C of the "ABC" test.[83] The court found that determining whether the certified class of drivers performed a service outside the usual course of

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[76] *Id.* at 21 (quoting *Martinez*, 231 P.3d at 283).
[77] *Id.* at 22–23 (quoting *Martinez*, 231 P.3d at 278).
[78] *Id.* at 29.
[79] *Id.* at 29–30.
[80] *See id.* at 30, 34.
[81] *Id.* at 34.
[82] *Id.*
[83] *See id.* at 41–42.

Dynamex's business was easily resolvable on a class basis.[84] Because the "ABC" test requires a hiring party to establish each prong, the court noted class certification was sufficient on prong B's finding alone; however, the court also found sufficient commonality of interest in whether the driver class independently engaged in the services provided to Dynamex as part of their own distinct business or trade.[85]

1. *DYNAMEX* DISCUSSION

In reaching its conclusion of class certification, the *Dynamex* court noted some particular facts that are useful in considering whether the "ABC" test—and subsequently AB 5—should be applied to TNCs operating under the gig economy. The most significant fact, which the court addressed within the second paragraph of the opinion, was that Dynamex's procedure of classifying its drivers as independent contractors rather than employees was a new business practice:[86]

> Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors . . . .In recent years, the relevant regulatory agencies of both the federal and state governments have declared that misclassification of workers as independent contractors rather than employees is a very serious problem, *depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.*[87]

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[84] *Id.*

[85] *Id.* at 42.

[86] *See id.* The court first mentions this fact two paragraphs after delineating the persistent issue of worker misclassification. *Id.*

[87] *Id.* (emphasis added) (internal citations omitted).

Indeed, the court made clear that economic incentive is what drove Dynamex to undergo reclassification of its drivers as independent contractors: "In 2004, Dynamex converted all of its drivers to independent contractors after management concluded such a conversion would generate economic savings for the company."[88]

Another distinguishing fact noted in the opinion was Dynamex's business model. The court characterized Dynamex as a

> nationwide same-day courier and delivery service that operates a number of business centers . . . offers on-demand, same-day pickup and delivery services to the public . . . and . . . has a number of large business customers—including Office Depot and Home Depot—for whom it delivers purchased goods and picks up returns on a regular basis.[89]

Because the drivers were an essential part of Dynamex's delivery service business model, the company had little room to argue the drivers were independent contractors.

Dynamex's relationship and obligatory procedures for its drivers were also significant. Drivers that elected to be assigned as part of the dedicated fleet were required to notify Dynamex on which days they intended to work even though they could set their own schedules.[90] Drivers that performed on-demand work were "required to obtain a Nextel cellular telephone"—at no cost to Dynamex—to receive delivery orders.[91] Drivers were liable for any loss incurred due to failed timely deliveries, were expected to wear Dynamex shirts, and were required to place Dynamex decals on their vehicles.[92] Dynamex drivers were not prohibited from making deliveries for other competitors but could not prioritize a competitor's delivery over that of Dynamex.[93]

In finding for the plaintiff's class certification, the *Dynamex* court resolved commonality in prongs B and C of the "ABC" test because the plaintiff-drivers exclusively delivered for Dynamex and

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88 *Id.* at 8.
89 *Id.*
90 *See id.*
91 *Id.*
92 *Id.*
93 *See id.*

avoided the fact-intensive inquiry of the control element in prong A.[94]

Even though there are several similarities between Dynamex and Uber/Lyft, the rideshare corporations still maintain that under *Dynamex* and AB 5, their drivers are independent contractors.[95] In contrast to the specific cost-savings justification employed by Dynamex, TNCs can argue that their businesses have been wholly dependent on an independent contractor model since inception.[96] Further, TNCs continue to maintain that, first and foremost, they are technology companies that simply match drivers to riders,[97] unlike Dynamex who contracted with other corporations to fulfill delivery needs.[98]

Most significantly, however, is that the *Dynamex* court only tempered the "suffer or permit" standard after accepting Dynamex's argument that strict application would render all workers employees.[99] The adoption of the "ABC" test by the California Supreme Court was essentially a response to the "pragmatic effect" that the *Martinez* standard would have accomplished. Similarly, the "pragmatic effect" prism advocated in this Note would take into account the foundational business model of TNCs (or the gig economy at large) and its lasting effect. The *Dynamex* decision illustrates that courts are willing to consider and alter legal standards based on the "pragmatic effect" principle. This Note advocates courts should do so when dealing with TNC driver classification as current law is inept to handle these gig economy issues. This Note will now turn to the text of AB 5 to determine whether the California Legislature has foreclosed these arguments and further discusses the basis for Uber/Lyft's independent contractor theory.

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94 *See id.* at 41–42.

95 *See* Said, *supra* note 11.

96 *See* Uber Techs., Inc., *supra* note 1, at 28; Lyft, Inc., supra note 15, at 28.

97 *See* Janet Burns, *Uber and Lyft Won't Admit What They Are*, FORBES (Mar. 20, 2019, 1:11 PM), https://www.forbes.com/sites/janetwburns/2019/03/20/uber-and-lyft-dont-know-what-they-are-courts-have-some-ideas/#46d5900cc13f.

98 *Dynamex*, 416 P.3d at 8.

99 *See id.* at 30, 34.

2. AB 5 Discussion

The codification of *Dynamex* in AB 5 emphasizes the need to properly classify employees in order to place payment obligations on employers.[100] These payment obligations include contributions to unemployment insurance, disability insurance, workers' compensation premiums, minimum wage requirements, paid sick and family leave, and payroll taxes.[101] Further, AB 5 designates worker misclassification as a "significant factor in the erosion of the middle class and the rise in income inequality."[102] AB 5 makes clear that there is a presumption of an employer-employee relationship:

SEC. 2. Section 2750.3 is added to the Labor Code, to read:

> 2750.3. (a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor *unless* the hiring entity demonstrates that all of the following conditions are satisfied:
>
> > (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> >
> > (B) The person performs work that is outside the usual course of the hiring entity's business.
> >
> > (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[103]

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[100] *See generally* Assemb. B. 5, 2019–20 Sess. § 1 (Cal. 2019). These employment obligations will be further discussed in Part III of this Note.

[101] *Id.* § 1(b).

[102] *Id.* § 1(c).

[103] *Id.* § 2(a)(1) (emphasis added).

Interestingly, notwithstanding the assertion that significant erosion of the middle class and the increase of income inequality is due to employee misclassification, the majority of AB 5's text is spent outlining exceptions and fails to explicitly designate TNC drivers as employees.[104] AB 5 leaves a court with explicit discretion to not apply *Dynamex*'s "ABC" test if the court determines that the test is inapplicable to a particular circumstance.[105] Instead, the court is to apply the common-law agency test articulated in the *Borello* decision.[106] AB 5 then goes on to expressly exclude various occupations from the "ABC" test and makes *Borello* the default agency test for most applications.[107]

The enormous carve-out of exceptions raises significant questions that Uber and Lyft can exploit in their favor.[108] First, is a court to apply the "ABC" test in like circumstances to *Dynamex*, where the court can determine the independent contractor classification was adopted by the corporation as a means to circumvent obligatory employer contributions, rather than a business model crafted on an independent contractor model from inception? Second, is *Dynamex*'s appeal to "remedial statutory purpose" still as equally applicable due to AB 5's language? Or, alternatively, have the explicit exceptions swallowed "remedial statutory purpose" whole? Finally, is legislative history enough to effectuate what the majority of those in favor of employee-driver classification believe AB 5 to have accomplished?[109]

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[104] *See generally id.* § 2.

[105] *Id*. §2(a)(3).

[106] *Id.*; *see supra* note 67 (describing common-law agency test adopted in *Borello*).

[107] Assemb. B. 5, 2019–20 Sess. § 2 (Cal. 2019). AB 5 expressly excludes the following from the "ABC" test and makes *Borello* the default: physicians, surgeons, dentists, podiatrists, psychologist, veterinarians, lawyers, architects, engineers, private investigators, accountants, broker-dealers, investment advisers, direct salespersons, commercial fishermen, contracts for "professional services" (including marketing, human resources, travel agents, graphic designers, fine artists, photographers, and photojournalists), repossession agencies, and the construction industry (subject to its own requirements/restrictions). *Id.* § 2(b)–(h).

[108] *See* Said, *supra* note 11.

[109] Although Proposition 22 cut short pending litigation over AB 5's enforcement in California, in August 2020, a state judge held that Uber and Lyft had to comply with AB 5. *See* Preetika Rana, *Lyft, Uber Get More Time as They Fight*

For all of the media attention and public support garnered by AB 5, one would expect AB 5 to clearly designate Uber and Lyft drivers as employees rather than independent contractors. Nevertheless, AB 5 provides courts ample room to make the "ABC" test inapplicable in the rideshare-driver context. Courts could reasonably conclude that *Dynamex* and AB 5 are applicable to only those situations where it seems the corporation is trying to circumvent state benefit payments. This is exactly the atmosphere *Dynamex* was decided on. As was discussed above, the *Dynamex* court made explicit mention of Dynamex's relabeling of its drivers as independent contractors for the express purpose of saving cost to the company.[110]

This, however, is not the case for Uber and Lyft. Both ridesharing companies were founded on the idea that such a business venture would operate under an independent contractor theory and have warned potential investors of the consequences of such designation in their prospectuses.[111] Uber warned investors that an employee designation would "require [Uber] to fundamentally change [its] business model, and consequently have an adverse effect on [its] business and financial condition."[112] This disclosure was made after Uber identified several adverse rulings in the United Kingdom, France, and the United States, more specifically, the *Dynamex* decision.[113]

Lyft similarly warned investors by stating:

> [A]ny legal proceeding that classifies a driver on a ridesharing platform as an employee may require us to significantly alter our existing business model and operations and impact our ability to add qualified drivers to our platform and grow our business, which

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California Order, THE WALL ST. J. (Aug. 20, 2020, 6:59 PM) [hereinafter Rana, *Lyft, Uber Get More Time*], https://www.wsj.com/articles/lyft-to-suspend-service-in-california-11597942614?st=ja1iz41e4f7gxkr&reflink=article_email_share. Subsequently, both Uber and Lyft warned that they would be limiting or discontinuing operations in California, which prompted an emergency stay by a state appeals court. *Id.*

110 *See* Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 8 (Cal. 2018).

111 *See* Uber Techs., Inc., *supra* note 1, at 28; Lyft, Inc., *supra* note 15, at 28.

112 Uber Techs., Inc., *supra* note 1, at 28.

113 *See id.*

> could have an adverse effect on our business, financial condition and results of operations.[114]

Uber and Lyft are not postured in the same position as Dynamex because of the independent contractor model of TNCs from inception.[115] Thus, a court can likely maneuver around the "ABC" test, if so inclined. Additionally, it is important to consider *Dynamex*'s application of "remedial statutory purpose" as it applies to social benefits and the contrary language of AB 5. As previously discussed, the "remedial statutory purpose" construction enabled courts to read in an expansionist view of employee protections under the workers' compensation law at issue in *Borello* and in the wage statute at issue in *Dynamex.*[116] A court, however, will have to do some work in establishing that AB 5's purpose is to guarantee employee benefits to rideshare drivers amongst the backdrop of AB 5's language.

First, if the purpose of AB 5 is to curb the misuse of employee misclassification,[117] why would the bill include such a large swath of exceptions that reach major industries operating in just this manner? This question would likely have a court consider the factors at play in *Dynamex* that lead the court to adopt the presumptive employee classification and "ABC" test. The most significant factor for the applicability of the "ABC" test would be the highly suspicious motive of switching to an independent contractor status for the purposes of cost-savings by circumventing employee benefits.[118]

If the forces at play which rallied breath into AB 5 were, in fact, those of TNC driver concerns, why would the California legislature write AB 5 in such a manner that leaves wide uncertainty as to the TNC driver status? A much simpler solution would be to designate the TNC driver relationship as one clearly statutorily defined as

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[114] Lyft, Inc., *supra* note 15, at 29.

[115] *See* Frazer, *supra* note 3.

[116] *See supra* Part II.A.

[117] Additionally, some courts have given little weight to purposivist arguments on the grounds that determining statutory purpose is a futile task given the inherent give-and-take process of legislation. *See, e.g.*, Van Hollen, Jr. v. Fed. Election Comm'n, 811 F.3d 486, 494 (D.C. Cir. 2016) ("Statutes are hardly, if ever, singular in purpose. Rather, most laws seek to achieve a variety of ends in a way that reflects the give-and-take of the legislative process.").

[118] *See* Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 5 (Cal. 2018).

employer-employee instead of largely describing what AB 5 does not pertain to and relying on a statutory presumption. AB 5's silence on the TNC driver relationship is yet another factor leaning in Uber and Lyft's favor when arguing around the applicability of AB 5. Given the AB 5's legislative history and advocacy from TNC drivers in support,[119] however, a court could also reconcile these tensions in favor of TNC drivers when faced with the argument that the "ABC" test is inapplicable to Uber and Lyft.

In summary, a court against the application of the "ABC" test, as articulated in *Dynamex,* can just as equally decline application of the test as a court inclined to apply it. Instead of giving TNC drivers and corporations a clear indication of where they stand on the relationship scale, AB 5 created another layer of uncertainty until Proposition 22 settled the matter in California.[120] Other jurisdictions, however, could attempt to adopt the "ABC" test. Unlike the "ABC" test, *Borello* does not begin with a presumption of employee designation, which TNCs will want to take advantage of, despite the "remedial statutory purpose" principle that *Borello* does apply.[121] *Borello* further relies on several factors of the common-law agency test that TNCs have been successful in the past.[122] AB 5 applies the tempered *Martinez* standard through the narrow "ABC" test with the goal of finding an employee designation.[123] The "ABC" test takes little account of the financial impact an employer-employee designation would have and even less thought on how such an impact would incentivize TNCs to invest and develop autonomous driving capability.[124] Without the backdrop of the "pragmatic effect," the "ABC" test would injure state revenue and workers as the gig economy could significantly shrink.[125]

Many critics may characterize the "pragmatic effect" advocated for in this Note as nothing more than mere judicial activism. This Note, however, recognizes that the debate is long past judicial

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119 *See* della Cava, *supra* note 14.

120 *See* Rana, *Reclassifying Drivers*, *supra* note 13.

121 *See Dynamex*, 416 P.3d at 17 (citing S.G. Borello & Sons v. Dep't of Indus. Rel, 769 P.2d 399, 406–07 (Cal. 1989)).

122 *See id.* at 18 n.12; *Borello*, 769 P.2d at 406–07.

123 *See* Assemb. B. 5, 2019–20 Sess. § 1 (Cal. 2019); *Dynamex*, 416 P.3d at 35; *see also* Martinez v. Combs, 231 P.3d 259, 279 (Cal. 2010).

124 *See generally Dynamex*, 416 P.3d at 35.

125 *See infra* Part III.

activism. The *Dynamex* decision is just one example of judicial activism in American jurisprudence. When courts craft new legal standards based on societal implications—altering legal standards already in place—that later manifest in statutory adoption by the legislature, judicial activism is arguably at its peak. It may very well be that codification signals courts were right to consider societal implications and as such, the criticism that the "pragmatic effect" prism advocated here is nothing but judicial activism, is unavailing. This Note will next discuss Florida's approach to employment classification and how it differs from California.

B. *The Florida Approach and Recognized Public Policy Model*

At the time of this writing, Florida has not adopted the "ABC" test articulated in *Dynamex*, but there are many points of agreement between California's treatment of the employee classification test in *Borello* and that of Florida's in *Miami Herald Publishing Co. v. Kendall* and its progeny.[126] *Borello* and *Kendall* both pointed to the factors stated in the Restatement §220,[127] and both found the issue of "control" significant.[128] Even though *Kendall* was a negligence action, it set the stage for litigation over employee classification in

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[126] Mia. Herald Pub. Co. v. Kendall, 88 So. 2d 276, 276 (Fla. 1956). *Kendall* involved a negligence claim against the *Miami Herald* when a newspaper delivery person struck the appellee with a motorcycle while delivering newspapers. *Id.* The Court first looked to the contract provision between the newspaper delivery person and the *Miami Herald*. *Id.* at 277. The Court determined the contract established an independent contractor relationship and, though not dispositive, would require a showing otherwise to overcome the agreed upon relationship. *Id*. at 279. The Court further examined the practical nature of control on the delivery person by the *Miami Herald* and determined that—under the first Restatement §220 factors—the delivery person was an independent contractor. *Id.* at 279 (citing RESTATEMENT (FIRST) OF AGENCY § 220 (AM. L. INST. 1933)).

[127] *Compare Kendall*, 88 So. 2d at 279 *with Borello*, 769 P.2d at 404. *Kendall* cited the first Restatement of Agency Law § 220, while *Borello* cited the Restatement §220. *See Kendall*, 88 So. 2d at 279; *Borello*, 769 P.2d at 404. Restatement §220, however, remained materially similar between the two versions, except for the addition of a factor in the second Restatement of Agency Law. *See* RESTATEMENT (FIRST) OF AGENCY § 220 (AM. L. INST. 1933); RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

[128] *Compare Kendall*, 88 So. 2d at 277–79 *with Borello*, 769 P.2d at 400–01, 403–404 (both providing detailed analysis of the control exerted by the principle over the servant).

the context of social benefits. In *Keith v. News & Sun Sentinel Co.*, the Florida Supreme Court held that "the *Kendall* analysis of status applies regardless of whether the issue arises in the context of a tort claim or a workers' compensation claim."[129] *Keith* involved a workers' compensation claim against the *Sun Sentinel* from one of its newspaper street vendors.[130] The *Sun Sentinel* contracted with a delivery agent who in turn hired the street vendors.[131]

Like the *Borello* court, *Keith* recognized the "remedial statutory purpose" of Florida's Workers' Compensation Act but fell short of the talismanic effect *Borello* impugned: "Although we do not find that this policy factor controls the outcome of this case, we agree it is a proper matter to consider, and may be potentially helpful in the resolution of a case otherwise too close to call."[132]

In applying the *Kendall* framework, the *Keith* Court affirmed the compensation judge's analysis, which first looked to the agreement between the parties and determined the parties intended an independent contractor relationship.[133] The compensation judge then determined whether the agreement itself or the actual practice of the parties mitigated the independent contractor status and functionally created sufficient control over one party, rendering them an employee.[134] The Court found little factual evidence that the *Sun Sentinel* controlled the *means* by which the newspaper street vendor was to conduct business and found no evidence of a direct relationship between the *Sun Sentinel* and Keith.[135] On these facts, the Florida Supreme Court affirmed the compensation judge's findings below that Keith was an independent contractor and ineligible for workers' compensation benefits.[136]

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129 Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 171 (Fla. 1995).

130 *Id.* at 168.

131 *Id.* The contract between the *Sun Sentinel* and the delivery agent declared an independent contractor relationship. *Id.* The delivery agent was responsible for its own tax liability and contributions. *Id.* The delivery agent also provided its street vendors with the option of accident insurance, which the delivery agent paid premiums for through the *Sun Sentinel*, which would, in turn, pay the insurance carrier. *Id.*

132 *Id.* at 171.

133 *Id.* at 171–72.

134 *See id.* at 172–73.

135 *See id.*

136 *Id.* at 173–74.

In fleshing out Florida's approach to employee classification, the Eleventh Circuit discussed *Kendall* and *Keith* in a dispute arising between FedEx and its drivers over business expense reimbursement and overtime pay.[137] The Eleventh Circuit looked at the agreement between FedEx and the drivers, which provided that the drivers were independent contractors and that the *means* by which the delivery tasks were completed were "within the discretion of the drivers."[138]

Similarly, the Eleventh Circuit examined other provisions of the agreement and the practical control that FedEx exercised over the drivers.[139] Most significantly, the court recognized that the robust contract provisions, despite their characterization of the relationship, evidenced considerable control over the drivers on behalf of FedEx.[140] The agreement reserved to FedEx "control over the type, configuration, and appearance of the driver's truck and the tools and instrumentalities used for package delivery, such as the FedEx scanner and recordkeeping methods."[141]

The Court then analogized the issue before it to *Del Pilar v. DHL Global Customer Solutions, Inc.*, which contained similar facts and in which it found that summary judgment was inappropriate due to the contractual provisions evincing control despite an independent contractor designation.[142] Based on the highly fact-intensive nature of employee classification, the Eleventh Circuit found that sufficient facts existed supporting each party's arguments and reversed the district court's summary judgment in favor of FedEx on the independent contractor designation.[143]

C. *The Florida and California Discussion*

As these cases make clear, Florida primarily turns to an examination of the relationship as intended by written contract ("party-

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[137] *See* Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313, 1316, 1320–22 (11th Cir. 2015).

[138] *Id.* at 1319 (quoting *In re* FedEx Ground Package Sys., Inc., 734 F. Supp. 2d 557 (N.D. Ind. 2010)).

[139] *See id.* at 1325–26.

[140] *See id.*

[141] *Id.* at 1321.

[142] *See id.* at 1323–24 (discussing Del Pilar v. DHL Glob. Customer Sols., Inc., 993 So. 2d 142 (Fla. Dist. Ct. App. 2008)).

[143] *See id.* at 1326–28.

intent") and then looks to any indicia of a contrary status.[144] As in *Carlson*, the robust contract provisions that nevertheless characterized the driver relationship as that of an independent contractor established genuine issues as to whether FedEx exercised significant control over the drivers.[145] Even though *Keith* recognized the public policy aspect of Florida's Workers' Compensation Act,[146] the subsequent case law demonstrates that Florida spends little time on such concerns and primarily relies on a "control" analysis and the factors outlined in the Restatement §220.[147]

That said, this is in opposition to California's *Borello* framework that seems to engage in "remedial statutory purpose" as a means to expand employee classification in social benefit instances.[148] Further, *Dynamex* and AB 5 are completely inconsistent with Florida's *Keith* framework, as the former establishes a presumption of employee designation,[149] while *Keith* first turns to the intended relationship of the parties, as evinced through their contract, and then examines the pragmatic relationship.[150]

As discussed in Part II.A.2., *Dynamex* and AB 5 leave plenty of questions unanswered for both parties. If anything, *Dynamex* and AB 5 incentivize TNCs to automate away the substantial California workforce under their respective umbrellas. Under *Keith*, at the very least, a party can expect a court to begin with an examination of the written contract to determine relationship intent while still being cognizant that the actual relationship conditions will also be scrutinized.[151] By its language, AB 5 presumes an employee relationship but, nevertheless, grants plenty of discretion to a reviewing court to make the "ABC" test inapplicable, a position Uber maintains.[152] If certainty and proper employee classification for TNCs drivers was an aim of AB 5, it falls short on this front. This Note will next discuss the analysis employed by a federal agency, the NLRB, in reaching employment classification decisions.

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144 Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 171 (Fla. 1995).
145 *See Carlson*, 787 F.3d at 1328–29.
146 *Id.* at 171.
147 *See supra* note 52.
148 *See supra* Part II.A.2.
149 *See id.*
150 Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 171 (Fla. 1995).
151 *See id.*
152 *See* Said, *supra* note 11.

D. *The Federal Approach*

For purposes of examining the classification approach adopted by federal agencies in the context of employee rights and benefits, this Note takes a look at the approach adopted by the NLRB. The NLRB is charged with the administration of the National Labor Relations Act (the "NLRA").[153] The NLRA enables employees, with or without a union, to take steps in improving their working conditions, wages, and benefits with at least some protection against managerial retaliation for such efforts.[154] Of particular importance to this Note is the fact that the NLRA explicitly exempts workers that are deemed to be independent contractors from the NLRA's protection.[155] Accordingly, a threshold requirement for NLRA protection is a determination that the worker is an employee for purposes of the Act.

The NLRB's guidance on this vital threshold issue is illustrative of the distinct approach between federal and state governments. Of primary interest is NLRB's Office of the General Counsel (the "OGC") Advice Memorandum to Region 20 on the issue of whether TNC drivers are employees or independent contractors.[156] The advice memorandum was written in response to two charges of unlawful termination and one charge of unlawful domination of a labor organization against Uber.[157] Accordingly, whether these drivers were entitled to protection from the alleged conduct of Uber hinged on their status as either employees or independent contractors.[158] The OGC ultimately concluded that these drivers[159] were

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153 *See* 29 U.S.C. §§ 151–169.

154 *Employee Rights*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/rights-we-protect/rights/employee-rights (last visited May 15, 2021).

155 29 U.S.C. § 152(3).

156 *See* NLRB Advice Memorandum, *supra* note 9, at 1. Region 20 of the NLRB services parts of California and the state of Hawaii. *Region 20 - San Francisco*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices/region-20-san-francisco (last visited May 15, 2021).

157 *See* NLRB Advice Memorandum, *supra* note 9, at 1–2.

158 *See id.* at 3.

159 The drivers were UberX and UberBLACK drivers. *Id.* at 14. The only significant differences between the two types of drivers are that UberBLACK drivers invest more capital because they must provide higher-end vehicles, can contract with Uber as distinct business entities, and can hire others to drive their vehicles. *Id.* at 14–15.

independent contractors by similarly applying the Restatement §220 factors[160] previously discussed. Unlike *Borello* and *Kendall*, however, the OGC did not turn to "remedial statutory purpose" like California, nor did it begin its analysis on the intended relationship of the parties like Florida. Instead, the OGC applied the common law test "through 'the prism of entrepreneurial opportunity' set forth in *SuperShuttle*."[161] The entrepreneurial opportunity principle, as articulated by the D.C. Circuit, is "an important animating principle by which to evaluate [common law] factors in cases where some factors cut one way and some the other [and looks to] whether the position presents the opportunities and risks inherent in entrepreneurialism."[162]

SuperShuttle involved a dispute between SuperShuttle Dallas-Fort Worth ("SuperShuttle") and its drivers under the NLRA.[163] Prior to 2005, these drivers were designated as employees by SuperShuttle.[164] In 2005, SuperShuttle DFW converted to a franchise business model and required the drivers to sign agreements recharacterizing their relationship as independent contractors.[165]

On its way to affirming the Regional Director's finding that these franchise drivers were independent contractors, the *SuperShuttle* Board took an interesting detour discussing the inapplicability of the "economic dependency" test implicitly disapproved by Congress.[166] The economic dependency test examined whether the putative independent contractor was dependent on the employer for its livelihood, favoring an employee relationship.[167] The NLRB discussed how the Supreme Court of the United States, similar to California in *Borello*, adopted a public policy reasoning for adopting a

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160 *Id.* at 3–4.

161 *Id.* at 14 (quoting *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, 9 (Jan. 25, 2019)).

162 FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).

163 *See SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at 1.

164 *Id.* at 3.

165 *Id.* The relationship also provided the drivers with the ability to hire their own relief drivers but the "franchisee" drivers were required to supply their own shuttles and pay franchise fees and flat weekly fees for the right to use the SuperShuttle brand and dispatch services. *Id.* Additionally, the drivers were free to work as much as they wanted and were entitled to keep the money earned for assignments they accepted. *Id.*

166 *Id.* at 9 (citing NLRB v. United Insurance Co., 390 U.S. 254, 256 (1968)).

167 *See id.* at 9 n.15.

broad definition of the word "employee" under the NLRA in *United States v. Silk*.[168] The *Silk* Court recognized that in light of the purpose of the NLRA, the primary consideration was not the control factor heavily relied upon in the common law test but rather whether reading in the putative employee under the NLRA would effectuate the purposes of that act.[169] Even though at the time, the NLRB was in favor of the expansive reading of the term "employee" by the *Silk* Court, the *SuperShuttle* Board discussed Congress' subsequent implicit rejection of such a reading:

> In the Taft-Hartley amendments of 1947, Congress reacted to this expansive alternative to the common-law test by specifically excluding independent contractors from coverage under the Act. In subsequent cases, the Supreme Court recognized that Congress had effectively abrogated the holdings of *Hearst* and *Silk* to the extent they authorized policy-based alternatives to the common-law agency test of employee and independent-contractor status in the absence of express statutory language.[170]

After dispensing with the "economic dependency" test, the *SuperShuttle* Board then applied the common-law factors to SuperShuttle drivers and specifically noted that in taxi-like disputes, the most significant factors against the backdrop of entrepreneurial opportunity are: (1) the extent of control by the employer and; (2) the payment scheme.[171]

SuperShuttle exhibited little control over its franchisee drivers because the drivers had near autonomy as to their day-to-day schedule and performance since they could decide whether or not to accept trips, when to work, and what routes to take within their designated areas.[172] The *SuperShuttle* Board also noted that the franchisee drivers were subject to various regulations by the Dallas Fort Worth

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168 *Id.* at 9 (citing United States v. Silk, 331 U.S. 704, 713 (1947)).

169 *See* S*ilk*, 331 U.S. at 713 (citing NLRB v. Hearst Publ'ns, 322 U.S. 111, 131–32 (1943)) (recognizing the purpose of the NLRA was to eliminate labor disputes and even the playing field in context of bargaining power).

170 *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, at 9.

171 *See id.* at 12–13.

172 *See id.* at 12.

Airport, but this was not indicative of SuperShuttle's control over the drivers.[173] The requirements set on the drivers by SuperShuttle consisted of frequent vehicle inspections, set fares, and some minimal training which the *SuperShuttle* Board found were "vastly outweighed by the general control that franchisees have over their working conditions."[174]

On SuperShuttle's payment scheme to its drivers, the *SuperShuttle* Board discussed the inferential differences between a flat fee and commission-based fee: "When an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work."[175] Because the franchisee drivers were only required to pay a flat fee, the SuperShuttle payment structure leaned towards an independent contractor status.[176]

The *SuperShuttle* Board went on to discuss the fact that the drivers supplied their own vehicles, that SuperShuttle did not supervise the method in which the drivers performed their tasks, and finally, that the written contract made clear that the franchisee drivers were independent contractors.[177] The Board concluded that the extent of control, the payment scheme, and the investment risk in self-supplied vehicles by the drivers provided the "franchisees with significant entrepreneurial opportunity and control over how much money they make each month."[178]

Applying the *SuperShuttle* analysis to the challenges launched against Uber by its drivers, the OGC placed significant weight on the extent of control over the drivers by Uber and Uber's payment structure.[179] The OGC found that Uber drivers had significant entrepreneurial opportunity and were thus independent contractors because they could determine what rides to accept, could work for a competitor service, and were not bound to drive at all.[180] The OGC further reasoned that Uber drivers actually had more control over their earning potential than the franchisee drivers in *SuperShuttle*

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173 *Id.* at 13.
174 *Id.*
175 *Id.*
176 *See id.*
177 *See id.* at 13–14.
178 *Id.* at 14.
179 *See* NLRB Advice Memorandum, *supra* note 9, at 4–5.
180 *Id.* at 5.

since those drivers could not negotiate the standard fees set by SuperShuttle, while Uber drivers could log in or out of the platform when "surge" fares were active.[181]

In contrast to the SuperShuttle franchisee drivers, however, Uber operates on a commission-based system which supports an employee inference because Uber would have a motivating factor to control the driver's means and manner, decreasing entrepreneurial opportunity.[182] The OGC noted that the payment structure was not dispositive but only indicative of the amount of control an employer might actually possess, and accordingly looked to the amount of control Uber exhibited based on this fee structure.[183] The OGC noted that Uber did not exert control over the driver's means itself but instead relied on customer feedback.[184] It further reasoned that in all reality, the Uber fee structure actually increased entrepreneurial opportunity because "this made it easier to take advantage of the unlimited freedom they had to work for competitors or pursue other ventures and drive for Uber only when it suited them."[185]

The OGC, like the *SuperShuttle* Board, summarily looked at the fact that drivers had to supply their own vehicles, were not supervised by Uber while they performed their tasks, and intended the relationship to be that of an independent contractor as evidenced by the written contract.[186] These facts all supported independent contractor status even though the OGC acknowledged that no special skill was necessary on behalf of the drivers and that the drivers were in fact an integral part of Uber's regular business.[187] Accordingly, the OGC concluded that UberX drivers were independent contractors under the NLRA and that UberBLACK drivers were not substantially distinct to be treated any differently.[188]

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[181] *Id.* at 9. "Surge" fares refers to increased fares for certain locations during high-demand times which drivers could take advantage of for additional profitability. *Id.* at 7.

[182] *Id.* at 10.

[183] *Id.* at 11.

[184] *Id*.

[185] *Id.*

[186] *See id.* at 11–12.

[187] *Id.* at 13.

[188] *Id.* at 14–15. In fact, UberBLACK drivers were clearly independent contractors, *inter alia*, since they could hire other drivers and contracted with Uber as distinct business entities. *Id.* at 15.

1. NLRB DISCUSSION

The NLRB's approach to the employment classification issue makes clear that the "remedial statutory purpose" engagement seen in California's *Borello*, and subsequently the *Dynamex* precedent, has been rejected by Congress and the Supreme Court under the NLRA.[189] Even though the NLRB's approach is much closer to that of Florida as seen in *Keith*, at least in the emphasis placed on the common law factors in the Restatement §220,[190] the NLRB applies these factors through a different lens. While Florida applies the common law factors as against the backdrop of party intent,[191] the NLRB seems to place party intent low on the totem pole and keeps entrepreneurial opportunity at the forethought of its analysis.[192]

In reviewing the approaches taken by California, Florida, and NLRB at the federal level, one thing is clear: A multitude of jurisdictions have essentially applied the same factors but have come to different conclusions. They have done so not solely based on the characterization of the facts involved, but also on the guiding principles the particular jurisdiction applied against these common law factors. Accordingly, a party seeking to determine its relationship status would avail itself of more certainty by ascertaining the jurisdictional guiding principles it finds itself up against rather than the factors articulated in the Restatement §220.[193]

In fact, it is arguably this very jurisdictional guiding principle that has manifested itself into California's AB 5. The "remedial statutory purpose" principle discussed in *Borello*, *Martinez*, and *Dynamex* suggests as much. Based on this principle, employers are now faced with a presumption of employer-employee, with the burden of proving otherwise through the "ABC" test—yet another *narrow* variation of the common law factors.[194] As such, this Note has identified the "remedial statutory purpose" principle, the "party-intent" principle, and now the "entrepreneurial opportunity" principle as

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189 The "statutory purpose" principle and the expansive read of the definition of "employee" is still alive and well in other federal social benefit frameworks. *See infra* Part IV.

190 *See supra* note 52.

191 *See supra* Part II.C.

192 *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).

193 *See supra* note 52.

194 *See id.*

starting points for societal benefit employment classification. The "pragmatic effect" principle would be especially applicable to gig economy issues, which places at the forefront of the analysis the necessary independent contractor designation giving rise to the gig economy and the deleterious effect that an employee classification would have.

2. LIABILITY TREATMENT OF TNC DRIVERS AND ITS IMPACT ON SOCIAL BENEFITS

Even though this Note is primarily focused on the social benefit aspect of employee classification, this is an appropriate time to raise the issue in the context of liability. Just like the *SuperShuttle* Board discussed congressional intent of the NLRA through subsequent legislation,[195] a reviewing court in the context of social benefit classification could look in the same direction for guidance. As of the time of this writing, every state, with the exception of Oregon, has some form of insurance legislation pertaining to TNCs and their drivers.[196] For practical purposes, this Note has classified these statutes into four distinct groups by their relative treatment of the TNC driver relationship. These four groups consist of: (1) explicit independent contractor designation, (2) implicit independent contractor designation, (3) implicit independent contractor designation unless contracted otherwise, and (4) undefined relationship statutes.

The first group consists of those states that have explicitly defined the TNC driver relationship as that of an independent contractor. Although though there are some variations as to each state's legislative language, states that follow this approach explicitly designate drivers as independent contractors so long as the TNCs meet particular conditions.[197] Some states explicitly designate the drivers

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[195] *See Super* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 9 (Jan. 25, 2019).

[196] *See Transportation Network Company,* PROP. CAS. INSURERS ASSOC., http://viewer.zmags.com/publication/60841263#/60841263/1 (last updated June 21, 2018).

[197] *See, e.g.*, FLA. STAT. § 627.748 (9) (2020) ("A TNC driver is an independent contractor and not an employee of the TNC if all of the following conditions are met: (a) The TNC does not unilaterally prescribe specific hours during which the TNC driver must be logged on to the TNC's digital network. (b) The TNC does not prohibit the TNC driver from using digital networks from other TNCs. (c) The TNC does not restrict the TNC driver from engaging in any other

as presumptively independent contractors, which can be rebutted based on the common-law agency test.[198]

The second group consists of states that implicitly provide that TNC drivers are independent contractors or alternatively are not employees. For example, Arizona maintains that TNCs "may but [are] not deemed to own, operate or control a personal motor vehicle of a transportation network company driver."[199] Connecticut defines "driver" as "an individual who is not an employee of a transportation network company but who uses a transportation network company vehicle to provide prearranged rides."[200]

The third group consists of states that essentially condition the relationship on the terms of the written contract. States that follow this approach use language similar to Rhode Island: "A transportation network company shall not be deemed to control, direct, or manage the personal vehicles or transportation network company drivers that connect to its digital network, except where agreed to by written contract."[201]

The fourth and final group are those states that are silent on the relationship.[202] This group consists of states that either define a "driver" simply to be "a driver certified by a transportation network company"[203] or an individual who uses their own personal vehicle and the TNC digital platform to perform prearranged ridges.[204]

As pointed out above, several states, either expressly or implicitly, maintain that drivers are independent contractors or at least not employees. A reviewing state court could look to these statutes as evidence of legislative intent when dealing with its own social benefit statute, but its weight will likewise ultimately depend on the

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occupation or business. (d) The TNC and TNC driver agree in writing that the TNC driver is an independent contractor with respect to the TNC.").

198 *See, e.g.*, N.C. GEN. STAT. ANN. § 20-280.8 (2019).

199 ARIZ. REV. STAT. ANN. § 28-9551(3) (2020).

200 CONN. GEN. STAT. § 13b-116(2) (2019).

201 R.I. GEN. LAWS § 39-14.2-1(8) (West 2021).

202 The outliers include Virginia and California. Virginia simply refers to TNC drivers as "partners." *See* VA. CODE ANN. § 46.2-2099.48 (2020). California, as discussed above, will attempt to presumptively treat TNC drivers as employees under AB 5 starting January 1, 2020. *See* CAL. LABOR CODE § 2750.3(a)(1) (West 2020).

203 MASS. GEN. LAWS ch. 159A1/2, § 1 (West 2020).

204 *See* MINN. STAT. § 65B.472(1)(f) (2020).

guiding principle at play. The discussion above on agency jurisprudence on the state and federal level establishes that there are various guiding principles in existence. This Note continues to argue that one of these guiding principles should consider the "pragmatic effect" on the gig industry. With this in mind, this Note now turns to the consequences TNCs face if confronted with an employee classification for its drivers.

III. CONSEQUENCES OF EMPLOYEE DESIGNATION

Thus far, this Note has examined some of the tensions at play within the legal debate over employee classification. What brings this debate into perspective, however, is the financial impact an employer faces when an employment relationship is established. Among other costs, employers are faced with statutory obligations based on an employer-employee relationship. Some of these statutorily imposed costs consist of obligations under the Employee Retirement Income Security Act,[205] the Federal Insurance Contributions Act,[206] the Fair Labor Standards Act,[207] the Family and Medical Leave Act,[208] and other state-level obligations like workers' compensation[209] or unemployment benefits.[210]

The Employee Retirement Income Security Act ("ERISA") was enacted by Congress with the goal of financially securing employee benefit plans and preventing retirees from losing such anticipated benefits.[211] ERISA applies to any employee benefit plan established or maintained "by any employer engaged in commerce or in any industry or activity affecting commerce."[212] ERISA defines

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[205] 29 U.S.C. §§ 1001–1461.
[206] 26 U.S.C. §§ 3101–3128.
[207] 29 U.S.C. §§ 201–219.
[208] *Id.* §§ 2601–2619.
[209] *See, e.g.*, FLA. STAT. § 440 (2020).
[210] *See* Sonja Sharp, *Uber Drivers Secure Unemployment Benefits*, WALL ST. J. (Oct. 14, 2016, 9:27 AM), https://www.wsj.com/articles/uber-drivers-secure-unemployment-benefits-1476405341.
[211] *See* 29 U.S.C. § 1001(a).
[212] *Id.* § 1003(a)(1).

"employee" as "any individual employed by the employer."[213] Even though ERISA is a complex statutory scheme, it provides some noteworthy employee protections. First, it sets out that an employee has a nonforfeitable right to their retirement benefit at retirement age or vests a nonforfeitable percentage of the retirement benefit which increases with years of service.[214] ERISA does not seek to establish a uniform pension plan for employees, rather it seeks to ensure that whatever retirement plan is offered by the employer, the employee will have access to its benefit upon retirement.[215] The way ERISA meets this end is by requiring employers to pay into a fund administered by the Pension Benefit Guaranty Corporation.[216] The minimum payment amount is dependent on the particular plan established by the employer and its funding requirement.[217] Even though ERISA does not mandate a retirement plan, gaining employee classification would enable drivers to unionize under the NLRA and condition negotiations on such benefits.[218]

The Federal Insurance Contributions Act ("FICA")[219] established a tax scheme that funds the Social Security Act ("SSA").[220] Employees are obligated to pay a 6.2% tax on earned wages which funds the SSA and an additional 1.45% tax on earned wages, which funds Medicare under the SSA.[221] Under FICA, employers are obligated to match the employee's contribution.[222] FICA, in part, defines an "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee

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213 *Id.* § 1002(2)(B)(6); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (holding that determination of "employee" under ERISA is analyzed under the common-law agency test).

214 *See* 29 U.S.C. § 1053(a).

215 *See* U.S. DEPT. OF LAB., FACT SHEET: WHAT IS ERISA, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa (last visited May 15, 2021).

216 *See* 29 U.S.C. § 1302.

217 *Id.* § 1082(a)(1).

218 *See generally id.* §§ 151–169 (establishing rights of employees under the NLRA).

219 26 U.S.C. §§ 3101–3128.

220 *See* SOC. SEC. ADMIN., NO. 05-10297, WHAT IS FICA? (2017), https://www.ssa.gov/thirdparty/materials/pdfs/educators/What-is-FICA-Infographic-EN-05-10297.pdf.

221 *See* 26 U.S.C. § 3101(a)–(b).

222 *See id.* § 3111(a)–(b).

relationship, has the status of an employee."[223] Further, the Social Security Administration has promulgated rules that declare the common law rules "the basic test" for determining employment classification.[224]

The Fair Labor Standards Act (the "FLSA") was enacted by Congress to establish a minimum standard of "living necessary for health, efficiency, and general well-being of workers."[225] The FLSA includes minimum hourly wage requirements[226] and sets a maximum workweek of forty hours per week unless the employee is paid at a rate of one and one-half times the regular rate at which employed.[227] Currently, the FLSA minimum wage requirement is $7.25 per hour.[228] The FLSA defines an "employee" as "any individual employed by an employer," and does not distinguish between full-time or part-time employment.[229] Interestingly enough, the determination of employee or independent contractor under the FLSA has kept in tune with the same line of reasoning as *Silk*, discussed in Part II.D. of this Note.[230] The Department of Labor, Wage and Hour Division—charged with administrating the FLSA—has continued to maintain that "[t]he employer-employee relationship under the FLSA is tested by 'economic reality' rather than 'technical

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223 *Id.* § 3121(d)(2).

224 20 C.F.R. § 404.1007(a) (2019). The Social Security Administration considers the following factors when determining employee status: (1) whether the person you work for can fire you; (2) whether that person provides tools or equipment and a place to work; (3) whether you receive training or instructions from the person you work for; (4) whether you are required to do the work yourself; (5) whether you can hire, supervise, or pay assistants; (6) whether person you work for sets your hours of work; (7) whether person you work for pays any of your expenses; and (8) how often you are paid. *Id.*

225 29 U.S.C. § 202(a).

226 *Id.* § 206.

227 *Id.* § 207(a)(1).

228 *Id.* § 206(a)(1)(C).

229 *Id.* § 203(e)(1).

230 *See* United States v. Silk, 331 U.S. 704, 713 (1947); *see also* Walling v. Portland Terminal Co., 330 U.S. 148, 150–51 (1947) (holding that the FLSA contained its own definition of "employee" which encompassed a large swath of employment otherwise contemplated as independent contractor work).

concepts.' It is not determined by the common law standards relating to master and servant."[231]

The Family and Medical Leave Act (the "FMLA")[232] provides employees with the ability to take unpaid leaves of absences for certain periods of time with continued employee benefits.[233] Under the FMLA, an employee who takes an absence protected under the statute does not lose any accrued employment benefits and is entitled to the same or equivalent position held upon return.[234] Additionally, the employer must maintain the employee's medical coverage under any "group health plan" while the employee is on protected leave under the FMLA.[235] The FMLA, however, only applies if the employer employs fifty or more employees at a particular worksite.[236] The FMLA defines "employee" as "an employee who has been employed . . . for at least 12 months . . . and for at least 1,250 hours of service during the previous 12-month period."[237] Further, the FMLA states that "employee" has the same meaning as "employee" under the FLSA.[238] Accordingly, courts apply the "economic realities" test in determining whether an employer-employee relationship exists for FMLA purposes.[239]

On the state level, TNCs can also be subjected to additional obligations, like workers' compensation. Workers' compensation provides employees with the ability to recover expenses incurred due to workplace injuries.[240] In return, the employer is insulated from

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231 U.S. DEP'T OF LAB. FACT SHEET, *supra* note 48; *see also* U.S. DEP'T OF LAB., WAGE & HOUR DIV., FINAL RULE: INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT (2021), https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor (reaffirming the "economic reality" test under the FLSA and emphasizing the factors of control and profit/loss opportunity as the "most probative.").

232 29 U.S.C. §§ 2601–2619.

233 *Id.* § 2614(a)(1).

234 *Id*. § 2614(a)(2).

235 *Id.* § 2614(c)(1).

236 *See id.* § 2611(2)(B)(ii).

237 *Id.* § 2611(2)(A)(i)–(ii).

238 *Id.* § 2611(3).

239 *See* Coulibaly v. Tillerson, 273 F. Supp. 3d 16, 37 (D.C. Cir. 2017).

240 *See* FLA. STAT. § 440.015 (2020).

tort claims by the employee due to the cause of injury.[241] In Florida, the Workers' Compensation Law applies to employers that employ four or more employees.[242] Independent contractors who are not in the construction industry are not covered, and the statute sets out classification factors.[243] The statute enables the employee to continue to receive their average weekly pay, subject to various factors.[244] Additionally, the employer is required to pay the employee a percentage of their weekly wage based on the degree of disability sustained.[245] In 2015, workers' compensation was estimated to cost employers $1.32 per $100 of earned wages.[246]

Another state obligation can be in the form of unemployment benefits. In fact, Uber has already been found liable for unemployment benefits in New York in some cases.[247] In 2015, the New York State Department of Labor determined that an Uber driver was an employee for purposes of unemployment insurance, while finding other drivers were independent contractors during the same time frame.[248] With these obligations in mind, this Note takes a glance at the Ford Motor Company, which is illustrative of the potential costs some of these requirements place on employers.

A. *The Ford Motor Company and Statutory Obligation Discussion*

At the extreme end of the spectrum, the Ford Motor Company provides a glimpse of the costs of employee benefits. Ford employs over 55,000 U.S. hourly employees.[249] These employees are

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[241] *See id.* Also, failure on behalf of the employer to comply with the statute bars the employer from raising the defense of third-party negligence, assumption of risk, or the employee's comparative negligence during a civil suit. *See id.* § 440.06.

[242] *Id.* § 440.02 (17)(a)(2).

[243] *See id.* § 440.02 (15)(d)(1)(a).

[244] *See id.* § 440.14(1).

[245] *See id.* § 440.15.

[246] SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT, 2017, https://www.ssa.gov/policy/docs/statcomps/supplement/2017/workerscomp.html (last visited May 15, 2021).

[247] *See* Sharp, *supra* note 210.

[248] *Id.*

[249] *See* KELLI FELKER & TED O'NEIL, UAW-FORD, 2019 UAW-FORD NEGOTIATIONS MEDIA FACT GUIDE 4,

represented through the United Automobile Workers (the "UAW") Union.[250] In anticipation of upcoming renegotiations with the UAW, Ford released a Media Fact Guide in 2019 that provides helpful insight into employee cost.[251] At the time, Ford expected that the healthcare cost alone for these employees would exceed $1 billion by 2020.[252] Ford explained that these employees pay no healthcare premiums or deductibles and that across sectors, only 7% of U.S. employees have the benefit of paying no deductible.[253]

Ford reported its Hourly Labor Costs ("HLC")—the cost of labor including pay, cost of contractual benefits, and statutory payments like Social Security and workers' compensation—at $54 per hour.[254] Ford calculated this average over four employee groups, which included "Skilled Trades," "Legacy," "In-Progression," and "Temporary" employees.[255] Ford reported that in 2018, Legacy employees made between $28 and $30 per hour,[256] while In-Progression employees made between $17 and $30 per hour,[257] and Temporary employees made between $15.78 and $19.28 per hour.[258] Ford did not provide pay information for its Skilled Trades employees in the Media Fact Guide, but a 2015 *Skilled Trades Agreement* between Ford and the UAW revealed these employees are paid between $29.26 and $34.02 per hour.[259] For purposes of this Note, the maximum pay range for each group was utilized and averaged to

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https://media.ford.com/content/dam/fordmedia/North%20America/US/2019/07/uawford/uaw-ford-media-fact-guide.pdf.

250 *Id.*

251 *See id.* at 3–4.

252 *See id.* at 16.

253 *Id.*

254 *Id.* at 13. This number includes a net credit for Ford based on pension portfolio returns. *Id*. Ford reports that without this net credit, their HLC is $61 per hour. *Id*.

255 *Id.* at 7.

256 *Id.* at 9.

257 *Id.* at 10. This range reflects the difference between starting and maximum wage. *Id*.

258 *Id.* at 11. Ford did not provide pay information for its Skilled Trade employees, which makes up approximately 17% of its UAW workforce. *Id*. at 8.

259 *See* Skilled Trades Agreements and Letters of Understanding between UAW and the Ford Motor Company 22 (Nov. 5, 2015), https://uaw.org/wp-content/uploads/2015/11/UAW-Ford-Skilled-Trades-digipubZ.pdf.

$28.32 per hour.[260] Subtracting the average pay to each employee from Ford's self-reported HLC of $54 yielded an additional employee benefit payment of $25.68 per hour.[261] This represents a 47% cost increase on Ford's behalf based on employee status.[262] Ford's benefit-cost encompasses more than just statutory obligations because of other negotiated terms between itself and the UAW.[263] The fact that these employees can unionize under the UAW, however, is preceded by an employee designation under the NLRA, as discussed above.[264]

In September 2019, the Department of Labor, Bureau of Labor Statistics (the "BLS") provided a news release on the topic of employer compensation cost.[265] The BLS reported that employee benefits account for approximately 31% of the employer's cost.[266] Employee compensation averaged $36.61 per hour, wherein $25.12 of that was direct pay.[267] Employers paid an additional $11.48 per hour for employee benefits.[268] The $11.48 benefit pay consisted of $2.64 for paid leave, $1.03 for supplemental pay (e.g., overtime and shift pay), $3.19 for insurance benefits (where health insurance made up a majority of the cost at $3.04), $1.94 for retirement and savings plans, and $2.68 for statutory obligations.[269] With these figures in mind, what does it all mean for TNCs?

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[260] This calculation also assumes that each employee group comprises a quarter of Ford's workforce, which is not the case. *See* FELKER & O'NEIL, *supra* note 249, at 8. This Note is only meant to provide a general overview and not an exact employer-cost based on benefit obligations.

[261] This calculation was performed by this Note's author.

[262] This calculation was performed by this Note's author.

[263] *See* FELKER & O'NEIL, *supra* note 249, at 7–22 (describing employee benefits, many of which have been negotiated with the UAW).

[264] *See supra* Parts II.C & II.D.1.

[265] News Release, Dep't of Lab., Bureau of Lab. Stat., No. USDL-19-1649, Employer Cost for Employee Compensation – June 2019 1 (Sept. 17, 2019) [hereinafter Dep't of Lab. News Release], https://www.bls.gov/news.release/archives/ecec_09172019.pdf.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

B. *Statutory Obligations and TNC Discussion*

At the end of 2018, Uber and Lyft had a combined five million drivers on their platforms.[270] This is significantly more than the 55,000 Ford employees discussed above, where employee benefits represent approximately 47% of Ford's cost.[271] Even though Ford is an extreme example of employee-benefit cost, the Department of Labor reported an average cost increase of 31%.[272] Rough estimates based on the self-reported earnings of Uber and Lyft drivers previously discussed[273] would place Uber's HLC at $6.11[274] and Lyft's HLC at $5.52.[275] In total, this would represent an approximate increase of $23 million in HLC for Uber[276] and $6 million for Lyft.[277] Even if it is assumed that 100% of drivers work twenty hours per week,[278] this would represent a yearly cost of $6 billion for Lyft and $23 billion for Uber.[279] The increased operating costs are fatal to Uber and Lyft's business models.[280] Uber reported 2018 revenue in

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270 *See* Uber Techs., Inc., s*upra* note 1, at 5; Lyft, Inc., *supra* note 15, at 2.

271 *See supra* notes 249 and 262 and accompanying text.

272 *See* Dep't of Lab News Release, *supra* note 265, at 1.

273 *See supra* Part I.

274 This figure was calculated at the pre-expense average pay rate of $19.73 at 31% yielding a $6.11 HLC. It is important to note that the Ford calculations were based on actual wages Ford paid its employees. Because Uber and Lyft do not in the same sense pay its drivers, but rather take a commission of the fare, the calculated HLC here represents the best attempt on the available data.

275 This figure was calculated at the pre-expense average pay rate of $17.81 at 31% yielding a $5.52 Hourly Labor Cost.

276 This figure was calculated by multiplying the number of drivers Uber reported on its platform (3.9 million), Uber Techs., Inc., s*upra* note 1, at 5, by the $6.11 increase cost for employee benefits. *See supra* note 274 and accompanying text.

277 This figure was calculated by multiplying the number of drivers Lyft reported on its platform (1.1 million), Lyft, Inc., *supra* note 15, at 2, by the $5.52 increase cost for employee benefits. *See supra* note 275 and accompanying text.

278 Lyft, for example, reports that over 90% of its drivers work less than twenty hours per week. LYFT, *2020 Economic Impact Report*, *supra* note 28.

279 This increased operating cost assumes that all TNC drivers would be classified as employees.

280 These calculations are based on the assumption that five million drivers are actively operating on Uber and Lyft's platform at the rate of 20 hours per week and that the employee-benefit cost would represent approximately 31% of driver compensation, even though drivers are currently paid on commission and is the only available data.

the amount of $11 billion with an operating cost of $14 billion.[281] Lyft reported a $2.2 billion 2018 revenue with a $3.1 billion operating cost.[282]

The increased operating cost based on employee classification is enough for TNCs to seek alternative methods in which to become more profitable by eliminating these costs. One way[283] TNCs are currently exploring reducing operating costs in the long term is through heavily investing in autonomous driving research and development. If successful, TNCs will not have to worry about employee classifications because it will simply not have a need for drivers.[284] Arguably, AB 5 and like legislation effectively incentivizes TNCs to double-down on autonomous research and development which will eliminate the estimated five million drivers that depend on the gig economy for supplemental income. The final part of this Note discusses the current state of autonomous driving research and development by TNCs.

IV. PROACTIVE INDUSTRY MEASURES AGAINST EMPLOYEE DESIGNATION AND COVID-19'S IMPACT

In 2014, Uber's then CEO, Travis Kalanick, stated "[t]he reason Uber could be expensive is because you're not just paying for the car—you're paying for the other dude in the car. When there's no other dude in the car, the cost of taking an Uber anywhere becomes cheaper than owning a vehicle."[285] In 2015, Uber announced a

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[281] *See* Uber Techs., Inc., *supra* note 1, at F-4 app. (Consolidated Financial Statements).

[282] *See* Lyft, Inc., *supra* note 15, at F-4 app. (Consolidated Financial Statements).

[283] This Note does not discuss any *reactive* measures that TNCs are likely to take which could include: limiting work hours to less than forty hours per week to avoid overtime pay, limiting work hours to avoid the accumulation of required time for FMLA leave, and other work limitations to avoid triggering benefits under various state laws.

[284] Of course, there is the possibility that legislative action could also curtail the implementation of autonomous driving, a separate and distinct discussion not at the center of this Note.

[285] Mark Harris, *Uber Could be First to Test Completely Driverless Cars in Public*, IEEE SPECTRUM (Sept. 14, 2015), https://spectrum.ieee.org/cars-that-think/transportation/self-driving/uber-could-be-first-to-test-completely-driverless-cars-in-public.

partnership with Carnegie Mellon University with the goal of developing autonomous driving capability.[286] Since then, Uber has been actively testing and developing autonomous capability except for a nine-month halt after one of its autonomous vehicles struck and tragically killed Elaine Herzberg in Tempe, Arizona, on March 18, 2018.[287] Less than a month after the incident, the current CEO of Uber, Dan Khosrowshahi was interviewed and stated "we're absolutely committed to self-driving cars" and that these vehicles "will be safer than humans."[288]

In 2018 alone, Uber invested $457 million in autonomous driving research and development and has since raised $1 billion through private investors to continue funding the project.[289] Lyft has also ventured into the autonomous driving field, assigning 400 engineers to develop autonomous driving packages that it can install in any vehicle.[290] Lyft is also working on integrating other autonomous vehicle companies into its on-demand ride-hailing platform.[291]

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[286] *Uber and CMU Announce Strategic Partnership and Advanced Technologies Center*, UBER BLOG (Feb. 2, 2015), https://www.uber.com/blog/uber-and-cmu-announce-strategic-partnership-and-advanced-technologies-center/.

[287] *See* Carolyn Said, *Uber Puts the Brakes on Testing Robot Cars in California after Arizona Fatality*, S.F. CHRON. (Mar. 27, 2018), https://www.sfchronicle.com/business/article/Uber-pulls-out-of-all-self-driving-car-testing-in-12785490.php; Sean O'Kane, *Uber Debuts a New Self-Driving Car With More Fail-Safes*, VERGE (June 12, 2019), https://www.theverge.com/2019/6/12/18662626/uber-volvo-self-driving-car-safety-autonomous-factory-level; Troy Griggs & Daisuke Wakabayashi, *How a Self-Driving Uber Killed a Pedestrian in Arizona*, N.Y. TIMES (Mar. 21, 2018), https://www.nytimes.com/interactive/2018/03/20/us/self-driving-uber-pedestrian-killed.html.

[288] NBC News, *Uber CEO Dara Khosrowshahi: 'We're Absolutely Committed to Self-Driving Cars'*, TODAY (Apr. 12, 2018), https://www.today.com/video/uber-ceo-dara-khosrowshahi-we-re-absolutely-committed-to-self-driving-cars-1209073731757.

[289] Alison Griswold, *Uber Raised $1 Billion for Self-Driving Cars Because It Desperately Needs the Money*, QUARTZ (Apr. 19, 2019), https://qz.com/1599134/uber-secures-much-needed-1-billion-investment-for-self-driving-cars-unit/.

[290] Lora Kolodny et al., *Take a Peek Inside Lyft's Lab Where 400 Engineers are Working on Self-Driving Cars*, CNBC (Nov. 5, 2019), https://www.cnbc.com/2019/11/05/lyft-is-developing-self-driving-cars-at-its-level-5-lab-in-palo-alto.html.

[291] *See id.*

Even though Uber foresees autonomous vehicle integration as a long-term goal, the only obstacle at the moment is likely the technological restraint.[292] With legislation like AB 5 and other similar policy objectives, TNCs are likely incentivized to raise and increase funding for research and development into autonomous vehicles.

AB 5 does not only threaten TNCs based on the prohibitive cost that it would impose, but it also threatens TNCs' ability to retain their driver base. This is because one-third of drivers cite flexibility as the main reason that they drive for TNCs in the first place.[293] During the COVID-19 pandemic, 80,000 drivers were solicited for a poll and 734 responses were received.[294] Over 70% of drivers desired to maintain an independent contractor status.[295] An employee classification could simply reduce the number of drivers willing to operate under a set schedule that TNCs would have to develop or implement in some way. In fact, Uber discusses the importance of driver retention as a risk factor in its S-1 filing:

> Our success in a given geographic market significantly depends on our ability to maintain or increase our network scale and liquidity in that geographic market by attracting Drivers, consumers, restaurants, shippers, and carriers to our platform. If Drivers choose not to offer their services through our platform, or elect to offer them through a competitor's platform, we may lack a sufficient supply of Drivers to attract consumers and restaurants to our platform. We have experienced and expect to continue to experience Driver supply constraints in most geographic markets in which we operate.[296]

Alternatively, employee classification could lead TNCs to reduce the number of drivers on their respective platforms in jurisdictions that recognize drivers as such or eliminate service altogether.

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[292] Uber Techs., Inc., *supra* note 1, at 10.

[293] CAMPBELL, *supra* note 31, at 4.

[294] *See* Campbell, *supra* note 46.

[295] *Id*. This reflected a 10% decrease from a pre-COVID-19 poll which showed 81% were in favor of retaining an independent contractor status. *Id.*

[296] Uber Techs., Inc., *supra* note 1, at 29; Lyft discusses the same in its S-1 filing. *See* Lyft, Inc., *supra* note 15, at 23.

As a matter of fact, Uber and Lyft were on the verge of significantly reducing their California operations as a result of a state court ruling ordering them to comply with AB 5.[297] This would further disserve local communities that are already economically disadvantaged and depend on these services for transportation.[298] In fact, commentators have discussed the positive impact that ride-hailing services have had in economically depressed communities that have little to no access to alternative transportation.[299] Although the majority of this Note was written pre-COVID-19, we have seen many of the proactive measures discussed above deployed in response to market and legislative forces during the pandemic.

The seemingly endless COVID-19 pandemic continues to dominate the news daily. When the story is not directly centered on the latest infection numbers or tragic death count, headlines on the economic impact follow.[300] The pandemic has placed center stage the TNC driver classification debate for obvious reasons.[301] On one hand, states are incentivized to ensure their constituents have access to paid sick leave and healthcare.[302] This, they hope, would allow drivers not to have to choose between earning pay and their health.[303] On the other hand, lockstep with several other businesses, Uber and Lyft have dramatically cut their employee workforce.[304]

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297 *See* Rana, *Lyft, Uber Get More Time*, *supra* note 109.

298 *See* Kaitlyn Laurie, *Capping Uber in New York City: Ramifications for Rideshares, the Road, and Outer-Borough Residents*, FORDHAM URB. L.J., 942, 959–62 (2019).

299 *See id.*

300 *See, e.g.*, Julia Horowitz, *New Coronavirus Variants are Threatening the World's Economic Recovery*, CNN (Feb. 11, 2021, 8:47 AM), https://www.cnn.com/2021/02/11/investing/premarket-stocks-trading/index.html.

301 *See* Preetika Rana, *Uber Cuts 3,000 More Jobs, Shuts 45 Offices in Coronavirus Crunch*, WALL ST. J. (May 19, 2020) [hereinafter Rana, *Uber Cuts*], https://www.wsj.com/articles/uber-cuts-3-000-more-jobs-shuts-45-offices-in-coronavirus-crunch-11589814608.

302 *See* Andrew J. Hawkins, *Massachusetts Sues Uber and Lyft over Driver Classification*, VERGE (Jul. 14, 2020), https://www.theverge.com/2020/7/14/21324199/uber-lyft-driver-misclassification-massachusetts-lawsuit.

303 *See id.*

304 *See* Rana, *Uber Cuts*, *supra* note 301.

The independent contractor designation has spared drivers from the same fate.[305]

By mid-May 2020, Uber decided to cut approximately 6,700 jobs and close several offices.[306] This accounted for almost a quarter of Uber's employee workforce.[307] Lyft has also scaled back its workforce by approximately 17%.[308] In April 2019, Uber saw an 80% decrease on its ridesharing platform due to the pandemic.[309] The cutbacks, therefore, come as no surprise. Uber also recently announced it would be scaling back its autonomous vehicle program as a cost-saving initiative.[310] Lyft, however, restarted its program in late June 2020.[311]

Additionally, in May, California sued Uber and Lyft under the implementation of AB 5, seeking millions in civil penalties and unpaid wages.[312] Uber responded by citing the four million California workers currently unemployed and argued such policy would make employment opportunities harder to come across.[313] Uber and Lyft have maintained that an employee classification would result in decreased ridesharing operations in such areas.[314]

Massachusetts launched its own lawsuit against Uber and Lyft in July 2020, similarly arguing that TNCs have been misclassifying their drivers.[315] Instead of passing legislation like California, Massachusetts appears to be taking the debate to the courts under the common-law agency test, alluding to the control factor discussed

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305 *See generally id.*

306 *Id.*

307 *Id*.

308 Sebastian Herrera & Tim Higgins, *California Sues Uber, Lyft Saying They Misclassified Drivers as Independent Contractors*, WALL ST. J. (May 5, 2020), https://www.wsj.com/articles/california-to-sue-uber-lyft-saying-they-misclassified-drivers-as-independent-contractors-11588700626.

309 *See* Rana, *Uber Cuts*, *supra* note 301.

310 *Id.*

311 *See* Kristen Korosec, *Lyft's Self-Driving Test Vehicles Are Back on Public Roads in California*, TECHCRUNCH (Jun. 30, 2020), https://techcrunch.com/2020/06/30/lyfts-self-driving-test-vehicles-are-back-on-public-roads-in-california/.

312 Herrera & Higgins, *supra* note 308.

313 *Id.*

314 *Id.*

315 Hawkins, *supra* note 302.

above.[316] Massachusetts Attorney General Maura Healey stated "Uber and Lyft set the rates. They alone set the rules. Drivers are employees."[317] Like its response to California, Uber cited the threat the lawsuit posed to the 50,000 Massachusettsans on its platform who could find themselves out of supplemental income.[318]

In their response to California and Massachusetts, Uber and Lyft point to the "pragmatic effect" such designation would have on its platform and drivers.[319] Although investment in autonomous research may have been scaled back, Lyft's renewed research demonstrates that autonomous capability is a key goal of TNCs.[320] Even though Proposition 22 has now exempted Uber and Lyft from AB 5's grasp, TNCs have significant upcoming legal battles to face. On May 2, 2019, the U.S. House of Representatives introduced the Protecting the Right to Organize Act (the "PRO Act").[321] Section 4(a)(2) of the PRO Act would amend the NLRA by adopting the statutory presumption of employer-employee along with the "ABC" test and would abrogate the NLRB's *SuperShuttle* classification test.[322] Like AB 5, the prospects of federal oversight on this front more than sufficiently incentivizes TNCs to avoid the issue altogether and automate a majority of their workforce.

CONCLUSION

This Note has reviewed available data on TNC driver demographics and, though limited, has indicated that a majority of drivers engage these ride-hailing platforms as part of the gig economy, seeking supplementary rather than primary sources of income. Further, the discussion on various legal approaches taken by courts

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316 *See id.*; *supra* Part II.

317 Maura Healey (@MassAGO), TWITTER (July 14, 2020, 10:30 AM), https://twitter.com/MassAGO/status/1283046160006086657?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1283046160006086657%7Ctwgr%5E&ref_url=https%3A%2F%2Fwww.theverge.com%2F2020%2F7%2F14%2F21324199%2Fuber-lyft-driver-misclassification-massachusetts-lawsuit.

318 *See* Hawkins, *supra* note 302.

319 *See id.*; Herrera & Higgins, *supra* note 308.

320 *See* Korosec, *supra* note 311.

321 Protecting the Right to Organize Act, H.R. 2474, 116th Cong. (2019).

322 *See id.* § 4(a)(2) (2019).

and administrations on employee classification has revealed wide inconsistencies. Even though all of these approaches apply the same or variations of the common-law agency test, they end up with varying classifications on similar facts. This discrepancy is best attributable to the lens in which each authority is applying the common-law agency test. This Note has discussed in depth three of these lenses: (1) the "remedial statutory purpose" lens seen in California through *Borello*, *Dynamex*, and AB 5; (2) the "party-intent" lens seen in Florida through *Keith* and *Kendall*; and (3) the "entrepreneurial opportunity" lens applied by the NLRB but not exclusive in all federal matters.

While providing a broad look at statutory obligations at the federal level to include ERISA, FICA, FMLA, FLSA, and state-level obligations like workers' compensation and unemployment benefit, this Note took a cursory look at costs associated with such obligations, concluding an approximate 31% HLC increase upon employee classification. Applying this cost to the TNC business model, the prohibitive nature of such classification was realized. Even though employee classification may not be the direct motivating factor in which TNCs have invested heavily in autonomous vehicle development, policies like AB 5 and the PRO Act surely incentivize TNCs to continue to research and develop this technology as quickly as possible. TNCs' commitment to autonomous research has (seemingly) survived the COVID-19 pandemic as TNCs continue to cut costs.

With five million drivers on TNC platforms, policies like AB 5 and the PRO Act could end up hurting these gig economy drivers in the long run, foreclosing the opportunity to generate supplemental income. COVID-19 has spurned additional attacks on TNCs in Massachusetts, and additional states may follow suit. Because of this very real threat, legislators and reviewing authorities should also take a hard look at the employee classification issue through the lens of the "pragmatic effect" that such policy consequences will have on the gig economy. The "pragmatic effect" principle should look at how gig economy industries necessarily depend on the independent contractor status at inception and also how an employee classification could result in the industry's destruction. This is especially true at a time where economic recovery in the post-COVID market will depend on the ability of workers generating supplemental

income as many traditional employers reevaluate and adjust their market strategy.