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THE SHOE'S ABOUT TO DROP FOR THE PLATFORM ECONOMY: UNDERSTANDING THE CURRENT WORKER CLASSIFICATION LANDSCAPE IN PREPARATION FOR A CHANGED WORLD

[University of Memphis Law Review, Forthcoming] November 1, 2021 Draft

Samantha J. Prince*

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I. Introduction

Everybody's talking about it. No matter where you are, it is the subject of conversations everywhere—the European Union, India, Italy, Kenya, Thailand, South Africa, United Kingdom, to name a few, and at all levels of government in the United States. "It" is how to provide protections for workers engaged in app-based/platform work.

When we shop for clothing, what do we look for? Many of us seek out clothing that is ethically made—produced in a way that is responsible toward people, animals, and the environment. If a product is ethically made, the workers who made the clothing were treated fairly—fair wage, safe working conditions, etc. We spend quite a bit of time trying to find companies that source products that were made ethically. And we are fine with paying more for such products because we want the workers who made them to be able to afford food for their families and have a good life. Yet, when we need a ride or want a food delivery, why are we ok with grabbing our phone, opening that app, and ordering without concern over whether the drivers are fairly treated by the companies they work for or protected by governmental regulation?

Like other workers, how that driver is classified is a key determinant of whether they receive employment related benefits and protections.²

¹ Laura, Why I Buy Ethically Made, FAIRLY SOUTHERN (Sept. 4, 2018) https://fairlysouthern.com/why-i-buy-ethically-made ("I choose to buy ethically made products because I want the producers of my products to be able to afford food for themselves and their families. I want them to have pleasant and safe work environments just like I would want for myself. I want them to be paid decently, just as I would want any of my own family members or friends to be paid decently. I want the producers of my belongings and my food to be treated with dignity and respect.")

² The author recognizes that worker classification is used for a variety of purposes and in this article discusses the topic generally for employment law related purposes unless otherwise stated more specifically, for example to address solely minimum wage.

[W]hether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. If [a Grubhub driver] is an employee, he has rights to minimum wage, overtime, expense reimbursement and workers compensation benefits. If he is not, he gets none. With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy. In the meantime the Court must answer the question one way or the other.³

Historically, app-based platform workers have not been protected by employment and labor laws because app-based companies have long touted that their workers are independent contractors, end users of their software, or customers.⁴ However, that storyline has not aged well, and times are changing. App-based companies are being called to the carpet for not providing worker protections, and not just in the United States.⁵ For instance, in Spain, food

³ Lawson v Grubhub, Inc. et al., 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018).

⁴ O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (outlining Uber's argument that drivers are independent contractors); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (outlining Lyft's arguments against employee status). Uber's public SEC filings refer to drivers as independent contractors. Uber Technologies, Inc., Quarterly Report (Form 10-Q) (June 30, 2021). See Alex Rosenblat, UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK 157 (2018) (commenting that Uber refers to drivers as "end users" of its software rather than workers. The term "end users" distances drivers from being classified as employees and having protection by employment and labor laws.) See also, Lyft has referred to its drivers as "customers" in its explanation to the SEC as to why it was not going to include in its Proxy Statement a shareholder proposal submitted by the New York State Common Retirement Fund asking that the Board of Directors prepare a report comparing the compensation and benefits of executives to Lyft's workforce including drivers. Lyft, Inc. (SEC No-Action Request) (February 5, 2021) found here https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/nyscrlyft020521-14a8-incoming.pdf.

⁵ See generally, Jason Moyer-Lee & Nicola Kountouris, The "Gig Economy": Litigating the Cause of Labour, Taken for a Ride: Litigating the Digital Platform Issue Brief 6, 7 (March 2021) ("Uber, alone has had various aspects of its business model impugned before the apex courts of India, Brazil, the UK, the EU, Canada..."); Tham Yuen-C, Advisory committee on gig workers does not rule out laws to protect workers, The Straits Times (Sept. 15, 2021)(Prime Minister Lee Hsien Loong of Singapore created a committee to focus on providing gig workers protections with the expectation that a solution will be reached by the second half of 2022.); Swiss court confirms Uber status as 'employer,' SWISSINFO (Sept. 16, 2020) https://www.swissinfo.ch/eng/swiss-court-confirms-uber-status-as--employer-/46036976; In Chile, Judge Angela Hernandez Guiérrez found that a delivery driver was an employee: Alvaro Felipe Arrendondo Montoya and Pedidos Ya Chile SPA, Court of Appeal of Concepción (Rol N 395-2020). In India "gig workers" are now provided Social Security benefits but not yet protected by minimum wages or allowed collective bargaining. Sanaya Sinha, Gig Workers'

delivery drivers are now considered employees entitled to a host of benefits.⁶ Additionally, Uber lost a legal battle in the United Kingdom, and now rideshare drivers there must be treated as workers with entitlement to minimum wage (National Living Wage), holiday pay, and participation in pension benefits.⁷ Formerly they were treated as independent contractors with no entitlements. And in the Netherlands, Uber drivers will now be treated as employees.⁸

Governments are not the only entities scrutinizing app-based companies. For example, Aviva Investors, one of the UK's largest asset managers said that it would not invest in Deliveroo because its riders/drivers were not guaranteed minimum wage, sick leave, and holiday pay. And, Fairwork raises awareness by utilizing globally diverse researchers to rank app-based companies based on fair pay, fair conditions, fair contracts, fair management, and fair

Access to Social Security in India, ACCOUNTABILITY INDIA (May 31, 2021) https://accountabilityindia.in/blog/gig-workers-access-to-social-security-in-india/. However, on September 20, 2021 the Indian Federatio of App-based Transport Workers filed a "public interest litigation" on behalf of app-based workers with the Supreme Court of India seeking more protections. Haritima Kavia, The gig is up: international jurisprudence and the looming Supreme Court decision for Indian gig workers, THE LEAFLET (Oct. 5, 2021) https://www.theleaflet.in/the-gig-is-up-international-jurisprudence-and-the-looming-supremecourt-decision-for-indian-gig-workers/ Portugal is also tackling the app-based economy. The government approved a bill that requires platforms, such as Uber and Glovo, to employ some drivers as "staff" with benefits and formal employment contracts. This would correlate with classifying them as "employees" in other countries. Sergio Concalves & Catarina Demony, Portugal's Gig-Economy Workers Set to Become Staff, REUTERS (Oct. 22, 2021), https://www.reuters.com/technology/portugals-gig-economy-workers-set-become-staff-2021-10-22/. But see, cases in New Zealand and Australia holding app-based drivers were independent contractors: Atapattu Arachchige v. Rasier New Zealand Limited & Uber B.V., Employment Court of New Zealand (Dec. 17, 2020) and Gupta v. Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats, FWCFB 1698 (2020). And in Brazil where the high court held that there was no employment relationship between Uber and its drivers, overruling the lower court's finding, Marcio Vieira Jacob v. Uber do Brasil Tecnologia Ltda, RR - 1000123-89.2017.5.02.0038 (Superior Labour Court 2020).

⁶ See infra Part III.B.

⁷ See Uber BV v. Aslam [2021] UKSC 5 (appeal taken from EWCA (Civ)). The worker category lies between independent contractors and employees. See *infra* Part I.C.

⁸ Anthony Deutsch and Toby Sterling, *Uber drivers are employees, not contractors, says Dutch court*, REUTERS (Sept. 13, 2021) https://www.reuters.com/world/europe/dutch-court-rules-uber-drivers-are-employees-not-contractors-newspaper-2021-09-13/ (Uber drivers are employees and therefore entitled to worker's rights under Dutch labor laws).

⁹ Jem Bartholomew, "In my dreams I'm still doing the deliveries": Inside the battle against the gig economy, PROSPECT MAGAZINE (July 15, 2021) https://www.prospectmagazine.co.uk/essays/deliveroo-gig-economy-unions-strike-employees-share-price-ipo.

representation.¹⁰ Sometimes the workers themselves speak out. In New York City, food delivery workers were regularly violently attacked while riding their bikes home after their shifts.¹¹ As a result of the attacks which often included serious injury and bike thefts, city delivery workers protested and lobbied with nonprofits in favor of protective legislation.¹² In China, an app-based platform food delivery driver doused himself in gasoline and set himself on fire.¹³ The video went viral and brought awareness that China's delivery drivers, at that time, did not receive adequate protections.¹⁴

App-based service companies have existed for over ten years now,¹⁵ and U.S. courts classified app-based workers as early as 2015.¹⁶ Classifying workers, particularly those working for app-based companies, has become a

¹⁰ Fairwork is a project based at the Oxford Internet Institute, University of Oxford. https://fair.work/en/fw/principles/.

¹¹ Josh Dzieza, *Revolt of the Delivery Workers*, CURBED: CITYSCAPE (Sept. 13, 2021), https://www.curbed.com/article/nyc-delivery-workers.html.

¹² Id. Protective legislation was quickly passed. See, infra _____. Jeffery C. Mays, New York Passes Sweeping Bills to Improve Conditions for Delivery Workers, NY TIMES, (Sept. 23, 2021), <a href="https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html?campaign_id=9&emc=edit_nn_20210924&instance_id=41203&nl=the-morning®i_id=96902683&segment_id=69784&te=1&user_id=f03e3e8c4ba4931f55658d 5d433729a0.

¹³ The delivery driver's current agency withheld wages when the delivery driver attempted to switch working for his current app-based platform to another platform. Because the agency refused to pay him his wages, the driver set himself on fire. Alice Su, *Why a Takeout Deliveryman in China set Himself on Fire*, L.A. TIMES (Feb. 8, 2021), https://www.latimes.com/world-nation/story/2021-02-08/why-takeout-delivery-man-china-set-himself-on-fire; Zen Soo, *Deaths, self-immolation draw scrutiny on China tech giants*, ASSOCIATED PRESS (Jan. 17, 2021) https://apnews.com/article/technology-hong-kong-coronavirus-pandemic-e-commerce-fires-f4cd68ecf971263229343ab49f5f440d.

¹⁴ *Id.* China is making moves to protect app-based workers. In July 2021 the China State Administration for Market Regulation required app-based companies to provide certain benefits to the drivers/riders. In September China's Supreme People's Court announced that it was going to "strike a balance between protecting gig works and ensuring the country's internet platforms can continue to develop and offer flexible employment." From this it is postulated that the Court will create a third category of worker that will be entitled to certain benefits but not as many as employees. Josh Ye, *China's top court wants to protect gig workers without hampering tech platforms' development, aiding Meituan and Didi, SOUTH CHINA MORNING POST, Sept. 24, 2021 https://www.scmp.com/tech/policy/article/3149932/chinas-top-court-wants-protect-gig-workers-without-hampering-tech*

¹⁵ Uber was founded in 2009 and went live in San Francisco in May, 2010. Lyft went live in San Francisco in 2012. https://en.wikipedia.org/wiki/Timeline_of_Uber.

¹⁶ Sam Sanders, California Labor Commission Rules Uber Driver Is An Employee, Not A Contractor, NPR: THE TWO-WAY (Jun. 17, 2015, 4:58 PM), https://www.npr.org/sections/thetwo-way/2015/06/17/415262801/california-labor-commission-rules-uber-driver-is-an-employee-not-a-contractor.

challenge for all levels of our government.¹⁷ Subnational policymakers have been moving the issue of app-based worker classification to the forefront, albeit in different ways. Tennessee and a handful of other states passed "marketplace contractor laws" in 2018.¹⁸ California notably passed its "gig" worker classification law, AB5, in September 2019.¹⁹ In 2018 and 2020 respectively, New York City and Seattle passed ordinances providing for minimum wage for app-based ride-share drivers.²⁰ And, in the fall of 2021, New York City became the first city in the United States to pass a legislative package designed to protect delivery drivers and riders.²¹

¹⁷ See Zane Muller, Algorithmic Harms to Workers in the Platform Economy: The Case of Uber, 53 COLUM. J.L. & SOC. PROBS. 167, 197 (2020). "There is widespread agreement that the existing worker classification scheme is poorly suited to work relationships in the platform economy." See also Thomas W. Joo & Leticia Saucedo, A New Paradigm: Rideshare Drivers, Collective Labor Action, and Antitrust, 69 BUFFALO L. REV. 805, 815 (2021) (discussing the difficulty in determining employee status because each employment and labor law statute—such as the NLRA—requires close examination). Professors Joo & Saucedo comment on the fact that none of the current tests are "outcome determinative" but rather require courts to make fact-determinative inquiries with every case. See, e.g., V.B. Dubal, Labor Platforms and Gig Work: The Failure to Regulate (Institute for Research on Labor and Employment, IRLE Working Paper No. 106-17, 2017) (analyzing regulatory issues for app-based workers and utilizing Uber as an example). Professor Dubal's analysis includes a look into the major regulatory dispute over worker classification.

¹⁸ See infra Part V. D.

 $^{^{19}}$ Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020) ("AB5") and infra Part V. B.

²⁰ New York, N.Y., Local Law No. 150 (2018); Seattle, Wash., Ordinance 126189 (Sept. 9, 2020). Putting into context the NYC rule: "The New York pay rules would apply to four major car service apps – Uber, Lyft, Via and Juno – all of which provide more than 10,000 trips each day in New York." Emma G. Fitzsimmons and Noam Scheiber, "New York City Considers New Pay Rules for Uber Drivers," NEW YORK TIMES (July 2, 2018) https://nyti.ms/2KEwtlo; On June 25, 2021, an ordinance was introduced in Chicago that would require a minimum pay rate similar to ordinances in New York and Seattle. A.D. Quig, Chicago could be next big city to set minimum pay rate for Uber and Lyft drivers, CHICAGO BUSINESS (June 25, 2021) https://www.chicagobusiness.com/transportation/chicago-could-be-next-big-city-set-minimum-pay-rate-uber-and-lyft-drivers.

²¹ The package provides delivery workers minimum wage and numerous other protections by: "prevent[ing] the food delivery apps and courier services from charging workers fees to receive their pay; mak[ing] the apps disclose their gratuity policies; prohibit[ing] the apps from charging delivery workers for insulated food bags, which can cost up to \$50; and requir[ing] restaurant owners to make bathrooms available to delivery workers." Lack of access to restrooms has been an issue for app-based workers particularly in cities. Drivers will still be considered independent contractors otherwise. Jeffery C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, NY TIMES, (Sept. 23, 2021), <a href="https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html?campaign_id=9&emc=edit_nn_20210924&instance_id=41203&nl=the-morning®i_id=96902683&segment_id=69784&te=1&user_id=f03e3e8c4ba4931f55658d 5d433729a0.

The United States federal government has lagged behind, but it would appear that the shoe is about to drop.²³ U.S. Labor Secretary Marty Walsh told Reuters, "in a lot of cases gig workers should be classified as employees... in some cases they are treated respectfully and in some cases they are not and I think it has to be consistent across the board."²⁴ And, President Biden campaigned to "[e]nsure workers in the 'gig economy' . . . receive the legal benefits and protections they deserve."²⁵ To move things forward, the Biden administration increased funding for the Wage and Hour Division of the Department of Labor—the unit that handles worker classification issues.²⁶ The NLRB is also hoping to receive more funding to address misclassification.²⁷

The uncertainty and volume of lawsuits created by this one issue—worker

²³See generally a report covering select worker classification tests prepared for Congress by the Congressional Research Service. Jon O. Shimabukuro, Cong. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST (2021).

²⁴ Nandita Bose, *Exclusive U.S. Labor Secretary supports classifying gig workers as employees*, REUTERS (April 29, 2021, 10:50 AM). https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29/.

²⁵ The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, BIDEN HARRIS, https://joebiden.com/empowerworkers/ (last visited Sept. 13, 2021); see also Fact Sheet: The American Jobs Plan, THE WHITE HOUSE (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

²⁶ [OFF.] OF MGMT & BUDGET, EXEC. [OFF.] OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2022 (2021). ("The Budget provides increased funding to the worker protection agencies in the Department of Labor to ensure workers are treated with dignity and respect in the workplace. The Administration is also committed to ending the abusive practice of misclassifying employees as independent contractors, which deprives these workers of critical protections and benefits. In addition to including funding in the Budget for stronger enforcement, the Administration intends to work with the Congress to develop comprehensive legislation to strengthen and extend protections against misclassification across appropriate Federal statutes.")

²⁷ On Sept. 8, 2021, a new bill was submitted by the House Education and Labor Committee as part of a Democrat-led budget reconciliation package. The bill provides for funds to increase enforcement for several agencies including \$350,000,000 for the NLRB "for carrying out activities of the board." HOUSE EDUC AND LAB. COMM., 117TH CONG., AMENDMENT IN THE NATURE OF A SUBSTITUTE TO COMMITTEE PRINT, 115 (2021) (offered by Congressman Bobby Scott), https://edlabor.house.gov/imo/media/doc/ANS%20to%20the%20Committee%20Print%20Off ered%20by%20Mr.%20Scott.pdf; Nandita Bose, *U.S. Labor Board prosecutor hopes to bulk up staffing, budget as gig worker scrutiny grows*, REUTERS (June 24, 2021). https://www.reuters.com/legal/transactional/us-labor-board-prosecutor-hopes-bulk-up-staffing-budget-gig-worker-scrutiny-2021-06-24/

classification—is not efficient or sustainable and certainly not ideal.²⁸ Boosting enforcement is necessary, but it would be even better if we did not have to allocate so many resources to this issue and if workers and companies did not have to be burdened by so many lawsuits. To get a small glimpse of the volume of app-based worker classification suits in California alone, we can look to Lyft's Form 10-Q filed on May 8, 2020:

The Company is currently involved in a number of putative class actions, *thousands* of individual claims, including those brought in arbitration or compelled pursuant to our Terms of Service to arbitration, matters brought, in whole or in part, as representative actions under California's Private Attorney General Act, Labor Code Section 2698, et seq., alleging that the Company misclassified drivers as independent contractors and other matters challenging the classification of drivers on the Company's platform as independent contractors.²⁹ (emphasis added)

Worker classification for app-based workers needs to be clarified now. Some policymakers are seeking new ideas; some are hanging onto the old. Some are free-riding on tests used by others, and some are customizing others' laws seeking to improve upon them.³⁰ Regardless of the way the federal or subnational government policymakers choose to proceed, knowing what tests are being used, and what other countries are doing will be instrumental in reaching an optimal solution to classifying app-based workers. It is not enough to imitate or blindly adopt what appears to be trending at the state level (e.g., the ABC test or the IRS twenty-factor test).³¹

²⁸ For example, two class action cases were filed in the Southern District of New York simultaneously against Lyft and Instacart alleging that workers were misclassified under New York law. *Chandra v. Lyft, Inc.*, No. 1:21-cv-07113 (S.D.N.Y. Aug. 23, 2021) and *Chambers v. Maplebear, Inc.*, No. 1:21-cv-07114 (S.D.N.Y. Aug. 23, 2021). Until we have some more definitive (reliable) guidance on how to classify app-based workers, large numbers of lawsuits will continue to be brought. The same goes for arbitrations. See, *Déjà vu in the Independent Contractor Misclassification Arena: August 2021 New Update*, JDSupra (Sept. 15, 2021).

²⁹ Lyft, Inc., Quarterly Report (Form 10-Q) (May 8, 2020).

³⁰ As a way to customize its adoption of the ABC test, California policymakers created 109 exemptions that would be tested under their old test. *See* Samantha J. Prince, *The AB5 Experiment – Should States Adopt California's Worker Classification Law?*, 11 AM. UNIV. BUS. L. REV. (2022) (forthcoming).

³¹ It is interesting to note that in an April 2021 report generated by the Congressional Research Service, the author only reported on the control test, the economic realities test, and the ABC test. The report does not cover other tests such as the IRS twenty-factor test which begs the question, why is Congress only considering the ABC test as an alternative to the traditionally used worker classification tests. Presumably the answer lies with the PRO Act's

As policymakers forge ahead, it is important they be familiar with the options that exist currently and what is going on internationally. During such exploration, policymakers may find portions of current tests sufficiently applicable to app-based workers. Then again some may find that classifying such workers under the historical tests is like "fitting a square peg into a round hole." It is difficult to classify app-based workers under the traditional employment law factor-based tests—the control test and economic realities test. On the one hand, such workers are akin to independent contractors in that they have the freedom to choose when to work, but on the other hand app-based workers are doing work for the app companies that is instrumental to their core business and the businesses have significant control over the workers. Heaville to the property of the significant control over the workers.

In the classic sense, independent contractors possess a skill outside the core competencies of the hiring company that is needed only for a limited purpose and duration. Independent contractors have traditionally provided occasional skills tangential to the hiring party's business. But businesses have found hiring independent contractors to be economically advantageous even when the workers' skills are directly related to the hiring company's core competencies and are needed not only continuously, but also required for the business to

passing in the House in March 2021. However, the research should go beyond a discussion of the ABC test, which is part of the reason for this article. Jon O. Shimabukuro, *Worker Classification: Employee Status under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC test*, CONGRESSIONAL RESEARCH SERVICE (April 20, 2021).

³² Cotter v Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015); Robert Sprague, Worker (Mis) Classification in the Sharing Economy: Trying to Fit Square Pegs in Round Holes, 31 A.B.A. JOURNAL OF LABOR & EMPLOYMENT LAW 53, 60 (2015).

³³ And actually at least two scholars believe we should not try to correct this issue via employment laws. *See* Martin H. Malin, *Protecting Platform Workers in the Gig Economy: Look to the FTC*, 51 INDIANA L. REV. 377, 383 (2018) (proffering that addressing the app-based worker to platform company relationship as a franchisee to franchisor relationship will be more effective than seeking to classify through employment laws.); *See also*, Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001).

³⁴ Harris & Krueger, A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker", THE HAMILTON PROJECT 1, 10 (Dec. 2015). Gig work in many instances can fall into the gray area between employee and independent contractor relationships. One example is the immeasurability of work hours. Consider the Uber or Lyft driver who has both apps open on their phone while at home doing laundry. They decide when they want to pick up a rider but determining "whether and for whom an independent worker is 'working' is impossible or deeply problematic in too many circumstances for the concept of work hours to translate into these emerging relationships." *Id.* at 14.

exist.35

For example, without drivers, Uber could not operate. Is it appropriate to allow Uber to offload risk and responsibilities by classifying drivers as independent contractors? Many courts say "no" even under the current tests.³⁶ But the current tests do not provide consistent results.

This article provides an up-to-date review of the tests being used at various levels in the United States as well as movement in other countries with a goal toward providing more information for policymakers. Part II lays out the economic and existential instabilities as well as the health issues that app-based workers (particularly drivers) experience. These concerns should motivate policymakers to prioritize protecting app-based workers. Then, Part III presents an up-to-date review of app-based worker classification in select countries. While the textual focus is on several European countries, countries representing each continent are discussed throughout this article in footnotes. Next, Part IV provides a compilation of the current United States tests used by the federal government to determine a worker's classification and provides the scope of each test. Part V then progresses with an up-to-date discussion on which worker classification tests are trending at the state level, such as the ABC test, California's AB5, the IRS twenty-factor test, and Marketplace Contractor statutes. It contains critiques and commentary regarding the different tests employed. Part VI concludes with a call to action encouraging policymakers to move swiftly but smartly.

II. HEALTH EFFECTS STEMMING FROM THE ECONOMIC AND EXISTENTIAL INSTABILITIES OF APP-BASED WORK

The gig job is a platform-based evolution of the "piece paid" job of the '80's, likewise transferring employers' economic risk-taking and

³⁵ Sprague, *supra* note [PEGS], at 71.

³⁶ See e.g., People v. Uber Technologies, Inc., 56 Cal. App. 5th 266, 298 (Cal. Ct. App. 2020) as modified on denial of reh'g (Nov. 20, 2020), review denied (Feb. 10, 2021); O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1142 (N.D. Cal. 2015) ("Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers."); Colin v. Uber Techs., 2019 Cal. Super. LEXIS 1752. The Supreme Court of New York State held that there is substantial evidence that Uber can exercise sufficient control over their drivers to establish an employment relationship. But see Razak v. Uber Techs., Inc., No. 16-573, 2016 U.S. Dist. LEXIS 139668 (E.D. Pa. Oct. 7, 2016); Razak v. Uber Techs., Inc., 951 F.3d 137 (3d Cir. 2020). A district court found that the control test weighed heavily in favor of independent contractor status and upheld UberBlack drivers' self-employed workers classification. The Third Circuit remanded for further proceedings as it contemplated whether drivers were subject to control under the FLSA.

responsibilities to individuals without a real reciprocal potential for gains in the form of increased pay or job security.³⁷

App-based, platform, or gig work exists on every inhabited continent. It doesn't matter what you call it: gig work, platform work, app-based work, shared work, it is all pretty much the same.³⁸ And even though the company names differ, they share the same general model, which is to say they run their businesses through an app with little or no face-to-face interaction with their workers or customers.³⁹

Some workers gravitate toward app-based work because they are free to set their own hours. 40 In that respect, it can be empowering. 41 However, app-based work causes existential and economic instability for workers, particularly those who treat the work as their main source of income. 42 "What is evident, from a

³⁷ Anna Freni-Sterrantino & Vincenzo Salerno, *A Plea for the Need to Investigate the Health Effects of Gig-Economy*, FRONTIERS IN PUBLIC HEALTH 1, 1 (Feb. 9, 2021) https://www.frontiersin.org/articles/10.3389/fpubh.2021.638767/full.

³⁸ Although the term "gig" has a broader meaning than app-based or platform work, this article will use the term "app-based" primarily to deliberately focus on work that emanates from the use of an app or platform. Some commentators also use the term "sharing economy." See, Elizabeth Tippett, *Using Contract Terms to Detect Underlying Litigation Risk: An Initial Proof of Concept*, 20 LEWIS & CLARK L. REV. 548 (2016) where Prof. Tippett divides app-based companies into different categories based on what they are sharing: property-sharing, property-based services, and service sharing.

³⁹ See Muller, supra note [ZANE], at 168 ("technology firms create app-based digital marketplaces where buyers and sellers can transact in perfect algorithmic harmony.") See also Veena Dubal, The New Racial Wage Code, HARV. L. & POL'Y REV. (forthcoming 2021) (manuscript at n.14) (describing the business model as "one that disseminates assignments through a digital platform, pays by assignment, and maintains that workers are not legally entitled to employment protections, including the minimum wage, overtime, workers' compensation, unemployment insurance, and the right to collectively organize and bargain.").

⁴⁰ See Das Acevedo supra note [DDAUN] at __. See generally Liya Palagashvili, Response to Comment on Independent Contractor Status under the Fair Labor Standards Act, Oct. 26, 2020 (Women are statistically the predominant caregivers in their families and need work flexibility.)

⁴¹ But see, Rina Chandran, *Invaluable but unprotected: Asian gig workers fight for rights*, THE CHRISTIAN SCIENCE MONITOR BANGKOK (Oct. 4, 2021), *quoting* Mr. Quah, an economics professor at the National University of Singapore. ("flexibility doesn't mean unprotected." Singapore is conducting a study to determine the best way to increase protections for app-based workers.)

⁴² Freni-Sterrantino, *supra* note [FRENI], at 2. *See* Rosenblat, *supra* note [UBERLAND], at 52, for a discussion on how workers who try to make a living in ride-share work take on more risk than part-time drivers who may use this work for supplemental income. *See also*, Fitzsimmons, *supra* note [EMMA], at _____ stating that a recent study showed that "about 40% of drivers have incomes so low that they qualify for Medicaid and about 18% qualify for food stamps." *See also*, Emma Bartel, Ellen MacEachen, Emily Reid-Musson, Samantha B. Meyer,

public health perspective, is that the flexibility of such jobs goes hand-in-hand with *existential instability* (i.e., narrowing other domains of life, hampering partnering and starting families with potential for other adversities in individual adult life course), which is exacerbated among those who rely entirely on 'gigs' for their income." Another concern is that many app-based workers work in isolation—for example drivers—and this isolation yields a lack of social support which in turn also adds to existential instability. 44

In many jurisdictions, there is no established minimum wage for app-based work, leaving workers with low pay and economic instability. ⁴⁵ But low pay is not the only form of economic instability. Job insecurity brought forth by algorithms used to rate workers also creates economic instability. ⁴⁶ Additionally, not knowing the frequency in which one will have jobs to generate income not only creates economic instability but also job strain ("a combination of high demands and low job control"). ⁴⁷ For instance, an app-

Ron Saunders, Philip Begelow, Agnieszka Kosny and Sharanya Varatharajan, *Stressful by design: Exploring health risks of ride-share work*, J. OF TRANSPORT & HEALTH 4 (2019) (Noting that after drivers started working for Uber, they found that their net income after expenses was "very low" and that this financial pressure caused stress.)

⁴³ *Id*.

⁴⁴ Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59 JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE e64 (2017); *See generally*, Marcia Facey, 'Maintaining Talk' among taxi drivers; accomplishing health-protective behaviour in precarious workplaces, 16 HEALTH & PLACE 1259 (Nov. 2010).

⁴⁵ See Robert Sprague, Using the ABC Test to Classify Workers: End of the Platform-based Business Model or Status Quo Ante?, 11 WM. & MARY BUS. L. REV. 733, 738 (2020); Sarah Kessler, GIGGED xiii (2018). See generally, Orly Lobel, We are all Gig Workers Now: Online Platforms, Freelancers & the Battles Over Employment Status & Rights During the Covid-19 Pandemic, 57 SAN DIEGO L. REV. 919, 938 (2020) ("...gig workers are low-wage laborers with a small income and large instability.")

⁴⁶ Bartel, et al., *supra* note [DESIGN], at 4–5 (discussing that ride-share work is "stressful by design" through mediated ratings, and automated navigation and dispatching, and that because drivers can be removed from the app at any time without any recourse, they experience emotional stress and anxiety. And quoting a driver as having said ratings are a 'major stress factor.') *See*, Dubal, *supra* note [VDCODE], at 7 ("Through the use of opaque data collection and hidden algorithms, companies personalize wages for each worker, which allows the companies to practice first degree labor price discrimination. As a result of this unpredictable and inconsistent wage calculation system, workers sometimes make no money—or even lose money—after considering vehicle expenses.")

⁴⁷ Nico Dragno, et al., Effort-reward Imbalance at Work and Incident Coronary Heart Disease: A Multicohort Study of 90,164 Individuals, 28(4) EPIDEMIOLOGY 619, 619 (July 2017) https://pubmed.ncbi.nlm.nih.gov/28570388/ (Job strain can be used to measure work stress. Job insecurity, including not knowing the frequency in which one will have jobs, is commonplace among app-based workers and can induce stress.) See, Rosenblat, supra note

based worker turns on the app and waits for a customer, but the worker does not know how quickly a customer will get lined up, thereby creating an "effort-reward imbalance." Job strain and economic instability have been shown to increase risk of heart disease. 49

Researchers have only recently begun gathering data on the health effects of app-based workers.⁵⁰ But some researchers have been drawing correlations between the negative health effects of taxi drivers (widely studied) and app-based drivers,⁵¹ and others are seeing patterns emerging.⁵² For example, Dr. Sandra Davidson and colleagues, at the University of Melbourne, studied taxi drivers and found high rates of psychological distress as a result of working conditions such as long hours, sedentariness, and low pay.⁵³ In their concluding remarks, they suggest that high rates of psychological distress would also be found in app-based ride-share drivers.⁵⁴ In addition to psychological distress, long hours, repetitive motions, and sedentary work engaged in by app-based workers (particularly drivers) also create physical health issues such as back, foot, knee, and leg pain.⁵⁵

Predictably, stress emanating from existential and economic instabilities

[UBERLAND], at 64 (describing an online forum where drivers debated about whether to quit driving for Uber and Lyft full time. One driver from Los Angeles left the following comment: "Driving full time is a nice little fantasy, but reality soon slaps you in the face when you end up living in your car to make ends meet as demand fluctuates...[l]ife on the road isn't all that great as your health starts taking a toll from all the driving you do to survive the dirt cheap, rates of \$3 to \$5 for the average ride [...].")

⁴⁸ Dragno, *supra* note [DRAGNO], at 619. See also generally accompanying text and footnote 244 (our note here... it is the note that cites to Veena Dubal Time Politics)

⁴⁹ *Id.* (Regardless of actual job strain experienced, individuals with effort-reward imbalance at work have been shown to have an increased risk of coronary heart disease.)

⁵⁰ Freni-Sterrantino, *supra* note [FRENI], at 1(Noting that researchers only have a "partial picture of the health effects of the gig economy on workers, as data on gig jobs are fragmentary and research on health effects has only begun.")

⁵¹ Bartel, *supra* note [DESIGN], at 5 (comparing taxi drivers and ride-sharing drivers in Canada to predict the health and safety risks that Uber and Lyft drivers encounter. But noting that the "conditions and design of ride-share work are not identical to the taxi industry: the introduction of an app-based service with strict app rules made for unique pressures and risks related to mental health for ride-share drivers, including the possibility of lost income for low ratings, high cancellation rates, or low acceptance rates.")

⁵² Freni-Sterrantino, *supra* note [FRENI], at 2.

⁵³ Sandra Davidson, Greg Wadley, Nicola Reavley, Jane Gunn & Susan Fletcher, *Psychological distress and unmet mental health needs among urban taxi drivers: A cross-sectional survey*, 52(5) Australian & New Zealand Journal of Psychiatry 473, 481 (May 2018).

⁵⁵ Bartel, *supra* note [DESIGN], at 3. (Noting that because drivers are paid on a per-ride basis, during peak times, drivers take few if any breaks. And that Uber's 'surge pricing' provides more pressure to keep driving without taking breaks.)

can lead to other negative health effects as well.⁵⁶ In past research, workers who had constant economic insecurity were shown to have higher cholesterol and other adverse health issues compared to economically secure workers.⁵⁷ This correlation leads to the inference that all workers, including app-based workers, who live with economic insecurity could experience such adverse health outcomes.

Health and economic stakes are high for app-based workers and therefore for the countries in which they reside. And if this was not evident before, it is certainly seen now that the COVID-19 pandemic has increased the use of app-based platforms, particularly food delivery apps. ⁵⁸

A high percentage of app-based workers, particularly drivers in major cities, are immigrants and subordinated minorities.⁵⁹ And, "if one removes ridesharing drivers (predominately men) from the calculation, women constitute a larger share of platform economy workers."⁶⁰ As such these

⁵⁶ Dragno, *supra* note [DRAGNO], at 619. *See*, Freni-Sterrantino, *supra* note [FRENI], at 2 (discussing that "job-related sources of stress like job demand, job content, effort-reward imbalance, insecurity, job loss, and unemployment contribute in different and possibly independent ways to well-being.")

⁵⁷ Claire L. Niedzwiedz, Srinivasa Vittal Katikireddi, Aaron Reeves, Martin McKee & David Stuckler, *Economic insecurity during the Great Recession and metabolic, inflammatory and liver function biomarkers: analysis of the UK Household Longitundinal Study*, Journal of Epidemiology & Community Health (2017). ("Perceived economic insecurity is linked to poor health, including depressive and anxiety disorders, diabetes and coronary heart disease, as well as hazardous health behaviours... Indeed, fear of job loss can be just as harmful as, if not more than, the job loss itself.")

⁵⁸ See Anthony Derrick, Mayor Durkan Applauds City Council Unanimous Passage of her Fare Share Plan to Guarantee a Fair Minimum Compensation Standard for TNC Drivers, OFFICE OF THE MAYOR BLOG (Sept. 29, 2020) https://durkan.seattle.gov/2020/09/mayor-durkan-applauds-city-council-unanimous-passage-of-her-fare-share-plan-to-guarantee-a-fair-minimum-compensation-standard-for-tnc-drivers/. (quoting Mayor Durkan, "[t]he pandemic has exposed the fault lines in our systems of worker protections, leaving many front line workers like gig workers without a safety net. It is more important than ever that we add to the economic resilience of our community of drivers."); See generally Chris Taylor, Your Money: Freelancers have 'perfect storm' of anxiety because of COVID-19, REUTERS (April 6, 2020) https://www.reuters.com/article/us-health-coronavirus-freelancers/your-money-freelancers-have-perfect-storm-of-anxiety-because-of-covid-19-idUSKBN21022K (quoting Johann Hari "of course financial insecurity is going to cause depression and anxiety.")

⁵⁹ Dubal, *supra* note [VDCODE], at 6; Freni-Sterrantino, *supra* note [FRENI], at 1; *See generally*, Davidson, *supra* note [DAVIDSON].

⁶⁰ Prince, supra note [SPAB5] citing Diana Farrell, Fiona Greig, and Amar Hamoudi, The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors (New York: JPMorgan Chase Institute, 2018). See also, HyperWallet supra note 33; Lawrence F. Katz and Alan B. Krueger, Understanding Trends in Alternative Work Arrangements in the United States

individuals disproportionately feel the brunt of economic and existential instability and the health issues associated with app-based work.⁶¹ To protect the app-based working society, changes need to be made. But for app-based workers to be eligible for safety net protections such as minimum wage, they must be classified in a manner that allows such. Numerous countries around the world rely on worker classification to define eligibility for protections and benefits like health insurance. The next part highlights what progress policymakers and courts around the world are making in ensuring protections for their app-based workers.

III. CHANGES ARE HAPPENING AROUND THE WORLD

Courts on all inhabited continents are being tasked with deciding how to classify app-based workers based on current statutes—statutes not created with the app-based economy in mind.⁶² These court holdings often put pressure on policymakers to enact laws.⁶³ In some cases, the laws will clarify or codify a

(NBER Working Paper No. 25425, National Bureau of Economic Research, Cambridge, MA January 2019); Lawrence F. Katz and Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States*, 1995-2015 (NBER Working Paper No. 22667, National Bureau of Economic Research, Cambridge, MA Sept. 2018).

⁶¹ Dubal, *supra* note [VDCODE], at 7; Niels van Doorn, *Platform labor: On the gendered and racialized exploitation of low-income service work in the 'on-demand' economy*, INFORMATION, COMMUNICATION & SOCIETY 898, 907 (2017). ("It is this legacy that ondemand platforms...disavow when they rebrand domestic and institutional service work as a post-racial and gender-neutral opportunity that combines good pay with a flexible schedule...despite this influx of white middle-class workers, the majority of cleaners, janitors, and home care providers operating in the gig economy are working-class men and women of color, especially in urban areas."); Palagashvili, *supra* note [WOMEN].

62 See Jaratphong Srirattanan & Seha Yatim, Do gig workers deserve better deal?, BANGKOK POST, Feb. 23, 2021, https://www.bangkokpost.com/opinion/2072935/dogig-workers-deserve-better-deal- ("The problem that Thailand and many other countries face is outdated labour laws that do not adequately embrace (or protect) gig economy workers."); Ellen MacEachen, Samantha Meyer, Ron Saunders, Philip Begelow, Agnieszka Kosney, Emily Reid-Musson, Emma Bartel, and Sharanya Varatharajan, Report: Driving for Uber: A Developmental Evaluation of Occupational Health and Safety Conditions of Ride-Share Work, School of Public Health and Health Systems, Univ. Of Waterloo 8 (July 15, 2019) ("Regulators have struggled to keep pace with the rise of ride-hail and have developed various forms of ride-hail regulation, often through municipal licensing, as is the case in Ontario. These regulations are often new, improvised and local regulations, described as a game of 'whack a mole', where governments struggle to contain new enterprises while more pop up.") citing Sunil Johal & Noah Zon, Policymaking for the Sharing Economy: Beyond whack-a-mole. Univ. of Toronto: Mowat

Centre

(2015)

https://tspace.library.utoronto.ca/bitstream/1807/99326/1/Johal_Zon_2015_Policymaking_for_the_Sharing.pdf. See also Moyer-Lee supra note [MOYER] at 34.

⁶³ For example, Spain's La Ley del Rider (Rider Law) was enacted due to a court ruling

court's ruling, and in other cases they will distinguish it. Policymakers are concerned with ensuring protections for their app-based workers, and even if their own courts are not deciding cases, they may look to other countries for ideas or momentum.⁶⁴

While this Part cannot cover all countries in the world,⁶⁵ it starts with the moves that the European Union (EU) is making.⁶⁶ It then covers Spain, not only because it was an early enactor of legislation that classified delivery riders as "employees," but also because Spain has a binary system like the U.S. (workers are either employees or independent contractors). Next, it discusses the United Kingdom, which has a third category of worker classification and is influential to other countries, particularly in Africa. Finally, it covers Denmark, where worker classification is negotiated by trade unions rather than through governmental regulation. All of these countries have recently addressed app-based worker classification in their own ways and provide insight into the current changes being made around the world regarding this topic.

A. The European Union's Public Consultation

In February 2021, the EU launched a "public consultation" to determine how to improve working conditions for workers in the app-based economy across its member states.⁶⁷ On June 15, 2021, the EU announced the second-

⁽see infra). Another example is Belgium where the government initially codified the principles developed by its courts into statutory law but then went beyond it. See Valerio De Stefano, Ilda Durri, Charalampos Stylogiannis, & Mathias Wouters, Platform work and the employment relationship (International Labour Organization, ILO Working Paper note 94 (No. 27, 2021). See also Prince supra, note [SPAB5], at ____ for a domestic example, where California's legislature codified the court's ruling in Dynamex Operations West, Inc. v. Superior Court of Los Angeles, 4 Cal. 5th 903 (2018) into AB5 under pressure to clarify the ruling for businesses and workers.

⁶⁴ For example, South Africa and Kenya policymakers are considering laws inspired by the UK's recent Supreme Court ruling in *Uber BV v Aslam. See* infra Part I.B.

⁶⁵ See the various footnotes throughout this part for information from other countries.

⁶⁶ The Member States in the EU are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.

⁶⁷ Foo Yun Chee, *EU seeks views on gig workers' rights ahead of possible law*, REUTERS (Feb. 24, 2021, 6:15 AM) https://www.reuters.com/technology/eu-seeks-views-gig-workers-rights-ahead-possible-law-2021-02-24/. Uber endeavors to weigh in on the process, seeking to work with policy makers across Europe to provide platform workers with protections. See, Dara Khosrowshahi, *A Better Deal: Partnering to Improve Platform Work for All*, UBER NEWSROOM (Feb. 15, 2021) https://uber.app.box.com/s/tuuydpqj4v6ezvmd9ze81nong03omf11?uclick_id=b996c52b-4fdc-4291-ba4d-3e501c719a06.

stage consultation and stated that based on the replies received from the first consultation, "there is a need for further EU action to ensure basic labour standards and rights to people working through platforms." The app-based economy "has grown almost fivefold from an estimated €3 billion in 2016 to about €14 billion in 2020." The EU's announcement for the second-stage consultation outlines the following issues:

The key challenge in platform work relates to employment status. It is a key determinant of the access of people working through platforms to existing labour rights and protection. Moreover, people working through platforms can be subject to automated decisions made by algorithms without a possibility to question the decision and seek redress. They also often have limited access to collective representation and bargaining. Finally there are also challenges related to the cross-border nature of platform work and the possibility to trace in which country work is performed.

In light of these challenges, the aim of the second-stage consultation is to get the social partners' views on how to ensure that people working through platforms have decent working conditions, while supporting the sustainable growth of digital labour platforms in the EU. Social partners will be consulted on a possible content of the EU-level initiative, in areas such as:

- facilitating employment status classification and access to labour and social protection rights;
- improving information, consultation and redress, notably when it comes to the use of algorithmic management in platform work;
- providing clarity on applicable rules for all people working through platforms operating across borders;
- strengthening enforcement, collective representation and social dialogue.⁷⁰

Any EU initiative or proposal "would be designed in full respect of national competence, the diversity of labour market traditions in Member States, and the autonomy of social partners." The initiative would also respect different

⁶⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip 21 2944

⁶⁹ *Id*.

⁷⁰ *Id*.

⁷¹ *Id*.

Member States' current or future definitions and classifications of workers.⁷² "There is also no intention to create a 'third' employment status (neither self-employed, nor worker) at EU level."⁷³ The EU hopes to have a proposal by the end of 2021.⁷⁴

B. Spain's La Ley del Rider

Spain policymakers did not await the results of the EU's consultation and on May 11, 2021, became the first EU country to enact a law that reclassifies app-based food delivery drivers as employees.⁷⁵ Labor Minister Yolanda Díaz stated with pride, "Spain has become a world leader on this issue," and "[t]he world and Europe are both looking to us."⁷⁶

In September, 2020, Spain's Supreme Court ruled that the relationship between food delivery drivers and app-based company Glovo is "of a professional nature" meaning the food delivery drivers are employees not independent contractors.⁷⁷ This court ruling provided the impetus for Spain's policymakers to create "La Ley del Rider" (the "Rider Law").⁷⁸ The Rider Law provides that app-based food delivery drivers are not self-employed

⁷² *Id*.

⁷³ *Id*.

⁷⁴ *Id*.

⁷⁵ Workers' Statute Law, 7840 Royal Decree Law, (2021). (The text recast of the Workers' Statute Law, approved by the Royal Legislative Decree 2/2015, of October 23). (<u>Link</u>) See, Eoghan Gilmartin, *Spain's New 'Rider Law' Could Change the Gig Work Game*, TRIBUNE MAGAZINE (June 6, 2021), https://tribunemag.co.uk/2021/06/spains-new-rider-law-could-change-the-gig-work-game.

⁷⁶ Gorka R. Pérez, *Spain Approves Landmark Law Recognizing Food-Delivery Riders as Employees*, EL PAÍS, May 12, 2021 https://english.elpais.com/economy and business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html.

The seconomy shifts: Spain makes delivery riders employees, ASSOCIATED PRESS (MADRID) (Mar. 11, 2021), https://apnews.com/article/business-laws-legislation-spain-economy-b74bfd4c1e8da05271853b069cb012b9. But see Pablo Agüera & Tatiana López, Lessons from the Glovo Strikes in Spain – Interview with Carmen Juares, FAIRWORK (Oct. 14, 2021), https://fair.work/en/fw/blog/lessons-from-the-glovo-strikes-in-spain-interview-with-carmen-juares/#continue. Even though the law has been in operation since May, Glovo is still treating most of its workforce as independent contractors. When asked if she thinks the 'ley rider' law will be successful in ensuring fairer standards for delivery riders, Carmen Juares Palma (responsible for the secretary of New Realities of Work and Social and Solidary Economy at Comisiones Oberes (CCOO)) stated that the law "sets the grounds to ensure labour rights and social protection for delivery riders on digital platforms." However, she notes that these rights will "only be achieved if they are supported by mobilizations and complaints to the labour authorities from workers and unions." She said it is also necessary to improve the human and financial resources of the labor inspection services so they can take stronger actions against platform companies.

⁷⁸ *Id*.

(independent contractors).⁷⁹ This means that such drivers will have employment rights such as sick pay, disability benefits, breaks, and paid holidays.⁸⁰ Additionally, drivers will no longer have to pay their own social security fees which provide benefits such as unemployment subsidies and a public pension.⁸¹ The law also requires businesses to be transparent with food delivery drivers as to how algorithms and artificial intelligence affect their working conditions, hiring decisions, and layoffs.⁸²

"Spain's [R]ider's [L]aw is the beginning of the end for false self-employment across Europe," enthused Ludovic Voet, of the European Trade Union Confederation.⁸³ "It sets the standard for forthcoming EU action on platform companies—a worker must be recognized as a worker."⁸⁴

While the law is designed to help riders, it may backfire in some respects. Rather than change to meet the requirements of the law, Deliveroo may pull out of Spain. Deliveroo has stated that "[t]he company has determined that achieving and sustaining a top-tier market position in Spain would require a disproportionate level of investment with highly uncertain long-term potential returns that could impact the economic viability of the market for the company." But if Deliveroo leaves, the other food delivery companies will likely embrace those riders left behind by Deliveroo.

C. The United Kingdom on Uber & Deliveroo

While it does not look like Parliament is considering adopting a law like Spain's Rider Law, the definition of which app-based workers qualify in the United Kingdom as a worker entitled to safety net protections or a living/minimum wage received worldwide attention in 2021. Uber drivers were found to be entitled to certain protections; Deliveroo riders were found not entitled to collective bargaining. Both cases were worker classification cases.

⁷⁹ *Id*.

⁸⁰ *Id*.

⁸¹ Aritz Parra and Renata Brito, Spain adopts landmark law to protect 'gig' delivery workers, ASSOCIATED PRESS (May 11, 2021), https://abcnews.go.com/International/wireStory/spain-adopts-landmark-law-protect-gig-delivery-workers-77620461.

⁸² Pérez, *supra* note [GORKA].

⁸³ Bojana Bellamy, *Tech28 Yolanda Díaz, Spain's Labor Minister, Rulebreaker No. 1*, Politico EU https://www.politico.eu/list/tech-28-class-of-2021-the-ranking/yolanda-diaz/.
⁸⁴ Id.

⁸⁵ Spain – Deliveroo set to pull out of Spain following gig economy law changes (City A.M.) STAFFING INDUSTRY ANALYSTS (Aug. 2, 2021) https://www2.staffingindustry.com/eng/Editorial/Daily-News/Spain-Deliveroo-set-to-pull-out-of-Spain-following-gig-economy-law-changes-City-A.M.-58563.

1. Uber

In February 2021, the United Kingdom's Supreme Court unanimously dismissed Uber's final appeal in *Uber BV v Aslam*, a case regarding driver classification that spanned five years. ⁸⁶ The court provided a detailed statutory interpretation analysis of the definition of "worker" and expressed that classifying an individual as a "limb (b) worker" is predicated on giving effect to the employment statute's purpose. ⁸⁸ Here, the purpose is "to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimized for whistleblowing)." ⁸⁹

In the UK, employment law recognizes three types of workers: "[1] those employed under a contract of employment; [2] those self-employed people who are in business on their own account and undertake work for their clients or customers; and [3] an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else." A limb (b) worker is represented by 3 above—the intermediate worker between category 1 and 2—that provides "their services as part of a profession or business undertaking carried on by someone else." 91

⁸⁶ Uber BV v Aslam [2021] UKSC 5 (19 Feb. 2021) (hereinafter Aslam); See also, Mary-Ann Russon, Uber drivers are workers not self-employed, Supreme Court rules, BBC News (Feb. 19, 2021) https://www.bbc.com/news/business-56123668.

⁸⁷ A limb (b) worker is one that qualifies under the Employment Rights Act 1996 § 230(3)(b) *Id.* at 11–13. "an individual who has entered into or works under (or, where the employment has ceased, worked under) -

⁽a) a contract of employment, or

⁽b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

⁸⁸ Id. at 20.

⁸⁹ *Id.* at 21.

⁹⁰ *Id.* at 12 (citing Baroness Hale of Richmond in *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32).

⁹¹Id. at 12–13. "Limb (b) of the statutory definition of a 'worker's contract' has three elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual." Elements 2 and 3 were not at issue. "It is not in dispute that the claimant drivers worked under contracts whereby they undertook to

The court stated that in determining which workers are vulnerable (and thereby in need of statutory protection), one must consider the "subordination to and dependence upon another person in relation to the work done." Elaborating further the court noted that "a touchstone of such subordination and dependence is (as has long been recognized in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a [limb (b)] worker" "93"

The court determined that Uber drivers were in "a position of subordination to Uber where the only way they could increase their earnings would be to work longer hours." In determining subordination and control, the court emphasized five aspects of the employment tribunal's findings:

- 1. The "remuneration paid to drivers for the work they do is fixed by Uber and the drivers have no say in it (other than by choosing when and how much to work)."⁹⁵
- 2. The contractual terms are dictated by Uber. 96
- 3. "[A]lthough drivers have the freedom to choose when and where (within the area covered by their PHV licence) to work, once a driver has logged onto the Uber app, a driver's choice about whether to accept requests for rides is constrained by Uber."⁹⁷ One way Uber controls the driver is by controlling the information provided to the driver.⁹⁸ Another way is by monitoring the driver's rate of acceptance (and cancellation) of trip requests.⁹⁹
- 4. Uber significantly controls the way in which drivers deliver their services by vetting the type of car and providing routes for the driver to take. ¹⁰⁰
- 5. Uber disallows and makes it more difficult for communication between the driver and the passenger to transpire. ¹⁰¹

perform driving services personally; and it is not suggested that any Uber company was a client or customer of the claimants."

⁹² *Id.* at 28.

⁹³ *Id*.

⁹⁴ *Id*.

⁹⁵ Id. at 30.

⁹⁶ *Id*.

⁹⁷ *Id*.

⁹⁸ *Id*.

⁹⁹ *Id*.

¹⁰⁰ *Id.* at 31.

¹⁰¹ *Id.* at 32.

The above enumerated facts tipped the scales for the court to find that Uber drivers meet the requirements of protected workers. Because of the ruling, Uber drivers are to be afforded a minimum wage (National Living Wage equal to £8.72/hour), holiday pay, and participation in pension benefits. 103

Uber has reported that its drivers will earn at least a minimum wage after accepting a trip request and expenses.¹⁰⁴ Drivers will also get holiday pay equal to 12.07% of their earnings, paid every two weeks.¹⁰⁵ Additionally, they will be enrolled in a pension plan that both drivers and Uber will contribute to.¹⁰⁶

The ruling applies only to Uber drivers, not other ridesharing apps. Uber has launched a rideshare driver recruitment marketing campaign highlighting the benefits that they are providing their drivers (as compared to their competitors). "Sickness cover for drivers à Just what the doctor ordered – Only on Uber." "Every car comes with an out of office à Drivers earn holiday pay – Only on Uber." But as Uber touts the benefits it provides, it is also calling for compliance by competitors. At the time of this writing, there does not appear to be any movement in the UK Parliament to codify the *Aslam*

¹⁰² *Id*.

¹⁰³ Ryan Browne, *Uber Employment Rights Setback is a 'gut punch' to its prospects in the UK*," CNBC (Mar. 18 2021) https://www.cnbc.com/2021/03/18/uber-is-reclassifying-uk-drivers-as-workers-heres-what-happens-next.html. (and quoting Tom Vickers, senior lecturer in sociology at Nottingham Trent University and head of the Work Futures Research Group, which studies the jobs that people do and how they change over time, "The central point for me is that the ruling focuses on the control that companies exercise over people's labour – this control also carries with it responsibilities for their conditions and wellbeing.")

¹⁰⁴ Kelvin Chan, *Uber to give UK drivers minimum wage, pension, holiday pay*, ASSOCIATED PRESS (LONDON) (Mar. 16, 2021) https://apnews.com/article/minimum-wage-europe-cb15b4aff66c3838ef9470192c9fcefd.

¹⁰⁵ *Id*.

¹⁰⁶ Id

¹⁰⁷ Ellen Ormesher, *After trying to deny them, Uber is using driver rights as a marketing USP*, THE DRUM (July 1, 2021) https://www.thedrum.com/news/2021/07/01/after-trying-deny-them-uber-using-driver-rights-marketing-usp.

¹⁰⁸ *Id*.

¹⁰⁹ *Id*.

¹¹⁰ See, Simon Duke, Uber claims rivals deny drivers their rights; The ride-hailer says that abiding by the Supreme Court ruling on status puts it at a disadvantage, THE TIMES (LONDON) (June 30, 2021); Jonathan Keane, Uber Calls for UK Rivals to Follow Court Ruling on Driver Status, FORBES (July 13, 2021) https://www.forbes.com/sites/jonathankeane/2021/07/13/uber-calls-for-uk-rivals-to-follow-court-ruling-on-driver-status/?sh=23c51b44675d ("The other operators, and not just the other app-based operators, but the model that we operate is very common in the taxi and private hire industry in general. I think when they look at those details, although it's specifically Uber drivers who brought the case, those things will be true to them. We operate the same model as them and therefore they need to step up.")

ruling.

2. Deliveroo

On June 24, 2021, the Court of Appeal ruled that Deliveroo riders do not meet the definition of "worker" for purposes of eligibility for collective bargaining rights. The statutory definition of worker for collective bargaining purposes is similar but not identical to the Employment Rights Act 1996 § 230(3) which was used in the *Aslam* case above. In looking at precedent, the court compared the test—"the right to use substitutes, the right to choose which tasks to accept, the right to work for a competitor," and the right to choose at what time within a prescribed time slot to make a delivery.

The court stated that the primary issue in this case was whether the riders were required to personally provide the service or whether they could utilize a substitute.¹¹⁴ The court reviewed the Deliveroo Supplier's Agreements and noted that riders are permitted to have a substitute execute their deliveries.¹¹⁵ Ultimately, the court found that since a right of substitution existed, it did not matter whether workers actually took advantage of that right—just that the right was genuine.¹¹⁶ As such, the court found that Deliveroo drivers were not entitled to organize because they were not in an employment relationship with Deliveroo.¹¹⁷

One can see that app-based companies are not treated the same for all reasons, i.e., there is no blanket rule that holds all app-based companies and

¹¹¹ Indep. Workers Union of Great Britain v. Roofoods Ltd t/a Deliveroo, [2021] EWCA Civ 952.

¹¹² Trade Union and Labour Relations (Consolidation) Act 1992 § 296(1): "In this Act 'worker' means an individual who works, or normally works or seeks to work – (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

¹¹³ Deliveroo UK case supra note [DELUK] 27 discussing B v Yodel Delivery Network Ltd, C-692/19, [2020] IRLR 550. The court dismissed the last part of the test as not one that would make a "decisive difference."

¹¹⁴ Deliveroo UK case supra note [DELUK] at 26.

¹¹⁵ Id

¹¹⁶ *Id.* Court quoting *Kalwak v Consistent Group Ltd* [2007] IRLR 560 "The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligations to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship."

¹¹⁷ *Id.* at 34.

their interactions with those who work for them are the same. One important distinguishing point between the *Deliveroo* case and the *Aslam* case is that Uber did not have a substitution clause in its driver agreement which matters when looking at a personal service requirement. Another distinction made by the court is that the facts were different in both cases. As such, the *Deliveroo* court considered the *Aslam* case of limited relevance.

Still, the *Aslam* case is providing momentum for app-based workers in other countries. "The ruling sent shockwaves around the world as the jurisprudence could be adopted in other countries and change the entire model of how digital taxi services operate." 121 Uber drivers in other countries are initiating legal actions in the hopes that their own courts will apply the rationale in Aslam. 122 And worker advocacy groups are using the Aslam case to pressure policymakers into classifying workers in a manner that will allow them protections. 123 "We call on the government to follow in the UK footsteps and give drivers their rights."¹²⁴ However, some countries' worker classification laws are binary (employee or independent contractor) and do not have a middle worker classification like the UK does. For those countries with an intermediate classification or the willingness to create one, Aslam may be more persuasive; for those that do not, it may not be. Regardless, countries are hoping their courts and policymakers will find inspiration from the UK Supreme Court.

D. Denmark's Agreement re: Delivery Drivers

¹¹⁸ *Id*. at 30.

¹¹⁹ Deliveroo UK case supra note [DELUK] at 30.

¹²⁰ Id.

¹²¹ Ndungu Jay, *Hope for Digital Taxi Drivers as Kenya Considers Historic Directive*, NAIROBI TIMES (Feb. 24, 2021) quoting Cabinet Secretary Labour & Social Protection, Simon Chelugui. https://nairobitimes.co.ke/2021/02/24/hope-for-digital-taxi-drivers-as-kenya-considers-historic-directive/.

¹²² Id.; Staffing Industry Analysts, South Africa – Uber set to face class action lawsuit as demand emplovee rights, Staffing Industry (Mar. drivers https://www2.staffingindustry.com/eng/Editorial/Daily-News/South-Africa-Uber-set-to-faceclass-action-lawsuit-as-drivers-demand-employee-rights-56882 (Richard Meeran attorney at Leigh Day said, "The ruling by the UK Supreme Court is a final vindication for UK Uber drivers who have for too long been denied their statutory employment rights as workers. We hope that this class action in South Africa will enable South African Uber drivers to access those same rights."); Bianca Healey, Uber drivers from Sydney and Melbourne have launched legal action to prove they are employees, hoping to emulate a landmark UK win, Business Insider (Aug. 2, 2021) (https://www.businessinsider.com.au/uber-drivers-legal-challenge).

 $^{^{123}}$ *Id*.

¹²⁴ *Id.* (quoting Secretary-General to the Digital Partners Society Wycliffe Alutalala)

In Denmark, agreements that cover pay and conditions are dealt with at the industry level rather than the governmental level. ¹²⁵ In February 2021, the 3F trade union worked directly with app-based food delivery company, Just Eat, to reach a "national sectoral agreement." ¹²⁶ The agreement secures workers a minimum wage that increases over a two year period. ¹²⁷ Additionally, the workweek duration is a minimum of eight hours and can go up to thirty-seven hours. ¹²⁸ If the work exceeds thirty-seven hours, overtime is allowed up to forty-four hours. ¹²⁹ "Among other provisions, a platform company will also be obliged to provide their employees with a vehicle (or an allowance if the employee has its own), work clothes, and safety equipment." ¹³⁰

* * *

While countries around the world have been making country-wide strides in providing safety net protections for app-based workers—some classifying workers as employees, while others classifying them in a position between traditional employees and independent contractors—the United States has not clearly addressed classification of app-based workers on a federal level. Our federal government is still trying to use old tests, although bills have been submitted to change or modify the tests. The next part discusses the tests

https://www.worker-participation.eu/National-Industrial Relations/Countries/Denmark/Collective-Bargaining

Transport Workers' Federation (Feb. 4, 2021) https://www.etf-europe.org/3f-secures-ground-breaking-national-sectoral-agreement-for-delivery-riders/; And food delivery platform, Foodora, reached a collective bargaining agreement with Norway riders in September 2019. Foodora and the Fellesforbundet union reached an agreement that includes an annual pay increase for full-time riders. The agreement also guarantees the Foodora riders "a winter allowance and compensation for the use of equipment at work such as bikes, clothes and smartphones." Union win! Historic agreement for food delivery workers, INTERNATIONAL TRANSPORT WORKERS' FEDERATION (Oct. 7, 2019). https://www.itfglobal.org/en/news/union-win-historic-agreement-food-delivery-workers.

¹²⁷ *Id*.

¹²⁸ *Id*.

¹²⁹ *Id*.

¹³⁰ *Id*.

¹³¹ For example, the PRO Act passed in the U.S. House of Representatives on March 9, 2021. The PRO Act would require use of the ABC test for determining worker classification for NLRA purposes. In states that use the ABC test, courts have typically found that app-based workers should be classified as employees. See infra _____. See also, President Biden's campaign pledge indicating he would like the ABC test to be used for multiple purposes supra note [BIDENCAMP]. ("The ABC test will mean many more workers will get the legal protections and benefits they rightfully should receive. As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.")

that are being used by the federal government.

IV. FEDERAL WORKER CLASSIFICATION TESTS IN THE UNITED STATES

At the federal level in the United States, there are three main common law factor-based tests for determining a workers' status: the control test, the entrepreneurial opportunities test, and the economic realities test. The control test and economic realities test have broader use, but all three tests are presented herein to include coverage of the National Labor Relations Act of 1935 (NLRA). Each of these tests has numerous factors that must be weighed to determine whether a worker is an employee or independent contractor. Notably, these tests are all used for different statutory determinations and have been said to fail to provide workers, hiring entities, and the courts with a foundational basis for classifying workers. Additionally, the tests are considered unpredictable.

¹³² Note that the IRS twenty-factor test is covered infra in Part III.C. because several states recently adopted its use.

¹³³ Griffin Toronjo Pivateau, Opposite Sides of the Same Coin: Worker Classification in the New Economy, 37 HOFSTRA L. & EMP. L. J. 93, 102 (2019).

¹³⁴ Due to this unpredictability, the American Law Institute's Restatement (Third) of Employment Law adopted a test that came from an evaluation of the worker classification tests and court opinions applying them. RESTATEMENT OF EMPLOYMENT LAW SECTION 1.01 "Conditions for Existence of Employment Relationship." (1) Except as provided in §1.02 and §1.03, an individual renders services as an employee of an employer if (a) the individual acts, at least in part, to serve the interests of the employer, (b) the employer consents to receive the individual's services, and (c) the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering services as an independent business person.(2) An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers. The Restatement's endeavor was to "provide guiding principles to render the multifactor tests more focused and predictable." Michael C. Harper, Focusing the Multifactor Tests for Employee Status; the Restatement's Entrepreneurial Formulation Harper, (October 1, 2015). Boston Univ. School of Law, Public Law Research Paper No. 15-51, available at SSRN: https://ssrn.com/abstract=2684134. In regard to app-based work, Professors Garden and Slater critique the Restatement, acknowledging that it provides useful guidance but that it falls short by not providing "a clearly articulated statement regarding the various purposes of the employee/independent contractor dichotomy in different contexts [which] would have been useful to decision makers, and would have promoted justice by making it more difficult for enterprises to evade employer status by offloading supervision tasks onto customers and control onto algorithms." Charlotte Garden & Joseph Slater, Comments on Restatement of Employment Law (Third), Chapter 1, 21 EMP. RTS. & EMP. POL'Y J., 265, 303 (2017).

A. The Control Test

Since the 1800s, workers have been classified as either "employees" or "independent contractors." The control or right-to-control test was created in England and appropriated by the United States. Originally, the classification significance regarded tort liability—respondeat superior. This agency law tort liability test was designed to determine whether a principal "controlled" the work of its agent such that if the agent committed a tort, the principal would appropriately be liable. If an agent was subject to sufficient control by the principal/hiring entity, then it was reasonable to hold such principal/hiring entity liable to the third-party plaintiff. This worker was classified as an "employee." Hence, if an employee committed a tort, the hiring entity/employer would be liable to the injured plaintiff.

Numerous scholars have challenged the prudence of parlaying the control

¹³⁵ See Prince, supra note [SPAB5] page 6 fn 13: The common law distinction between employees and independent contractors originated in England and was originally an agency law question. It was first transplanted into the United States via Boswell v. Laird, 8 CAL. 469, 489-90 (1857). See also Carlson supra note [RCWhy] at 302; Gerard M. Stevens, The Test of the Employment Relation, 38 MICH. L. R. 188, 189-90 (1939).

¹³⁶ Carlson, *supra* note [RCWhy], at 302-05; Gerard M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. R. 188, 194-95 (1939); Jooho Lee, *The Entrepreneurial Responsibilities Test*, 92 Tul. L. Rev. 777, 786 (2020).

¹³⁷ Stevens, *supra* note, at 189–90. *See* Michael C. Duff, *All the World's a Platform?*: Some Remarks on "Marketplace Platform" Employment Laws, (January 16, 2020). Available at SSRN: https://ssrn.com/abstract=3520723 where Professor Duff states that the "creation of the independent contractor category may simply have been a strategy allowing masters to *escape* tort liability created by putative servants. In other words, creating a category of 'nonservants' may have had more to do with a 'push' policy of tort-liability-avoidance than a 'pull' policy of consciously-allocative tort compensation (leaving entirely to one side questions of employment law – including workers' compensation – *coverage*)" (emphasis in the original) p1

¹³⁸ See Duff, supra note [DUFF].

¹³⁹ RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958); Gasal v. CHS Inc., 798 F. Supp. 2d 1007, 1013 (D.N.D. 2011); Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968). See Deepa Das Acevedo, Unbundling Freedom in the Sharing Economy, 91 So. Cal. L. Rev. 793, 799 (2018); Brishen Rogers, Employment Rights in the Platform Economy: Getting Back to Basics, 10 HARVARD LAW & POLICY REVIEW 479, 485 (2016).

¹⁴⁰ Respondeat superior liability is a problem that needs to be addressed when it comes to app-based work. See Agnieszka McPeak, Sharing Tort Liability in the New Sharing Economy, 49 CONN. L. REV. 171, 192 (2016). See also, Travis Clark, The Gig is Up: An Analysis of the Gig-Economy and an Outdated Worker Classification System in Need of Reform, 19 SEATTLE JOURNAL FOR SOC. JUSTICE 769, 795 (2021) (proffering that states – Washington State in particular – should impose vicarious liability on app-based companies).

test and using it for means other than tort liability.¹⁴¹ Regardless, several federal statutes and their corresponding administrative agencies continue to use versions of the control test to determine a worker's classification for reasons other than tort liability including: Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Employee Retirement Income Security Act (ERISA), Federal Unemployment Tax Act (FUTA), Federal Insurance Contributions Act (FICA), Internal Revenue Code (IRC),¹⁴² NLRA,¹⁴³ Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act of 1964, and the Worker Adjustment and Retraining Notification Act (WARN).¹⁴⁴ Additionally, many courts use the control test as a default when the term "employee" is not statutorily defined.¹⁴⁵

The control test holds that a worker is an employee if the hiring entity "controlled or had the right to control the manner and means" of the worker's work. To make this determination, the totality of the circumstances is viewed while weighing a lengthy list of factors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;

¹⁴¹ Rogers supra note [BRPE] at 486; Sprague supra note [PEGS] at 60.

The IRS divides facts that provide evidence of the degree of control into three categories. These categories categorize twenty factors from Rev. Rul. 87-41, 1987-1 C.B. 296. The twenty factors align well with the Restatement Agency control test. The three categories are behavioral control, financial control, and the relationship between the parties. I.R.S. Publication 15-A Employer's Supplemental Tax Guide 6 (For use in 2021). See generally, S.D. Watson, Who's an Employee, 9 J. OF PENSION BENEFITS 20 (2002); Paul F. McGee, David A. Goodof, Jayanti Bandyopadhyay, & Andrew Christensen, Misgivings of Misclassification of Workers: Tax Gaps, 14 COMPETITION FORUM INDIANA 222 (2016).

¹⁴³ See infra (next section) where the NLRB and the DC circuit court have modified the strict use of the control test by inserting "entrepreneurial opportunity." Of note also in February 2020, the U.S. House of Representatives passed the PRO Act which would change from using the control test to the ABC test for purposes of worker classification in the NLRA. However, as of this writing, the PRO Act has not passed the Senate.

¹⁴⁴ Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 679 (2013); Michael W. Fox, *Whos' an Employee, Who's the Employer? It's Not as Easy as You Might Think*, 2016 TXCLE ADV. BUS. L. 1, appendix 25 (2016).

¹⁴⁵ See Lee, supra note [JOOHO] at 787.

¹⁴⁶ Logue v. United States, 412 U.S. 521, 525 n. 5 (1973).

- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business. 147

The control test makes sense when it comes to tort liability because if the hiring entity has sufficient control over the worker, it is in the best position to prevent the harm. However, this rationale fails when applying it to other areas of the law. "Large firms are often better positioned to ensure compliance with employment laws than their thinly-capitalized contractors and suppliers. Indeed, given its relatively narrow definition of employment, the control test affirmatively incentivizes companies to avoid employment law obligations by restructuring work relationships as contracting relationships." Using the control test to classify a worker as employee or independent contractor for purposes of anti-discrimination laws, such as ADEA, ADA or Title VII, makes little to no sense.

When it comes to app-based platform work, the control test does not provide consistent results. In the eyes of numerous judges and commentators, Uber (by example) has the right to control its drivers and therefore its drivers should be considered employees.¹⁴⁹ "To the extent that there is a dominant

¹⁴⁷ RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958); *see also* Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 739-740 (1989); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, at 323 (1992).

¹⁴⁸ Rogers, *supra* note [BRPE], at 486; Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 6 (2010). *See also* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 283, 288-89 (2011).

¹⁴⁵ See Garden, supra note [GARDEN], at 295 (2017). When referring to app-based work, Professors Charlotte Garden and Joseph Slater have observed: "Some commentators have persuasively argued that Uber drivers qualify as employees under existing tests, but that is certainly not the only view. See generally, Nicholas L. DeBruyne, Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy, 92 CHICAGO-KENT LAW REV 289, 307 (2017); See also Elizabeth Tippett, Employee Classification in the Sharing Economy, CAMBRIDGE HANDBOOK OF LAW AND REGULATION OF THE SHARING ECONOMY (forthcoming); Noah Zatz, Does Work Have a Future if the Labor Market Does Not?, 91 CHI-KENT L. REV. 1081, 1086 (2016); Keith Cunningham-Parmeter, From Amazon to Uber: Defining

view among labor and employment scholars, it seems to be that the difficulty of applying the traditional factors [is] wholly unsatisfactory; this group often advocates for new approaches to distinguishing independent contractors from employees, or to regulating work in the app-based economy altogether."¹⁵⁰

B. The Entrepreneurial Opportunity Test (NLRA)

The NLRA uses the term "employee" when determining who has the right to organize. As stated above, numerous federal statutes, including the NLRA use the control test or massage it. Currently there is dissention regarding what the actual test should be for classifying workers for NLRA purposes. In NLRB v United Insurance Co. of America, the U.S. Supreme Court held that the common law agency principles (the control test supra) are used to determine whether an individual is an employee or independent contractor under the NLRA. The National Labor Relations Board (NLRB) added to the foregoing test an entrepreneurial opportunity consideration that originally looked more like an additional factor—one not having any more weight than the others. But recently the NLRB adopted a more expansive use of entrepreneurial opportunities in making worker classification decisions in the Supershuttle

Employment in the Modern Economy, 96 B.U. L. Rev. 1673, 1682 (2016) for a discussion on how the sharing economy involves both non-compliance and avoidance and how the sharing economy makes it more difficult for companies to "identify control when it is exerted through software."

¹⁵⁰ Garden, *supra* note [GARDEN], at 295 (2017).

¹⁵¹ Section 2(3) of the National Labor Relations Act, as amended by the Taft-Hartley Act in 1947, defines a covered "employee" excluding "any individual having the status of an independent contractor." 29 U.S.C. § 152(3) (2006).

¹⁵² See Supershuttle DFW, Inc. and Amalgamated Transit Union Local 1338, No. 16-RC-010963, 367 NLRB No. 75, at *15 (Jan. 25, 2019) (McFerran, J., dissenting). See also Micah Prieb Stoltzfus Jost, Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach, 68 WASH. & LEE L. REV. 311 (2011).

¹⁵³ NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968). The Court further elaborated that the Restatement (Second) of Agency §220 factors are to be used, that there is "no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no one factor being decisive." Pg. 258; See also, Supershuttle DFW, Inc., 367 NLRB No. 75 *13 (2019).

¹⁵⁴ See, e.g., FedEx Home Delivery, 361 NLRB 610 (2014). The NLRB utilized this case to further explore the significance of entrepreneurial opportunity as a factor. Before FedEx Home Delivery, the Board previously considered entrepreneurial opportunity as part of its application of the control test but emphasized that no single factor was determinative. See, e.g., Dial-a-Mattress Operating Corp., 326 NLRB 884, 891 (1998) (evaluating common law agency principles as well as "significant entrepreneurial opportunity for gain or loss" in determining the employee status of customer delivery service workers).

case.¹⁵⁵ The impetus behind this shift emanates from the use of this entrepreneurial focus by the D.C. Circuit court. This lesser known test (or modification of the control test) is referred to as the Entrepreneurial Opportunities Test.¹⁵⁶

According to the NLRB, "entrepreneurial opportunity is not an independent common-law factor, let alone a 'super factor' . . . [n]or is it an 'overriding consideration, 'a shorthand formula' or a 'trump card' in the independent-contractor analysis." Instead, to explain in the NLRB's words, the "Board [] evaluate[s] the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." The Entrepreneurial Opportunity Test was described as an "important animating principle" by which to evaluate the control test factors i.e., "whether the position presents the opportunities and risks inherent in entrepreneurialism." 159

Of note, however, is that other NLRB decisions are not all in sync with the *Supershuttle* case, and Member McFerran wrote a very detailed, persuasive

¹⁵⁵ Supershuttle DFW, Inc., 367 NLRB No. 75, at *9 (2019). See Lee, supra note [JOOHO], at 798; Jeffrey M. Hirsch, Employee or Entrepreneur?, 68 WASH. & LEE L. REV. 353, 357 (2011); See, e.g., Roadway Package System (Roadway I), 288 NLRB 196 (1998); Standard Oil Co., 230 NLRB 967 (1977). See also Tanya Goldman & David Weil, Who's Responsible Here? Establishing Responsibility in the Fissured Workplace (Inst. for New Economic Thinking, Worker Paper No. 114, 2020). The NLRB has examined entrepreneurial opportunity in the past, but its application has evolved. While mention of entrepreneurialism was earlier than 1976, it wasn't until then that the NLRB consistently started incorporating it as a consideration in their worker classification cases. For instance, in NLRB v Hearst Publications, the U.S. Supreme Court found itself trying to distinguish between "employment" and "entrepreneurial enterprise." The Court considered many factors as relevant when making this determination, to wit, the permanency of the newsboys' relationship with Hearst, their limited ability to control their profit or loss, the extent to how integral they were to the business, their relative investment, and their lack of control over the terms and conditions of their work. (emphasis added) 322 U.S. 111, 124-5 (1944). However, shortly thereafter, in 1947, Congress passed the Taft-Hartley Act, which the Court interpreted as a "rejection of Hearst and a return to the common law control test." Goldman & Weil, supra note [WEILWHO], at 21. For a more complete history of worker classification determination, see Jost, supra note [JOST], at 315-332.

¹⁵⁶ Corp. Exp. Delivery Sys. v. N.L.R.B., 292 F.3d 777, 780 (D.C. Cir. 2002); FedEx Home Delivery, Inc. v N.L.R.B., 563 F.3d 492 (D.C. Cir. 2009). *See* Jost, *supra* note [JOST], at 318, where Jost provides an excellent, detailed explanation of the evolution of the definition of "employee" for NLRA purposes.

¹⁵⁷ Supershuttle DFW, Inc., 367 NLRB No. 75, at *9 (2019).

¹⁵⁸ Supershuttle DFW, Inc., 367 NLRB No. 75, at *15 (2019).

¹⁵⁹ Supershuttle DFW, Inc., 367 NLRB No. 75, at *8 (2019) quoting FedEx Home Delivery v NLRB (FedEx I), 563 F.3d 492, 497 (2009).

dissent in that case.¹⁶⁰ McFerran stated that the Entrepreneurial Opportunity Test is not really a test at all.¹⁶¹ Rather, consideration of the entrepreneurial opportunities is another factor to weigh with the other Restatement factors.¹⁶²

Whether looking at the Entrepreneurial Opportunity Test as an underlying "principle" to consider with all factors or as an additional factor to weigh in, consideration of entrepreneurial opportunities generally requires a look at whether workers have a "significant entrepreneurial opportunity for gain or loss." "When examining entrepreneurial opportunities, [the court] . . . consider[s] the opportunities created by the position to 'take [] economic risk and ha[ve] the corresponding opportunity to profit from working smarter, not just harder." "Morkers who have opportunities to work "harder" but not "smarter," are more like employees than independent contractors. Examples of working "smarter" are factually distinct but have been phrased as having the ability to hire individuals to either satisfy, or assist with, the hired-for task and make a profit from their assistance, 166 and having control over the amount of time they allocate to a task. 167

¹⁶⁰ See Supershuttle DFW, Inc., 367 NLRB No. 75, at *15 (2019) (McFerran, J., dissenting) (discussing the lack of support for the majority's claim that entrepreneurial opportunity is at the core of the control test). Member? McFerran further explains that none of the Restatement factors embody the concept of entrepreneurial opportunity.

¹⁶¹ *Id.* at *19.

¹⁶² Id

Lancaster Symphony Orchestra v. N.L.R.B., 822 F.3d 563, 565-66 (D.C. Cir. 2016);
 PIAA v. N.L.R.B., 926 F.3d 837, 840 (D.C. Cir. 2019);
 Corporate Express Delivery Systems,
 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002);
 Slay Transportation Co.,
 NLRB 1292, 1294 (2000).

¹⁶⁴ Lancaster Symphony Orchestra, 822 F.3d at 569 citing Corp. Exp. Delivery Sys., 332 NLRB at 780.

¹⁶⁵ PIAA, 926 F.3d 837, 840 (D.C. Cir. 2019) citing Corp. Exp. Delivery Sys., 292 F.3d at 780.

F.3d at 780 (D.C. Cir. 2002); Arizona Republic, 349 NLRB 1040, 1044-45 (2007) (finding that carriers were independent contractors because they had entrepreneurial potential to increase their income where they could use fill-time substitutes.); Argix Direct, Inc., 343 NLRB 1017, 1020-21 (2004) (finding that some of the drivers were entrepreneurs who owned multiple trucks and hired their own drivers.); Dial-A-Mattress, 326 NLRB at 891 (finding that the drivers were independent contractors because they had significant entrepreneurial opportunity for gain or loss where they could own multiple trucks and hire their own employees without being subject to employer control.) But see, Slay Transportation Co., 331 NLRB 1292, 1294 (2000) where the Board found despite the drivers having the ability to hire their own drivers, the employer's control of the compensation and pricing nullified any potential economic gain, noting that a "theoretical potential for entrepreneurial opportunity" was not enough to classify the drivers as independent contractors.

¹⁶⁷ PIAA, 926 F.3d 837, 842 (D.C. Cir. 2019) (Lacrosse officials have no control over the

As stated above, the D.C. Circuit court uses this test for NLRA matters but not all circuits do. Regardless of its recent use, some scholars and judges have criticized the Entrepreneurial Opportunity Test either stating it is inconsistent with U.S. Supreme Court precedent or that the definition of entrepreneur is not properly considered in the determination of the entrepreneurial opportunities. Another flaw noted is that the Entrepreneurial

length of the games they referee, and they may not hire assistants, assign games to others, or find cheaper replacements and pocket the difference.) *See also Corp. Exp. Delivery Sys.*, 292 F.3d at 780; *FedEx I*, 563 F.3d at 499-500.

¹⁷⁰ See Jeffrey M. Hirsch, Employee or Entrepreneur?, 68 WASH. & LEE L. REV. 353, 357 (2011). See also FedEx Home Delivery v NLRB (FedEx I), 563 F.3d 492, 504 (2009) (Garland, J., dissenting); Supershuttle DFW, Inc., 367 NLRB No. 75 (2019) (McFerran, J., dissenting), where Member McFerran pens that the Board majority adopted a confused approach "which cannot be reconciled with common-law principles or Supreme Court authority." slip p. 20.

¹⁷¹ See Lee, supra note [JOOHO], at 830. (Lee observes that judges seem to rely on their own "common sense notions of entrepreneur as profit seeking and/or risk taking" but that they do not have a "theoretical understanding of what entrepreneurship actually is and why it matters." Through his own proposed Entrepreneurial Responsibilities Test, Lee draws on three classic theories of entrepreneurship derived from Frank Knight, Joseph Schumpeter and Israel Kirzner to create a true definition of "entrepreneur." Lee defines the entrepreneur as someone who "assumes entrepreneurial responsibility for [their] economic activity."); Pivateau, supra note [PIVCOIN], at 119-124 (Pivateau's proposal goes beyond the Entrepreneurial Opportunity Test set forth by the D.C. Circuit by not only requiring "genuine opportunity, but the existence of actual entrepreneurship." Pivateau's test requires a court to consider each dimension of entrepreneurship: process (innovation), behavior (risk), and outcome (results).). For more on building entrepreneurship into tests see, Margaret Kobia & Damary Sikalieh, Towards a Search for the Meaning of Entrepreneurship, 34 J. Eur. Indus. Training 110, 111 (2010); Mirit Eyal-Cohen, Through the Lens of Innovation, 43 FLA. St. U.L. REV. 951, 952 (2016); Naomi B. Sunshine, Employees as Price-Takers, 22 LEWIS & CLARK L. REV. 105, 106 (2018). But see, Veena B. Dubal, Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities, 105 Cal. L. Rev. 101, 134 (2017). In her article examining the taxi industry, Dubal provides a critique of the use of working-class entrepreneurship as a means of classifying workers. She states that the current reliance or focus on entrepreneurship for determining a worker's classification relies on the neoliberal belief that workers benefit or prosper by being free of state protections. Further she notes that legalizing ride-sharing companies in California "produced casual, insecure work, were validated through the pretense

¹⁶⁸ See Corp. Exp. Delivery Sys., 292 F.3d at 779. See Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 983, 993-994, where the Ninth Circuit declined to use the DC Circuit's FedEx decision approach, noting that there was "no indication that California had replaced its longstanding right-to-control test with the new entrepreneurial opportunities test developed by the D.C. Circuit." The court further stated that under California law, the sort of company-constrained "entrepreneurial opportunities" available to the drivers "did not override other factors in [the] multi-factor analysis." Some courts have utilized entrepreneurial opportunity as part of their testing. See N.L.R.B. v Friendly Cab Co., 512 F.3d 1090, 1097 (9th Cir. 2008); Doud v Yellow Cab of Reno, Inc., 96 F. Supp. 3d 1076, 1092 (D. Nev. 2015); Crew One Prods., Inc. v. N.L.R.B., 811 F.3d 1305, 1311 (11th Cir. 2016).

Opportunities Test has been applied in a manner that determines the "entrepreneurial *potential* offered to all workers, rather than the realities of the actual relationship between the worker and the hiring company."¹⁷²

If the U.S. federal government adopts the ABC test via the PRO Act, these issues will likely become moot.¹⁷³

C. The Traditional Economic Realities Test and the Trump DoL's Version

The FLSA uses the term "employee" when determining who is protected under federal minimum wage, and overtime laws.¹⁷⁴ The FLSA uses the "economic realities test" to classify workers as either employees or independent contractors.¹⁷⁵ This test originated from two 1947 U.S. Supreme Court cases¹⁷⁶ and has evolved into a list comprised of the following factors:

1- The degree of the alleged employer's right to control the manner in which the work is to be performed; 2- the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3-the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4- whether the service rendered requires a special skill; 5- the degree of permanence of the working relationship; and 6- whether the service rendered is an integral part of the alleged employer's business.¹⁷⁷

Conceptually, a worker is an employee if "as a matter of economic reality, the worker follows the usual path of an employee and is dependent on the business

of working-class entrepreneurship, and were devised through new business models that transferred corporate risk onto workers."

¹⁷² David K. Millon, *Keeping Hope Alive*, 68 WASH. & LEE L. REV. 369, 372 (2011) referring to *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); Millon points out that in this case, all drivers were found to be independent contractors, even though some did not meet the test in reality and they would have been employees under the "traditional, long-established principles of agency law." *See* Jost, *supra* note [JOST], at 311.

¹⁷³ See infra Part V.A.

¹⁷⁴ 29 U.S.C. § 203(e).

¹⁷⁵ See Bodie *supra* note [BODIE] at 663. See, e.g., Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987) (using the "economic realities" test to interpret "employee" in the context of the FLSA); Schultz v. Capital Int'l Sec., Inc., 460 F.3d 595, 602 (4th Cir. 2006); Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008).

¹⁷⁶ Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); see also U.S. v. Silk, 331 U.S. 704(1947).

¹⁷⁷ https://www.govinfo.gov/content/pkg/FR-2021-03-12/html/2021-05256.htm

which he or she serves."¹⁷⁸ One of the justifications for use of this test is that workers who are economically dependent on their hiring entities are vulnerable due to their lack of bargaining power as compared to those who have greater bargaining power because they would only be limited by laws or regulations as to what they can negotiate. ¹⁷⁹ Judge Easterbrook in a 1987 concurring opinion stated,

Indeed, the details of independent contractor relations are fundamentally contractual. Firms can structure their dealings as "employment" or "independent contractor" to maximize the efficiency of incentives to work, monitor, and take precautions. The FLSA is designed to defeat rather than implement contractual arrangements In this sense "economic reality" rather than contractual form is indeed dispositive . . . [M]igrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. 180

The economic realities test has been widely criticized as being circular because it uses the word "employee" when defining an employee.¹⁸¹ Nevertheless, it is used to determine whether a worker is an employee for purposes of the FLSA as well as the Family Medical Leave Act of 1993 (FMLA) since the FMLA adopted the FLSA definition of employee.¹⁸²

On its face, the economic realities test is appears quite similar to the control test because the tests share common factors. Of note is the first enumerated factor, which is the right to control.

¹⁷⁸ See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET 13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008). See also Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992). This is a circular definition given that the term employee is used to define the term employee.

¹⁷⁹ See Bodie, supra note [BODIE], at 686; Lee, supra note [JOOHO], at 793.

¹⁸⁰ Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1544–45 (7th Cir. 1987) (Easterbrook, J., concurring) (citations omitted).

¹⁸¹ Bodie, *supra* note [BODIE], at 685; Sprague, *supra* note [PEGS], at 58; Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 295 (2001).

¹⁸² 29 U.S.C. § 203(e)(1); 29 U.S.C. § 2611(3). *See* Bodie *supra* note [BODIE] at 685 n.134. See also Michael S. Horne, Thomas S. Williamson, Jr., & Anthony Herman, The Contingent Workforce: Business and Legal Strategies § 2.07 (2017)(Some variation of the economic realities test is used to classify workers under the FLSA, the Equal Pay Act of 1963, the Family and Medical Leave Act of 1993, and the Employee Polygraph Protection Act of 1988.)

¹⁸³ See Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945 (9th Cir. 2010); Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 n.3 (9th Cir. 1999); Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n, 20 F.3d 938, 941-2 (9th Cir. 1994).

Control of employment opportunities is the linchpin of the economic realities test, viewed from the perspective of the employee's dependency on the employer and the vulnerability to discriminatory conduct. This focus requires an analysis of the economic terms of particular relationships on a case-by-case basis, rather than on the basis of a catalogue of immutable factors. The flexibility of this analysis is essential to avoid the rigidity of the common law [control] test and to accommodate the present range of employment relationships and the new patterns that may evolve in the future.¹⁸⁴

The "elevation of the control factor to a position of critical importance . . . suggests that [the economic realities test] easily could be oversimplified to an examination of [the control] factor alone, thus overshadowing the . . . effort to suggest a broader framework of analysis." But a distinguishing point is that instead of focusing on "personal control," this test focuses on the hiring entity's control over capital and the project. 186

Additionally, scholars have criticized that the economic realities test "captures neither economic reality nor economic dependence." Because there are so many factors, courts can lose sight of applying them to the individual relationship. "Instead of becoming the centerpiece of purpose-driven interpretation under the FLSA, this 'economic reality of dependence' test has itself degenerated into a disembodied laundry list of factors. Judges, regardless of whether they wish to include or exclude the workers in question, unimaginatively check off these factors without embedding the test in the act's purpose." 188

¹⁸⁴ Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 112-113 (1984).

¹⁸⁵ Dowd, *supra* note [DOWD], at 110. *See* Lee, *supra* note [JOOHO], at 796.

¹⁸⁶ Pivateau, supra note [PIVCOIN], at 106; Jane P. Kwak, Note, Employees Versus Independent Contractors: Why States Should Not Enact Statutes that Target the Construction Industry, 39 J. LEGIS. 295, 308 (2012)

¹⁸⁷Lee, supra note [JOOHO], at 781; Brishen Rogers, Employment Rights in the Platform Economy: Getting Back to Basics, 10 HARV. L. & POL'Y REV. 479, 482 (2016); Marc Linder, Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness, 21 COMP. LAB. L. & POL'Y J. 187 (1999); Lewis L. Maltby & David C. Yamada, Beyond "Economic Realties": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors, 38 B.C.L. REV. 239 (1997).

¹⁸⁸ Linder, *supra* note [LINDERDICHOTOMY], at 208. *See generally*, Guy Davidov, A PURPOSIVE APPROACH TO LABOUR LAW 4 (2016)("[W]e have to restore the connection between labour laws and the goals behind them.")

Steps were taken in January 2021 to change the test that governs worker classification for FLSA purposes. The Trump administration's U.S. Department of Labor Wage and Hour Division (DoL) announced a final rule "clarifying the standard" used for determining worker status. 190 While this new rule was withdrawn by the Biden administration prior to its effective date, it reflects that change is being sought. 191 The rule's executive summary explained the uncertainty that exists due to the economic realities test. 192 Through its new regulations, the DoL endeavored to provide an articulation that would "lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy."193

The new regulations changed the economic realities six-factor test into a five-factor test naming two "core factors": the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative and/or investment.¹⁹⁴ The remaining three factors or "guideposts" are: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production.¹⁹⁵ Observing that there is no "clear principle regarding how to balance the multiple factors" of the economic realities six-factor test, the new five-factor test required that the two core factors be allocated greater weight.¹⁹⁶ Additionally, the test was to be applied to actual circumstances or practice and not simply what is contractually or theoretically possible.

The DoL indicated that it had the "modern economy" in mind with this new structure, noting that certain factors in the old test are not as applicable to the modern economy¹⁹⁷ and that "continued legal uncertainty may deter innovative

¹⁹⁰ U.S. DEP'T OF LAB. WAGE AND HOUR DIV., WITHDRAWN RULE: INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT (2021). *See* 85 Fed. Reg. 187,60600 (Sept. 25, 2020) for Department of Labor's proposed rulemaking notice.

¹⁹¹ U.S. DoL: Withdrawn Rule: Independent Contractor Status Under the Fair Labor Standards Act https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor

¹⁹² 85 Fed. Reg. 187,60600 (Sept. 25, 2020). The Executive Summary explained that the current test's "process for its application lack focus and have not always been sufficiently explained by courts or the Department, resulting in uncertainty among the regulated community."

¹⁹³ *Id*.

¹⁹⁴ *Id*.

¹⁹⁵ Id. at 60610.

¹⁹⁶ *Id.* at 60609–10.

¹⁹⁷ Id. at 60608, referencing Coase's Theorem on transaction costs when considering the

There were 1,825 comments submitted when DoL solicited feedback.¹⁹⁹ By example, a call for more clarity for the technology community came from Dr. James Conrad, President of IEEE-USA, stating that "rules that protect technology workers, especially new technology workers, from exploitation need to also allow freelance software engineers, university professors with contracting businesses on the side, retired aerospace experts, licensed professional engineers, and technology start-up experts to flourish as legitimate consultants in their chosen fields."²⁰⁰ Dr. Conrad was not against the test as presented but noted specific needs for clarification.²⁰¹ At least one scholar has stated that the test is "still too similar to the economic realities test and has several factors that can complicate enforcement and application."²⁰²

economic realities test integral part factor. When transaction costs of hiring are high, businesses will hire more employees to perform routine tasks, but when transaction costs are low, as in the modern (platform) economy, more independent contractors are utilized. This makes the permanence factor irrelevant to the modern economy. *See* Ronald Coase, *Nature of the Firm*, 4 Economica 386 (1937). *See also* 85 Fed. Reg. 187,60609 (Sept. 25, 2020) (referencing how our shift from an industrial economy to a knowledge-based economy diminishes the investment factor's relevance and how shorter job tenures diminish the underlying rationale of the permanence factor because shorter job tenures are the trend); News Release, Bureau of Lab. Statistics, U.S. Dep't of Lab., Employment Tenure in 2014 (Sept. 18, 2014) (on file with author).

¹⁹⁸ 85 Fed. Reg. 187,60609 (Sept. 25, 2020). *See id.* at 60610 (noting that a clear standard is required so that entrepreneurs will know if what they would like to do, say in an app-based business, is going to result in litigation to determine worker classification).

¹⁹⁹ While there were so many comments submitted, at a glance there are many that are not actual comments on the proposed language, but rather disclosure as to what the person does to earn money or are simple rants. Unfortunately, these commenters do not understand the purview and scope of the FLSA and the proposed regulations. This acknowledgement drives the point that workers in the American economy do not understand our worker classification legal system. Example: Comment from Kimberly Jenkins: "I am self-employed with a full-time business. I have no children in my home anymore, so I enjoy the flexibility of driving for UberEats. I am able to drive when I want to, as it fits into my schedule. The extra income I earn goes toward my future retirement plans. I appreciate the flexibility of this gig, the opportunity to be of service to people, and additional income it provides me as a woman in her mid 50's."

²⁰⁰ Letter from Dr. James Conrad to Dep't of Lab. Wage & Hour Div. (Oct. 26, 2020). "Attempting to devise a simple rule, or rules, that classify individuals as employees or contractors neatly is not manageable. Trying to do so will either erroneously classify a good number of successfully [sic] consultants as employees, thereby ending careers prematurely, or require an endless list of exemptions, exceptions, and special rules that will needlessly complicate and confuse the life of independent contractors and their clients."

²⁰¹ *Id*

²⁰² Brian A. Brown II, *Symposium: Consumer Structure, Market Structure, and Political Power: Note: Your Uber Driver is Here, But Their Benefits are not: The ABC Test, Assembly Bill 5 and Regulating Gig Economy Employers*, 15 Brook. J. Corp. Fin. & Com. L. 183, 206 (Fall, 2020).

As mentioned above, the rule was withdrawn prior to its go-live date. The reasons given by the Biden administration DoL included: (1) The independent contractor rule was in tension with the FLSA's text and purpose, as well as relevant judicial precedent; (2) The rule's prioritization of two "core factors" for determining employee status under the FLSA would have undermined the longstanding balancing approach of the economic realities test and court decisions requiring a review of the totality of the circumstances related to the employment relationship; and (3) The rule would have narrowed the facts and considerations comprising the analysis whether a worker is an employee or an independent contractor, resulting in workers losing FLSA protections.²⁰³

While policymakers are considering what to do to modernize worker classification laws, particularly those meant to classify app-based platform workers properly, knowing about the traditional economic realities test and how Trump's DoL attempted to modify it is important. As of this writing, the economic realities test is still being used for FLSA purposes, although President Biden has said that he'd like to consider a uniform test for purposes of the FLSA, IRC, and NLRA.²⁰⁴ He has been cited as saying that he believes the ABC test, that is used in various states, should be used at the federal level.²⁰⁵ The next part discusses the ABC test and other tests that states are using (that differ from the federal tests.)

V. WORKER CLASSIFICATION TESTS AT THE STATE LEVEL

As shown in Part IV, the federal government uses three tests to determine worker classification. Because states are not required to utilize the federal government's tests, many states employ other tests. This Part outlines state tests that address worker classification such as the ABC test, and California's modified ABC test formerly "AB5." It then visits a current trend by a few red states to adopt the IRS twenty-factor test. ²⁰⁶ Finally, it outlines state laws that

²⁰³ 29 C.F.R. §§ 780, 788, 795. *See* U.S. Dep't of Labor, Wage & Hour Div., Withdrawn Rule: Independent Contractor Status Under the Fair Labor Standards Act (2021).

²⁰⁴ Biden Plan *supra* note [BIDENCAMP].

²⁰⁵ Id

Notably it is not only state policymakers that are drafting potential legislation. In May, 2021, the American Legislative Exchange Council ("ALEC") released a "Uniform Worker Classification Act" for consideration by states. https://www.alec.org/model-policy/uniform-worker-classification-act/. A version of the uniform act passed in West Virginia as the West Virginia Employment Law Worker Classification Act and became effective June 9. 2021. Bills have been submitted in numerous states and is gaining some traction in some states such as

directly address app-based work, such as marketplace contractor laws.

A. The ABC Test

The ABC Test (see below) has been trending for the past few years.²⁰⁷ It is used by numerous states for various determinations.²⁰⁸ It has been said that

North Carolina (HB 867), and Oklahoma (SB 380). The overall stated goal of the uniform act is to "simplify] the criteria used to define independent contractors with respect to employment, and impose[] objective standards on the differentiation of independent contractors from employees. [It] also provides for uniformity of a state's laws where the distinction between employees and independent contractors is relevant." In Section 2(a) of the act, it was made clear that the act applies to the gig economy. While ALEC describes itself as "America's largest nonpartisan, voluntary membership organization of state legislators...," others have described it as a conservative nonprofit organization that drafts sample legislation for use by state policymakers. See, Maya Pinto, Rebecca Smith & Irene Tung, Rights as Risk: Gig Companies' Campaign to upend employment as we know it, NATIONAL EMPLOYMENT LAW PROJECT (Mar. 25, 2019) https://www.nelp.org/publication/rights-at-risk-gig-companiescampaign-to-upend-employment-as-we-know-it/ (referring to ALEC as a "right-wing 'bill mill""); Nancy Scola, "Exposing ALEC: How Conservative-Backed State Laws Are All Connected," Atlantic, https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservativebacked-state-laws-are-all-connected/255869/; Yvonne Wingett Sanchez & Rob O'Dell, What is ALEC? 'The most effective organization' for conservatives, says Newt Gingrich, USA TODAY (Apr. 3, 2019) https://www.usatoday.com/story/news/investigations/2019/04/03/alecamerican-legislative-exchange-council-model-bills-republican-conservative-devosgingrich/3162357002/ ("ALEC was created in 1973 in Chicago by a small group of conservative activists and state legislators. Their broad goal was to support conservative ideas and make it easier to disseminate policies that advanced their cause at the state level.")

²⁰⁷ Maine adopted the ABC test in 1935; Massachusetts adopted it in 2004, and other states have followed. See, R. Stell, Independent Contractors and the ABC Test Reform in Maine, NAT'L FED'N OF INDEP. BUS. (Mar. 31, 2006) (Maine was first to adopt the ABC test.); See also, Anna Deknatel & Lauren Hoff-Downing, ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. PA. J.L. & SOC. CHANGE 53, 65 (2015). See also, Prince supra note [SPAB5] at Part II for coverage of California's 2019 adoption of the ABC test, and Part III. C. for a discussion of other states considering adopting the ABC test now that California has.

²⁰⁸ An analysis of all of the states that use the ABC test and for what purposes is beyond the scope of this article. *See*, Jennifer D. Thayer, Amye M. Melton, & David R. Grimmett, *Employment Classification in an App-Based Nation*, 39 ABA TAX TIMES No. 4 (Summer 2020) (Thayer et. al. set forth states that use the ABC test and those that use a shortened version of the ABC test that does not include element B.) Note that even if the state uses a form of the ABC test, it may not use it for all purposes, i.e. It may only use it for unemployment compensation purposes. *See*, 43 P.S. § 753(I)(2)(B) for the definition of "employment" for purposes of being "self-employed" for unemployment compensation in Pennsylvania where the statute only uses two of the elements of the ABC test (A and C). (*Lowman v Unemployment Comp. Bd. of Rev.* J-73-2019 Decided July 24, 2020).

"widespread adoption of the ABC test could be a game changer." However, not every state's policymakers are enamored with the ABC test, and some are refuting the use of it. 210

Although a creature of state law, the ABC test has shown signs of gaining traction at the federal level. In 2020, The Worker Flexibility and Small Business Protection Act, if passed, would have adopted the ABC test for purposes of the NLRA, FLSA, OSHA, the Federal Mine Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Davis-Bacon Act, and the Walsh-Healy Public Contract Act.²¹¹ The Protecting the Right to Organize Act of 2021 (PRO Act) would adopt the ABC test for purposes of the NLRA.²¹² The PRO Act passed the House on March 9, 2021, but it is not likely to pass the Senate "given a lack of Republican support." President Biden's platform materials indicated that he was a proponent of using the ABC test for various federal statutes.²¹⁴

What is it and why all of the interest? The ABC test is said to "offer[] a relatively more straightforward approach that avoids the totality of the circumstances balancing of the economic realities analysis. But, unlike the economic realities test, it may result in both over- and under-inclusiveness." The ABC test from the Massachusetts statute states:

An individual performing any service . . . shall be considered to be an employee unless:

(1) the individual is free from control and direction in connection with

²⁰⁹ Sprague *supra* note [ANTE] at 767. *See* V.B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* 5, (Leg. Stud. Rsch. Paper Series, Working Paper No. 381, 2019) (arguing that proposals to the historical tests often fail to consider "the legally inscribed ability of businesses to re-shape their business models and evade employment obligations.") Professor Dubal notes that the ABC test shifts the focus to enforcement, which challenges the ability of businesses to escape liability.

²¹⁰ See *infra* section III. C. Some scholars also have reservations, see Zelinsky *supra* note [EDZ] at __ stating that the ABC test is "no model of clarity" and Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L. J. 111, 129 (2008).(Stating that the ABC test "introduces new interpretative challenges to the determination of employee status.")

²¹¹ S. 4738, 116th Cong. § 102 (2020); H.R. 8375, 116th Cong. § 102 (2020).

²¹² S. 420, 117th Cong. § 101(b) (2021); H.R. 842, 117th Cong. § 101(b) (2021).

²¹³ Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021) https://www.npr.org/2021/03/09/975259434/house-democratspass-bill-that-would-protect-worker-organizing-efforts

²¹⁴ See, Biden Plan *supra* note [BIDENCAMP].

²¹⁵ Goldman & Weil *supra* note [WEILWHO] at 46.

the performance of the service, both under his contract for the performance of service and in fact; and

- (2) the service is performed outside the usual course of the business of the employer; and,
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.²¹⁶

As shown, the ABC test presumes employee status unless all elements of the test are proven to be met by the hiring entity, in which case the worker will be classified as an independent contractor. Since the test contains three elements, it is conceivably simpler and should improve predictability, thereby reducing uncertainty. Undeniably, there appear to be less considerations than the control and economic realities tests require. And the ABC test is elemental, not factor-based, so one would think that it would be easier to apply since no weighing of factors must be done.²¹⁷

The ABC test reclassifies most app-based workers as employees because it is difficult for typical app-based relationships to satisfy the second element—the service is performed outside the usual course of the business of the employer. For example, in *People v. Uber Technologies, Inc.*, the California Court of Appeal held that Uber drivers were employees under California's ABC test because even though Uber drivers met elements one and three, they failed element two. ²²⁰

²¹⁶ MGL C.149 §148B

²¹⁷ See generally, Sprague supra note [ANTE] at 767 ("the ABC test is no panacea with respect to employee/independent contractor classification."); Edward A. Zelinsky, "Defining Who is an Employee After A.B.5: Trading Uniformity and Simplicity for Expanded Coverage," 70 CATH. UNIV. L. REV. 52, 52 (forthcoming) (2020) (Further, it is "no model of clarity" and it "introduces new interpretative challenges to the determination of employee status." (Zelinksy at 58)

²¹⁹ See generally, Keith Cunningham-Parmeter, Gig-Dependence: Finding the Real Independent Contractors of Platform Work, 39 N. Ill. U. L. Rev. 379, 423 (2019)(commenting that had Razak v. Uber Technologies, Inc. 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018) been tested under the ABC test, the drivers would have been considered part of Uber's regular business – element 2 – and therefore classified as employees.)

²²⁰ People v. Uber Technologies, Inc., 56 Cal. App. 5th 266, 298 (Cal. Ct. App. 2020) as modified on denial of reh'g (Nov. 20, 2020), review denied (Feb. 10, 2021). ("While these details relating to how drivers are compensated might to a limited extent bear on whether the drivers are free from Uber's direction and control or whether the drivers are engaged in an independently established trade—prongs A and C of the ABC test—they do not support Uber's

Further, in *Cunningham v. Lyft, Inc.*, U.S. District Court Judge Talwani considered the likelihood that drivers would be "employees" of Lyft under the ABC test.²²¹ In proving element two under Massachusetts's ABC test, Lyft had to show that a driver's service "is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed."²²² Judge Talwani was not persuaded by Lyft's argument that it "does not provide transportation services and [that it] is not a transportation carrier."²²³ "[T]he court finds a substantial likelihood of success on the merits that, despite Lyft's careful self-labeling, the realities of Lyft's business—where riders pay Lyft for rides—encompasses the transportation of riders."²²⁴ As this and other cases move forward, Uber, Lyft, and others are taking steps to place an initiative on the November 2022 Massachusetts ballot similar to California's Proposition 22²²⁵ ("Prop 22") that would allow voters to decide their resident drivers' classification.²²⁶

The ABC test (like the control and economic realities tests) is designed to catch employers who misclassify workers as independent contractors. However, because some workers are legitimately independent contractors or

contention that the drivers' work is outside the usual course of its business under prong B.") But note that Uber, Lyft, et al were successful with their ballot initiative, "Prop 22," and now, despite the court rulings, California rideshare app drivers are independent contractors (or some sort of other category of worker) unless Prop 22 is ultimately found to be unconstitutional. *See*, *Castellanos v. State of California*, No. RG21088725 [] (Aug. 20, 2021)(Judge Roesch ruled that Prop 22 was unconstitutional because it "limits the power of the future legislature to define app-based drivers as workers subject to workers' compensation law.") Uber et al are expected to appeal the ruling, so the constitutionality of Prop 22 is still being tested.

²²¹ Cunningham v. Lyft, Inc., 2020 WL 2616302 (2020).

²²² *Id*.

 $^{^{223}}$ Id

²²⁴ *Id.* More tales of woe for Uber and Lyft occurred when the Superior Court of Massachusetts denied Uber and Lyft's motion to dismiss the claim that their workers are employees not independent contractors and that they have been depriving drivers of required minimum wages, overtime, and sick leave. Healey vs. Uber Technologies, Inc. and Lyft, Inc., 2021 WL 1222199 (March 25, 2021).

²²⁵ See infra Part V.B.

²²⁶ Nate Raymond & Tina Bellon, *Group backed by Uber, Lyft pushes Massachusetts gig workers ballot measure*, REUTERS (August 4, 2021)("The proposal would establish an earnings floor equal to 120% of the Massachusetts minimum wage for app-based rideshare and delivery drivers, or \$18 an hour in 2023 before tips. Drivers would be guaranteed at least \$0.26 per mile to cover vehicle upkeep and gas."); Spencer Buell, *What you need to know about the Gig Worker Ballot Question*, BOSTON MAGAZINE (September 20, 2021)(The initiative could have an indirect impact on hotel and retail workers if employers decide to replace their employees with gig labor. This was pointed out by Senator Elizabeth Warren.)

the industries in which they operate cannot function by over-inclusively reclassifying workers as employees, there are often carve-outs or exemptions to a statute containing the ABC test.²²⁷ Policymakers considering the adoption of the ABC test with carve-outs, therefore, should proceed with caution so that the carve-outs do not "reflect political will and power rather than a need to rebalance power in a working relationship."²²⁸ The state that uses the ABC test and has the most carve-outs is California.

B. California's Modified ABC Test—Formerly "AB5"

California's worker classification law is comprised of the ABC test²²⁹ and a 1989 court-created multi-factor test (the *Borello* test).²³⁰ Originally codified

https://www.bloomberglaw.com/public/desktop/document/THEPEOPLEOFTHESTATEOFC ALIFORNIAvsHANDYTECHNOLOGIESINCETALDocketNo?1633976810

²²⁷ See, Jean-Marie Caterina, Commentary: ABC exemptions help workers, protect small businesses, The Press Herald (June 18, 2021). https://www.pressherald.com/2021/06/18/commentary-abc-exemptions-help-workers-protect-small-businesses/ ("The ABC test cannot tell the difference between a small-business owner and a worker at risk, but members of Maine's congressional delegation can. If they conclude that the ABC test is the right way to help workers, then they should help small businesses like [my real estate business] and others through California-like exemptions.")

²²⁸ Goldman and Weil *supra* note [WEILWHO] at 50.

²²⁹ Need AB5 cite from note 17? Calif. Assembly Bill 2257 § 2 (adding Article 1.5 and repealing LABOR CODE § 2750.3; effective Sept. 4, 2020). *See* Prince *supra* note [SPAB5] at 10. When referring to the California worker classification law, most still refer to it as AB5. This practice continues as we see the San Francisco complaint against Handy using AB5 as the name of the statute. California vs. Handy Techs, Inc. CGC-21-590442 line 8 filed March 17, 2021

²³⁰ The California Department of Industrial Relations provides the *Borello* multifactor test as follows: (1) Whether the potential employer has all necessary control over the manner and means of accomplishing the result desired (although such control need not be direct, actually exercised or detailed); (2) Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer; (3) Whether the work is a regular or integral part of the employer's business; (4) Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work; (5) Whether the worker has invested in the business, such as in the equipment or materials required by their task; (6) Whether the service provided requires a special skill; (7) The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision; (8) The worker's opportunity for profit or loss depending on their managerial skill; (9) The length of time for which the services are to be performed; (10) The degree of permanence of the working relationship; (11) The method of payment, whether by time or by the job; (12) Whether the worker hires their own employees; (13) Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and (14) Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-

as "AB5," the law has been updated (repealed) by AB2257.²³² California's worker classification law has broad coverage in that it covers unemployment compensation, workers' compensation, and the state's minimum wage and overtime protections.²³³ The scope is broader than what most other states use the ABC test for.

California applies the ABC test for some workers and its older *Borello* test for others. If a worker is exempt (or carved out) from the ABC test, then it is tested under the *Borello* test. In other words, using *Borello* is a default position used for workers that are exempt from being tested under the elemental ABC test. "AB5's initial carve-outs have been subsequently supplemented by those in AB2257 in an effort to accommodate workers in several industries. Presently there are 109 exemptions from the ABC test. 234 Accordingly, AB2257 does not simplify or clarify a worker's classification but rather creates 'rigid exemptions' with detailed conditions." 235

AB5 reclassified ride-share and delivery app drivers as employees entitling them to a host of protections under the California labor laws. However, Uber, Lyft, and a select group of other rideshare/delivery companies placed an initiative known as Prop 22 on the California ballot in November 2020. Prop 22 asked residents to vote in favor of treating "app-based transportation (rideshare) and delivery drivers as independent contractors and adopt labor and wage policies specific to app-based drivers and companies. Prop 22 passed, and if it is upheld by the courts, such drivers will be exempt from California's

employee relationship). https://www.dir.ca.gov/dlse/faq_independentcontractor.htm; S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal. 3d 341 (1989).

²³² *Id*.

²³³ Id.

²³⁴ See Prince supra note [SPAB5] Appendix A for the list of exemptions from AB5 and AB2257; Chris Micheli, AB 5 'Fix:' New Exemptions Added to California's Independent Contractor Law, The California Globe, September 14, 2020, https://californiaglobe.com/section-2/ab-5-fix-new-exemptions-added-to-californias-independent-contractor-law/

²³⁵ See Prince supra note [SPAB5] at 22 and Appendix A. See, Richard Reibstein, AB2257: Not Much Better Than AB5 for Most Industries in California Using Independent Contractors, JD SUPRA, Sept. 8, 2020, https://www.jdsupra.com/legalnews/ab2257-not-much-better-than-ab5-for-35040/. (Discussing the shortcomings of both AB5 and AB2257. Specifically noting key deficiencies in AB2257's exemptions.).

²³⁶ See e.g. People v. Uber Technologies, Inc., 56 Cal. App. 5th 266, 298 (Cal. Ct. App. 2020) as *modified on denial of reh'g* (Nov. 20, 2020), *review denied* (Feb. 10, 2021).

²³⁷ California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020), https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020).

AB5 entirely.²³⁹ Uber and the others set forth benefits and a minimum wage calculation to apply to its drivers although these were not as generous as what the drivers would receive if classified as employees under California law.²⁴¹ Essentially, Prop 22 established a third category of worker by providing drivers with lesser benefits than an employee would receive but more than an independent contractor would receive.²⁴² While drivers are getting a minimum hourly wage, the hours are not calculated as favorably and fairly as they would be if the drivers were classified as "employees." For example, drivers who come within the purview of Prop 22 will not be paid for time waiting for work but rather only for time paid executing the task. According to Professor Dubal's research, "this unpaid time ranges from 40-60% of all the time they spend working."²⁴³ And what is the demographic of these ride-share and delivery drivers? In our cities it is overwhelmingly immigrants and subordinated minorities.²⁴⁴ Prop 22 compounds the wealth gap and does little to reduce economic insecurity and health issues for app-based drivers.

Prop 22's constitutionality is working its way through the California courts. On August 20, 2021, the California Superior Court ruled that Prop 22 was unconstitutional because it limited the future legislature's ability to change workers' compensation laws.²⁴⁵ Uber will appeal the ruling.²⁴⁶

Prop 22 only exempted rideshare and delivery app drivers from AB5. It did

²³⁹ Through extensive and expensive lobbying efforts, Uber and group were successful and Prop 22 received 58.63% of the votes. See, California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020) available at https://ballotpedia.org/California_Proposition_22,_App-Based Drivers as Contractors and Labor Policies Initiative (2020)

²⁴¹ *Id. See*, Brian Chen & Laura Padin, Prop 22 Was a Failure for California's App-based Workers. Not, It's Also Unconstitutional, NELP (Sept. 16, 2021)("[T]he benefits package that the companies offered in exchange proved to be a mirage.") https://www.nelp.org/blog/prop-22-unconstitutional/

²⁴² Dubal *supra* note [VDCODE] at 4. (Prop 22 "threatened to take away the employment rights granted to California platform workers and [codified] a third, substandard category of work for delivery and transportation 'network workers.'")

²⁴³ Note 11 and Veena Dubal, *The Time Politics of Home-Based Digital Piecework*, 2020 ETHICS IN CONTEXT 50 (2020), https://papers.csm.com/sol3/papers.cfm?abstract_id=3649270.

[[]https://perma.cc/ESX8-Z49H].

²⁴⁴ Dubal, *supra* note [VDCODE], at 6.

²⁴⁵ Castellanos v. State of California, No. RG21088725 [] (Aug. 20, 2021)(Judge Roesch ruled that Prop 22 was unconstitutional because it "limits the power of the future legislature to define app-based drivers as workers subject to workers' compensation law.") Uber et al. are expected to appeal the ruling.

²⁴⁶ Preetika Rana, California Ballot Measure that Classifies Uber, Lyft Drivers as Independent Ruled Unconstitutional, THE WALL STREET JOURNAL (Aug. 20, 2021).

not exempt other app-based companies, and California District Attorneys have launched misclassification cases against other app-based companies including Handy, Taskrabbit, Rover, Mobile Wash, Fuzzy Pet Health, and Lime scooters.²⁴⁷ In the suit against Handy, the San Francisco District Attorney's complaint alleges that element one of the ABC test cannot be met by Handy.²⁴⁸ "Through Handy's omnipresent App and the policies and structure imposed on Pros by the company, Handy directs and controls the work of its Pros."²⁴⁹ The complaint outlines more indicia of control including the requirement to use certain COVID-19 protocols.²⁵⁰ The complaint also alleges that Handy cannot meet element two of the ABC test because Pros perform services in the usual course of Handy's business.²⁵¹ Lastly, the complaint also alleges that Handy cannot meet element three of the ABC test because Pros working for Handy are not engaged in their own independently owned businesses.²⁵² As of this writing, this case is pending.

C. The IRS Twenty-Factor Test

While numerous states have adopted (or are considering adopting) the ABC test, some have recently adopted the 1987 IRS twenty-factor test found in Revenue Ruling 87-41 instead.²⁵³ In 2019, Arkansas, Oklahoma, and

²⁴⁷ On August 17, 2020, TaskRabbit settled a pre-AB5 misclassification class action suit for \$1,750,000. http://www.finholtsettlement.com/media/2972431/preliminary_approval_order.pdf; Maeve Allsup, *Gig Companies Face California Crackdowns that Über, Lyft Escape,* DAILY LABOR REPORT (April 15, 2021). https://news.bloomberglaw.com/daily-labor-report/gig-companies-face-california-crackdowns-that-uber-lyft-escape

²⁴⁸ California vs. Handy Techs, Inc. CGC-21-590442 filed March 17, 2021. https://www.bloomberglaw.com/public/desktop/document/THEPEOPLEOFTHESTATEOFC ALIFORNIAvsHANDYTECHNOLOGIESINCETALDocketNo?1633976810

²⁴⁹ *Id.* at line 30.

²⁵⁰ *Id.* at line 36. "During the current COVID-19 pandemic, Handy has exercised even further control and monitoring of its Pros. Handy now 'require[s] that Pros wear PPE during bookings' and '[s]tay home and rest if they feel sick.' Handy also mandates that Pros do 'daily self-certifications,' explaining to customers that '[w]e are requiring every pro to confirm that they are not experiencing a fever, cough, or shortness of breath and committing to following CDC and local health regulations on a daily basis.' And Handy has turned all 'indoor assembly/installations' into 'no contact services' whereby Handy requires that Pros follow detailed instructions on how to conduct themselves before, during and after the job." The complaint then lists detailed directions regarding use of PPE and such written by Handy.

²⁵¹ *Id.* at line 44.

²⁵² *Id.* at line 56.

²⁵³ Rev. Rul. 87-41, 1987-1 C.B. 296. Using the twenty-factor test is not new. Some states have been using it for some time, e.g. Michigan started using the twenty-factor test for unemployment compensation purposes in 2013 having previously used the economic realities

Tennessee abandoned the ABC test (or consideration of it) and adopted the IRS twenty-factor test (see below).²⁵⁷ In 2021, Alabama jumped on the bandwagon and also adopted the IRS twenty-factor test.²⁵⁸

Interestingly, in 2020, the Commonwealth of Virginia's legislature was presented with a choice: adopt the ABC test or the IRS twenty-factor test.²⁵⁹ After considering both, it chose to adopt the twenty-factor test.²⁶⁰

In the summer of 2021, West Virginia passed the West Virginia Employment Law Worker Classification Act that outlines a safe-harbor for classifying a worker as an independent contractor.²⁶¹ If the safe-harbor is not met, the IRS twenty-factor test applies before deciding whether a person should be classified as an employee.²⁶² In other words, failing to meet the safe-harbor does not automatically classify the worker as an employee. The hiring entity has another opportunity to show the worker is truly an independent contractor through application of the twenty-factor test.

The twenty factors as outlined in Revenue Ruling 87-41 are:

- 1. Instructions
- 2. Training
- 3. Integration
- 4. Services Rendered Personally
- 5. Hiring, Supervising, and Paying Assistants
- 6. Continuing Relationship

test. https://www.michigan.gov/documents/uia/155 - Independent Contractor 20-Factor IRS Test Revised 01-08-13 408013 7.pdf Missouri has been using the twenty-factor test for unemployment tax purposes since 2001, *Klausner v. Brockman*, 58 S.W.3d 671, 680 (Mo.App.2001).

261 Cite to WVA ACT: https://www.wvlegislature.gov/Bill Status/bills text.cfm?billdoc=HB2590%20ORG.htm&yr=2021&sesstype=RS&i=2590 and https://whoismyemployee.com/2021/03/29/west-virginia-adopts-pro-business-independent-contractor-test/

^r262 *Id*.

²⁵⁷ HB 1850 (Arkansas Empower Independent Contractors Act) was signed by Governor Asa Hutchinson on April 16, 2019; HB 1095 (Oklahoma Empower Independent Contractors Act) was signed by Governor Kevin Stitt on May 13, 2019; HB 539 was signed into law by Governor Bill Lee on May 10, 2019.

²⁵⁸ HB 408 was signed by Governor Kay Ivey on April 7, 2021. It became effective August 1, 2021. HB 408 does not apply for workers' compensation purposes.

²⁵⁹ HB 801 which would have adopted the ABC test, but instead enacted HB 1407 which requires use of the twenty-factor test.

²⁶⁰ HB 1407 was signed by Governor Ralph Northam on April 6, 2020. It became effective on July 1, 2020.

- 7. Set Hours of Work
- 8. Full Time Required
- 9. Doing Work on Employer's Premises
- 10. Order or Sequence Set.
- 11. Oral or Written Reports
- 12. Payment by Hour, Week, Month
- 13. Payment of Business and/or Traveling
- 14. Furnishing of Tools and Materials
- 15. Significant Investment
- 16. Realization of Profit or Loss
- 17. Working for More than One Firm at a Time
- 18. Making Service Available to General Public
- 19. Right to Discharge
- 20. Right to Terminate

No one single factor is dispositive; hiring entities (and courts) are to consider all of the factors and the relationship as a whole.²⁶³

It is likely that business-friendly states are adopting the IRS test because their resident business owners are often most immediately concerned with taxation—paying half of a worker's social security and Medicare taxes and being subject to withholding. Ensuring alignment with the IRS by using its test gives business owners security in the knowledge that they are less likely to violate tax laws and thereby receive deficiency notices.

While Tennessee has adopted the use of the twenty-factor test, it does not use it for purposes of app-based companies. Tennessee, instead, adopted a "marketplace contractor" law to address app-based workers directly.

D. Addressing the Gig Economy Head-on: Marketplace Contractor Laws

A handful of states (mostly red voting states) have adopted app-based worker classification laws or administrative rules that specifically address the classification of marketplace platform workers.²⁶⁴ These laws typically use the term "marketplace contractor" when addressing the app-based worker. Of note, these laws do not create a functionally different classification like the United Kingdom's limb (b) worker or Prop 22's other "category," but instead clarify that workers who fit within these statutes will be classified as independent

²⁶³ I.R.S. Publication 15-A Employer's Supplemental Tax Guide 6 (For use in 2021).

²⁶⁴ See table below. <u>Ariz. Rev. Stat. Ann. § 23-1603; Fla. Stat. § 451.02; Ind. Code § 22-1-6-3; Iowa Code § 93.2; Ky. Rev. Stat. Ann. § 336.137; Tenn. Code Ann. § 50-8-102; Utah Code Ann. § 34-53-201; 40 Tex. ADMIN. CODE §815.134 (2021).</u>

contractors.

The marketplace contractor laws were initially authored by Handy, Inc., an app-based company that matches workers with customers who need to hire a cleaning or handy person. Although Handy initially engaged in unsuccessful lobbying efforts in California, Colorado, Alabama and Georgia, it ultimately focused its lobbying efforts on "mostly-Republican states" seeing these states as ones where there was a greater potential for success. Handy's political strategist and lobbyist, Bradley Tusk, has been quoted as saying: "If starting with the harder states failed, we're taking a shot at something's [sic] that a little faster' 'What is ultimately a better business decision? To try to change the law in a way that you think works for your platform, or to make sure your platform fits into the existing law?" 267

Table 1 lists the states that have marketplace contractor statutes together with their statutory citations.

able 1. Marketplace Contractor Statutes by State			
State	Marketplace Contractor Statute		
Arizona	Ariz. Rev. Stat. Ann. § 23-1603		
Florida	Fla. Stat. § 451.02		
Indiana	Ind. Code § 22-1-6-3		
Iowa	Iowa Code § 93.2		
Kentucky	Ky. Rev. Stat. Ann. § 336.137		
Tennessee	Tenn. Code Ann. § 50-8-102		
Utah	<u>Utah Code Ann. § 34-53-201*</u>		

^{*}limited to building service contractors

²⁶⁵ The marketplace contractor laws are often referred to as "Handy laws." *See*, Sarah Kessler, "Handy is Quietly Lobbying State Lawmakers to Declare its Workers Aren't Employees," Quartz at Work, Mar 30, 2018, https://work.qz.com/1240997/handy-is-trying-to-change-labor-law-in-eight-states/; Norman Scheiber, "Is Gig Work a Job? Uber and Others are Maneuvering to Shape the Answer," NYT, March 26, 2019.
https://www.nytimes.com/2019/03/26/business/economy/gig-economy-lobbying.html; Justin Miller, "Handy Wanted to Disrupt Texas Labor Laws. It May Have Also Disrupted Texas Lobbying Laws." April 3, 2019. https://www.texasobserver.org/handy-wanted-to-disrupt-texas-labor-laws-it-may-have-also-disrupted-texas-lobbying-laws/

²⁶⁶ Lydia DePillis, For gig economy workers in these states, rights are at risk, CNN MONEY, (Mar 14, 2018) https://money.cnn.com/2018/03/14/news/economy/handy-gig-economy-workers/index.html (California, Colorado, Alabama, and Georgia declined to adopt the Handy laws.) Handy seems to have foreseen the potential misclassification issue in California and now finds itself in a lawsuit brought by the San Francisco District Attorney's office. See infra at Part V.B.

²⁶⁷ DePillis *supra* note [DEPILL].

The stated motivation behind the marketplace contractor laws is to provide consistency and reduce uncertainty, however, these laws have been criticized by many scholars and organizations because by codifying "independent contractor" status for platform companies, app-based workers are precluded from employment-related protections such as workers' compensation.²⁶⁸ The laws are also self-serving because companies make more money if their workers are independent contractors. App-based companies thus do not want to absorb the costs or risks of having employees thereby giving them a competitive edge against companies that do classify workers as employees.²⁶⁹

1. Tennessee

Marketplace contractor statutes are all similar since Handy authored them. As such, looking at one is representative of the others. Tennessee's statute states:

- [A] marketplace contractor is an independent contractor, for all purposes under state and local laws . . . if the following conditions are set forth in a written agreement between the marketplace platform and the marketplace contractor:
- (1) The marketplace platform and marketplace contractor agree in writing that the contractor is an independent contractor with respect to the marketplace platform;
- (2) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to

²⁶⁸ Duff *supra* note [MDMARK] at __. Aside from the obvious reasons that this is problematic, it is exacerbated when one considers that "on-demand jobs are among the most dangerous in the nations, with most work focused on transportation, delivery, and home services." David B. Torrey, Nonstandard Work and Workers in the Gig Workforce: An Introduction and Pennsylvania Workers' Compensation Doctrine, Annual Pennsylvania Workers' Compensation Conference June 7-8, 2018 citing Rebecca Smith & Sarah Leberstein, Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy (Sept. 2015).

²⁶⁹ Keeping costs down puts these companies at a competitive advantage. For example, in the complaint brought by San Francisco District Attorney against Handy, the DA avers that in misclassifying the workers, Handy does not contribute to the social safety net like the workers' compensation fund or the unemployment trust fund and therefore it violates California's unfair competition law. Additionally, the complaint states "The illegal employment practices of Handy further harm responsible businesses that comply with State and local laws, because misclassification skews the market and allows companies like Handy to reap the benefits of, *inter alia*, artificially low labor costs, which can drive competitors out of business or prevent new businesses from ever entering the market." Line 68.

accept service requests from third-party individuals or entities. If a marketplace contractor posts the contractor's voluntary availability to provide services, the posting does not constitute a prescription of hours for purposes of this subdivision (a)(2);

- (3) The marketplace platform does not prohibit the marketplace contractor from using any online-enabled application, software, website, or system offered by other marketplace platforms;
- (4) The marketplace contractor may, at its discretion, enlist the help of an assistant to complete the services, and the marketplace platform may require the assistant to complete the marketplace platform's standard registration and vetting process. If the marketplace contractor enlists the help of an assistant, the marketplace contractor, not the marketplace platform, is responsible for paying the assistant;
- (5) The marketplace platform does not restrict the marketplace contractor from engaging in any other occupation or business;
- (6) The marketplace platform does not require marketplace contractors to use specific supplies or equipment;
- (7) The marketplace platform does not control the means and methods for the services performed by a marketplace contractor by requiring the marketplace contractor to follow specified instructions governing how to perform the services. However, the marketplace platform may require that the quality of the services provided by the marketplace contractor meets specific standards and requirements;
- (8) The agreement or contract between the marketplace contractor and the marketplace platform may be terminated by either the marketplace contractor or the marketplace platform with or without cause;
- (9) The marketplace platform provides no medical or other insurance benefits to the marketplace contractor, and the marketplace contractor is responsible for paying taxes on all income derived as a result of services performed to third parties from the assignments or connections received from the marketplace platform; and
- (10) All, or substantially all, payment to the marketplace contractor is based on performance of services to third parties who have engaged the services of the marketplace contractor through the marketplace

platform.²⁷⁰

This law is a perfect example of how Handy authored a statute that "simply restates the elements of the current business model of its company. The "test" is said to be rigged so that gig companies will always earn a passing grade and an exemption from labor standards governing the employer-employee relationship.²⁷¹

Marketplace contractor laws, moreover, have been said to place downward pressure on labor standards while incentivizing businesses to incorporate online labor platform technology in order to have a legal basis for classifying workers as independent contractors.²⁷²

Handy laws attempt to put distance between the marketplace platform hiring entity and the worker to avoid a "control" issue. In fact, in looking at the Tennessee statute above, one can see how it delicately dances around the control factor provided by other tests by outlining specific ways it is *not controlling* the workers.

The Tennessee marketplace contractor statute contains an exemption for ride-sharing platforms like Uber and Lyft.²⁷³ These companies are "transportation network companies" and are addressed under a different provision in the Tennessee Code.²⁷⁴ Workers who do not come within the purview of the marketplace contactor laws previously were tested under the ABC test, however, as noted in Part V.C. effective January 1, 2020, Tennessee abandoned the ABC test in favor of the IRS twenty-factor test from Rev. Rul. 87-41.²⁷⁵

2. Texas

The Texas Workforce Commission (the agency that handles unemployment related matters such as unemployment insurance and taxation) passed an app-based worker/marketplace contractor rule that became effective on April 29, 2019.²⁷⁶ Texas Administrative Code Section 815.134, "Employment Status:

²⁷⁰ Tenn. Code 50-8-102 (2021).

²⁷¹ National Employment Law Project, Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It (April 2019) https://s27147.pcdn.co/wpcontent/uploads/Rights-at-Risk-4-2-19.pdf

²⁷² Report: Rights at Risk p 4. See Goldman & Weil supra note [WEILWHO] at 48.

²⁷³ Tenn. Code 50-8-103 (2021).

²⁷⁴ Tenn. Code 65-15-301-311 (2021).

²⁷⁵ See *infra* Part III C.

²⁷⁶ 40 TEX. ADMIN. CODE §815.134 (2021).

Employee or Independent Contractor," is limited to determining a marketplace contractor's "employment status" for purposes of unemployment compensation and associated withholding taxes provided in Title 4, Subtitle A of the Texas Labor Code.²⁷⁷ The Texas Workforce Commission also adopted the following language:

The employment status analysis is generally predicated on determining whether direction and control could exist in fact or in contract. Because marketplace platforms' business models are becoming increasingly prevalent in our economy, clarification, through rule, of how direction and control apply in these instances is needed as it applies to unemployment insurance.²⁷⁸

The rule contains nine elements that define a "marketplace contractor," and if all nine are met, then the worker will not be considered "in employment" of the "marketplace platform." Said another way, the rule presumes employment unless all of the nine elements are met. The elements must be met in contract and in fact before a worker is not treated as in employment. The nine elements are:

- (1) That all or substantially all of the payment paid to the contractor shall be on a per-job or transaction basis;
- (2) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from the public (including third-party individuals or entities) submitted through the marketplace platform's digital network;

²⁷⁷ Id.

p. 2 lines 7-9 at https://www.twc.texas.gov/files/agency/fr-ch-815-marketplace-adopted-4-9-19-twc.pdf; The stated purpose of the rule is to "develop an employment status analysis for workers who use a marketplace platform's digital network to conduct their own independent businesses." *Id.* at lines 24-25.

²⁷⁹ 40 TEX. ADMIN. CODE § 815.134 (b)(1)(C)(2) (2021). "Marketplace platform" is defined as an entity operating in Texas that: "(i) uses a digital network to connect marketplace contractors to the public (including third-party individuals and entities) seeking the type of service or services offered by the marketplace contractors; (ii) accepts service requests from the public (including third-party individuals and entities) only through its digital network, and does not accept service requests by telephone, by facsimile, or in person at physical retail locations; and (iii) does not perform the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state." 40 Tex. ADMIN. CODE §815.134(b)(1)(B) (2021).

- (3) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;
- (4) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;
- (5) The marketplace contractor is free from control by the marketplace platform as to where and when the marketplace contractor works and when the marketplace contractor accesses the marketplace platform's digital network;
- (6) The marketplace contractor bears all or substantially all of the contractor's own expenses that are incurred by the contractor in performing the service or services;
- (7) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;
- (8) The marketplace platform does not control the details or methods for the services performed by a marketplace contractor by requiring the marketplace contractor to follow specified instructions governing how to perform the services; and
- (9) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.²⁸⁰

The above elements will be applied on a case-by-case basis based upon the facts of each working relationship.²⁸¹ Clearly when reviewing the elements (like those of the Tennessee statute), one can see that most, if not all, app-based relationships will meet these elements, and therefore, workers will be independent contractors entitled to no protections.

* * *

 $^{^{280}}$ *Id.* at § (b)(1)(C)(2).

²⁸¹ P. 5 lines 42-3 https://www.twc.texas.gov/files/agency/fr-ch-815-marketplace-adopted-4-9-19-twc.pdf and p 6 lines 36-42 ("These rules will provide for a robust consideration of all facts and circumstances applicable to the marketplace platform/contractor working relationship and help ensure a consistent approach while preserving a case-by-case analysis on the precise aspects present in a particular case. Whether an individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact under \$815.134(b) will be determined by TWC based upon the unique facts of each relationship.")

Table 2 compares the Texas rule and the Tennessee statute. This comparison shows that the Texas rule has more elements that must be met and is not geared primarily to an app-based company that is similar to, or actually, Handy.²⁸² But overall, the result is likely the same under both tests—app-based workers will be classified as independent contractors.

Table 2. Comparison of Texas and Tennessee's Marketplace Contractor Laws			
Element	Texas	Tennessee	
Per-job or transaction compensation	Yes	No	
No prescribed hours	Yes (B) and (E)	Yes (2)	
Workers can use other platforms	Yes (C)	Yes (3)	
Workers can engage in other occupations or businesses	Yes (D)	Yes (4)	
Worker bears substantially all of their own expenses in providing the services	Yes (F)	No	
Worker supplies own tools, materials, and equipment	Yes (G)	No	
Platform does not require workers to use specific supplies or equipment	No	Yes (5)	
Platform does not control the details or methods by requiring specified instructions	Yes (H)	Yes (6) with different wording	
No mandatory meetings or training	Yes (I)	No	
Independent Contractor Agreement in place	No	Yes (1)	

VI. CONCLUSION

The shoe's about to drop in the United States and in some places around the globe it has already done so. President Biden seeks to change and unify the federal law applicable to worker classification in an effort to fairly protect workers, while app-based companies seek ways around these efforts. These companies have already shown that they intend to do things their own way—fighting in court and arbitrations or creating a new classification of worker and providing those workers with only those benefits they choose to provide. They are also spending a lot of time and money on lobbying to get laws passed that accommodate their business model and preserve independent contractor status for workers.

²⁸² Other marketplace contractor statutes are nearly identical to Tennessee's statute. Thus, the comparison between Texas and Tennessee is really a comparison between Texas and all other marketplace contractor statutes.

Worldwide governments and courts are seeking clarity as well. Spain has already addressed app-based drivers' classification head-on and has enacted legislation classifying them as employees.²⁸³ The EU is trying to provide guidance for its Member States.²⁸⁴ And it seems like every month another app-based worker classification court case is decided somewhere in the world.

It has been proposed by many that we need a third category of worker that could apply to app-based workers.²⁸⁵ The UK has limb (b) workers that receive certain benefits, benefits less than an employee would have but more than an independent contractor.²⁸⁶ Prop 22 created a third category of worker (for transportation network company and delivery network company workers).²⁸⁸

²⁸³ See *supra* Part III.B.

²⁸⁴ See *supra* Part III.A.

²⁸⁵ Harris, supra note [HARRIS], at 8; John A. Pearce, II and Jonathan P. Silva, The Future of Independent contractors and Their Status as Non-employees: Moving on from a Common Law Standard, 14 HASTINGS BUS. L. J., 1, 31-34 (2018) ("A three-category legal framework could be beneficial because it would recognize and account for a large and growing number of worker-employer relationships that exist in the modern economy, such as conflicts involving gig-economy workers who are hard to classify under the current binary system."); Michael L. Nadler, Independent Employees: A New Category of Workers for the Gig Economy, 19 N.C. J.L. & TECH. 443, 480-81 (2018) (Arguing that the term "dependent contractor" is inapt because many Gig workers are not dependent on their work platforms. And proposing that the third category be called "independent employee" instead of "dependent contractor."). But see Elizabeth Tippett, Employee Classification in the Sharing Economy, CAMBRIDGE HANDBOOK OF LAW AND REGULATION OF THE SHARING ECONOMY (forthcoming) (discussing regulatory approaches to protect workers in the sharing economy, including a possible approach that extends coverage of existing employment protections to all workers, regardless of their worker classification). Professor Tippet advocates for necessary adjustments to court and regulatory approaches to ensure a "baseline level of protections to affected workers."

²⁸⁶ See infra 12–17. Italy and Canada also use a third category of worker. *See* Miriam A. Cherry and Antonio Aloisi, "Dependent Contractors" in the Gig Economy: A Comparative Approach, 66 AM. UNIV. L. REV. 635 (2017). Canada Labour Code. R.S.C. 1985, c L-2, s.3: A dependent contractor is a person who "whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are in, relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person." See Harris, supra note [HARRIS], at 8; Pearce, supra note [PEARCE], at 31; Cherry, supra note [CHERRYCOMP], at ; Judy Fudge, Eric Tucker and Leah Vosko, Employee or Independent Contractor:" Charting the Legal Significance of the Distinction in Canada, 10 CAN. LAB. & EMP. L.J. 193, 198-201 (2003) (Professors Fudge, Tucker and Vosko studied four Canadian jurisdictions and note that there are "wide variations in the personal scope of coverage of the common and civil law of employment, collective bargaining, employment standards, human rights and workers' compensation legislation, as well as social wage and income tax legislation." There is no country-wide universal solution and the definition of employee vs. dependent contractor can vary from jurisdiction to jurisdiction.)

²⁸⁸ Part II Dubal Racial Code

The Prop 22 third category of worker "lowers the baseline employment standards" because workers are getting less than they would if they were treated as employees.²⁸⁹ The Prop 22 category also perpetuates racial inequalities.²⁹⁰ If U.S. policymakers are interested in creating an intermediate or additional category of worker, they need to ensure that the benefits/protections required under such a category do not further perpetuate worker inequities including racial and gender inequalities.²⁹¹

One thing is for sure, the volume of legal disputes over the issue of appbased worker classification is unsustainable and puts tremendous pressure on workers who must hire attorneys or enter administrative processes to establish their rights. Each day app-based workers are being denied rights they should be entitled to and as such are not only living with existential and economic instability but also experience increased health risks. It is important that we protect such workers and take the guesswork out of this point of classification. This article provides an up-to-date review of the tests being used at various levels in the United States as well as movements in other countries with a goal toward providing more information for policymakers.

It is urgent that governments move swiftly and smartly to solve not only the economic issues associated with app-based work but also the public health issues created by stress, psychological distress, and physical ailments brought on by unregulated app-based work. Let's go.

²⁸⁹ Dubal, supra note [VDCODE], at 10.

²⁹⁰ Id.

²⁹¹ Dubal, *supra* note [VDCODE], at 46 ("The lowering of wage and benefits regulations for workers at the margins of the labor market through a third category—whether that category reflects the specific terms of Prop 22 or is framed more benevolently through legislation or a private business-labor compromise—will necessarily entrench racialized hierarchies and be understood historically as a form of abandonment of dispossessed workers.")