The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World

SAMANTHA J. PRINCE*

Abstract

Whether a worker is an independent contractor or employee is of great significance in many countries, including the United States. This label drives whether a worker is entitled to many protections and benefits, including minimum wage, overtime, workers' compensation, unemployment compensation, anti-discrimination protection, NLRA protection, and more. The difficulty inherent in accurately classifying workers as either independent contractors or employees cannot be overstated. First, there are so many tests spanning all levels of our government. Second, there are so many ways that people work, and with the increased popularity of app-based work, classification becomes even more difficult. Simply, some of the tests have not been

*Samantha J. Prince is an Assistant Professor of Law at Penn State Dickinson Law. She earned her LL.M. (Tax) from Georgetown University Law Center; J.D. Widener Commonwealth Law; and her B.S. in Chemistry from Muhlenberg College. The author would like to thank *The University of Memphis Law Review* staff and editorial board and in particular Rachel McCallister, Katelyn Jackson, and Ameshia Frenshae Forrest for their valuable assistance. Additional thank you to Matthew Bodie, Jeffrey Dodge, David Friedman, Victoria Haneman, Joan MacLeod Heminway, Cassidy R. Prince, Laurel Terry, and Sarah Williams, for their support, helpful feedback, and valuable suggestions at various stages of this article. The author would also like to express gratitude to Maame Boateng, Adrianna Dunn, Jeremy Garcia, Christopher Gazzio, Dharvi Goyal, Phyillis Macharia, Lauren Stahl, Elikem Tsikata, and Rachel Tunney for their assistance with research. Special thank you to Lauren Stahl for her additional help with footnotes. All errors are my own.

working well when applied to precarious app-based work. As a result, policymakers are forced to finally bring these issues to the forefront.

Worldwide policymakers and leaders are implementing changes to protect app-based workers. In the United States, the federal government is evaluating whether these changes in the workforce require changes in national labor and tax laws. While campaigning, President Biden pledged to establish a uniform worker classification test for purposes of all federal labor, employment, and tax laws. Subnational governments— states and cities—are also evaluating and making changes in their policies and laws.

To make these decisions, policymakers will need to be familiar with the current landscape of tests and statutes. Policymakers should evaluate the approaches that currently are being used and how they have fared so that they can decide whether to strike out with a novel test or adopt one already in use. Although prior articles have considered worker classification laws, and the benefits associated with various classification approaches, things have evolved so quickly that in some respects most of those articles are at least partially out of date. And having all of this information in one place is critical for ease in policymaking research and deliberations.

This Article fills the current knowledge gap by providing an up-to-date compendium of the current state of worker classification laws. The Article starts with a segment on instabilities and health issues experienced by app-based workers. Then it covers the latest on worker classification laws around the world including the EU Commission's Proposed Directive. It then turns to tests that the U.S. is using, which include traditional tests and new tests from both the state and city levels. The Article explains how these tests are used and summarizes commentary about the strengths and weaknesses of each of these tests. As national, state, and local policymakers consider how best to move forward in regulating the app-based economy and its workers, they are likely to find the information in this Article useful to their deliberations.

I. INTRODUCTION

> *Everybody's talking about it. No matter where you are, it is the subject of conversations everywhere—the European Union, India, 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.[1] 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] The Ninth Circuit recognized:

> [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

1. Laura, *Why I Buy Ethically Made*, FAIRLY S. (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.

3. Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018), *aff'd in part*, *vacated in part*, 13 F.4th 908 (9th Cir. 2021).

4. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137–38 (N.D. Cal. 2015) (outlining Uber's argument that drivers are independent contractors); Cotter v.

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 delivery drivers are

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 Announces Results for Second Quarter 2021*, UBER INV. (Aug. 4, 2021), https://investor.uber.com/news-events/news/press-release-details/2021/Uber-Announces-Results-for-Second-Quarter-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 from receiving protection by employment and labor laws. ROSENBLAT *supra*; *see also* Letter from Lisa Stimmell, Att'y, Wilson Sonsini Goodrich & Rosati, P.C., to U.S. Sec. & Exch. Comm'n (Feb. 5, 2021), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/nyscrlyft020521-14a8-incoming.pdf. 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. Stimmell *supra*, at 4.

5. *See* Jason Moyer-Lee & Nicola Kountouris, *The "Gig Economy": Litigating the Cause of Labour*, *in* TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL 6, 7–8 (2021) ("Uber alone has had various aspects of its business model impugned before the apex courts of India, Brazil, the UK, the EU, Canada, and [several U.S. states] . . . .") (citations omitted); Tham Yuen-C, *Advisory Committee on Gig Workers Does Not Rule Out Laws to Protect Workers*, STRAITS TIMES (Sept. 15, 2021) (reporting on a committee created by Prime Minister of Singapore Lee Hsien Loong 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.CH (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. *See* INT'L LAWS. ASSISTING WORKERS NETWORK, TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL 51 (2021) (providing a summary of Judge Hernandez Guiérrez's decision in *Alvaro Felipe Arredondo Montoya and Pedidos Ya Chile SPA*). 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' 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

now considered employees entitled to a host of benefits.[6] Additionally, Uber lost a legal battle in the United Kingdom, and now ride-share 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 and Deliveroo drivers won court cases entitling them to be treated as employees receiving wage protections.[8]

LEAFLET (Oct. 5, 2021), https://www.theleaflet.in/the-gig-is-up-international-jurisprudence-and-the-looming-supreme-court-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. *See* Sergio Goncalves & 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. INT'L LAWS. ASSISTING WORKERS NETWORK, *supra*, at 62 (providing a summary of the Employment Court of New Zealand's decision in *Atapattu Arachchige v. Rasier New Zealand Ltd. & Uber B.V.*); *id.* at 39 (providing a summary of Australia's Fair Work Commission in *Gupta v. Portier Pacific Pty. Ltd.*). Additionally, in Brazil the high court held that there was no employment relationship between Uber and its drivers, overruling the lower court's finding. See id. at 46 (providing a summary of Brazil's Superior Labour Court's decision in *Marcio Vieira Jacob v. Uber do Brasil Tecnologia Ltda.*).

6. *See infra* Part III.B.

7. *See* INT'L LAWS. ASSISTING WORKERS NETWORK, *supra* note 5, at 72 (proving a summary of the UK's Supreme Court's decision in *Uber BV v. Aslam*). The worker category lies between independent contractors and employees. *See also infra* Part III.C; Uber v. United Trade Action Grp., Ltd. [2021] EWHC (Admin) 3290 (holding that London taxi-hailing apps cannot offload their legal obligations on gig economy drivers).

8. Anthony Deutsch & 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 (reporting on the ruling that Uber drivers are employees and therefore entitled to workers' rights under Dutch labor laws). *Netherlands—Court of Appeals Rules Deliveroo Couriers are Employees, Not Self-Employed*, STAFFING INDUS. ANALYSTS (Feb. 17, 2021), https://www2.staffingindustry.com/eng/Editorial/Daily-News/Netherlands-Court-of-Appeals-rules-Deliveroo-couriers-are-employees-not-self-employed-56714. Deliveroo drivers must be paid a fixed hourly

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.[9] And Fairwork—a group that evaluates and ranks digital platforms based on a variety of "fair work" principles—scrutinizes and raises awareness by utilizing globally diverse researchers to rank app-based companies based on fair pay, fair conditions, fair contracts, fair management, and fair representation.[10] Sometimes the workers themselves speak out. In New York City, food delivery workers were regularly 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

wage, allowances, and holiday pay. In addition, they must be paid wages while they wait.

9. Jem Bartholomew, *"In My Dreams I'm Still Doing the Deliveries": Inside the Battle Against the Gig Economy*, PROSPECT MAG. (July 15, 2021), https://www.prospectmagazine.co.uk/essays/deliveroo-gig-economy-unions-strike-employees-share-price-ipo.

10. Fairwork is a project based at the Oxford Internet Institute, University of Oxford. *Principles*, FAIRWORK, https://fair.work/en/fw/principles (last visited Apr. 2, 2022).

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

12. *Id.* Protective legislation was quickly passed. *See infra* note 21; Jeffery C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html.

13. Alice Su, *Why a Takeout Deliveryman in China Set Himself on Fire*, L.A. TIMES (Feb. 8, 2021, 11:59 AM), https://www.latimes.com/world-nation/story/2021-02-08/why-takeout-delivery-man-china-set-himself-on-fire. 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. *Id.*; *see also* 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.

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 have classified app-based workers as early as 2015.[16] Classifying workers, particularly those working for app-based companies, remains a challenge for all levels of our government.[17]

14. Su, *supra* note 13. 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. Josh Ye, *China's Top Court Wants to Protect Gig Workers Without Hampering Tech Platforms' Development, Aiding Meituan and Didi*, S. CHINA MORNING POST (Sept. 24, 2021, 2:00 PM), https://www.scmp.com/tech/policy/article/3149932/chinas-top-court-wants-protect-gig-workers-without-hampering-tech. 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." *Id.* 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. *Id.*

15. Uber was founded in 2009 and went live in San Francisco in May 2010. *See* Ellen Huet, *Uber's Global Expansion in Five Seconds*, FORBES (Dec. 11, 2014, 6:00 AM), https://www.forbes.com/sites/ellenhuet/2014/12/11/ubers-global-expansion. Lyft went live in San Francisco in 2012. Ryan Lawler, *With a San Francisco Launch Imminent, Lyft Is Doubling Its Fleet of Drivers and Readying an Android App*, TECHCRUNCH (Aug. 25, 2012, 5:00 PM), https://techcrunch.com/2012/08/25/lyft-san-francisco-launch.

16. Sam Sanders, *California Labor Commission Rules Uber Driver Is an Employee, Not a Contractor*, NPR (June 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.

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 BUFF. 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. Joo & Saucedo, *supra*; *see also, e.g.*, Ruth Berins Collier, V.B. Dubal, & Christopher Carter, *Labor Platforms and Gig Work: The Failure to Regulate* 2 (Inst. for Rsch. on Lab. and Emp., IRLE Working Paper No. 106-17, 2017) (analyzing regulatory issues for app-based workers, using Uber as

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]

The United States federal government has lagged behind, but it looks like the shoe is about to drop.[22] U.S. Labor Secretary Marty

an example). Professor Dubal and her colleagues' analysis includes a look into the major regulatory disputes over worker classification. *Id.*

18. *See infra* Part V.D.1.

19. Assemb. B. 5, Ch. 296, § 2 (Cal. 2019). The bill, which took effect January 1, 2020, added CAL. LAB. CODE § 2750.3. *See also infra* Part V.B.

20. N.Y.C. Admin. Code § 19-549 (effective Aug. 14, 2018); Seattle, Wash., Ordinance 126189 (Jan. 1, 2021). Putting into context the N.Y.C. 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 & Noam Scheiber, *New York City Considers New Pay Rules for Uber Drivers*, N.Y. TIMES (July 2, 2018), https://www.nytimes.com/2018/07/02/nyregion/uber-drivers-pay-nyc.html. 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*, CRAIN'S CHI. BUS. (June 25, 2021, 2:05 PM), 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." Jeffery C. Mays, *New York Passes Sweeping Bills to Improve Conditions for Delivery Workers*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html. Lack of access to restrooms has been an issue for app-based workers, particularly in cities. *Id.* Drivers will still be considered independent contractors otherwise. *Id.*

22. *See generally* 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) (describing a report covering select

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 . . . ."[23] And President Biden campaigned to "[e]nsure workers in the 'gig economy' . . . receive the legal benefits and protections they deserve."[24] To move things forward, the Biden administration increased funding for the Wage and Hour Division of the Department of

worker classification tests prepared for Congress by the Congressional Research Service). *See also* The Atlanta Opera, Inc., 371 N.L.R.B. No. 45 (2021) (where the Board majority, composed of Chairman McFerran and Members Prouty and Wilcox, seek comments on whether the NLRB should adhere to the independent contractor standard in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019), and if not, what standard should replace it—e.g., should the Board return to the standard in *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014), either in its entirety or with modifications?). Members Kaplan and Ring, however, wrote a dissenting opinion contending that the Board's reexamination of its recent precedent is inappropriate. *Id.* And the Federal Trade Commission (FTC) warned gig companies that they could be fined for misleading prospective workers about how much they can earn on app-based platforms. Lois Greisman, Associate Director of Marketing Practices at the FTC, stated that the gig economy is "an area of serious concern" when it concerns wage transparency. Levi Sumagaysay, *From Treatment of Gig Workers to Tip Transparency, the App-Based Economy Could See Key Changes in 2022*, MarketWatch (Jan. 1, 2022, 12:23 PM), https://www.marketwatch.com/story/from-treatment-of-gig-workers-to-tip-transparency-the-app-based-economy-could-see-key-changes-in-2022-11640900832.

23. Nandita Bose, *Exclusive: U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 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; *see also* Josh Eidelson, *Biden's Top Labor Lawyer Will Use Her Whole Enforcement Arsenal*, BLOOMBERG BUSINESSWEEK (Dec. 14, 2021, 3:00 AM), https://www.bloomberg.com/news/articles/2021-12-14/biden-labor-lawyer-jennifer-abruzzo-to-fully-use-nlrb-power-to-protect-workers. NLRB's general counsel, Jennifer Abruzzo, spoke with *Bloomberg Businessweek* in December 2021 and was asked whether her view on employee status is affected if a company says that its dispatched gig workers are contractors. *Id.* She responded, "There's plenty of workers in the gig economy that I think are misclassified as independent contractors. It's not like all or none. Every case is fact-specific." *Id.*

24. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN HARRIS, https://joebiden.com/empowerworkers (last visited Apr. 2, 2022); *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.

Labor—the unit that handles worker classification issues.[25] The NLRB is also hoping to receive more funding to address misclassification.[26]

The uncertainty and volume of lawsuits created by this one issue—worker classification—is not efficient or sustainable and certainly not ideal.[27] 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:

25. OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2022, at 15 (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.").

26. On September 8, 2021, the House Education and Labor Committee submitted a new bill as part of a Democrat-led budget reconciliation package. H. EDUC. & LAB. COMM., 117TH CONG., AMENDMENT IN THE NATURE OF A SUBSTITUTE TO COMMITTEE PRINT 115 (Comm. Print 2021) (offered by Congressman Bobby Scott), https://edlabor.house.gov/imo/media/doc/ANS%20to%20the%20Committee%20Print%20Offered%20by%20Mr.%20Scott.pdf. 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." *Id*.; *see also* Nandita Bose, *U.S. Labor Board Prosecutor Hopes to Bulk Up Staffing, Budget as Gig Worker Scrutiny Grows*, REUTERS (June 24, 2021, 4:03 PM), https://www.reuters.com/legal/transactional/us-labor-board-prosecutor-hopes-bulk-up-staffing-budget-gig-worker-scrutiny-2021-06-24.

27. 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. See Class Action Complaint, Chandra v. Lyft, Inc., No. 1:21-cv-07113 (S.D.N.Y. Aug. 23, 2021); Class Action Complaint, Chambers v. Maplebear, Inc., No. 1:21-cv-07114 (S.D.N.Y. Aug. 23, 2021). Until we have definitive (reliable) guidance on how to classify app-based workers, large numbers of lawsuits—some repetitive—will continue to be brought. The same goes for arbitrations. *See* Richard Reibstein, *Déjà Vu in the Independent Contractor Misclassification Arena: August 2021 News Update*, JDSUPRA (Sept. 15, 2021), https://www.jdsupra.com/legalnews/deja-vu-in-the-independent-contractor-5497740.

> 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.[28]

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.[29] 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 a t the state level (e.g., the ABC test or the IRS twenty-factor test).[30]

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

28. Lyft, Inc., Quarterly Report (Form 10-Q), at 24 (May 8, 2020)(emphasis added).

29. 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. U. BUS. L. REV. 43 (2022).

30. 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 raises 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 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. *See* Shimabukuro, *supra* note 22.

is like "fitting a square peg into a round hole."[31] It is difficult to classify app-based workers under the traditional employment law factor-based tests—the control test and economic realities test.[32] On the one hand, such workers are akin to independent contractors in that they have the freedom to choose when to work. 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.[33]

> 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 exist.[34]

31. 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. J. LAB. & EMP. L. 53, 60 (2015).

32. 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 IND. L. REV. 377, 383–84 (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).

33. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, THE HAMILTON PROJECT 10 (Dec. 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf. 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 "[d]etermining 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 13.

34. Sprague, *supra* note 31, at 71.

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.[35] 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 & EXISTENTIAL

35. *See, e.g.*, People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 298 (Cal. Ct. App. 2020) *as modified on denial of reh'g* (Nov. 20, 2020); O'Connor v. Uber Techs., Inc., 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., Inc., No. CFC-18-567463, 2019 Cal. Super. LEXIS 1752 (Cal. Super. Ct. Mar. 19, 2019). The Supreme Court of New York State held that there is substantial evidence that Uber can exercise sufficient control over its drivers to establish an employment relationship. *See* Razak v. Uber Techs., Inc., No. 16-573, 2016 WL 5874822, at *8–9 (E.D. Pa. Oct. 7, 2016) (finding 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. Razak v. Uber Techs., Inc., 951 F.3d 137 (3d Cir. 2020).

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 responsibilities to individuals without a real reciprocal potential for gains in the form of increased pay or job security*."[36]

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, or shared work, it is all pretty much the same.[37] 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.[38]

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

37. 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. 549 (2016). Professor Tippett divides app-based companies into different categories based on what they are sharing: property-sharing, property-based services, and service sharing.

38. *See* Muller, *supra* note 17, at 168 ("[T]echnology 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. 5 n.13 (May 27, 2021) (unpublished manuscript) (on file with author) (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").

Some workers gravitate toward app-based work because they are free to set their own hours.[39] In that respect, it can be empowering.[40] However, app-based work causes existential and economic instability for workers, particularly those who treat the work as their main source of income.[41]

> What is evident, from a 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.[42]

39. *See* Monica Anderson, Colleen McClain, Michelle Faverio, & Risa Gelles-Watnick, *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021. In August, 2021, Pew Research Center surveyed 10,348 U.S. adults on the Center's American Trends Panel and found 16% of U.S. adults have earned money through an online gig platform. Of those Americans, 49% reported that "being able to control their own schedules is a major reason why they have taken on [app-based] jobs over the past year." *Id.*; *see also* Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 808 (2018). *See generally* Liya Palagashvili, *Four Recommendations for Analyzing the Department of Labor's Proposed Rule on Employees vs. Independent Contractors*, MERCATUS CTR. (Oct. 27, 2020), https://www.mercatus.org/publications/department-labor/four-recommendations-analyzing-department-labor's-proposed-rule (arguing women are statistically the predominant caregivers in their families and need work flexibility).

40. *See* Rina Chandran, *Invaluable but Unprotected: Asian Gig Workers Fight for Rights*, THE CHRISTIAN SCI. MONITOR (Oct. 4, 2021), https://www.csmonitor.com/World/Asia-Pacific/2021/1004/Invaluable-but-unprotected-Asian-gig-workers-fight-for-rights. Mr. Quah, an economics professor at the National University of Singapore, is quoted saying, "[f]lexibility doesn't mean unprotected." *Id.* Singapore is conducting a study to determine the best way to increase protections for app-based workers. *Id.*

41. Freni-Sterrantino & Salerno, *supra* note 36. See ROSENBLAT, *supra* note 4, 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 & Scheiber, *supra* note 20 (pointing to a recent study that showed "about 40 percent of drivers have incomes so low that they qualify for Medicaid and about 18 percent qualify for food stamps"); Emma Bartel, Ellen MacEachen, Emily R. Reid-Musson, & Samantha B. Meyer, *Stressful by Design: Exploring Health Risks of Ride-Share Work*, 14 J. TRANSP. & 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).

42. Freni-Sterrantino & Salerno, *supra* note 36.

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.[43]

In many jurisdictions, there is no established minimum wage for app-based work, leaving workers with low pay and economic instability.[44] 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.[45] 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."[46] For instance, an app-based worker turns on the app

43. Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59 J. OCCUPATIONAL & ENV'T MED. e63 (2017). *See generally* Marcia Facey, *'Maintaining Talk' Among Taxi Drivers; Accomplishing Health-Protective Behaviour in Precarious Workplaces*, 16 HEALTH & PLACE 1259 (Nov. 2010).

44. *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); AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 355 (2021) ("Today's gig economy workers—the people struggling to afford their health-care or educational expenses or working two or three jobs just to get by—are yesterday's grangers with pitchforks."); SARAH KESSLER, GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK 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) ("[G]ig workers are low-wage laborers with a small income and large instability."). *But see* Anderson, McClain, Faverio, & Gelles-Watnick, *supra* note 39 (finding that 64% of recent or current app-based workers believe the apps or sites have paid them at least somewhat fairly).

45. Bartel, MacEachen, Reid-Musson, & Meyer, *supra* note 41, at 4–5 (discussing the proposition 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 also* Dubal, *supra* note 38, at 6 (footnote omitted) ("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.").

46. Nico Dragano et al., *Effort-Reward Imbalance at Work and Incident Coronary Heart Disease: A Multicohort Study of 90,164 Individuals*, 28 EPIDEMIOLOGY 619, 619–20 (2017), https://pubmed.ncbi.nlm.nih.gov/28570388. The authors indicate that job strain can be used to measure work stress. *Id.* at 620. Job insecurity,

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."[47] Job strain and economic instability have been shown to increase risk of heart disease.[48]

Researchers have only recently begun gathering data on the health effects of app-based workers.[49] But some researchers have been drawing correlations between the negative health effects of taxi drivers (widely studied) and app-based drivers,[50] and others are seeing patterns emerging.[51] 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.[52] In their concluding remarks, they

including not knowing the frequency in which one will have jobs, is commonplace among app-based workers and can induce stress. *See id.*; *see also* ROSENBLAT, *supra* note 4, at 64–65 (describing an online forum where drivers debated about whether to quit driving for Uber and Lyft full-time). One driver from Los Angeles commented, "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 . . . . Life 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." *Id.*

47. Dragano et al., *supra* note 46, at 620; *see also infra* note 241 and accompanying text.

48. Dragano et al., *supra* note 46, at 620 (explaining that 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").

49. Freni-Sterrantino & Salerno, *supra* note 36 (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").

50. Bartel, MacEachen, Reid-Musson, & Meyer, *supra* note 41, at 5. Comparing taxi drivers and ride-sharing drivers in Canada to predict the health and safety risks that Uber and Lyft drivers encounter, the authors note:

> [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.

Id.

51. *See* Freni-Sterrantino & Salerno, *supra* note 36.

52. 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 AUSTL. & N.Z. J. PSYCHIATRY 473, 481 (2018).

suggest that high rates of psychological distress would also be found in app-based ride-share drivers.[53] 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.[54]

Predictably, stress emanating from existential and economic instabilities can lead to other negative health effects as well.[55] 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.[56] 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.[57]

53. *Id.*

54. Bartel, MacEachen, Reid-Musson, & Meyer, *supra* note 41, at 3 (noting that because drivers are paid on a per-ride basis, during peak times, drivers take few if any breaks). The article also notes that Uber's "surge pricing" provides more pressure to keep driving without taking breaks.

55. *See* Dragano et al., *supra* note 46, at 623–24; *see also* Freni-Sterrantino & Salerno, *supra* note 36 (observing 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").

56. Claire L. Niedzwiedz, Srinivasa 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 Longitudinal Study*, 71 J. EPIDEMIOLOGY & CMTY. HEALTH 1005, 1005 (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.") (footnotes omitted).

57. *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*, OFF. OF THE MAYOR (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 (statement of Mayor Durkan) ("The 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 also* Chris Taylor, *Your Money: Freelancers Have*

A high percentage of app-based workers, particularly drivers in major cities, are immigrants and subordinated minorities.[58] And, "if one removes ridesharing drivers (predominately men) from the calculation, women constitute a larger share of platform economy workers."[59] As such these individuals disproportionately feel the brunt of economic and existential instability and the health issues associated with app-based work.[60] 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

'Perfect Storm' of Anxiety Because of COVID-19, REUTERS (Apr. 6, 2020, 10:41 AM), https://www.reuters.com/article/us-health-coronavirus-freelancers/your-money-freelancers-have-perfect-storm-of-anxiety-because-of-covid-19-idUSKBN21O22K (statement of Johann Hari) ("[O]f course financial insecurity is going to cause depression and anxiety . . . .").

58. Dubal, *supra* note 38, at 5–6; Freni-Sterrantino, *supra* note 36, at 1; *see* Anderson, McClain, Faverio, & Gelles-Watnick, *supra* note 39, at 3 (finding the percentages of adults who have earned money through app-based work are 30% Hispanic, 20% Black, 19% Asian, and 12% White); Levi Sumagaysay, *'Tremendous Potential Being Wasted': How Gig Work Widens the Racial Wealth Gap — And What Can Be Done About It*, MARKETWATCH (March 27, 2021 9:21 AM), https://www.marketwatch.com/story/tremendous-potential-being-wasted-how-gig-work-widens-the-racial-wealth-gap-and-what-can-be-done-about-it-11616777441. The Institution for the Future (IFTF) screened hundreds of California workers making $15 an hour or less and found that many of those low-wage workers relied on gig work (with little to no benefits) as their sole source of income. Sumagaysay, *supra*. During a conversation with MarketWatch, Marina Gorbis, Executive Director of IFTF, stated, "[Because of] the pandemic and the shutdowns . . . [w]e see polarization of labor and mostly nonwhite people being greatly affected. It absolutely exacerbates the racial wealth gap."). *Id. See generally* Davidson, Wadley, Reavley, Gunn & Fletcher, *supra* note 52.

59. Prince, *supra* note 29, at 63.

60. Dubal, *supra* note 38, at 6–7; Palagashvili, *supra* note 39, at 2–4; Niels van Doorn, *Platform Labor: On the Gendered and Racialized Exploitation of Low-Income Service Work in the 'On-Demand' Economy*, 20 INFO., COMMC'N & SOC'Y 898, 907 (2017) ("It is this legacy that on-demand 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 . . . . [D]espite 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.") (citations omitted).

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.[61] These court holdings often put pressure on policymakers to enact laws.[62] In some cases, the laws will clarify or codify a 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

61. *See* Jaratphong Srirattanan & Seha Yatim, *Do Gig Workers Deserve Better Deal?*, BANGKOK POST (Feb. 23, 2021, 4:00 PM), https://www.bangkokpost.com/opinion/opinion/2072935/do-gig-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 BIGELOW, AGNIESZKA KOSNY, EMILY REID-MUSSON, EMMA BARTEL, & SHARANYA VARATHAJAN, UNIV. OF WATERLOO, DRIVING FOR UBER: A DEVELOPMENTAL EVALUATION OF OCCUPATIONAL HEALTH AND SAFETY CONDITIONS OF RIDE-SHARE WORK 8 (2019) [hereinafter DRIVING FOR UBER]. Researchers at the University of Waterloo note:

> 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', [sic] where governments struggle to contain new enterprises while more pop up.

DRIVING FOR UBER, *supra* (citing SUNIL JOHAL & NOAH ZON, POLICYMAKING FOR THE SHARING ECONOMY: BEYOND WHACK-A-MOLE (2015), https://tspace.library.utoronto.ca/bitstream/1807/99326/1/Johal_Zon_2015_Policymaking_for_the_Sharing.pdf); *see also* Moyer-Lee & Kountouris *supra* note 5, at 34.

62. For example, Spain's La Ley del Rider (Rider Law) was enacted due to a court ruling. *See* discussion *infra* Part III.B. Another example is Belgium where the government initially codified the principles developed by its courts into statutory law and then went beyond it. *See* Valerio De Stefano, Ilda Durri, Charalampos Stylogiannis, & Mathias Wouters, *Platform Work and the Employment Relationship*, at 24 n.94 (Int'l Lab. Org., Working Paper No. 27, 2021); *see also* Prince *supra*, note 29, at 54 (discussing a domestic example, where California's legislature codified the court's ruling in, *Dynamex Operations W., Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018), into AB5 under pressure to clarify the ruling for businesses and workers).

not deciding cases, they may look to other countries for ideas or momentum.[63]

While this Part cannot cover all countries in the world,[64] it starts with the moves that the European Union (EU) is making.[65] 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 in the United States as well as other countries, particularly in Africa. Finally, it covers Denmark, where worker classification is negotiated by trade unions rather than through governmental regulation. All 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 Commission's Proposed Directive

EU countries (Member States) have taken varying approaches to regulating work in the app-based economy, which "has grown almost fivefold from an estimated €3 billion in 2016 to about €14 billion in 2020."[66] "More than 100 court decisions and 15 administrative decisions dealing with the employment status of people working through platforms have been observed in the Member States, with varying outcomes but predominantly in favour of reclassifying people working

63. For example, South Africa and Kenya's policymakers are considering laws inspired by the UK's recent Supreme Court ruling in *Uber BV v. Aslam*. Uber BV v. Aslam [2021] UKSC 5 (UK); *see also infra* Part III.C.

64. *See supra* note 5; *see also* the various footnotes throughout this part for information from other countries.

65. 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.

66. European Commission Press Release IP/21/2944, Protecting People Working Through Platforms: Commission Launches Second-Stage Consultation of Social Partners (June 15, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2944.

through platforms as workers."[67] To address the uncertainty and unfairness behind the variety of approaches, the EU Commission took on the task of establishing "basic labour standards and rights" for the growing number of app-based workers across its Member States.[68]

After holding two public consultations and performing an impact assessment, the Commission released in late 2021 a proposed directive that sets minimum standards for Member States to meet within two years after passing of the directive.[69] The proposed directive contains three general objectives focused on improving "working conditions and social rights of people working through platforms, . . . [while supporting] the conditions for the sustainable growth of digital labour platforms in the [EU]":

> (1) to ensure that people working through platforms have – or can obtain – the correct employment status in light of their actual relationship with the digital labour platform and gain access to the applicable labour and social protection rights;
> (2) to ensure fairness, transparency and accountability in algorithmic management in the platform work context; and
> (3) to enhance transparency, traceability and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders.[70]

67. *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, at 8, COM (2021) 762 final (Dec. 9, 2021) [hereinafter *European Commission Proposed Directive*], https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en.

68. *See id.* at 1–3 ("Today, over 28 million people in the EU work through digital labour platforms. In 2025, their number is expected to have reached 43 million.").

69. *Id.* at 10.

70. *Id.* at 3; *see also* European Commission Press Release IP/21/6605, Commission Proposals to Improve the Working Conditions of People Working Through Digital Labour Platforms (Dec. 9, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 ("The clear criteria the Commission proposes will bring the platforms increased legal certainty, reduced litigation costs and it will facilitate business planning.").

The first objective, which is the most significant to this article, was met by creating a framework designed to ensure correct worker classification of app-based workers. The framework utilizes a rebuttable presumption of an employment arrangement for workers that work through platforms that "control certain elements of the performance of work."[71] The Commission stated its rationale for use of the presumption:

> Those who, as a result of correct determination of their employment status, will be recognised as workers will enjoy improved working conditions – including health and safety, employment protection, statutory or collectively bargained minimum wages and access to training opportunities – and gain access to social protection according to national rules. Conversely, genuine self-employed people working through platforms will indirectly benefit from more autonomy and independence, as a result of digital labour platforms adapting their practices to avoid any risk of reclassification. Digital labour platforms will also gain from increased legal certainty, including with respect to potential court challenges. Other businesses that compete with digital labour platforms by operating in the same sector will benefit from a level playing field as regards the cost of social protection contributions. Member States will enjoy increased revenues in the form of additional tax and social protection contributions.[72]

Article 4 of the proposed directive sets forth the legal presumption together with a list of five control factors, two of which must be met, to trigger the presumption.[73] An app-based company controls the performance of work if two of the following are met:

> (a) effectively determining, or setting upper limits for the level of remuneration;

71. *European Commission Proposed Directive*, *supra* note 67, at 3.
72. *Id.* at 3.
73. *Id.* at 34–35.

> (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
> (c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
> (d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
> (e) effectively restricting the possibility to build a client base or to perform work for any third party.[74]

To clarify, if any two of the above are met, then a worker is presumed to be an employee or in an employment arrangement with the app-based company, and therefore the worker will be entitled to the benefits and social protections that employment brings. The minimum social protections include transparent and predictable working conditions, minimum requirements for parental and care-giving work-life balance arrangements, definitions for "working time" and "rest periods," health and safety guarantees, minimum wages, pay transparency, collective bargaining, unemployment and sickness benefits, participation in old-age pensions, and non-discrimination protection for temporary agency workers (which may apply to certain app-based arrangements).[75]

The proposed directive creates a baseline or minimum floor of rights for app-based workers that each Member State has to either meet or beat to prevent a "race to the bottom in employment practices and social standards to the detriment of workers."[76] The next step is for the European Parliament and the Council to consider the proposed directive.[77] If the directive is passed, then Member States have two years to comply.

74. *Id.* at 34.
75. *Id.* at 5–6; *see also* European Commission Press Release IP/21/6605, *supra* note 70.
76. *European Commission Proposed Directive*, *supra* note 67, at 4.
77. European Commission Press Release IP/21/6605, *supra* note 70.

B. Spain's La Ley del Rider

Spain policymakers did not await the results of the EU's public consultation or the impending proposed directive and on May 11, 2021, became the first EU country to enact a law that reclassifies app-based food delivery drivers as employees.[78] 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."[79]

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.[80] This court ruling provided the

78. C.E., B.O.E. n. 113, May 12, 2021 (Spain); *see* Eoghan Gilmartin, *Spain's New 'Rider Law' Could Change the Gig Work Game*, TRIB. MAG. (June 6, 2021), https://tribunemag.co.uk/2021/06/spains-new-rider-law-could-change-the-gig-work-game.

79. Gorka R. Pérez, *Spain Approves Landmark Law Recognizing Food-Delivery Riders as Employees*, EL PAÍS (May 12, 2021, 9:54 AM), https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html.

80. *Id.*; *see Gig Economy Shifts: Spain Makes Delivery Riders Employees*, ASSOCIATED PRESS (Mar. 11, 2021), https://apnews.com/article/business-laws-legislation-spain-economy-b74bfd4c1e8da05271853b069cb012b9; *see also Glovo Announces Improvements to the Working Conditions of Couriers in Consultation with the Fairwork Project*, FAIRWORK (Oct. 28, 2021), https://fair.work/en/fw/blog/glovo-announces-improvements-to-the-working-conditions-of-couriers-in-consultation-with-the-fairwork-project. Glovo announced a pledge—the Couriers Pledge—to improve working conditions for their workers. *Id.* The Couriers Pledge offers policies and social benefits for couriers; however, the pledge still falls short in standards of fair work in several areas. *See id. 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. While the law took effect in May, 2021, by October of that year Glovo was still treating most of its workforce as independent contractors. Agüera & López, *supra*. 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 Obreres (CCOO)) stated that the law "sets the grounds to ensure labour rights and social protection for delivery riders on digital platforms." *Id.* However, she noted that these rights will "only be achieved if they are supported by mobilisations and complaints to the labour authorities from workers and unions." *Id.* She further observed that 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. *Id.*

impetus for Spain's policymakers to create "La Ley del Rider" (the "Rider Law").[81] The Rider Law provides that app-based food delivery drivers are not self-employed (independent contractors).[82] This means that such drivers will have employment rights such as sick pay, disability benefits, breaks, and paid holidays.[83] Additionally, drivers will no longer have to pay their own social security fees which provide benefits such as unemployment subsidies and a public pension.[84] 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.[85]

"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.[86] "It sets the standard for forthcoming EU action on platform companies—a worker must be recognized as a worker."[87]

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

81. *See* Agüera & López, *supra* note 80.

82. *Id.*

83. *Id.*

84. Aritz Parra & Renata Brito, *Spain Adopts Landmark Law to Protect 'Gig' Delivery Workers*, ABC NEWS (May 11, 2021, 10:24 AM), https://abcnews.go.com/International/wireStory/spain-adopts-landmark-law-protect-gig-delivery-workers-77620461.

85. Pérez, *supra* note 79. *But see* Antonio Aloisi, *Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead*, 13 EUR. LABOUR L. J. 4, 8 (2022) (noting "[t]his collective right to information may contribute to making algorithms more transparent, but systems of objection and redress are lagging"). Professor Aloisi further states: "By operating in conjunction with the GDPR, however, the new provision could pave the way to a modern understanding of algorithmic accountability, combining national efforts and traditions on workplace monitoring with the general EU framework on data protection." *Id.*

86. *Tech28: Yolanda Diaz, Spain's Labor Minister*, POLITICO EU, https://www.politico.eu/list/tech-28-class-of-2021-the-ranking/yolanda-diaz (last visited Apr. 10, 2022).

87. *Id.*

economic viability of the market for the company."[88] 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 workers 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.

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.[89] The court provided a detailed statutory interpretation analysis of the definition of "worker" and expressed that classifying an individual as a "limb (b) worker"[90] is predicated on giving effect to the employment statute's

88. *Spain—Deliveroo Set to Pull Out of Spain Following Gig Economy Law Changes (City A.M.)*, STAFFING INDUS. 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.

89. Uber BV v. Aslam [2021] UKSC 5 (UK); *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.

90. A "limb (b) worker" is one that qualifies under the Employment Rights Act 1996 as:

> [A]n 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

purpose.[91] 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)."[92]

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."[93] 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."[94]

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."[95] Elaborating further the court noted that:

> reference to a worker's contract shall be construed accordingly.

Employment Rights Act 1996, c. 18, § 230(3)(b) (UK), https://www.legislation.gov.uk/ukpga/1996/18/section/230.

91. Uber BV v. Aslam [2021] UKSC 5, [71]–[72] (UK).

92. *Id.* at 71.

93. *Id.* at 38 (citing Baroness Hale of Richmond in *Bates van Winkelhof v. Clyde & Co LLP* [2014] UKSC 32).

94. *Id.* The *Aslam* court continues:

> 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.

Id. at 41. Elements 2 and 3 were not at issue. *Id.* "It is not in dispute that the claimant drivers worked under contracts whereby they undertook to perform driving services personally; and it is not suggested that any Uber company was a client or customer of the claimants." *Id.* at 42.

95. *Id.* at 87.

> [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] . . . .[96]

The court determined that Uber drivers were in a position of subordination to Uber [where] "the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance."[97] 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)."[98]
>
> 2. The contractual terms are dictated by Uber.[99]
>
> 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."[100] One way Uber controls the driver is by controlling the information provided to the driver.[101] Another way is by monitoring the driver's rate of acceptance (and cancellation) of trip requests.[102]
>
> 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.[103]

96. *Id.*
97. *Id.* at 101.
98. *Id.* at 94.
99. *Id.* at 95.
100. *Id.* at 96.
101. *Id.*
102. *Id.* at 97.
103. *Id.* at 98.

> 5. Uber disallows and makes it more difficult for communication between the driver and the passenger to transpire.[104]

The above enumerated facts tipped the scales for the court to find that Uber drivers meet the requirements of protected workers.[105] 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.[106]

Uber has reported that its drivers will earn at least a minimum wage after accepting a trip request and expenses.[107] Drivers will also get holiday pay equal to 12.07% of their earnings, paid every two weeks.[108] Additionally, they will be enrolled in a pension plan that both drivers and Uber will contribute to.[109]

The ruling applies only to Uber drivers, not other ridesharing apps. As a result, Uber launched a rideshare driver recruitment marketing campaign highlighting the benefits that they are providing their drivers (as compared to their competitors):[110]

> Sickness cover for drivers → Just what the doctor ordered—Only on Uber.[111]

104. *Id.* at 100.

105. *Id.* at 101.

106. Ryan Browne, *Uber Employment Rights Setback Is a "Gut Punch" to Its Prospects in the UK*, CNBC (Mar. 18, 2021, 3:27 AM), https://www.cnbc.com/2021/03/18/uber-is-reclassifying-uk-drivers-as-workers-heres-what-happens-next.html. Tom Vickers, a 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, has stated, "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 well-being." Russon *supra* note 89.

107. Kelvin Chan, *Uber to Give UK Drivers Minimum Wage, Pension, Holiday Pay*, ASSOCIATED PRESS (Mar. 16, 2021), https://apnews.com/article/minimum-wage-europe-cb15b4aff66c3838ef9470192c9fcefd.

108. *Id.*

109. *Id.*

110. 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.

111. *Id.*

> Every car comes with an out of office → Drivers earn holiday pay—Only on Uber.[112]

But as Uber touts the benefits it provides, it is also calling for compliance by competitors.[113] At the time of this writing, there does not appear to be any movement in the UK Parliament to codify the *Aslam* 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.[114] 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.[115] In looking at precedent, the court compared the test—"the

112. *Id.*

113. *See* Simon Duke, *Uber Claims Rivals Deny Drivers Their Rights*, THE SUNDAY TIMES (June 30, 2021, 12:01 AM), https://www.thetimes.co.uk/article/uber-claims-rivals-deny-drivers-their-rights-jp7q78x72; Jonathan Keane, *Uber Calls for UK Rivals to Follow Court Ruling on Driver Status*, FORBES (July 13, 2021, 6:53 AM), https://www.forbes.com/sites/jonathankeane/2021/07/13/uber-calls-for-uk-rivals-to-follow-court-ruling-on-driver-status ("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.").

114. Indep. Workers Union of Gr. Brit. v. Cent. Arb. Comm., [2021] EWCA (Civ) 952 (Eng.).

115. Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, § 296(1) (UK), https://www.legislation.gov.uk/ukpga/1992/52/section/296. This Act defines a "worker" as:

> 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.

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.[116]

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.[117] The court reviewed the Deliveroo Supplier's Agreements and noted that riders are permitted to have a substitute execute their deliveries.[118] 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.[119] As such, the court found that Deliveroo drivers were not entitled to organize because they were not in an employment relationship with Deliveroo.[120]

***

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 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 was deemed important when looking at a personal service requirement.[121] Another distinction made by the court is that the facts were different in both cases.[122] As such, the *Deliveroo* court considered the *Aslam* case of limited relevance.[123]

Id.

116. Indep. Workers Union of Gr. Brit. v. Cent. Arb. Comm., [2021] EWCA (Civ) 952 [71] (Eng.)(discussing B v. Yodel Delivery Network Ltd, [2020] IRLR 550). The court dismissed the last part of the test as not one that would make a "decisive difference." *Id.*

117. *Id.* at 23.

118. *Id.* at 24.

119. *Id.* at 26 ("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.")(quoting Kalwak v. Consistent Group Ltd. [2007] IRLR 560).

120. *Id.* at 85–86.

121. *Id.* at 85.

122. *Id.*

123. *Id.*

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."[124] Uber drivers in other countries are initiating legal actions in the hopes that their own courts will apply the rationale in *Aslam*.[125] And worker advocacy groups are using the *Aslam* case to pressure policymakers into classifying workers in a manner that will allow them protections.[126] "We call on the government to follow in the UK footsteps and give drivers their rights."[127] 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 due to the subordination analysis.

124. Ndungu Jay, *Hope for Digital Taxi Drivers as Kenya Considers Historic Directive*, NAIROBI TIMES (Feb. 24, 2021), https://nairobi-times.co.ke/2021/02/24/hope-for-digital-taxi-drivers-as-kenya-considers-historic-directive (quoting Cabinet Sec'y Lab. & Soc. Prot., Simon Chelugui).

125. Jay, *supra* note 124; *South Africa—Uber Set to Face Class Action Lawsuit as Drivers Demand Employee Rights*, STAFFING INDUS. ANALYSTS (Mar. 4, 2021), https://www2.staffingindustry.com/eng/Editorial/Daily-News/South-Africa-Uber-set-to-face-class-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*, BUS. INSIDER AUSTL. (Aug. 2, 2021), https://www.businessinsider.com.au/uber-drivers-legal-challenge.

126. Jay, *supra* note 124.

127. *Id.* (quoting Secretary-General to the Digit. Partners Soc'y,Wycliffe Alutalala).

D. Denmark's Agreement re: Delivery Drivers

In Denmark, agreements that cover pay and conditions are dealt with at the industry level rather than the governmental level.[128] In February, 2021, the 3F trade union worked directly with app-based food delivery company, Just Eat, to reach a "national sectoral agreement."[129] The agreement secures workers a minimum wage that increases over a two year period.[130] Additionally, the workweek duration is a minimum of eight hours and can go up to thirty-seven hours.[131] If the work exceeds thirty-seven hours, overtime is allowed up to forty-four hours.[132] "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."[133]

* * *

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

128. *Collective Bargaining*, EUR. TRADE UNION INST., https://www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark/Collective-Bargaining (last visited Apr. 10, 2021).

129. *3F Secures Ground-Breaking National Sectoral Agreement for Delivery Riders*, EUR. TRANSP. WORKERS' FED'N (Feb. 4, 2021), https://www.etf-europe.org/3f-secures-ground-breaking-national-sectoral-agreement-for-delivery-riders. Food delivery platform, Foodora, reached a collective bargaining agreement with Norway riders in September 2019. *Union Win! Historic Agreement for Food Delivery Workers*, INT'L TRANSP. WORKERS' FED'N (Oct. 7, 2019), https://www.itfglobal.org/en/news/union-win-historic-agreement-food-delivery-workers. Foodora and the Fellesforbundet union reached an agreement that includes an annual pay increase for full-time riders. *Id.* 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." *Id*.

130. *3F Secures Ground-Breaking National Sectoral Agreement for Delivery Riders*, *supra* note 129.

131. *Id.*

132. *Id.*

133. *Id.*

modify the tests.[134] The next part discusses the tests 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 worker's status: the control test, the entrepreneurial opportunities test, and the economic realities test.[135] 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.[136] Additionally, the tests are considered unpredictable.[137]

134. For example, the PRO Act passed in the U.S. House of Representatives on March 9, 2021, but has not passed in the Senate. *H.R. 842—Protecting the Right to Organize Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/842 (last visited Apr. 10, 2022). The PRO Act would require use of the ABC test for determining worker classification for NLRA purposes. *See* H.R. 842, 117th Cong. (2021). In states that use the ABC test, courts have typically found that app-based workers should be classified as employees. *See infra* note 219; *see also supra* note 24. President Biden's campaign pledge indicated he would like the ABC test to be used for multiple purposes: "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." *See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, *supra* note 24.

135. *See infra* Part V.C. (covering the IRS twenty-factor test because several states recently adopted its use).

136. Griffin Toronjo Pivateau, *Opposite Sides of the Same Coin: Worker Classification in the New Economy*, 37 HOFSTRA L. & EMP. L.J. 93, 102–04 (2019).

137. Due to this unpredictability, the American Law Institute's *Restatement (Third) of Employment Law* adopted a test that was created after an evaluation of the worker classification tests and court opinions applying them. In the section entitled "Conditions for Existence of Employment Relationship," the *Restatement* provides:

> (a) Except as provided in §1.02 and §1.03, an individual renders services as an employee of an employer if:
>
> (1) the individual acts, at least in part, to serve the interests of the employer;

A. The Control Test

Since the 1800s, workers have been classified as either "employees" or "independent contractors."[138] The control or right-to-control test was created in England and appropriated by the United States.[139] Originally, the classification significance regarded tort

> (2) the employer consents to receive the individual's services; and
>
> (3) 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 businessperson.
>
> (b) 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.

RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (AM. L. INST. 2015).

The *Restatement*'s endeavor was to "provide guiding principles to render the multifactor tests more focused and predictable." Michael C. Harper, *Focusing the Multi-Factor Tests for Employee Status: The Restatement's Entrepreneurial Formulation*, (Bos. Univ. Sch. of L., Working Paper No. 15-51, 2015), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1800&context=faculty_scholarship. Regarding 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).

138. *See* Prince, *supra* note 29, at 48 n.13. The common law distinction between employees and independent contractors originated in England and was originally an agency law question. It was first used in the United States in *Boswell v. Laird*, 8 CAL. 469, 489–90 (Cal. 1857). *See also* Carlson, *supra* note 32, at 302; Gerard M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189–90 (1939).

139. Carlson, *supra* note 32, at 302–05; Stevens, *supra* note 138, at 194–95; Jooho Lee, *The Entrepreneurial Responsibilities Test*, 92 TUL. L. REV. 777, 786–91 (2020).

liability—*respondeat superior*.[140] 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 vicariously liable.[141] 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.[142] 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.[143]

Numerous scholars have challenged the prudence of parlaying the control test and using it for means other than tort liability.[144] 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

140. Stevens, *supra* note 138, at 195; *see* Michael C. Duff, *All the World's a Platform?: Some Remarks on 'Marketplace Platform' Employment Laws*, U. WYO. COLL. L.: FAC. SCHOLARSHIP 1 (2020), https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1074&context=faculty_articles. Professor Duff stated the:

> [C]reation 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 "not servants" 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*)"

Id.

141. *See* Duff, *supra* note 140.

142. RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. 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* Acevedo, *supra* note 39, at 799; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 484–85 (2016) (discussing the "control test" under the common law of agency).

143. Vicarious liability through the doctrine of *respondeat superior* 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, 192–95 (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 J. FOR SOC. JUST. 769, 795–96 (2021) (proffering that states—Washington State in particular—should impose vicarious liability on app-based companies).

144. Rogers, *supra* note 142, at 486; Sprague, *supra* note 31, at 60.

Disabilities Act (ADA), Employee Retirement Income Security Act (ERISA), Federal Unemployment Tax Act (FUTA), Federal Insurance Contributions Act (FICA), Internal Revenue Code (IRC),[145] NLRA,[146] Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act of 1964, and the Worker Adjustment and Retraining Notification Act (WARN).[147] Additionally, many courts use the control test as a default when the term "employee" is not statutorily defined.[148]

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"[149] 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 [employer] may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;

145. The IRS divides facts that provide evidence of the degree of control into three categories: behavioral control, financial control, and the relationship between the parties. I.R.S. Publication 15-A, Cat. No. 21453T, at 7 (2021). These categories essentially categorize the twenty factors from Rev. Rul. 87-41, 1987-1 C.B. 296 into buckets. *See infra* Part V.C. Note that the twenty factors align well with the *Restatement*'s Agency control test. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958). *See generally*, S.D. Watson, *Who's an Employee*, 9 J. PENSION BENEFITS 20 (2002); Paul F. McGee, David A. Goodof, Jayanti Bandyopadhyay, & Andrew Christensen, *Misgivings of Misclassification of Workers: Tax Gaps*, 14 COMPETITION F. 222 (2016).

146. *See infra* Part IV.B. The NLRB and the D.C. circuit court have modified the strict use of the control test by inserting "entrepreneurial opportunity." *See infra* Part IV.B. Also of note, 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. *See H.R. 842—Protecting the Right to Organize Act of 2021*, *supra* note 134. However, as of this writing, the PRO Act has not passed the Senate. *Id.*

147. *See generally* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 679 (2013) (arguing that the control test "no longer represents our modern notion of what it means to be an employee"); Michael W. Fox, *Who's an Employee, Who's the Employer? It's Not as Easy as You Might Think*, 2016 TXCLE BUS. DISP. 12 app. 25 (describing the tests used under various federal labor and employment laws).

148. *See* Lee, *supra* note 139, at 788–89.

149. Kelley v. S. Pac. Co., 419 U.S. 318, 325 (1974); *see also* Logue v. United States, 412 U.S. 521, 527 n.5 (1973).

> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of [employer] and [employee]; and
> (j) whether the principal is or is not in business.[150]

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."[151] 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

150. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958); *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

151. Rogers, *supra* note 142, 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).

therefore its drivers should be considered employees.[152] According to Professors Charlotte Garden and Joseph Slater:

> To the extent that there is a dominant 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.[153]

B. The Entrepreneurial Opportunity Test (NLRA)

The NLRA uses the term "employee" when determining who has the right to organize.[154] 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.[155] In *NLRB v. United Insurance Company of America*, the U.S. Supreme Court held that the common law

152. *See* Garden & Slater, *supra* note 137, at 295 (2017). When referring to app-based work, Professors Garden and 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." *Id.*; *see also* Elizabeth Tippett, *Employee Classification in the United States*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 291 (Nestor M. Davidson, Michèle Fink, & John J. Infranca eds., 2018); Noah Zatz, *Does Work Have a Future If the Labor Market Does Not?*, 91 CHI.-KENT L. REV. 1081, 1086 (2016). *See generally* Nicholas L. DeBruyne, *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, 92 CHI.-KENT L. REV. 289, 307 (2017). See Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673, 1682 (2016) for a discussion of 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."

153. Garden & Slater, *supra* note 137, at 295.

154. 29 U.S.C. § 152(3) (2006). 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." *Id.*

155. *See* Atlanta Opera, Inc., 371 N.L.R.B. No. 45 (2021); *see also* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75 (2019) (McFerran, J., dissenting) (citing the NLRB's inconsistent application of the control test); Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311 (2011).

agency principles (i.e., the control test) are used to determine whether an individual is an employee or independent contractor under the NLRA.[156] 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.[157] But somewhat recently the NLRB adopted a more expansive use of entrepreneurial opportunities in making worker classification decisions in the *Supershuttle* case.[158] The impetus behind this shift emanated from the use of this entrepreneurial focus by the

156. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968). The Court further elaborated that the *Restatement (Second) of Agency* §220 factors are to be used and 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." *Id.* at 258; *see also Supershuttle DFW, Inc.*, 367 N.L.R.B at *12–14.

157. *See, e.g.*, FedEx Home Delivery, 361 N.L.R.B 610, at 620 (2014). The NLRB utilized this case to further explore the significance of entrepreneurial opportunity as a factor. *Id.* 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 N.L.R.B 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).

158. *Supershuttle DFW, Inc.*, 367 N.L.R.B at *9. *See* Lee, *supra* note 139, at 798; Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 357 (2011); *see also* Roadway Package System, 288 N.L.R.B 196 (1988); Standard Oil Co., 230 N.L.R.B 967, 968 (1977); Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Responsibility in the Fissured Workplace* (Inst. for New Econ. Thinking, Working Paper No. 114, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551446 (describing the NLRB's shift in focus from control to economic dependency in the employer-employee relationship).

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. NLRB v. Hearst Publ'ns, 322 U.S. 111, 124–25 (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*, at 21. For additional information on the history of worker classification determination, see Jost, *supra* note 155, at 315–32.

D.C. Circuit court. This lesser known test (or modification of the control test) is referred to as the Entrepreneurial Opportunities Test.[159]

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."[160] 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."[161] 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."[162]

Of note, however, is that other NLRB decisions are not all in sync with the *Supershuttle* case, and Member (now Chairman) McFerran wrote a very detailed, persuasive dissent in that case.[163] McFerran stated that the Entrepreneurial Opportunity Test is not really a test at all.[164] Rather, consideration of the entrepreneurial opportunities is another factor to weigh with the other *Restatement* factors.[165]

Consideration of entrepreneurial opportunities generally requires a look at whether workers have a "significant entrepreneurial opportunity for gain or loss."[166] "When examining entrepreneurial opportunities, [the court] . . . consider[s] the opportunities created by the

159. Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002); FedEx Home Delivery, Inc. v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009). See Jost, *supra* note 155, at 318–25, for an excellent, detailed explanation of the evolution of the definition of "employee" for NLRA purposes.

160. Supershuttle DFW, Inc., 367 N.L.R.B at *15.

161. *Id.*

162. *Id.* at *12 (quoting *FedEx Home Delivery*, 563 F.3d at 497).

163. *See id.* at *24 (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. *Id.* at *25.

164. *Id.* at *24–25.

165. *Id.*

166. Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 565–66 (D.C. Cir. 2016); Pa. Interscholastic Athletic Ass'n v. NLRB, 926 F.3d 837, 840 (D.C. Cir. 2019); Corp. Express Delivery Sys., 332 N.L.R.B. 1522, 1522 (2000), *enforced sub. nom.* Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777 (D.C. Cir. 2002); Slay Transp. Co., 331 N.L.R.B. 1292, 1294 (2000).

position to 'take [] economic risk and ha[ve] the corresponding opportunity to profit from working smarter, not just harder.'"[167] Workers who have opportunities to work "harder" but not "smarter," are more like employees than independent contractors.[168] Examples of working "smarter" —and therefore more like independent contractors—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,[169] and having control over the amount of time they allocate to a task.[170]

As stated above, the D.C. Circuit court uses this test for NLRA matters but not all circuits do.[171] Regardless of its recent use, some

167. *Lancaster Symphony Orchestra*, 822 F.3d at 569 (quoting *Corp. Express Delivery Sys.*, 292 F.3d at 780).

168. *Pa. Interscholastic Athletic Ass'n*, 926 F.3d at 842 (citing *Lancaster Symphony Orchestra*, 822 F.3d at 569).

169. *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 503 (D.C. Cir. 2009); *Corp. Express Delivery Sys.*, 292 F.3d at 780; Ariz. Republic, 349 N.L.R.B. 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 N.L.R.B. 1017, 1020–21 (2004) (finding that some of the drivers were entrepreneurs who owned multiple trucks and hired their own drivers); Dial-A-Mattress Operating Corp., 326 N.L.R.B 884, 891 (1998) (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 Transp. Co.*, 331 N.L.R.B. at 1294 (finding that 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 and noting that a "theoretical potential for entrepreneurial opportunity" was not enough to classify the drivers as independent contractors).

170. *Pa. Interscholastic Athletic Ass'n*, 926 F.3d at 842 ("Lacrosse officials have no control over the length of the games they referee, and they may not hire assistants, assign games to others, or find cheaper replacements and pocket the difference.") (citations omitted); *see also Corp. Express Delivery Sys.*, 292 F.3d at 780 (taking into account Corporate Express owner-operators' freedom to manage their time on the job); *FedEx Home Delivery*, 563 F.3d at 499–500 ("[C]ontractors do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there.").

171. *See Corp. Express Delivery Sys.*, 292 F.3d at 779; Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 993–94 (9th Cir. 2014) (declining to use the D.C. 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 *Alexander* 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

scholars and judges have criticized the Entrepreneurial Opportunity Test either stating it is inconsistent with U.S. Supreme Court precedent[172] or that the definition of entrepreneur is not properly considered in the determination of the entrepreneurial opportunities.[173] Another flaw noted is that the Entrepreneurial Opportunities Test has been applied in a manner that determines the "entrepreneurial *potential* offered

analysis." 765 F.3d at 993–94. Some courts have utilized entrepreneurial opportunity as part of their testing. *See* NLRB. 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. NLRB, 811 F.3d 1305, 1311 (11th Cir. 2016).

172. *See* Hirsch, *supra* note 158, at 357; *see also FedEx Home Delivery*, 563 F.3d at 504 (Garland, J., dissenting); Supershuttle DFW, Inc., 367 N.L.R.B. No. 75, at *22 (2019) (McFerran, J., dissenting). Member McFerran wrote that the Board majority adopted a confused approach "which cannot be reconciled with common-law principles or Supreme Court authority." *Supershuttle DFW, Inc.*, 367 N.L.R.B. at *22

173. *See* Lee, *supra* note 139, at 830–32. Lee observes that judges seem to rely on their own "common sense notions of entrepreneurship as profit seeking or risk taking" but that they do not have a "theoretical understanding of what entrepreneurship actually is and why it matters." *Id.* at 781. 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." *Id.* at 781–83. Lee defines the entrepreneur as someone who "assumes entrepreneurial responsibility for her economic activity." *Id.* at 811; *see also* Pivateau, *supra* note 136, at 119–24.

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." *Id.* at 108. Pivateau's test requires a court to consider each dimension of entrepreneurship: process (innovation), behavior (risk), and outcome (results). *Id.* at 119–25. 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. 106, 106–15 (2018). *But see* Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 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. *See id.* at 67. 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. *See id.* at 89. Further she notes that legalizing ride-sharing companies in California "produced casual, insecure work, were validated through the pretense of working-class entrepreneurship, and were devised through new business models that transferred corporate risk onto workers." *Id.* at 98.

to all workers, rather than the realities of the actual relationship between the worker and the hiring company."[174]

If the U.S. federal government adopts the ABC test via the Protecting the Right to Organize Act of 2021 (PRO Act) or some other similar bill, these issues will likely become moot but that does not mean that we should rubberstamp the ABC test.[175] As of this writing, NLRB Chairman McFerran has called for comments or suggestions on which test the NLRB should apply; options better than the ABC test may avail themselves through the open comment process.[176]

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

The FLSA uses the term "employee" when determining who is protected under federal minimum wage, and overtime laws.[177] The FLSA uses the "economic realities test" to classify workers as either employees or independent contractors.[178] This test originated from two 1947 U.S. Supreme Court cases[179] 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

174. 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." *Id.*; *see also* Jost, *supra* note 155, at 311.

175. *See infra* Part V.A.

176. See Atlanta Opera, Inc., 371 N.L.R.B. No. 45 (2021), and *supra* note 22 for details regarding the comment request.

177. *See* 29 U.S.C. § 203(e).

178. *See* Bodie, *supra* note 147, at 663; *see, e.g.*, Sec'y of Lab. 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. Cap. Int'l Sec., Inc., 460 F.3d 595, 602 (4th Cir. 2006); Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008).

179. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); *see also* United States v. Silk, 331 U.S. 704, 713 (1947).

permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.[180]

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 which he or she serves."[181] 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.[182] 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.[183]

The economic realities test has been widely criticized as being circular because it uses the word "employee" when defining an employee.[184] Nevertheless, it is used to determine whether a worker is an employee for purposes of the FLSA as well as the Family Medical

180. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 14027, 14029 (Mar. 12, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

181. *See* U.S. DEP'T OF LAB., 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. *See id.* at 323.

182. *See* Bodie, *supra* note 147, at 686; Lee, *supra* note 139, at 793.

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

184. Bodie, *supra* note 147, at 685; Sprague, *supra* note 31, at 58; Carlson, *supra* note 32, at 296.

Leave Act of 1993 (FMLA) since the FMLA adopted the FLSA definition of employee.[185]

On its face, the economic realities test appears quite like the control test because the tests share common factors.[186] Of note is the first enumerated factor, which is the right to control.

> 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.[187]

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."[188] But the lens through which one views control can be different. Instead of focusing on "personal control," this test can be viewed as focusing on the hiring entity's control over capital and the project.[189]

185. 29 U.S.C. § 203(e)(1); 29 U.S.C. § 2611(3); *see* Bodie *supra* note 147, 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) (explaining that 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).

186. *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 Rev. Comm'n, 20 F.3d 938, 941–42 (9th Cir. 1994).

187. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 112–13 (1984).

188. *Id.* at 110; *see* Lee, *supra* note 139, at 796.

189. Pivateau, *supra* note 136, at 108; Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes that Target the Construction Industry*, 39 J. LEGIS. 295, 297 (2012).

Scholars have criticized that the economic realities test "captures neither economic reality nor economic dependence."[190] 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.[191]

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.[192] While this new rule was withdrawn by the Biden administration prior to its effective date, it reflects that change is being sought.[193] The rule's executive summary explained the uncertainty that exists due to the economic realities test.[194] 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,

190. Lee, *supra* note 139, at 779; *see* Rogers, *supra* note 142, at 482; 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, 250 (1997). *See generally* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMPAR. LAB. L. & POL'Y J. 187 (1999).

191. Linder, *supra* note 190, 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.").

192. U.S. DEP'T OF LAB., WAGE AND HOUR DIV., WITHDRAWN RULE: INDEP. CONTRACTOR STATUS UNDER THE FAIR LAB. STANDARDS ACT (2021); *see* 85 Fed. Reg. 60600 (Sept. 25, 2020) (explaining the Department of Labor's proposed rulemaking notice).

193. *See* U.S. DEP'T OF LAB., *supra* note 192.

194. 85 Fed. Reg. 60600, 60600 (Sept. 25, 2020). The current test's "underpinning and the 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." *Id.*

which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy."[195]

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.[196] 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.[197] 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.[198] 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 economy[199] and that "continued legal uncertainty may deter innovative work arrangements."[200]

195. *Id.*

196. *Id.* at 60612.

197. *Id.* at 60610, 60635.

198. *Id.* at 60609–10.

199. *Id.* at 60608 (referencing Coase's Theorem on transaction costs when considering the 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. *Id.* 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. 60600, 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. Stat., U.S. Dep't of Lab., Employee Tenure in 2014 (Sept. 18, 2014), https://www.bls.gov/news.release/archives/tenure_09182014.pdf.

200. 85 Fed. Reg. 60600, 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).

There were 1,825 comments submitted when DoL solicited feedback.[201] 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."[202] Dr. Conrad was not against the test as presented but noted specific needs for clarification.[203] Additionally, at least one scholar has stated that the test is "still too similar to the economic

201. *Independent Contractor Status Under the Fair Labor Standards Act*, REGULATIONS.GOV (Mar. 24, 2020), https://www.regulations.gov/document/WHD-2020-0007-0001/comment. While there were 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. *Id.* 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. This comment from Kimberly Jenkins provides a telling example:

> 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.

Kimberly Jenkins, *Independent Contractor Status Under the Fair Labor Standards Act*, REGULATIONS.GOV (Oct. 21, 2021), https://www.regulations.gov/comment/WHD-2020-0007-0383.

202. Letter from Dr. James Conrad, President, Inst. of Elec. & Elec. Eng'r, to Dep't of Lab., Wage & Hour Div. (Oct. 26, 2020) (on file with author) ("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.").

203. *Id.*

realities test and has several factors that can complicate enforcement and application."[204]

As mentioned above, the rule was withdrawn prior to its go-live date. The reasons given by the Biden administration DoL included: (1) The 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.[205]

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 would like to consider a uniform test for purposes of the FLSA, IRC, and NLRA.[206] 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.[207] The next part discusses the ABC test and other tests that states are using (that differ from the federal tests). Notably no states have adopted the Trump's DoL version of the economic realities test.

V. WORKER CLASSIFICATION TESTS AT THE STATE LEVEL

As shown in Part IV, the federal government uses three main tests to determine worker classification. Because states are not required to utilize the federal government's tests, many states employ other

204. Brian A. Brown II, 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 (2020).

205. 29 C.F.R. §§ 780, 788, 795; *see* U.S. DEP'T OF LAB., WAGE & HOUR DIV., *supra* note 192.

206. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, *supra* note 24.

207. *Id.*

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.[208] Finally, it outlines state laws that directly address app-based work, such as marketplace contractor laws.

208. 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. UNIF. WORKER CLASSIFICATION ACT (AM. LEGIS. EXCH. COUNCIL 2021), 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 the uniform act is gaining some traction in states such as North Carolina (HB 867), and Oklahoma (SB 380). The overall stated goal of the uniform act is to "simplif[y] the criteria used to define independent contractors with respect to employment, and impose[] objective standards on the differentiation of independent contractors from employees." UNIF. WORKER CLASSIFICATION ACT, *supra*. The model act "also provides for uniformity of a state's laws where the distinction between employees and independent contractors is relevant." *Id.* In Section 2(a) of the act, ALEC makes clear that the act applies to the gig economy. *Id.*

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. *About ALEC*, AM. LEGIS. COUNCIL (2021), https://www.alec.org/about. *But see* Maya Pinto, Rebecca Smith, & Irene Tung, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, NAT'L EMP. L. PROJECT (Mar. 25, 2019), https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-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,* THE ATL. (Apr. 14, 2012), https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-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/alec-american-legislative-exchange-council-model-bills-republican-conservative-devos-gingrich/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.").

A. The ABC Test

The ABC Test (see below) has been trending for the past few years.[209] It is used by numerous states for various determinations.[210] It has been said that "widespread adoption of the ABC test could be a game changer."[211] However, not every state's policymakers are enamored with the ABC test, and some are refuting the use of it.[212]

209. Maine adopted the ABC test in 1935. Christopher J. Cotnoir, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment compensation "ABC Test"*, 46 ME. L. REV. 325 (1994). Massachusetts adopted the test in 2004, and other states have followed. *See* 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); Prince, *supra* note 29. See Part II for a discussion of the coverage of California's 2019 adoption of the ABC test and Part IV.C for a discussion of other states considering adopting the ABC test now that California has.

210. An analysis of all 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 4 (Aug. 24, 2020), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/20aug/20aug-pp-thayer-employment-classification (observing that those that use the ABC test and those that use a shortened version of the ABC test do 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 PA. STAT. § 753(l)(2)(B) (2019) 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). *See also* Lowman v. Unemployment Comp. Bd. Rev., 235 A.3d 278, 298 (Pa. 2020).

211. Sprague, *supra* note 44, at 767; *see* V.B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* 5 (Legal Stud. Rsch. Paper Series, Working Paper No. 381, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488009 (arguing that proposals to the historical tests often fail to consider "the legally inscribed ability of businesses to reshape 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. *Id.*

212. *See infra* Part IV.C. Some scholars also have reservations. *See* Edward A. Zelinsky, *Defining Who is an Employee After A.B.5: Trading Uniformity and Simplicity for Expanded Coverage*, 70 CATH. U. L. REV. 1, 26–29 (2021) (arguing that the ABC test is "no model of clarity" and "introduces new interpretative challenges to the determination of employee status"); Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J.

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.[213] The PRO Act would adopt the ABC test for purposes of the NLRA.[214] 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."[215] President Biden's platform materials indicated that he was a proponent of using the ABC test for various federal statutes.[216]

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."[217] The ABC test from the Massachusetts statute states:

> [A]n individual performing any service . . . shall be considered to be an employee unless:
>
> (1) the individual is free from control and direction in connection with the performance of the service, both

111, 129 (2009); Sprague, *supra* note 44, at 767 ("[T]he ABC test is no panacea with respect to employee/independent contractor classification.").

213. Worker Flexibility and Small Protection Act of 2020, S. 4738, 116th Cong. § 102 (2020); H.R. 8375, 116th Cong. § 102 (2020).

214. *See* Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. § 101(b) (2021); H.R. 842, 117th Cong. § 101(b) (2021).

215. Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts.

216. *See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, *supra* note 24.

217. Goldman & Weil, *supra* note 158, at 46; Mark Elrich, *Misclassification in Construction: The Original Gig Economy*, ILR REV. (2020), https://lwp.law.harvard.edu/files/lwp/files/erlich_ilrr_final_article_11.28.20.pdf ("The 'ABC' test codified in California's AB 5 (modeled on a 2004 Massachusetts statute) is the clearest; it presumes workers to be employees unless they are free from another's direction and control, perform services outside the employer's usual course of business, and, customarily engage in that trade, occupation, or profession.").

> 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.[218]

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 fewer 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.

In application, 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.[219] 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]

218. MASS. GEN. LAWS ANN. ch. 149 §148B (West 2009).

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) (citing Razak v. Uber Techs., Inc., No. 16-573, 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018)) (commenting that had *Razak* 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 Techs., Inc., 56 Cal. App. 5th 266, 298 (Cal. Ct. App. 2020) *as modified on denial of reh'g* (Nov. 20, 2020) ("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

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 22 (Prop 22)[225] that would allow voters to decide their resident drivers' classification.[226]

Uber's contention that the drivers' work is outside the usual course of its business under prong B.").

But note that Uber, Lyft, and others 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. California, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *17–18 (Cal. Sup. Ct. 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." *Id.* at 11–12. Uber and others are expected to appeal the ruling, so the constitutionality of Prop 22 is still being tested.

221. Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37 (D. Mass. 2020).

222. Cunningham v. Lyft, Inc., No. 1:19-cv-11974, 2020 WL 2616320, at *9 (D. Mass. May 22, 2020) (quoting Athol Daily News v. Bd. of Rev. of the Div. of Emp't & Training, 786 N.E.2d 365, 371 (Mass. 2003)).

223. *Id.* at *10.

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 v. Uber Techs., Inc., 2084CV01519-BLS1, 2021 WL 1222199 (Mass. Sup. Ct. Mar. 25, 2021).

225. *See infra* Part V.B.

226. *See* Nate Raymond & Tina Bellon, *Group Backed by Uber, Lyft Pushes Massachusetts Gig Workers Ballot Measure*, REUTERS (Aug. 4, 2021, 1:25 PM), https://www.reuters.com/business/autos-transportation/group-backed-by-uber-lyft-pushes-massachusetts-gig-worker-ballot-measure-2021-08-04 ("The proposal would establish an earnings floor equal to 120% of the Massachusetts minimum wage for

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 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 re-balance power in a working relationship."[228] The state that uses the ABC test and has the most carve-outs is California.

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*, BOS. MAG. (Sept. 20, 2021, 5:04 PM), https://www.bostonmagazine.com/news/2021/09/20/massachusetts-gig-worker-ballot-question (describing the initiative's impact on hotel and retail workers if employers decide to replace their employees with gig labor. This was pointed out by Senator Elizabeth Warren.).

227. Prince, *supra* note 29, at 66; *see* Jean-Marie Caterina, *Commentary: ABC Exemptions Help Workers, Protect Small Businesses*, 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 & Weil, *supra* note 158, at 50; @TheIndypendent, TWITTER (Jan. 23, 2022, 8:06 PM), https://twitter.com/TheIndypendent/status/1485433850050273283?s=20 (discussing Congresswoman Alexandria Ocasio-Cortez's remarks regarding New York City's new law providing delivery workers with access to restrooms, fair pay, and tip transparency).

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

California's worker classification law is comprised of the ABC test[229] and a 1989 court-created multi-factor test (the *Borello* test).[230]

229. Assem. B. 2257, 2019–2020 Reg. Sess. (Cal. 2020) (adding Article 1.5 and repealing LABOR CODE § 2750.3; effective Sept. 4, 2020); *see* Prince, *supra* note 29, at 85 n.244. 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. Complaint for Injunctive Relief, Civil Penalties, Restitution & Other Equitable Relief at 5, California v. Handy Techs., No. CGC-21-590442 (Cal. Super. Ct. Mar. 17, 2021), https://www.bloomberglaw.com/public/desktop/document/THEPEOPLEOFTHESTATEOFCALIFORNIAvsHANDYTECHNOLOGIESINCETALDocketNo?1633976810.

230. The California Department of Industrial Relations states the *Borello* multifactor test as "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" and:

> 1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
> 2. Whether the work is a regular or integral part of the employer's business;
> 3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
> 4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
> 5. Whether the service provided requires a special skill;
> 6. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
> 7. The worker's opportunity for profit or loss depending on their managerial skill;
> 8. The length of time for which the services are to be performed;
> 9. The degree of permanence of the working relationship;
> 10. The method of payment, whether by time or by the job;
> 11. Whether the worker hires their own employees;
> 12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
> 13. 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-employee relationship).

Originally codified as "AB5," the law has been updated (repealed) by AB2257.[231] 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.[232] 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 workers are exempt (or carved out) from the ABC test, then they are 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.[233] Accordingly, AB2257 does not simplify or clarify a worker's classification but rather creates 'rigid exemptions' with detailed conditions."[234]

AB5 reclassified ride-share and delivery app drivers as employees entitling them to a host of protections under the California labor laws.[235] 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.[236] Prop 22 asked residents to vote in

Independent Contractor Versus Employee, CAL. DEP'T OF INDUS. RELS., https://www.dir.ca.gov/dlse/faq_independentcontractor.htm (last visited Apr. 8, 2022); *see also* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 404 (Cal. 1989).

231. *See* Prince, *supra* note 29, at 54–55.

232. *See Independent Contractor Versus Employee*, *supra* note 230.

233. *See* Prince, *supra* note 29, at 67. See *id.* at 94–96 for the list of exemptions from AB5 and AB2257. *See also* Chris Micheli, *AB 5 'Fix:' New Exemptions Added to California's Independent Contractor Law*, CAL. GLOBE (Sept. 14, 2020, 2:20 PM), https://californiaglobe.com/section-2/ab-5-fix-new-exemptions-added-to-californias-independent-contractor-law.

234. Prince, *supra* note 29, at 67–68; *see also* 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).

235. *See, e.g.*, People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 298–301 (Cal. Ct. App.), *as modified on denial of reh'g* (2020).

236. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative* (2020), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) (last visited Apr. 11, 2022).

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."[237] Prop 22 passed, and if it is upheld by the courts, such drivers will be exempt from California's AB5 entirely.[238] As part of Prop 22, 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.[239] 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.[240] 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."[241] And what is the demographic of these ride-share and delivery drivers? In our cities it is overwhelmingly immigrants and subordinated minorities.[242] Prop 22

237. *Id.*

238. Through extensive and expensive lobbying efforts, Uber and other groups were successful, and Prop 22 received 58.63% of the votes. *Id.*

239. *Id.*; *see* Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional ("[T]he benefits package that the companies offered in exchange proved to be a mirage."); *see also* Veena B. Dubal, *Economic Security & the Regulation of Gig Work in California: From AB5 to Proposition 22*, 13 EUR. LAB. L.J. 51, 56 (2021). Professor Dubal commented on how the companies—Uber, Lyft, DoorDash, and Instacart—misled voters and drivers. *Id.* For example, voters were given information via television and other forms of media indicating that Prop 22 would provide workers with more benefits and guarantee a minimum wage. *Id.* However, Prop 22 instead "legally sanctioned the workers' independent contractor status, stripped workers of protections owed to them by law, and provided very limited benefits in return." *Id.*

240. Dubal, *supra* note 38, 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.'" *Id.*

241. *Id.* at 5 n.11; *see, e.g.*, Dzieza, *supra* note 11 (describing the perilous situations in which delivery workers find themselves between deliveries and the safety measures they have taken to protect themselves and each other in New York City).

242. Dubal, *supra* note 38, at 6.

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.[243] Uber will appeal the ruling.[244]

Prop 22 only exempted rideshare and delivery app drivers from AB5. It did not exempt other app-based companies, and city District Attorneys have launched misclassification cases against other app-based companies including DoorDash, Handy, Taskrabbit, Rover, Mobile Wash, Fuzzy Pet Health, and Lime scooters.[245] 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.[246] "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."[247] The complaint outlines more indicia of control including the

243. Castellanos v. California, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *17–18 (Cal. Sup. Ct. Aug. 20, 2021). Judge Roesch ruled that Prop 22 was unconstitutional because it "limits the power of a future legislature to define app-based drivers as workers subject to workers' compensation law." *Id.* Uber and others are expected to appeal the ruling.

244. Preetika Rana, *California Ballot Measure that Classifies Uber, Lyft Drivers as Independent Ruled Unconstitutional*, WALL ST. J. (Aug. 20, 2021), https://www.wsj.com/articles/proposition-22-is-unconstitutional-california-judge-says-11629512394.

245. On November 22, 2021, DoorDash settled a misclassification case with the San Francisco Office of Labor Standards and Enforcement for $5,137,953. Press Release, City Att'y, David Chiu, San Francisco Secures Over $5 Million Settlement for DoorDash Workers (Nov. 22, 2021), https://www.sfcityattorney.org/2021/11/22/san-francisco-secures-over-5-million-settlement-for-doordash-workers.

On August 17, 2020, TaskRabbit settled a pre-AB5 misclassification class action suit for $1,750,000. Order Granting Preliminary Approval of Class Action Settlement, at 2, Finholt v. TaskRabbit Inc., No. BC722869 (Cal. Super. Ct. 2020), http://www.finholtsettlement.com/media/2972431/preliminary_approval_order.pdf; *see also* Maeve Allsup, *Gig Companies Face California Crackdowns that Uber, Lyft Escape,* DAILY LAB. REP. (Apr. 15, 2021, 3:45 AM), https://news.bloomberglaw.com/daily-labor-report/gig-companies-face-california-crackdowns-that-uber-lyft-escape.

246. Complaint for Injunctive Relief, Civil Penalties, Restitution & Other Equitable Relief, at 2, 7, California v. Handy Techs., Inc., No. CGC-21-590442, at 2, 7 (Cal. Super. Ct. Mar. 17, 2021), https://aboutblaw.com/Wj0.

247. *Id.* at 7.

requirement to use certain COVID-19 protocols.[248] 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.[249] 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.[250] 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.[251] In 2019, Arkansas, Oklahoma, and Tennessee abandoned the ABC test (or consideration of it) and adopted the IRS twenty-factor test (see below).[252] In

248. *Id.* at 9. The complaint continues:

> 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.

Id. The complaint then lists detailed directions regarding use of PPE and such written by Handy. *Id.* at 9–10.

249. *Id.* at 12.

250. *Id.* at 14.

251. 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. For example, Michigan started using the twenty-factor test for unemployment compensation purposes in 2013 having previously used the economic realities test. MICH. COMP. LAWS § 418.161(n) (2012). Missouri has been using the twenty-factor test for unemployment tax purposes since 2001. *See* Klausner v. Brockman, 58 S.W.3d 671, 680 (Mo. App. 2001), *overruled on other grounds by* Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. 2003).

252. H.B. 1850, 92d Gen. Assemb., Reg. Sess., (Ark 2019) (the Arkansas Empower Independent Contractors Act was signed by Governor Asa Hutchinson on April

2021, Alabama jumped on the bandwagon and also adopted the IRS twenty-factor test.[253] Also in 2021, Louisiana adopted a new classification test consisting of a twelve-point list that if seven of the points are met, the worker will be deemed an independent contractor—it is easy to see the alignment of these twelve points with the IRS twenty-factor test, but, notably, the statute requires the math to work whereas the IRS and courts are left to using their own math.[254]

16, 2019); H.B. 1095, 58th Legs., 1st Sess. (Okla. 2021) (the Oklahoma Empower Independent Contractors Act was signed by Governor Kevin Stitt on May 13, 2019). Tennessee's H.B. 539 was signed into law by Governor Bill Lee on May 10, 2019.

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

254. H.B. 705, 2021 Reg. Sess. (La. 2021) was signed by Governor John Bel Edwards on June 23, 2021, and became effective on August 1, 2021. Workers who pass at least 7 of the 12 points are classified as independent contractors. The twelve points are:

> (a) The individual or entity operates an independent business that provides services for or in connection with the contracting party.
>
> (b) The individual or entity represents the provided services as self-employment available to others, including through the use of a platform application to obtain work opportunities or as a lead generation service.
>
> (c) The individual or entity accepts responsibility for all tax liability associated with payments received from or through the contracting party.
>
> (d) The individual or entity is responsible for obtaining and maintaining any required registration, licenses, or other authorization necessary for the legal performance of the services rendered by him as the contractor.
>
> (e) The individual or entity is not insured under the contracting party's health insurance or workers' compensation insurance coverage and is not covered for unemployment insurance benefits.
>
> (f) The individual or entity has the right to accept or decline requests for services by or through the contracting party and is able to perform services for or through other parties or can accept work from and perform work for other businesses and individuals besides the contracting party even if the individual voluntarily chooses not to exercise this right or is temporarily restricted from doing so.
>
> (g) The contracting party does not direct or oversee the performance, methods, or processes the individual or entity uses to perform services.

Interestingly, in 2020, the Commonwealth of Virginia's legislature was presented with a choice: adopt the ABC test or the IRS twenty-factor test.[255] After considering both, it chose to adopt the twenty-factor test.[256]

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.[257] If the safe-harbor is not met, the IRS twenty-factor test applies before deciding whether a person should be classified as an employee.[258] 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 consider:

> (h) The contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the individual or entity determines the days worked and the time periods of work.
>
> (i) The individual or entity furnishes the major tools or items of equipment needed to perform the work.
>
> (j) The individual or entity is paid a fixed or contract rate for the work performed and the contracting party does not pay the individual or entity a salary or wages based on an hourly rate.
>
> (k) The individual or entity is responsible for the majority of expenses incurred in performing the services, unless the expenses are reimbursed under an express provision of a written contract between the parties or the expenses reimbursed are commonly reimbursed under industry practice.
>
> (l) The individual or entity can use assistants as deemed proper for the performance of the work and is directly responsible for supervision and compensation.

Id.

255. H.B. 801, Gen. Assemb., 2020 Sess. (Va. 2020), which would have adopted the ABC test, but instead enacted H.B. 1407 Gen. Assemb., 2020 Sess. (Va. 2020), which requires use of the twenty-factor test.

256. H.B. 1407, Gen. Assemb., 2020 Sess. (Va. 2020), was signed by Governor Ralph Northam on April 6, 2020. It became effective on July 1, 2020.

257. H.B. 2590, 2021 Leg., Reg. Sess. (W. Va. 2021); Todd Lebowitz, *West Virginia Adopts Pro-Business Independent Contractor Test*, WHO IS MY EMP.? (Mar. 29, 2021), https://whoismyemployee.com/2021/03/29/west-virginia-adopts-pro-business-independent-contractor-test; *see also supra* note 208.

258. Lebowitz, *supra* note 257.

1. Instructions
2. Training
3. Integration
4. Services Rendered Personally
5. Hiring, Supervising, and Paying Assistants
6. Continuing Relationship
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[259]

No one single factor is dispositive; hiring entities (and courts) are to consider all of the factors and the relationship as a whole.[260]

It is likely that business-friendly states are adopting the IRS test because their resident business owners are often most immediately concerned with the economics of 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 saves the business owners money while providing the added security in the knowledge that they are less likely to violate tax laws and receive deficiency notices.[261]

259. Rev. Rul. 87-41, 1987-1 C.B. 296.

260. I.R.S. Publication 15-A, Cat. No. 21453T (2022), https://www.irs.gov/pub/irs-pdf/p15a.pdf.

261. Additionally, now tax attorneys can employ machine-learning tools that perform scenario testing and sensitivity analysis based on federal tax worker classification cases from 1921 to 2021, which can enable tax attorneys to estimate the relevance of each of the IRS factors based on their client's specific fact pattern. I have no evidence that policymakers knew about this artificial intelligence, but as it becomes more well-known it could influence policymakers to choose the IRS test instead of

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.[262] 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 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.[263] 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.[264] Handy's political strategist and

one of the other options. Benjamin Alarie & Kathrin Gardhouse, *Predicting Worker Classification in the Gig Economy*, TAX NOTES (Dec. 20, 2021), https://www.taxnotes.com/featured-analysis/predicting-worker-classification-gig-economy/2021/12/17/7cpkf.

262. *See infra* Table 1.

263. 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, https://work.qz.com/1240997/handy-is-trying-to-change-labor-law-in-eight-states (last updated Apr. 2, 2018); Norman Scheiber, *Is Gig Work a Job? Uber and Others Are Maneuvering to Shape the Answer*, N.Y. TIMES (Mar. 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*, TEX. OBSERVER (Apr. 3, 2019, 2:05 PM), https://www.texasobserver.org/handy-wanted-to-disrupt-texas-labor-laws-it-may-have-also-disrupted-texas-lobbying-laws.

264. Lydia DePillis, *For Gig Economy Workers in These States, Rights Are at Risk*, CNN MONEY (Mar. 14, 2018),

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?"[265]

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

Table 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	Utah Code Ann. § 34-53-201*

*limited to building service contractors

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.[266] The laws are also self-serving because companies make more money if their workers are independent

https://money.cnn.com/2018/03/14/news/economy/handy-gig-economy-workers/index.html (noting that 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* Part V.B.

265. DePillis, *supra* note 264.

266. Duff, *supra* note 140. 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 nation, with most work focused on transportation, delivery, and home services . . . ." David B. Torrey, *Workers' Compensation, Nonstandard Work, and Workers Laboring in the Gig*, 49 THE BRIEF (July 8, 2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/spring/workers-compensation-nonstandard-work-and-workers-laboring-the-gig/.

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.[267]

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 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);

267. Keeping costs down puts these companies at a competitive advantage. For example, in the complaint brought by San Francisco District Attorney (DA) 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.

Complaint for Injunctive Relief, Civil Penalties, Restitution & Other Equitable Relief, at 2, 7, California v. Handy Techs., Inc., No. CGC-21-590442, at 2, 7 (Cal. Super. Ct. Mar. 17, 2021), https://aboutblaw.com/Wj0.

(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.[268]

This law is a perfect example of how Handy authored a statute that "simply restates the elements of the current business models of the gig companies. 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."[269] 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.[270]

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.[271] These companies are "transportation network companies" and are addressed under a different provision in the Tennessee Code.[272] Tennessee workers who do not come within the purview of the marketplace contractor 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.[273]

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

268. TENN. CODE ANN. § 50-8-102 (2021).

269. NAT'L EMP. L. PROJECT, RIGHTS AT RISK: GIG COMPANIES' CAMPAIGN TO UPEND EMPLOYMENT AS WE KNOW IT 3 (2019), https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf.

270. *Id.*; *see* Goldman & Weil, *supra* note 158, at 48.

271. TENN. CODE ANN. § 50-8-103 (2021).

272. TENN. CODE ANN. §§ 65-15-301 to -311 (2021).

273. *See supra* Part III.C.

became effective on April 29, 2019.[274] Texas Administrative Code Section 815.134, "Employment Status: 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.[275] 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.[276]

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."[277] Said another way, the rule presumes employment unless all of the nine elements are met.

274. 40 TEX. ADMIN. CODE § 815.134 (2021).

275. *Id.*

276. 40 TEX. ADMIN. CODE § 815.134 (2018) (amended Apr. 9, 2019), 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.*

277. 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.

Id. at § 815.134(b)(1)(B).

The elements must be met in contract and in fact before a worker is not treated as in employment. The nine elements are:

> (A) That all or substantially all of the payment paid to the contractor shall be on a per-job or transaction basis;
> (B) 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;
> (C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;
> (D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;
> (E) 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;
> (F) 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;
> (G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;
> (H) 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
> (I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.[278]

278. *Id.* at § (b)(1)(C)(2).

The above elements will be applied on a case-by-case basis based upon the facts of each working relationship.[279] 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.

* * *

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.[280] 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

279. *See* 40 TEX. ADMIN. CODE § 815.134 (2018) (*amended* Apr. 9, 2019), https://www.twc.texas.gov/files/agency/fr-ch-815-marketplace-adopted-4-9-19-twc.pdf ("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.").

280. 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.

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 is 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.

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.[281] The EU Commission released its proposed directive on app-based workers for the EU Parliament and Council's consideration.[282] 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.[283] The UK has limb (b)

281. *See supra* Part III.B.

282. *See supra* Part III.A.

283. Harris, *supra* note 33, at 8; John A. Pearce II & 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-

workers that receive certain benefits, benefits less than an employee would have but more than an independent contractor.[284] Prop 22 created a third category of worker (for specific app-based drivers).[285] 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.[286] The Prop 22 category also perpetuates racial inequalities.[287] 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

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* Tippett, *supra* note 152 (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." *Id.*

284. *See supra* notes 12–17 and accompanying text. Italy and Canada also use a third category of worker. *See* Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017); Can. Labour Code, R.S.C. 1985, L-2, § 3 (defining a dependent contractor as 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 also* Harris, *supra* note 33, at 8; Pearce II & Silva, *supra* note 283, at 31; Judy Fudge, Eric Tucker, & 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 noted 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." *Id.* There is no country-wide universal solution, and the definition of employee versus dependent contractor can vary from jurisdiction to jurisdiction. *See id.*

285. *See supra* Part II; Dubal, *supra* note 38, at 9–10.

286. Dubal, *supra* note 38, at 10.

287. *Id.*

perpetuate worker inequities including racial and gender inequalities.[288]

One thing is for sure, the volume of legal disputes over the issue of app-based worker classification is unsustainable and puts tremendous pressure on workers who must hire attorneys or enter lengthy 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 experiencing 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.

288. *Id.* at 45 ("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.").