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Redefining ‘Employee’ in the Gig Economy: Shielding Workers from the Uber Model

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*J.D. Candidate, Fordham University School of Law, 2018.

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Abstract

Increasingly, companies in the gig-economy utilize independent contractors, rather than traditional employees, as a means to cut costs and decrease employment related liability. These companies rely on independent contractors for work and retain control over work typically performed by employees. But there are significant legal distinctions between employees and independent contractors; namely employees are protected in ways that independent contractors are not. Traditionally, employees are defined as workers over whom an employer exerts or retains the right to control the manner and means of the work. While the traditional test to determine whether an individual is an employee is set forth in the Restatement (Second) of Agency, under this framework, courts struggle to characterize many of the non-traditional working arrangements utilized by the gig economy. This Note summarizes the seminal case law addressing the distinctions between independent contractors and employees. This Note then discusses Uber Technologies, a popular ride sharing application, to highlight the inadequacies of the current employment test. Specifically, this Note describes a growing problem where, different courts have analyzed Uber’s employment framework under the traditional test, yet reached opposite conclusions regarding driver’s employment status—even when predominately considering the same facts and circumstances. In light of the ever changing economy, this Note argues that the Restatement’s traditional test is insufficient to determine an individual’s working status. As a solution, this Note proposes both a new five factor test and legislative solution to prevent companies from improperly utilizing the independent contractor type worker. Without a revised standard to determine employment status, companies may be motivated to engage in a race to the bottom on wages and labor costs without the long-standing safeguards in place to protect employees.

KEYWORDS: Independent Contractor, Employee, Legislation

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*Ben Z. Steinberger**

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Increasingly, companies in the gig-economy utilize independent contractors, rather than traditional employees, as a means to cut costs and decrease employment related liability. These companies rely on independent contractors for work and retain control over work typically performed by employees. But there are significant legal distinctions between employees and independent contractors; namely employees are protected in ways that independent contractors are not. Traditionally, employees are defined as workers over whom an employer exerts or retains the right to control the manner and means of the work. While the traditional test to determine whether an individual is an employee is set forth in the Restatement (Second) of Agency, under this framework, courts struggle to characterize many of the non-traditional working arrangements utilized by the gig economy. This Note summarizes the seminal case law addressing the distinctions between independent contractors and employees. This Note then discusses Uber Technologies, a popular ride sharing application, to highlight the inadequacies of the current employment test. Specifically, this Note describes a growing problem where, different courts have analyzed Uber’s employment framework under the traditional test, yet reached opposite conclusions regarding driver’s employment status—even when predominately considering the same facts and circumstances. In light of the ever changing economy, this Note argues that the Restatement’s traditional test is insufficient to determine an individual’s working status. As a solution, this Note proposes both a new five factor test and legislative solution to prevent companies from improperly utilizing the independent contractor type worker. Without a revised standard to determine employment status, companies may be motivated to engage in a race to the bottom on wages and labor costs without the long-standing safeguards in place to protect employees.

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INTRODUCTION

Legal doctrine distinguishes employer-employee relationships from arrangements between companies and independent contractors. Specifically, the law protects employees in various ways that it does not protect independent contractors.¹ Thus, an individual’s designation as

1. See, e.g., *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137–38 (N.D. Cal. 2015).

either an employee or independent contractor is significant. The Restatement (Second) of Agency (the Restatement) sets forth the traditional test to determine whether an individual is an employee or an independent contractor.² However, courts struggle to apply this test to new or non-traditional business arrangements. Particularly, the gig economy—whereby companies contract with independent workers on a part-time basis—has influenced the way several companies model their businesses. Therefore, it is increasingly difficult for courts to analyze these relationships under the traditional employment test. Given these new business models, it is necessary to adopt a new test to determine whether an individual is in fact an employee or independent contractor.

Uber Technologies, Inc. (Uber) is an example of a company that has built a business by leveraging new technology in the gig economy.

In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger.³

Uber and drivers using the company's software disagree on whether the drivers are employees or independent contractors. Resolving this dispute requires courts to determine what type of company Uber is and the product it provides. Notably, Uber claims to be a technology company—not a transportation company.⁴ Uber specifies that the product it offers is the mobile application software used to connect drivers and riders.⁵ The company claims that its platform is merely a broker between drivers looking to make money and riders looking to reach their destination.⁶ Therefore, Uber contends that drivers are independent contractors, rather than employees.

On the other hand, Uber's drivers claim that they are employees of the company. For example, "Uber is deeply involved in marketing its

2. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

3. *O'Connor*, 82 F. Supp. 3d at 1135.

4. *Id.* at 1137.

5. *Id.*

6. *Id.* ("Uber . . . describes the software it provides as a lead generation platform that can be used to connect businesses that provide transportation with passengers who desire rides.").

transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices.”⁷ Drivers assert that this control over the manner and means of their work likens Uber to a typical employer. Unfortunately, even when examining the same facts and circumstances, courts have issued conflicting opinions on whether the drivers are employees or independent contractors.⁸

Part I of this Note outlines the traditional test under the Restatement to determine whether someone is an employee or independent contractor. Part I also describes a growing problem—courts applying this test to similar facts and circumstances have arrived at different conclusions. Using Uber as an example, Part II of this Note emphasizes that this problem has only increased in the gig economy. To address this concern, Part III of this Note proposes a new test for courts to weigh when examining whether an individual is an employee. This Note also proposes a legislative solution.

I. THE RESTATEMENT TEST HAS RESULTED IN A DIVERGENCE IN DETERMINING WHETHER A WORKER IS AN EMPLOYEE

The test to determine whether someone is an employee or independent contractor stems from the common law and is applied differently from state to state. This Part begins by examining the factors outlined in the Restatement.⁹ This Note will then discuss the divergence in seminal case law applying these factors.

“A[n] [employee] is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”¹⁰ To determine whether a worker is an employee or independent contractor, courts review the facts and circumstances of the relationship, including:

- (a) the extent of control which, by the agreement, the [employer] may exercise over the details of the work;

7. *Id.*

8. *See infra* Part II.

9. The Restatement (Third) of Agency does not modify this test. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006).

10. RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958).

- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of [employer]and [employee]; and
- (j) whether the principal is or is not in business.¹¹

While these factors can all lend evidence of an employer-employee relationship, courts place significant weight on the extent of the employer's control.¹² In the case of either independent contractors or employees, the employer can direct the desired outcome and general procedure. This direction does not necessarily constitute control.¹³ Instead, control is determined by evaluating the extent of oversight the employer has over the 'manner and means' of the work.¹⁴ Thus, if an employer exerts significant control over the details of a job and the way it is executed, there is a strong inference that the parties have an employer-employee relationship.¹⁵ On the other hand, a worker who has autonomy to execute the work is more likely an independent contractor.¹⁶

Still, jurisdictions apply and weigh these factors differently, which has only added confusion to the current test. For example, two seminal cases—*Humble Oil & Refining Co. v. Martin* and *Hoover v. Sun Oil Co.*—which examined similar facts and circumstances, came to opposite conclusions. These cases illustrate the inadequacy of the current test

11. *Id.* § 220(2).

12. *Id.* § 220(1) cmt. d.

13. *Id.* § 220(1) cmt. e.

14. *Id.*

15. *See, e.g.,* *Humble Oil & Ref. Co. v. Martin*, 222 S.W.2d 995 (Tex. 1949).

16. *See, e.g.,* *Hoover v. Sun Oil Co.*, 212 A.2d 214 (Del. Super. Ct. 1965).

courts use to determine whether an individual is an independent contractor or employee.

In *Humble Oil*, the court held that because the employer exerted considerable control over its gas station attendant, the parties had an employer-employee relationship despite the label the parties gave the relationship.¹⁷ The parties' agreement illustrated several characteristics of an independent contractor arrangement, namely, the agreement was titled "Commission Agency Agreement," and explicitly renounced any control by the employer over the employee.¹⁸

However, the facts and circumstances suggested that the gas station attendant was instead an employee. The court pointed to several factors, including: that the attendant was obligated to prepare financial reports for the employer and perform duties in connection with the operation of the station, the employer retained ownership of all products sold at the station until the ultimate sale to the customer, the employer furnished the location and equipment for the station, and the employer paid for the advertising media, the products, and a substantial part of operating costs.¹⁹ Furthermore, the employer determined the hours of operation and could terminate the agreement at will.²⁰ These facts, taken together, demonstrated that the attendant was an employee, despite the label the parties gave the relationship.

When evaluating similar facts, the *Hoover* court came to the opposite conclusion.²¹ The court held that there was no employer-employee relationship between Sun Oil, the property owner, and its gas station proprietor, because the gas station proprietor, rather than Sun Oil, controlled the day-to-day operations of the gas station.²²

The court considered the facts and circumstances of the relationship. For example, either party could terminate the lease with thirty days' notice.²³ Further, there was no set rent price; the rent varied partially based on gasoline purchases.²⁴ The parties also had a separate dealer agreement in which the gas station operator agreed to buy gas products from Sun Oil

17. *Humble Oil*, 222 S.W.2d at 998.

18. *Id.* at 997-98.

19. *Id.* at 998.

20. *Id.*

21. *Hoover*, 212 A.2d at 214.

22. *Id.* at 216.

23. *Id.* at 214.

24. *Id.* at 214-15.

and in return Sun Oil provided equipment for the station.²⁵ While the service station was free to sell other gasoline products, the operator chose to carry predominantly Sun Oil's products.²⁶

The court placed significant emphasis on the property owner's control over the work. The court noted that the standard for finding an employer-employee relationship was "whether the oil company has retained the right to control the details of the day-day operation of the service station."²⁷ Since the property owner did not have control over the details of the station's day-to-day operation, no employer-employee relationship existed.²⁸ These cases illustrate how courts analyze similar scenarios differently and weigh each factor dissimilarly.

II. APPLYING THE TEST IN THE GIG ECONOMY HAS INCREASED THE DIVERGENCE BETWEEN COURTS

Novel business models in the gig economy have only increased conflicting applications of the factors in the Restatement. In particular, whether drivers are independent contractors has been the subject of recent judicial review. For example, examining a motion for summary judgment, one court found that Grubhub—an online food ordering service that connects diners to local restaurants—could not establish, as a matter of law, that the drivers were independent contractors.²⁹ Nevertheless, after a bench trial, the same court found that the driver was an independent contractor.³⁰ Similarly, and the subject of this Note, courts applying the test to Uber's business model have come to opposite conclusions on whether drivers are employees of the company.

A. UBER

A number of facts support Uber's position that drivers are independent contractors rather than employees. For example, examining the factors that courts often place the most weight, Uber does not exert control over some aspects of the work. Uber provides job flexibility for

25. *Id.* at 215.

26. *Id.*

27. *Id.* at 216.

28. *Id.*

29. *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2017 WL 2951608 (N.D. Cal. July 10, 2017).

30. *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC (N.D. Cal. Feb. 8, 2018).

drivers by permitting them to choose their own hours³¹ and use their own cars.³² Drivers are not directly supervised by Uber³³ and they are not required to wear a uniform or display Uber signage in their vehicles.³⁴ Additionally, Uber allows drivers to work for direct competitors, such as Lyft, another on-demand ridesharing company.³⁵

Furthermore, Uber does not pay drivers a salary, but instead pays on a per-job basis—charging riders for the fare, an amount determined solely by Uber, and then giving drivers a percentage of that fare.³⁶ At the end of each week, Uber transfers payments to drivers via direct deposit and sends the drivers a Form 1099 at the end of each year³⁷—the IRS form used by independent contractors.

Before using the Uber application, a driver must agree to the terms and conditions of Uber’s “Software Sublicense and Online Agreement” (the Agreement), which disclaims any rights to claim an employee-employer relationship.³⁸ The Agreement expressly defines the relationship between Uber and drivers as hirer-independent contractor.³⁹ The drivers further explicitly agree that they are not entitled to unemployment benefits,⁴⁰ and each trip is considered a separate contract agreement that drivers can accept or reject.⁴¹ Additionally, the Agreement contains an arbitration provision and delegation clause.⁴² Thus, these facts support the argument that Uber and the drivers form an independent contractor relationship.

Some aspects of Uber’s arrangement with the drivers also reflect elements of an employer-employee relationship. For example, Uber

31. O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015).

32. *Id.* at 1137.

33. *Id.*

34. McGillis v. Dep’t of Econ. Opportunity, 210 So. 3d 220, 222 (Fla. Dist. Ct. App. 2017).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1207–08 (9th Cir. 2016). The arbitration provision specifies that disputes arising out of the contract and relationship must be submitted to arbitration. *Id.* The delegation provision states that any issues as to whether the claim can be arbitrated are to be decided by an arbitrator. *Id.*

provides drivers with instructions on how a driver should behave while on the job.⁴³ The company instructs on details as specific as what drivers should wear and maintaining proper hygiene.⁴⁴ Uber monitors the quality of the rides based on ratings each rider gives to the driver at the end of their trip.⁴⁵ If a driver's overall rating falls below a certain level, Uber may deactivate the driver's account.⁴⁶ As previously noted, Uber determines the fare without any input from the drivers,⁴⁷ and while drivers are free to set their own hours or refuse rides, this freedom is limited by the fact that if a driver declines three rides in a row, the software will mark the driver as unavailable.⁴⁸ Additionally, Uber exerts control by maintaining a strict non-solicitation policy, which prohibits drivers from arranging for rides with Uber customers outside of the Uber software.⁴⁹

Notably, Uber updates its Agreement from time to time⁵⁰ and drivers cannot use the software to pick up passengers until they agree to the updated terms.⁵¹ Each new agreement gives the driver the option to opt-out of the arbitration provision.⁵² However, even if a driver were to opt-out of the new agreement's arbitration provision, they are still bound by the previous version if they had not opted out.⁵³ Thus, to avoid arbitration, drivers must opt-out of the very first agreement and all subsequent agreements.⁵⁴

There is also a significant amount of work required to become an Uber driver.⁵⁵ First, a potential driver must complete an application.⁵⁶ The applicant must provide their driver's license and information about their

43. *O'Connor*, 82 F. Supp. 3d at 1150.

44. Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion For Summary Judgment at 18, *O'Connor*, 82 F. Supp. 3d 1133.

45. *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 222–23 (Fla. Dist. Ct. App. 2017).

46. *Id.* at 223.

47. *O'Connor*, 82 F. Supp. 3d at 1142.

48. *Razak v. Uber Techs., Inc.*, Civil Action No. 16-573, 2017 WL 4052417, at *5 (E.D. Pa. Sept. 13, 2017).

49. *O'Connor*, 82 F. Supp. 3d at 1142.

50. *Rimel v. Uber Techs., Inc.*, 246 F. Supp. 3d 1317 (M.D. Fla. 2017).

51. *Id.* at 1321.

52. *Id.*

53. *Id.*

54. *Id.*

55. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015).

56. *Id.*

vehicle, including registration and insurance details.⁵⁷ Additionally, the applicant must pass a background check conducted by a third party.⁵⁸ Finally, Uber requires drivers to pass a “city knowledge test” and a personal interview.⁵⁹ Only after a prospective driver has gone through all these steps can they sign a contract with Uber.⁶⁰ Taken together, these facts strongly indicate that Uber and the drivers share an employer-employee relationship.

B. FLORIDA

Florida courts have determined that the drivers are not Uber’s employees. While Florida adheres to the factors outlined in the Restatement, courts applying Florida law begin by examining how the parties label their relationship. First, the court looks to the label the parties assigned to their relationship in their agreement⁶¹: if the agreement addresses the issue, then the party disputing the label is required to establish that the reality of the relationship is not in accordance with the contract.⁶² While the label the parties agree to is not dispositive, it is both relevant and important.⁶³ Once a party establishes that the agreement or title of the relationship does not accurately reflect the reality of the relationship, then the court turns to the factors listed in the Restatement.⁶⁴ The most important factor in the analysis is the amount of control the employer has over the employee.⁶⁵

In *McGillis v. Department of Economic Opportunity*, a Florida court found that Uber’s drivers were not employees for the purpose of reemployment assistance.⁶⁶ The court relied on the title of the parties’

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1319 (11th Cir. 2015).

62. *Id.*

63. *Id.*

64. *Cantor v. Cochran*, 184 So. 2d 173, 174–75 (Fla. 1966).

65. *Verchick v. Hecht Invs., Ltd.*, 924 So. 2d 944, 946 (Fla. Dist. Ct. App. 2006).

66. *McGillis v. Dep’t of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017). The Department of Revenue initially found that the drivers were employees. *Id.* at 221. Uber contested this finding in an evidentiary hearing. *Id.* A special deputy

agreement and the explicit provision in the agreement that stated the driver was an independent contractor.⁶⁷ The court's analysis of the control Uber had over the drivers is particularly noteworthy. The court found that "the central issue is the act of being available to accept requests . . . this control is entirely in the driver's hands."⁶⁸ The court agreed with the Department's finding that,

[a]s a matter of common sense, it is hard to imagine many employers who would grant this level of autonomy to employees permitting work whenever the employee has a whim to work, demanding no particular work be done at all even if customers will go unserved, permitting just about any manner of customer interaction, permitting drivers to offer their own unfettered assessments of customers, engaging in no direct supervision, requiring only the most minimal conformity in the basic instrumentality of the job (the car), and permitting work for direct competitors.⁶⁹

Further, the use of a Form 1099 and the lack of any fringe benefits from Uber to the drivers supported the conclusion that the drivers were not employees of the company.⁷⁰

C. CALIFORNIA

In contrast to Florida's examination of the label the parties give to the relationship, California courts first look to whether the putative employee is providing a service to the employer. Under California law, "the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a[n] [employee] in the absence of evidence to the contrary."⁷¹ Thus, if a putative employee successfully presents evidence that they have provided a service to an employer, the burden shifts to the employer to prove the employee was an independent contractor.⁷² California courts examine the

recommended reversal and the Department of Economic Opportunity adopted the recommendation. *Id.* at 222.

67. *Id.*

68. *Id.* at 225 (internal quotation marks and alterations omitted).

69. *Id.* at 226 (alteration in original).

70. *Id.*

71. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (citing *Narayan v. EGL Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (citation and internal quotation marks omitted) (alterations in original omitted)).

72. *Id.*

extent to which the employer controlled the details of the work as the “most significant consideration” in determining whether the worker is an employee or independent contractor.⁷³ The right to control “need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains ‘all necessary control’ over the worker’s performance.”⁷⁴ The employer is not required to actually exercise the control—merely retaining the right to do so is sufficient.⁷⁵ The power to end the relationship at any time is a means by which employers control the worker’s activities.⁷⁶ Therefore, the power to terminate an agreement at will is strong evidence of an employment relationship.⁷⁷

California courts have applied this test to Uber’s business model.⁷⁸ In *O’Connor v. Uber Technologies, Inc.*, various drivers claimed that they were employees of Uber and entitled to “various statutory protections for employees codified in the California Labor Code.”⁷⁹ Uber moved for summary judgment “that [the] [p]laintiffs [were] independent contractors as a matter of law.”⁸⁰ The district court found that the drivers provided a service to Uber, and therefore, were entitled to the presumption that they were employees.⁸¹ First, the court found Uber’s self-proclaimed status as a technology company “unduly narrow.”⁸² Second, Uber “would not be a viable business entity without its drivers.”⁸³ Third, Uber exercises “significant control” by setting the riders’ fares and, ultimately, the amount of revenue the company generates from the drivers.⁸⁴ Therefore, it was clear that the drivers perform a service for Uber and were presumed employees.

73. *Id.* (citations omitted). Additionally, no particular factor is dispositive; the factors are intertwined and the outcome depends on the particular combination of facts. *Id.* at 1140.

74. *Id.* at 1138.

75. *Id.* at 1139.

76. *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014).

77. *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

78. *See, e.g., O’Connor*, 82 F. Supp. 3d at 1141.

79. *Id.* at 1135.

80. *Id.*

81. *Id.* at 1141.

82. *Id.* (“Uber does not simply sell software; it sells rides.”).

83. *Id.* at 1142.

84. *Id.*

The burden then shifted to Uber to rebut that presumption. Here, however, there was a dispute regarding whether Uber had “the right to control the manner and means” of the drivers’ result.⁸⁵ In particular, whether Uber could fire the drivers at will was a question of material fact.⁸⁶ Further, several facts regarding the extent Uber monitors the drivers were also in dispute.⁸⁷ Therefore, the court could not conclude, as a matter of law, that the drivers were Uber’s independent contractors rather than its employees.⁸⁸ Importantly, the court acknowledged that the employment test was antiquated in the Uber context.⁸⁹ The court suggested that “[o]ther factors, which might arguably be reflective of the current economic realities” may be more appropriate.⁹⁰

III. REDEFINING ‘EMPLOYEE’—A NEW TEST

The factors used to evaluate the performance of services under the Restatement have failed to provide an adequate framework for recognizing employment in the gig economy. Courts have relied on factors that inappropriately disadvantage employees. Accordingly, this Note proposes a new test for courts to use to determine whether an individual is an employee. However, since some courts have deflected the need for a new test to the legislature,⁹¹ this Note also highlights a potential legislative solution.

85. *Id.* at 1148–49 (quoting *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014) (quoting *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989))).

86. *Id.* at 1149.

87. *Id.* For example, Uber argued that since drivers could work as much or as little as they like, it could not have control over them. *Id.* at 1149–50. There was also a dispute about whether Uber’s quality of service guidelines were recommendations or requirements. *Id.* Further, it was unclear whether Uber actively monitored the performance of the drivers. *Id.*

88. *Id.* at 1153.

89. *Id.*

90. *Id.* Those other factors may include “the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each.” *Id.*

91. *See, e.g., id.* at 1153.

A. FIVE FACTOR TEST

To determine whether workers are performing services to a company—and are therefore employees rather than independent contractors—courts should consider the following factors:

1. whether the company exercises significant control over the details of the work;
2. whether the worker is relying on the proceeds of the work as a primary or sole source of income;
3. whether the company relies on the workers, collectively, as a significant, consistent revenue generator;
4. whether the employer is operating in an industry that traditionally utilizes employees or independent contractors; and
5. whether the arrangement is defined by a contract of adhesion with an unsophisticated party.

Each of these factors will be discussed in turn.

*1. Whether the Company Exercises Significant Control
over the Details of the Work*

If a company exercises significant control over the details of the work completed by a worker, that control should weigh in favor of finding an employer-employee relationship. Uber claims that it does not exert significant control over drivers using its software. For example, drivers choose their own hours and routes, use their own cars, and may work for Uber's competitors.⁹² Further, Uber does not require drivers to wear a uniform or display Uber signage in their vehicles.⁹³

However, Uber's claim that it lacks control over the drivers is a mere illusion. A driver cannot access Uber's passenger pool without first completing an onboarding process.⁹⁴ The onboarding process includes a requirement that each driver pass a background check, a "city knowledge test," and a personal interview.⁹⁵ Drivers who successfully complete the onboarding process are given smartphones with Uber's proprietary

92. *Id.* at 1138; *see also* McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 222 (Fla. Dist. Ct. App. 2017).

93. *McGillis*, 210 So. 3d at 226.

94. *O'Connor*, 82 F. Supp. 3d at 1136.

95. *Id.*

software to access the passenger pool.⁹⁶ To use the software, a driver must first agree to the on-screen terms and conditions of Uber's Agreement.⁹⁷ Only then can a driver access the passenger pool.⁹⁸ The fares paid by riders are determined solely by Uber.⁹⁹ Uber then delivers a percentage of the fare to each driver weekly.¹⁰⁰ Further, Uber screens, regulates, monitors, and disciplines drivers, and terminates drivers who do not meet their standards.¹⁰¹ Uber uses riders' ratings that are based on the rider's experience.¹⁰² These facts, in the aggregate, show that Uber exercises significant control over the manner and means of how the drivers do their job. This control should weigh in favor of indicating that the drivers are employees of Uber.

2. *Whether the Worker Is Relying on the Proceeds of the Work as a Primary or Sole Source of Income*

If a worker is relying on the proceeds of the work as their primary or sole source of income, that reliance should weigh in favor of indicating that the worker is an employee of the company. Uber engages in mass marketing directed at both drivers and riders.¹⁰³ Uber emphasizes how much money drivers can make driving for the company.¹⁰⁴ Some drivers have relied on these claims and quit their full-time employment to drive for Uber.¹⁰⁵ Unfortunately, some drivers fail to make the amount of money Uber advertises.¹⁰⁶ Therefore, these drivers are now relying on Uber as the sole source of their income.

Critics may argue that the drivers were acting on their own volition when they chose to quit their jobs. This argument, however, fails to recognize that the drivers relied, to their detriment, on Uber's deceptive marketing tactics to make that decision.

96. *Id.* at 1153.

97. *McGillis*, 210 So. 3d at 222.

98. *Id.*

99. *Id.* at 222 n.3.

100. *O'Connor*, 82 F. Supp. 3d at 1137.

101. *Id.*

102. *Id.* at 1151 ("Most notably, Uber requests passengers to give drivers a star rating, on a scale of 1–5, after each completed trip based on the driver's performance.").

103. *Id.*

104. Dave Lee, *Uber to Pay \$20m to 'Misled' Drivers*, BBC NEWS (Jan. 20, 2017), <http://www.bbc.com/news/technology-38686787> [<https://perma.cc/ACT5-F9JJ>].

105. *O'Connor*, 82 F. Supp. 3d at 1136.

106. Lee, *supra* note 104.

Further, Uber argues that drivers may work for the company's competitors¹⁰⁷ and, therefore, the status of each driver can be likened to an independent contractor. While this may be true, the argument ignores Uber's strict non-solicitation policy.¹⁰⁸ Drivers are prohibited from arranging for subsequent rides with customers who used the Uber application.¹⁰⁹ Further, while drivers are free to choose their own hours or refuse rides, if a driver declines three rides in a row, the software will mark the driver unavailable.¹¹⁰ If the drivers were truly independent contractors, they would be able to freely solicit customers who use the software. Such solicitation would serve as an alternative source of income for the drivers. Since the drivers are relying on Uber as their primary or sole source of income, and have no input into the price calculation, that reliance should weigh in favor of indicating that the drivers are employees of Uber.

3. *Whether the Company Relies on the Workers, Collectively, as a Significant, Consistent Revenue Generator*

If a company relies on the workers, collectively, as a significant, consistent revenue generator, that reliance should weigh in favor of finding that the workers are employees of the company. Since Uber does not sell or license its software, its only source of revenue is based on a percentage of each passenger's fare.¹¹¹ Without the drivers, Uber would lose its primary source of revenue.¹¹² Therefore, since Uber relies on the workers, collectively, as a significant, consistent revenue generator, that reliance should weigh in favor of finding that the drivers are employees of Uber.

107. *Id.* at 1137–38.

108. *Id.* at 1142.

109. *Id.*

110. Razak v. Uber Techs., Inc., 2017 WL 4052417 (E.D. Pa. 2017).

111. *O'Connor*, 82 F. Supp. 3d at 1142 (“Uber’s revenues do not depend on the distribution of its software, but on the generation of rides by its drivers.”).

112. Uber also leases cars to drivers through its subsidiary, Xchange Leasing LLC. Class Action Complaint at 2, Kikano v. Uber Techs., Inc., No. 2:17-cv-00509-CAS-JEM (C.D. Cal. Jan. 20, 2017). These leases can have exorbitant fees and, if not paid, are withheld by Uber from payments made to the driver on behalf of their subsidiary. *Id.*

4. *Whether the Employer Is Operating in an Industry that Traditionally Utilizes Employees or Independent Contractors*

The type of business the employer is in has always been a factor in the test. Platform companies, however, are non-traditional entities that can operate within a traditional industry. Whether or not a company is a true platform company is beyond the scope of this Note. Additionally, the companies trying to decrease liability and employee expenses are incentivized to call themselves platform companies. Deferring to the label of company, merely because that is what it claims to be, on such an important issue is nonsensical. Companies who are and want to be treated as platform companies must show that they are indeed a platform company. Therefore, the analysis must take into account the industry that the company is in. This would counter the effect of companies claiming to be platform companies simply to lower costs and undercut the competition.

5. *Whether the Arrangement Is Defined by a Contract of Adhesion with an Unsophisticated Party*

If the arrangement between a company and an unsophisticated worker is defined by of a contract of adhesion, the definition should be irrelevant for indicating whether the worker is an employee of the company. Unfortunately, some courts have used the definition of the relationship between the parties as an indicator of whether the worker is an employee.¹¹³ These courts have noted that if there is an express waiver of the employer-employee relationship the court is bound by it unless the party proves it does not accurately indicate the true nature of the relationship.¹¹⁴ However, this examination of the label defining the relationship between the parties, unfairly weighs in favor of the company. Since these contracts of adhesion are drafted by the companies and are seldom read by unsophisticated counterparties, the label of the parties' relationship will always be defined by the company. Further, as in the case of Uber, every time Uber revises the contract, drivers must agree before they can access the passenger pool.¹¹⁵ Therefore, courts should

113. See, e.g., *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 223–24 (Fla. Dist. Ct. App. 2017) (Florida law “requires courts to initially look to the parties’ agreement.”).

114. *Id.*

115. *Rimel v. Uber Techs., Inc.*, 246 F. Supp. 3d 1317 (M.D. Fla. 2017).

disregard the definition of the parties' relationship in a contract of adhesion between the company and an unsophisticated party.

B. A LEGISLATIVE SOLUTION

The economic realities of the gig economy warrant a new test for determining whether a worker is performing services for a company. However, some courts have been hesitant to adopt a new test, finding that it is the role of the legislature to provide an appropriate solution.¹¹⁶ Seattle is one city that has taken legislative action by passing an ordinance that permits for-hire drivers to collectively bargain with the companies "that hire, contract with, and or partner with them."¹¹⁷ The ordinance also allowed the parties to seek a judicial remedy if either party refused arbitration.¹¹⁸ An attempt to find such legislative action ultra vires and in violation of antitrust law proved futile.¹¹⁹

Regardless of which route to employee status one takes it will result in increased costs. Whether the increased cost is passed on to the consumer is irrelevant. As a society we have long ago agreed that certain things are more important than corporate profit. Minimum wage and safe working conditions are some examples. Allowing companies to circumvent employee protections by simply renaming their employees, independent contractors would just incentivize companies to engage in a race to the bottom, entirely abolishing the long-standing protections provided by legislation. Additionally, consumers are demonstrating that they care about factors other than cheap services. It is possible that consumers would be willing to pay more per trip to ensure that the drivers

116. See, e.g., *O'Connor*, 82 F. Supp. 3d at 1153.

117. City of Seattle Ordinance 124,968 (Dec. 23, 2015), http://clerk.seattle.gov/~archives/Ordinances/Ord_124968.pdf [<https://perma.cc/KY8R-VEFC>].

118. *Id.*

119. *U.S. Chamber of Commerce v. City of Seattle*, No. C17-0370RSL, 2017 WL 3267730, at *12 (W.D. Wash. Aug. 1, 2017) ("[T]he City's novel approach to improving safety, reliability, and stability in transportation services is in no way inconsistent with the legislature's purpose or the enumerated powers granted to local governments. As discussed above, the City made findings regarding the link between collective negotiation processes and improved public health and safety outcomes, and the driver coordinators are proper targets of local regulation aimed at privately operated for hire transportation services. The Ordinance therefore falls squarely within the scope of the 'other requirement' provision.").

are paid a living wage.¹²⁰ Therefore, jurisdictions where courts are hesitant to adopt the new test proposed by this Note, should consider doing so regardless.

CONCLUSION

The traditional employment test summarized by the Restatement has long led to a divergence between courts applying the test to the same facts and circumstances. The changing economic realities of the gig economy have only increased this divergence. Unfortunately, this divergence has been detrimental to modern employees. This Note has proposed a new test that accounts for the new economic reality. This test should be adopted by courts to accurately define employee-employer relationships in the gig economy. In the alternative, jurisdictions should consider a legislative solution that adequately protects employees.

120. Ashley Lutz, *Furious Customers are Deleting the Uber App After Drivers Went to JFK Airport During a Protest and Strike*, BUS. INSIDER: NORDIC (Jan. 29, 2017, 5:38 PM), <http://nordic.businessinsider.com/delete-uber-hashtag-jfk-airport-taxi-strikes-2017-1/> [<https://perma.cc/4RAB-G8H5>].

APPENDIX

PROPOSED PROTECT EMPLOYEES IN THE GIG ECONOMY ACT OF 2018 ACT

A BILL

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protect Employees in the Gig Economy Act of 2018.”

SECTION 2. DISTINGUISHING EMPLOYEES FROM INDEPENDENT CONTRACTORS.

(a) Where a corporation (or any corporate entity), acting in an industry that typically utilizes employees for the type of work the company is hiring an individual, that individual shall be presumed to be an employee where, the employer can terminate the employment at will and supervises the employee, directly or indirectly regardless of the name the parties give the relationship.

(b) Either party can rebut the presumption where the employer affirmatively shows that the parties agreed to an independent contractor-employer relationship and the employer does not supervise the details of the job performance, only the outcome to be achieved.

(c) Where the contract between the parties labels the relationship an independent contractor-employer relationship, courts should look to the facts and circumstances surrounding the negotiation and entering into of the agreement to ascertain whether the parties reached an agreement knowingly and consensually without any undue coercion. Undue coercion shall include, but is not limited to, a form contract between disparate parties where the hiree is not represented by legal counsel or is not fully informed of the distinctions and legal ramifications between an independent contractor and employee.