WORKER CHARACTERIZATION IN A GIG ECONOMY VIEWED THROUGH AN UBER CENTRIC LENS

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The ubiquitous presence of the Internet and social web applications have given rise to new opportunities for free-lance workers. Identified by various names, one such identification as *gig-economy* has been a coined phrase to describe interactions wherein a worker signs on for a *gig*, or usually limited time job such as a musical performance. The phrasing has also been extended to the *sharing economy* referring to consumers in some way sharing their property with users or renters, and also referenced as *peer-to-peer sharing*. Examples of such gig economy activities include residential sharing such as with Airbnb and Couchsurfing, transportation sharing with Uber and Lyft, home tasks with Taskrabbit, and even pet sitting with Dogvacay. Considered by this article, however, are the developing issues resulting from broad, more intensive use of the gig economy by companies in acquiring workers, and specifically the classification of those workers as either employees or independent contractors. For purposes of this article the bulk of the commentary will be directed toward the transportation company Uber due to its lead in the industry and pervasive presence both nationally and internationally. Structurally, Section I of this article will review Uber's method of operation; Section II will appraise various methods of characterizing workers, and the impacts of characterization as either independent contractor or employee; Section III will look specifically at specific recent and current litigation involving Uber; Section IV will identify several recent legislative attempts to provide guidance; and, Section V will propose that the most efficient system to resolve many of the issues presented specific to Uber and similar business models would be a commonality of statues, much as done with the Uniform Commercial Code, with recognition at the national level.

I. THE UBER MODEL

Uber is perhaps the poster-child for success in the sharing/gig-economy. At the time of writing of this article Uber is subject to a class action lawsuit in California, *O'Connor v. Uber Techs., Inc.*,[1] which was subject to a

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settlement agreement, but such agreement was not approved by the court.[2] Some of the commentary will therefore recognize the status of Uber worker's contingent on settlement.

Started in 2009 as an alternative to traditional taxi service, estimates of Uber's worth vary in estimates up to near $65 billion dollars.[3] Travis Kalanick and Garrett Camp, the founders of Uber, are said to have had the initial idea for a phone application while waiting for a taxi in Paris.[4] Today, Uber is an application which, as Uber stresses, puts drivers and riders in contact and provides a platform for contract. Uber has matured from its early start primarily arranging for premium car or limousine service (Uber Black). It has evolved to now providing access to less expensive smaller automobiles, usually with a maximum of four riders (Uber X), subsidiary access to taxi service (Uber taxi), and delivery services such as food delivery (Uber Eats).

In its people-transportation module, both Uber passengers and drivers are required to agree to Uber's terms of service before being granted access to its application. Within the terms included in the service agreement is the express recognition, by both passengers and drivers, that the drivers are independent contractors. Drivers and passengers are both subject to ratings and reviews within the application, and both can be denied further access to the application should their ratings fall below Uber's threshold. Passengers provide billing information such as a registered credit card, PayPal, or Uber credits.

In practice, should an Uber passenger wish a ride, they request one through the application. The passenger's request includes the current location and desired destination, and if desired the passenger receives feedback which includes the approximate fare. Drivers then logged into the application may choose to accept the passenger's request, but are not bound to accept any request. Once a driver accepts a request, the passenger is provided with information about the car, driver and expected arrival time at the passenger's location. Upon completion of the ride a charge is made to the passenger's

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[1] *O'Connor v. Uber Techs., Inc.*, 82 F.Supp.3d 1113 (N.D. Cal. 2015).

[2] Order Denying Plaintiffs' Motion for Preliminary Approval, O'Connor v. Uber Tech's Inc., 2016 WL 4398271.

[3] Eric Necomer, *Uber Raises Funding at $62.5 Billion Valuation*, BLOOMBERG BUSINESS (Dec. 3, 2015 1:54 PM), http://www.bloomberg.com/news/articles/2015-12-03/uber-raises-funding-at-62-5-valuation; Douglas MacMillan, *Uber in Fresh Funding Round That Could Value Company at Up to $64.6 Billion*, THE WALL STREET J. (Dec. 3, 2015, 5:25 PM), http://www.wsj.com/articles/uber-in-fresh-funding-round-that-could-value-company-at-up-to-64-6-billion-1449180409.

[4] Mohamed Amine Belarbi, *Startup from The Bottom: Here Is How Uber Started Out*, GULF ELITE MAGAZINE, http://gulfelitemag.com/startup-bottom-uber-started/ (last visited Mar. 17, 2016).

pre-authorized method of payment through the Uber application, with no provision for cash payment to the driver.

The cost of Uber services is determined exclusively by Uber, not the driver, and may be a combination of time and/or distance, depending on conditions. Fixed charges, such as its safe-ride fee, may also be included.[5] In the event that a ride is obtained during a peak period, as determined by Uber, Uber may assess a multiple of the ride cost designated as *surge pricing*. The use of surge pricing is rationalized as a way in which more drivers are induced to access the application and therefore be available to satisfy the increased demand. It should be noted that, with regard to surge pricing, Uber is not acting with pristine motives. Assumedly Uber derives a substantial benefit from its surge pricing scheme in that it continues to receive its percentage of the increased revenues even though it assumedly has no appreciable increased costs. As discussed later in reference to current litigation, in the past Uber has stated that no gratuities are necessary, but were included in the fare. Currently the policy, except for Uber taxi which explicitly provides a tip percentage, states "[y]ou don't need cash when you ride with Uber. Once you arrive at your destination, your fare is automatically charged to your credit card on file — there's no need to tip."[6] Uber typically receives twenty percent of the fare, together with other charges such as its safe-ride fee, and drivers receive the remainder.

By GPS Uber can track the route selected by the driver, including the speed of travel. Uber also constrains its drivers, designated as *partners*, by various methods. Uber limits the age, make and model of vehicles which may be used within the different categories of service.[7] Uber has also suggested that only certain music, essentially traditional jazz or classical, be played during the ride, but has also integrated an ability for riders to choose their music[8] either by manual connection, or to use the Spotify music

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[5] Uber has settled, in February 2016, a lawsuit alleging false advertising by use of its assertion of safe-ride by agreeing to pay a 28.5 million settlement. The safe-ride term will be dropped in favor of "booking fee," however the approximate one-dollar charge will be retained and will be used to offset other expenses such as background checks and insurance expenses. *See* Douglas MacMillan, *Uber Agrees to Pay $28.5 Million to Settle False Advertising Case*, THE WALL STREET J. (Feb. 12, 2016, 11:03 p.m. ET), http://www.wsj.com/articles/uber-agrees-to-pay-28-5-million-to-settle-rider-safety-case-1455228038.

[6] UBER HELP, https://help.uber.com (click on "More" under "A Guide to Uber" and then click on "Can the Uber app tip my driver?" under "Overview".).

[7] Specifications vary by location and type category of service. For example, the model years vary, but generally do not precede 2000, mileage may be capped, passenger capacity of no less than four and above, and recommended makes and models are suggested, *e.g.*, Uber black recommends Mercedes-Benz S-Class, BMW 7 Series, Audi A8, Porsche Panamera, Tesla Model S, Range Rover. *See* http://rideshareapps.com/uber-vehicle-requirements-for-2016/.

[8] *See* Uber, *Uber Newsroom*, (Sept. 25, 2016) https://newsroom.uber.com/improving-the-uber-experience-with-music/.

application to allow passengers to select music during their ride.[9] Should a driver's ranking from riders fall too low, the driver's access to the application will be removed, effectively resulting in termination of their status as an Uber driver.[10]

II. INDEPENDENT CONTRACTOR VS. EMPLOYEE STATUS

A. *The Stakes Attendant to Classification*

The methods of determining whether a worker is an employee or independent contractor is varied, highly subjective, and, on the whole, not greatly satisfactory. And although not a new challenge, the arrival of application-based referral and placement businesses has accelerated the likely friction and resulting litigation.[11] For purposes of this article, Uber[12] will be used as the leading example.

In general, the importance of worker classification, as either employee or independent contractor, is critical to the employers, workers, and moreover to governmental bodies.[13] Worker classification will determine liability and expense issues such as tort, contract, and tax, in addition to requirements for compliance with numerous government regulations such as labor laws, employment discrimination regulations, workers' compensation and social security requirements.

The relief of tort liability from a master-servant relationship[14] is certainly not to be discounted in any employer-worker relationship. The possibility that a neglectful or, perhaps worse, an aberrant employee may cause property damage or personal injury always poses a danger to a business' profitability. As Uber drivers are certainly faced with the possibility of liability for tortious acts while providing transportation services, the same tortious acts will create issues of tort liability for Uber if it

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[9] *See* Uber, *Uber Newsroom*, (September 25, 2016) https://newsroom.uber.com/uber-spotify-music-for-your-ride/.

[10] A firm ranking point for termination, out of a five-point scale, is not officially divulged.

[11] Examples of such businesses that have, or have experienced, employee classification difficulties are Uber, Lyft, GrubHub, DoorDash, Homejoy, Postmates, Caviar, and TaskRabbit. Note, Homejoy ceased operations in July, 2015 attributing its termination at least partially to outstanding worker misclassification lawsuits. *See* Ellen Huet Homejoy, *Shuts Down, Citing Worker Misclassification Lawsuits*, FORBES / TECH, (July 15, 2015, 2:58 PM), http://www.forbes.com/sites/ellenhuet/2015/07/17/cleaning-startup-homejoy-shuts-down-citing-worker-misclassification-lawsuits/#6bd94b457780.

[12] Uber Technologies, Inc., founded in 2009 by Travis Kalanick and Garrett Camp.

[13] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Question*, 12 RUTGERS J.L.& PUB. POL'Y 138 (2015).

[14] RESTATEMENT (SECOND) OF AGENCY, §§ 219-220, (AM. LAW INST. 1958).

is considered an employer. A recent example is found in the death of six-year-old Sophia Liu who was struck and killed, during the evening of December 31, 2013, by an automobile while crossing a cross walk with her parents. The driver of the automobile, Syed Muzzafar, was an Uber driver who reportedly was negligently driving while looking at his smartphone (possibly at his GPS and/or the Uber application). [15] Although the case against Uber has apparently been settled for an undisclosed amount, it appears that an Uber insurer, Evanston Insurance Company, is disputing, through an action for declaratory judgment, an expected Uber claim associated with the Liu accident. The Uber claim is anticipated to be under an excess liability policy. Evanston Insurance Company is, however, utilizing Uber's own theory against Uber, i.e., that Uber does not own or operate any automobiles, and therefore the excess insurance is not available.[16] Assumedly the defense by Uber will require at least assertions that Uber is a principal subject to vicarious liability to the degree necessary to qualify under the terms of the policy. Even though the settlement in the Liu case remains undisclosed, the Evanston suit does indicate the settlement amount exceeds one million dollars as that appears to be the policy threshold for payment under the excess coverage provisions.[17]

Obviously the issue of employee or agency status would place Uber in the crosshairs of liability for negligence in the performance by their workers. And just as obviously, the maintenance of liability insurance has become an issue. Many personal automobile insurance policies do not provide coverage for use of a personal automobile as a taxi or livery service. On that basis, without adjustment or purchase of commercial automobile coverage, the Uber driver would, in fact, not be providing any liability insurance to their passenger, other motorists and passengers, or pedestrians. As a solution to at least that issue, some states that have implemented insurance changes that specifically permit or require coverage for activities which fall within that of Uber and like companies known commonly as transportation network companies (hereinafter sometimes referred to as a TNC).[18]

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[15] Dan Levine, *Uber settles wrongful death lawsuit in San Francisco*, REUTERS (US) (July 15, 2015 at 1:42) http://www.reuters.com/article/us-uber-tech-crash-settlement-idUSKCN0PO2OW20150715.

[16] *Uber's Corporate Insurer Sues Uber Over Sofia Liu Settlement*, UBERPEOPLE.NET (Sept. 12, 2015), Uperpeople.net, http://uberpeople.net/threads/ubers-corporate-insurer-sues-uber-over-sofia-liu-settlement.35564/ (last visited Mar. 21, 2016). *See also* Complaint for Declaratory Relief, *Evanston Insurance Company v. Uber Tech's Inc.*, 2015 WL 8597239 (No. 4:15-cv-03988-KAW), 2015 WL 5124325.

[17] Complaint for Declaratory Relief, *Evanston Insurance Company v. Uber Tech's Inc.*, 2015 WL 8597239 (No. 4:15-cv-03988-KAW), 2015 WL 5124325.

[18] *See*, *e.g.*, ARK. CODE. ANN. § 23-13-701 - §23-13-722 (West, Westlaw through 2d sess. 2016); CAL. PUB. UTIL. §5431(a) (West, Westlaw through ch. 14 reg. sess. 2016).

Although the tort ramifications of employee characterization have, perhaps, greater visibility, in truth it is a contingent liability which will arguably never be actually imposed. Of more immediate concern to both the employer and the workers are questions of compliance with governmental mandates. Employers of independent contractors are often absolved from adherence to obligations imposed by governmental entities, and therefore often the payment of contributions associated with those obligations. For example, employers of employees, as opposed to independent contractors, are generally required to participate in payment of social security taxes to the extent of 6.2% and 1.45% for Medicare taxes, based on the employee's wages.[19] State worker's compensation systems may require state contributions or insurance funding, and employers are further subjected to regulation such as that under fair labor laws regulating employee organization, and are bound by statutes prohibiting discrimination in employment. Every compliance requirement imposed necessarily impresses both direct cost, such as payments of insurance premiums, payment to governmental agencies, and payment of penalties in the event of noncompliance. Indirect costs such as increased oversight and expansive human resources expenditures increase with the additional prophylactic policies necessary to assure compliance.

Given Uber's astounding valuation at a possible $65 billion or more, [20] any major change in its business method holds the very real danger of harming its growth and market position. Moreover, in monetary terms the cost of moving to an employee based system for application based intermediaries such as Uber have been estimated at an approximate forty percent increase in operational costs for California drivers.[21] Using very broad assumptions, in addition to required costs such as Social Security and Medicare, an estimate of employee compensation benefits such as paid leave, insurance, and retirement posed for service industry employers such as Uber an approximate twenty-nine percent cost increase[22] using a $50,000 per year salary base. The estimated percentage was based on nationwide data of multiple industries and included both mandated legally required benefits and also commonly permissive benefits such as vacation, sick leave, disability

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[19] *See* Internal Revenue Service Pub. 51, https://www.irs.gov/publications/p51/ar02.html#en_US_2016_publink1000195528.
[20] Necomer, s*upra* note 3.
[21] *See Kristen* V. Brown, *How much would it cost Uber to make drivers employees? (Hint: It's a lot.)*, FUSION.NET (June 19, 2015 5:55 AM), http://fusion.net/story/153243/uber-drivers-costs-if-employees/ (wherein, with all benefits for full time employees included the cost would be $20,423 dollars for a driver being paid $50,000 per year).
[22] *Id.*

insurance, and life insurance. [23] Looking directly to the Bureau of Labor Statistics report provided a more restrictive percentage of 8.6%, or $2.24 per hour, for only legally required benefits attributable to private industry transportation group specifically.[24] With application of the Affordable Care Act employer mandated health insurance coverage for employees working more than thirty hours, however, the legally mandated costs could rise.[25] In terms of numbers of drivers nationwide it has been estimated that there were four hundred thousand Uber partners in December, 2015.[26] Since each driver varies in their approach, and only Uber has the specific data on compensation paid and hours driven, any definitive estimate would be speculative at best. But even absent relevant specifics, it is obvious the total annual cost of re-characterization to employee status would be significant.

B. *Primary Tests or Methods of Determination of Contractor Status*

1. Common Law

The common law test for independent contractor status has been traditionally used by the Department of Labor to address a number of issues as well as establishing tortious vicarious liability to third party plaintiffs. The result to any employer or principal of failing to prove independent contractor status of a worker, and therefore finding an employee or agency relationship, is expanded liability for the employer of an employee-tortfeasor. Although not based in tort, the hallmark case, *Nationwide Mutual Insurance Company. v. Darden*,[27] articulates the common law test as focusing on the right to control both the means and method of the worker's actions. In *Darden*, the Supreme Court was tasked with determining if an insurance agent was an *employee,* and therefore entitled to coverage by a company retirement plan, under the terms of the Employee Retirement Income Security Act of 1974 (hereafter referred to as ERISA).[28] The United States Court of Appeals for

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[23] *See* U.S. Dep't. of Labor, Bureau of Labor Statistics News Release, Employer Costs for Employee Compensation-December 2015 (March 10, 2016), http://www.bls.gov/news.release/archives/ecec_03102016.pdf.
[24] *Id.* at Table 6.
[25] *Id.* Table 6 indicates that in the private industry transportation grouping, health insurance cost was eight percent, or $2.07 per hour, which would indicate an hourly salary of $25.87.
[26] Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker*," THE HAMILTON PROJECT, Discussion Paper 2012-10, 12 (Dec. 2015), http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker.
[27] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).
[28] 29 U.S.C.A. §§1001-1461.

the Fourth Circuit found in favor of the worker, Darden, by applying a new test which looked at the expectations of the worker/employee.[29] However, the Supreme Court, in reversing and remanding noted its dissatisfaction with the specificity in the statute,[30] and turned to common law agency principles for purposes of identifying an employee under ERISA:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's *right to control* the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[31]

2. The ABC Test

The ABC test used in some state jurisdictions[32] provides perhaps a brighter interpretable line. As the name suggests, the test embodies three standards which in many cases must all be met in order for independent contractor status to be allowed. Absent meeting the requisite number of tests, the presumption remains that the worker is appropriately categorized as an employee. Common attributes that must be satisfied include:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

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[29] Darden v. Nationwide Mutual Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986).

[30] "We have often been asked to construe the meaning of "employee" where the statute containing the term does not helpfully define it." Nationwide Mut. Ins. Col v. Darden, 503 U.S. at 322.

[31] *Nationwide Mut. Ins. Co*, 503 U.S. at 323-324, citing Community for Creative Non–Violence v. Reid, 490 U.S. 730, 751-752 (1989) (emphasis added).

[32] *E.g.*, Indiana as to unemployment insurance, IND. CODE §22-4-8-1(b) (2015); Illinois specific to the construction industry, 820 ILL. COMP. STAT. 185/10 (2015); Massachusetts specific to unemployment insurance, MASS GEN. LAWS ch.151A §2 (2015); New Jersey specific to unemployment insurance and wages, N.J. STAT. ANN. §43:21-19(i)(6) (2015); and Connecticut specific to unemployment insurance, CONN. GEN. STAT.§31-222(a)(B) (2015).

> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.[33]

Although the B and C aspects of the test are much more specific than the often cited common law test, aspect A essentially incorporates the common law question of control, leaving determination, at best, exceedingly subjective. When the full ABC test is utilized the addition of having to satisfy all three aspects mitigates in favor of a finding of employee status.

3. The Economic Realities Test

Attempting to move away from the grey concept of control, the economic realities test has been adopted by the Department of Labor (DOL) to be used for conflicts arising under the Fair Labor Standards Act. The test is intended to more specifically reflect the workers' dependence on the employer. Under the economic realities test generally six factors are reviewed:[34]

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?
3. How does the worker's relative investment compare to the employer's investment?
4. Does the work performed require special skill and initiative?
5. Is the relationship between the worker and the employer permanent or indefinite?
6. What is the nature and degree of the employer's control? [35]

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[33] N.J. STAT. ANN. §43:21-19(i)(6) (West, Westlaw current through law effective L. 2016, ch. 2).
[34] The list below is taken from U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 14, 2015). Note that other references note five factors as derived from United States v. Silk, 331 U.S. 704, (1947): (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).
[35] U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 14, 2015).

As can be seen, the economic realities test is not as dependent on control as other tests, but rather looks to the actual relationship between the employer and the employee. The greater the dependence on the relationship by the worker, the more likely the employer / employee distinction is to be found. Note, however, that control remains integral to the analysis.

The use of the economic realities test by the United States Department of Labor (DOL) stems from interpretation of its definition of *employ*, as used in the Fair Labor Standards Act, using the more expansive phrasing "suffer of permit to work."[36] In comparing the term employ as used in ERISA and the Fair Labor Standards Act (FLSA) the Supreme Court in *Darden* observed:

> The definition of "employee" in the FLSA evidently derives from the child labor statutes, … and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an "employee" to include "any individual employed by an employer*," it defines the verb "employ" expansively to mean "suffer or permit to work … This latter definition, whose striking breadth we have previously noted … stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles*.[37]

As with other tests, the ultimate outcome is not fixed on any one element, but is the gestalt derived from all considerations.[38]

In 2010 the Ninth Circuit considered the issue of independent contractor or employee definitions and made clear its perception of the relative distinctions provided by the various theories.[39] The plaintiff, an insurance agent, sued the employing company for sex discrimination. The company successfully defended on the basis that she, the worker, was not an employee, and therefore Title VII of the Civil Rights Act did not apply. The case is here important for its analysis of the type of test to be applied to determine that the worker was an independent contractor. In a previous decision the Circuit

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[36] 29 U.S.C.A. § 203(g) (2015). For an extensive recitation of the U.S. Dept. of Lab. position, *See* U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 14, 2015).

[37] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (citations omitted) (emphasis added).

[38] "[T]he ultimate concern" of a court's "economic reality" inquiry is the economic dependence of the putative employee on the putative employer; that is "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." Godoy v. Restaurant Opportunity Center of New York, Inc., 615 F. Supp. 2d 186, 193 (S.D. N.Y, 2009), citing *Brock*, 840 F.2d at 1059.

[39] Murray v. Principal Financial Group, Inc., 613 F.3d 943 (9th Cir. 2010).

Court had reflected on three different formulations of the test to determine whether an individual is an independent contractor or an employee for the purpose of Title VII: 1) the common law agency test; 2) the economic realities test; and, 3) a common law hybrid test. The first two tests are discussed in the text above. The third, the hybrid test, is a combination of the common law and the economic realities tests, and is sometimes considered applied in Title VII cases.[40] Following review and discussion the court recognized, pragmatically, that "*there is no functional difference between the three formulations*. … Even if the differences in formulation might suggest a difference in practical application, however, *Darden's* common law test as pronounced by the Supreme Court would have to control."[41]

4. Internal Revenue Service Consideration

The United States Internal Revenue Service (IRS), in determining worker classification, looks to the degree of control of the worker as is the common thread through all of the various methods of determination. In the past the IRS has used a list of twenty specific issues in review of questions of employee status.[42] The IRS has now uses a three category system of review, with sub-elements in each. Generally, the IRS recognizes worker status as independent contractors, common-law employees, statutory employees, and statutory non employees.[43] Given the specific application to Uber and like enterprises, the very specific categories of statutory employees,[44] and statutory non-employees[45] are not applicable and therefore are omitted from this discussion.

The distinction of the current IRS classification based on common law principles is its three pronged approach to the issue of control.[46] As with

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[40] "The hybrid test combines elements of the common law test and the economic realities test…[T]he hybrid test considers the economic realities of the work relationship as a critical factor in the determination, but focuses on the employer's right to control the work process as a determinative factor."; Charles J. Muhl, *What is an employee? The answer depends on the Federal law*, MONTHLY LAB. REV., Jan. 2002 at 9-10.

[41] *Murray*, 613 F. 3d at 945 (emphasis added).

[42] *See* Rev. Rul. 87-41, 1897-1 C.B. 296.

[43] I.R.S. PUB. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE AT 5 (2016) https://www.irs.gov/pub/irs-pdf/p15a.pdf.

[44] Statutory employees include certain food product, beverage, and laundry delivery drivers, full time life insurance agents, home workers, and certain traveling or city sales agents. *See* Int. Rev. Code §3121(d)(3).

[45] Statutory non-employees include placement entities for companion sitters for children and the elderly, qualified real estate agents, and direct sellers of certain consumer products. *See* Int. Rev. Code §§ 3506, 3508.

[46] *See* I.R.S. form SS-8 (2014), https://www.irs.gov/pub/irs-pdf/fss8.pdf (wherein specific questions are asked and are identified by the three categories of control).

other tests or systems of determination the IRS recognizes that, as a general rule, an individual is an independent contractor if the employer, the person for whom the services are performed, has the right to control or direct only the result of the work and not the means and methods of accomplishing the result.[47] Within the right of control concept, however, the IRS explicitly recognizes the source of control by an employer may arise either from behavioral control, financial control, or the type of relationship.[48] Behavioral control perhaps coincides most easily with perceptions of the right to control the work itself. The IRS itemizes examples of behavioral indicators including "when and where to do the work, what tools or equipment to use, what workers to hire or to assist with the work, where to purchase supplies and services, what work must be performed by a specified individual, and what order or sequence to follow."[49] But irrespective of whether the employer in fact did control, the primary issue remains that the employer had the power to control. Financial control instead looks to the questions of who bears the costs of operation, what degree of investment is required, does the worker provide similar services to others, and the possibility of profit or loss by the worker. The final area of control observed is the type of relationship which exists, i.e., whether it is formalized by a writing, are there provisions for fringe benefits, what is the permanency of the relationship, and whether the services are a key part of the employer's business. The determination by the IRS does not rest on any one category, but instead looks to the overall relationship.

III. RECENT LITIGATION

Many of the startup enterprises such as Uber have been the object of litigation based on their characterization of workers stemming from tort liability for personal injury and property damage,[50] to that of liability from anything from fraud to employee benefits. In the current environment, Uber is, perhaps, the most tantalizing object for such suits.[51] No doubt its success and financial worth, contribute to its appeal as a litigation target. Involving worker based lawsuits against Uber, allegations have run an extensive gamut of theories in addition to expected contract and agency status, including:

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[47] *See* Treas. Reg. § 31.3121(d)-1, 26 C.F.R. §31.3121(d)-1(c)(2).
[48] Employers Supplemental Tax Guide, *supra* note 43.
[49] *Id.*
[50] *See* Levine, *supra* note 155.
[51] In 2015 fifty federal lawsuits were filed against Uber: "17 were filed by Uber drivers, 15 by taxi and livery companies, and more than a dozen by customers alleging all manners of sin, including assault, illegal robocalling and deceptive pricing," Kristen V. Brown, *Uber is facing a staggering number of lawsuits*, Fusion, Jan. 25, 2016 7AM, http://fusion.net/story/257423/everyone-is-suing-uber/.

- Lanham Act false advertising and false association, Racketeer Influenced Corrupt Organizations Act (RICO) wire fraud, Connecticut Unfair Trade Practices Act, and tortious interference with contractual Relations: complaint generally failed to state a cause of action;[52]
- multiple claims including Lanham Act, unfair and deceptive acts, common law unfair competition, interference with contractual relationships, and RICO violation.[53]

As particularly on point for this article, in June, 2015, the California Labor Commission determined that an Uber driver was an employee for purposes of California labor law.[54] In *Berwick v. Uber Technologies,*[55] the driver requested recovery of expenses incurred as an Uber driver, including expenses based on the mileage driven, toll charges, and unpaid wages. The California Labor Commission ruling found in favor of the worker to the extent of mileage and toll charges, but due to a lack of evidence of the uncompensated hourly work, no award was made beyond the expense recovery. Recognizing that the case continues on appeal and may ultimately be reversed, the decision still provides encouragement to others to pursue similar claims, and bolsters assertions of employee status.

A. *O'Connor v. Uber*

Currently drawing the most attention is the "increasingly complicated litigation" of *O'Connor v Uber Technologies*. As above noted, the participants in the *O'Connor* case had reached a settlement agreement, but such agreement has been initially denied by the Court.[56] Judge Chen, noting inadequacy in the approximate settlement amount of one hundred million dollars compared to possible liability of approximately eight hundred fifty-four million dollars,[57] elected to reject the initial agreement and instruct the parties to confer on how to proceed.[58] Notably, as part of the rejected settlement proposal, the affected Uber drivers agreed to remain classified as independent contractors, thus, at least temporarily, shielding Uber from employee status claims. Uber would have agreed to provide greater

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[52] Greenwich Taxi, Inc. v. Uber Technologies, Inc., 123 F.Supp.3d 327 (D. Conn. 2015).
[53] Boston Cab Dispatch, Inc. v. Uber Technologies, Inc., 2014 WL 1338148 (D. Mass. 2014).
[54] Barbara Berwick v. Uber Tech's Inc., Cal. Lab. Comm. Case No. 11-46739 (2015), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical.
[55] *Id.*
[56] *O'Connor v. Uber Techs, Inc.*, 2016 WL 4398271 at 15.
[57] *Id*. at 11.
[58] *Id*. at 15.

specificity in its termination actions, provide an internal appeal procedure, allow drivers to notify passengers that a tip is not included in the fare, and would have granted recognition of a driver's association.[59]

Defensively, Uber has already implemented obstacles to future similar litigation. Uber's contracts now contain an arbitration clause which serves as essentially an aggrieved driver's exclusive remedy,[60] and, except as to several statutory instances, forbids class action suits or a driver's participation in the receipt of class action benefits.[61] Choice of law provisions dictate the law to be used in the event of conflict is that of California.[62]

Although the settlement and arbitration provisions would give Uber a time to adjust, it would not necessarily spell an end to the possibility of workers being classified as employees. Anti-Uber arbitration decisions could lead to an onslaught of such claims. Uber's contracts will generally not be binding on governmental bodies seeking to impress employee status for Uber's workers. Specifically, the United States Department of Labor, the IRS, state tax authorities, state worker compensation boards, the Equal Employment Opportunity Commission and similar state human resource agencies may determine that Uber is not fulfilling its obligations under their respective areas of interest. Any such governmental agency successful in implementing employee status for workers would likely result, either directly or indirectly, in a nationwide reclassification for all Uber drivers.

B. *Independent Contractor Observations in O'Connor*

Irrespective of the outcome of the settlement approval, review of the *O'Connor* litigation to date continues to be instructive due to the commentary of Judge Chen in analyzing the issue of independent contractor arguments made by Uber. To the date of the proposed settlement, the results of preliminary motions were largely not in favor of Uber's position that workers are independent contractors.[63] As previously stated, as of the date of

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[59] Rebecca Spalding, *Uber settlement attacked by drivers saying lawyer sold out*, CHICAGO TRIBUNE, May 14, 2016, 8:14 PM; http://www.chicagotribune.com/news/sns-wp-blm-uber-a4631fc0-1944-11e6-971a-dadf9ab18869-20160513-story.html.

[60] Uber contract of December 11, 2015, §15.3, https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/RASIER%20Technology%20Services%20Agreement%20Decmeber%2010%202015.pdf.

[61] *Id.*

[62] *Id.*

[63] For purposes of this article reference will primarily be made to the Order Denying Defendant Uber Technologies, Inc.'s Motion for Summary Judgment, *See O'Connor v. Uber Techs., Inc.*, 82 F.Supp.3d 1113 (N.D. Cal. 2015), and the Court's Amended Order Granting in Part and Denying in Part Plaintiffs' Motion For Class Certification, O'Connor v. Uber Techs, Inc., 2015 WL 5138097 (N.D. Cal 2015).

writing of this article the litigation has not reached a final resolution, with a decision on approval of the settlement agreement expected in June, 2016.

The O'Connor litigation is a class action suit now limited to a class of California Uber drivers approximating 160,000, seeking to recover both expenses of operation and also tips or gratuities allegedly converted by Uber in violation of the California Labor Code.[64] Looking to the denial of Uber's motion for summary judgement,[65] the trial court dealt with the primary position of Uber that it was not subject to suit due to its drivers being categorized as independent contractors, and therefore not subject to protections afforded by the California Labor Code to employees. Noting the common requirement of summary judgement that there be no issues of material fact legitimately in dispute, the Court determined that, as a prima facie and presumptive matter, the drivers were employees under the California Labor Code, and that Uber would necessarily therefore have to rebut such presumption at trial. Under a leading case on independent contractor status in California, *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*,[66] California uses a common law test, at least with regard to worker's compensation and labor issues, in which the right of control of the work details is the most significant consideration,[67] but also recognizing multiple secondary considerations much as identified in the discussion of common law independent contractor status above. Citing other California cases, *O'Connor* stressed that the exercise of control was specifically subordinate to the right of control,[68] and that among indicia of the right of control, the ability of a principal to terminate employment without cause is likely most important.[69]

Uber's attempt to pass itself as a technology company rather than a transportation company held little significance for the court. Acknowledging the agreements between Uber and its drivers stipulated the drivers were independent contractors, the court took notice of Uber's previous self-characterizations as an ""On-Demand Car Service" and "Everyone's Private Driver.""[70] The court forcefully discounted Uber's attempt to limit itself as being a purely technology company, finding its characterization "fatally flawed."[71]

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[64] *See* CAL. LAB. CODE §§ 2802 and 351 (West, Westlaw through ch. 14 reg. sess. 2016).
[65] *O'Connor*, 82 F.Supp.3d.
[66] S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989).
[67] *Id.*
[68] *O'Connor*, 82 F.Supp.3d at 1139; citing Ayala v. Antelope Valley Newspapers Inc., 327 P.3d 165 (2014).
[69] *Id.*
[70] *O'Connor*, 82 F.Supp.3d at 1137.
[71] *Id.* at 1141.

> Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does … Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs … 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.[72]

Looking further at the level of control, the court found Uber's unilateral control over fares; its expressed proprietary interest in riders (limiting discussions between drivers and riders as to future bookings or other solicitations); the selection and qualification process for drivers including background checks, city knowledge exams, vehicle inspections and personal interviews; and, being blocked from the Uber application if a driver's ranking fell too low all mitigated in finding employee status as a matter of law.[73]

Subsequent to the decision on Uber's motion for summary judgement, Uber suffered a second setback, when the court approved, in part, the plaintiff's motion for class certification. Specifically, the court allowed the class action to move forward as to the tip or gratuity claim, but denied certification to the class as to the expense claims, without prejudice to introducing additional evidence. Obviously Uber hoped to fracture the plaintiffs' greater class complaint thereby reducing any award, but perhaps more importantly, sapping the plaintiffs desire to move forward. A primary tactic of Uber in the certification decision was to attack the commonality of the plaintiffs. In the court's review Judge Chen revisited many of the indices of employment, finding, insofar as the tips, that the Plaintiffs' claims were reasonably ascertainable, homogenous and capable of determination. Uber's assertions that the class should not be certified because there is no typical Uber driver was dismissed by the court, finding that Uber's argument was focused on "legally irrelevant differences between the named Plaintiffs and class members."[74] In rejecting Uber's argument that many of the class to be certified wished to be considered independent contractors, and thereby were in conflict with the plaintiffs, the court pointed out that Uber had submitted only a statistically insignificant number of statements from drivers. The class to be certified is expected to be no less than 160,000, of which Uber provided 400 statements, 150 of which expressed the desire to be characterized as

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[72] *Id.* at 1141-42.
[73] *Id.* at 1142-45.
[74] O'Connor v. Uber Techs, Inc., 2015 WL 5138097 at 10 (N.D. Cal. 2015).

independent contractors. There was no evidence that those drivers making statements in support of remaining independent contractors were "free of the taint of biased questions" or "that they were told that were the Plaintiffs to prevail, they might be entitled to thousands of dollars."[75]

Other recent Uber cases have impleaded the American with Disabilities Act (hereinafter ADA),[76] both as to mobility accommodation,[77] and as to accommodation of service animals assisting blind.[78] With relation to the ADA mobility claim, *Ramos v. Uber*, involved a failure to provide wheelchair and equipment accommodation, and survived Uber's pre-trial Motion to Dismiss based on allegations of lack of standing and failure to state a cause of action by the Plaintiffs.[79] Specifically contested was the assertion that Uber, and Lyft in an associated case, were subject to the ADA due to being a public accommodation. Common to each defendant was the question of whether the defendant was a *specified public transportation service*,[80] or, as was maintained by the defendants, merely "mobile-based ridesharing platforms to connect drivers and riders."[81] The court disposed of the issue in favor of the plaintiffs, temporarily disposing of the positions of Uber and Lyft by finding that the Supreme Court had determined that the ADA applied to circumstances not specifically "anticipated by Congress," and that the question of whether or not the defendants were subject to the ADA was a mixed finding of fact and law requiring additional proceedings. [82] *National Federation for the Blind v. Uber*, presented very nearly the same legal issues and result in its denial of a motion to dismiss wherein the complaint was access to Uber services by those requiring service animals.[83] Although the *Ramos and National Federation for the Blind* are not expressly cases of employee misclassification, they are challenges to the often espoused Uber position that Uber provides only a technology application;

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[75] *Id.* at 11.
[76] 42 U.S.C. §§ 12101-12213.
[77] Ramos v. Uber Tech's Inc., 2015 WL 758087 (W.D. Tex. 2015). Note that Lyft has a similar suit pending in the same court, and therefore motions by both were treated in the same opinion.
[78] Nat'l Fed'n of the Blind of California v. Uber Tech's, Inc., 103 F.Supp.3d 1073 (N.D. Cal. 2015).
[79] *Ramos*, 2015 WL 758087.
[80] *Id.* at 3 "'[T]ransportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." 42 U.S.C.A. § 12181(10). Public transportation services include "demand responsive systems," which means "any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.'42 U.S.C.A. § 12181(3)."
[81] *Ramos*, 2015 WL 758087 at 7.
[82] *Id.*
[83] Nat'l Fed'n of the Blind of California v. Uber Tech's, Inc., 103 F.Supp.3d 1073 (N.D. Cal. 2015).

that Uber is solely a technology company. In a very real sense the cases are espousing Uber as the principal in providing transportation services, which would therefore further the argument that its drivers are agents and employees for the purposes of statutory compliance.

As appears to be the trend in these Uber cases, *National Federation for the Blind* appears to have been settled with Uber agreeing to a more robust reporting system for accommodation complaints and immediate termination for driver's discriminating against the presence of service animals.[84] The *Ramos* case may also have been settled, as documentation would substantiate on one reporting site,[85] but the authors could not confirm such settlement through other sources.

IV. LEGISLATION

A whitepaper published in 2015 reported that twenty-six states had enacted legislation dealing with independent contractors since 2007.[86] A majority of the legislation was characterized as generally applicable to all businesses,[87] with some legislation alternatively being aimed at specific industries such as construction industry issues.[88] At the federal level attempts have been made at stemming the misclassification of independent contractors, without significant success. One bill which has consistently been proposed since 2014, but not yet passed, is the Payroll Fraud Prevention Act. The 2015 iteration of the Act, if passed: would amend the Fair Labor

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[84] Chris Danielsen, *Groundbreaking Settlement to End Discrimination Against Blind Uber Riders Who Use Guide Dogs*, NATIONAL FEDERATION OF THE BLIND, April 30, 2016, https://nfb.org/groundbreaking-settlement-end-discrimination-against-blind-uber-riders-who-use-guide-dogs.

[85] *See* ORDER re 55 Joint Stipulation of Dismissal filed by Uber Technologies, Inc. Signed by Judge Xavier Rodriguez. (Entered: 08/04/2015), http://www.plainsite.org/dockets/2agqzdf19/texas-western-district-court/ramos-et-al-v-uber-technologies-inc-et-al/.

[86] Richard J. Reibstein et. al., *Independent Contractor Misclassification: How Companies Can Minimize the Risks*, HAMILTON PEPPER LLP at 7 (2015), http://www.pepperlaw.com/uploads/files/icmisclassification_minimizerisk_04_2015.pdf (last visited Mar. 24, 2016).

[87] *See e.g.,* Mass. Gen. Laws ch. 151A, §1(k) (West) (2016) for unemployment insurance purposes classifying employment generally as services for wages under contract, and Mass. Gen. Laws ch. 151A, §2 (West) (2016) characterizing those providing services as employees unless an ABC test is met.

[88] *See* Illinois Employee Classification Act, 820 ILL. COMP. STAT. §§185/1-185/999, effective January 1, 2008, where in the statute defines one performing services for a construction contractor to be an employee unless meeting essentially the ABC test described above. *See also*, the Pennsylvania Workplace Misclassification Act, codified at 43 PA. CONS. STAT. §§ 933.1-933.17 (2015); the Delaware Workplace Fraud Act codified at DEL. CODE ANN. tit. 19, §§3501-3515 (2015).

Standards Act to require those individuals, both natural and statutory, providing labor or services be correctly classified as employee or non-employee by the employer; would entitle those providing services to be given notice of their classification and warning as to rights to wage, hour and labor protections effects of the classification; create a presumption of employee status until the notice is given; and provide liquidated damages and civil penalties for failure to comply and for misclassification.

As a legislative win for Uber and other application based transportation companies, Arkansas passed in 2015 its Transportation Network Services Act.[89] The Arkansas law was clearly tailored to the business model of Uber, using definitions and concepts directly matching Uber's criteria, from the manner of accessing the application, to disclosing photos of the driver,[90] and payment of fees. The Arkansas Act specifically addresses the influence of tort liability by defining the insurance coverage necessary by the driver and employer at various times,[91] and specifics of driver qualification.[92] Most importantly to the topic at hand, the Arkansas statute, with criteria attached, explicitly identifies a TNC driver as an independent contractor for worker's compensation purposes.[93] Although the title identification of the paragraph is limited to worker's compensation coverage, the language "[notwithstanding] any provision of law to the contrary"[94] is sufficiently broad to justify an argument that such drivers are non-employees for all Arkansas state purposes. Addressing issues of discrimination, the Arkansas statute requires compliance with all *applicable* laws, e.g. disability, Title VII, and service animals. If, however, the Uber position that they are not the employer of the driver and are not a public accommodation, as was at issue in *Ramos* and *National Federation for the Blind*, the *applicability* phrasing might, in fact, not impose any responsibility for accommodation insofar as federal law.

Other legislation at the state level, and which has been particularly aimed at TNC's such as Uber, have generally treated the issue of liability insurance.[95] Much of the legislation is wholly or partially based on a model

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[89] 2015 Ark. Acts 1050, codified as ARK. CODE. ANN. § 23-13-701 - §23-13-722 (West, Westlaw through 2d sess. 2016).
[90] *Id.* at § 23-13-707.
[91] *Id.* at § 23-13-709.
[92] *Id.* at § 23-13-713.
[93] *Id.* at § 23-13-719.
[94] *Id.*
[95] Thirty-three states are reported to have "ride hailing" legislation. *PCI Applauds Innovation and Common Sense Approach to Fixing Transportation Network Company Insurance Gaps: 39 States Have Enacted Ride Hailing Legislation*, PROPERTY AND CASUALTY INSURERS OF AMERICA, http://www.pciaa.net/industry-issues/transportation-network-companies (last visited May 29, 2016).

statute[96] and generally seek to define the availability of insurance coverage by the driver and the TNC, establish the time at which a TNC may have liability (such as upon acceptance of a fare by a driver), and mandate minimum insurance coverage by the driver and TNC.[97] In some instances, however, the TNC legislation at least give traction to an argument that TNC's are not employers due to having been statutorily expressly divested of the necessary control. For example, the Texas legislation, passed in 2015 contains a provision that "[a] transportation network company does not control, direct, or manage a personal vehicle or a transportation network company driver who connects to the company's digital network except as agreed by written contract."[98] As with the Arkansas statute, the language is contained in the Texas Insurance Code, but is sufficiently broad to allow an argument that a contractual agreement that a driver is an independent contractor will dictate that interpretation for other state purposes.

V. PROPOSAL FOR A STATUTORY RESPONSE

Without doubt, the clarity of characterization between employees and independent contractors is murky at best. The primary reliance on the degree of control makes sense in a historical view of master and servant. Aside from the social adjustment of placing liability to third parties on the one best able to pay, the ever popular deep pocket, the master is the next most responsible party for having placed a particular servant in the position to commit a tort. As society has changed, however, the dichotomy between employee and independent contractor has resulted in the shoe-horning of a concept intended for use in tort vicarious liability suits into issues involving responsibility for collection of taxes (withholding from employees), social programs (social security or FICA), worker health (worker's compensation and health insurance), and a worker's right to organize for bargaining purposes, among others. The initial purpose of fault embodied in the concept of vicarious liability for tort bears little relation to the broad current application now used in the need for classification. And there is no reason to expect the situation to improve given the ease with which individuals may find themselves able to move between employers, and essentially multiple on-demand jobs, due to the rapid expansion of technology and its progeny, the sharing economy.

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[96] TNC Model Compromise Bill, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, http://www.naic.org/documents/committees_c_sharing_econ_wg_related_tnc_insurance_compromise_bill_package.pdf (last visited May 29, 2016).

[97] *See*, *e.g.,* LA. STAT. ANN. §§ 45:201.1 – 45:201.13 (West, Westlaw through 2d sess. 2016); TENN CODE ANN.§§ 65-15-301 – 65-15-313 (West, Westlaw through 2d sess. 2016).

[98] TEX. INS. CODE ANN., §1954.102 (West, Westlaw through reg. sess. 2015); *see also* ARK. CODE. ANN. § 23-13-707 (West, Westlaw through 2d sess. 2016).

The reliance on the courts to make decisions on a case by case basis at the federal level and in all fifty states is expensive and unwieldy at best. Such a system, especially for multistate enterprises, engenders significant expense and inconsistency in characterization which is harmful to business when suits are brought or penalties are imposed for misclassification. And the necessity of lawsuits by workers to obtain benefits otherwise due imposes an unacceptable monetary and social cost. One answer, particularly as applied to businesses operating as an application based referral system in the gig-economy, would be the creation of a statutorily defined independent contractor, or perhaps as considered below, a statutory independent worker.

The concept of dependent contractors is not original. Notably Canada in its provinces of Ontario, British Columbia, and Newfoundland have explicitly identified dependent contractors as types of employees for purposes of labor law.[99] In the Canadian system, dependency of the contractor refers to the economic dependence, much as the economic realities test. However, "many of the Canadian Labour Relations Boards have adopted an 'eighty-percent rule'" requiring eighty percent of a contractor's work be derived from the quasi-employer in order to qualify for dependent contractor status. [100]

In an extensive discussion paper, Seth D. Harris and Alan B. Krueger, propose the creation of a new category of worker identified as *independent workers* which would identify workers that seem a hybrid of the employee and independent contractor characterizations.[101] These workers, common in the gig-economy, "have some elements of the arms-length independent business relationships that characterize 'independent contractor' status, and some elements of a traditional employer-employee relationship."[102] Much like employees, these workers have "little individual bargaining power and … do not have the freedom to negotiate their compensation or terms of service."[103] But at the same time the worker's employment relationship "is not so dependent, deep, extensive, or long lasting" that employers should be responsible for the worker's "economic security."[104]

After persuasively arguing the rationale for independent worker recognition, Harris and Krueger propose that adjustments, at the federal level, would:[105]

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[99] Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26:1 BERKELEY J. EMP.& LAB. L. 143, 153.
[100] *Id.* at 154.
[101] Harris &. Krueger, *supra* note 26.
[102] *Id.* at 2.
[103] *Id.* at 8.
[104] *Id.*
[105] *Id.* at 15-21.

- allow workers organizing and collective bargaining power;
- allow employers / intermediaries to pool workers to obtain efficiencies in benefits such as insurance;
- provide civil rights protections, such as those for discrimination under Title VII and the ADA, to the workers;
- require tax withholding by employers / intermediaries for efficiencies in collection and economies of scale;
- require employers / intermediaries to make employer like contributions for social insurance programs such as Federal Insurance Contributions, Social Security, and Medicare;
- not mandate wage and hour requirements, but would be subject to bargaining between worker and employer (noting the easy entry and exit from the relationship weighs in favor of less protection);
- not mandated unemployment insurance;
- not impose Affordable Care Act requirements, but for independent workers the thirty hour criteria for a full time worker would, arguably, be shifted to a pooling of five percent of a workers' earnings.

The proposal of Harris and Krueger is limited to action at the federal level. However, any such federal action leaves open the seemingly endless questions of tort liability and employment obligations that arise in each state, and are idiosyncratically varied on a state by state basis. In extension of such proposal the authors suggest the development of a model act to serve as a blueprint for state legislation, much as with the wide ranging proposals of the Uniform Law Commission such as Uniform Commercial Code and the Limited Liability Company Act.[106] Such uniform statute would necessarily be customizable to suit state variations in statutory requirements such as tax collection and labor law application, and would designate the hybrid level of employment as the statutory independent worker. Businesses qualifying as an employer of statutory independent workers under such statute would be subject to such federal obligations as deemed socially appropriate and dictated by federal statute, such as those suggested by Harris and Krueger. A single federal act could conceivably be used which would recognize state adopted designations and mandate that for specific federal laws workers would be treated as employees, or non-employees, for purposes of those listed federal laws and in conformity with the state designations.

In order to avoid disruption of industries in which traditional notions of independent contractors are prevalent, such as the construction industry, initially state statutes should be limited to application based intermediaries in

[106] *See* Acts of the Uniform Law Commission, http://www.uniformlaws.org/Acts.aspx.

the gig-economy, such as transportation networking companies. Statutory inclusion of other industries could be made as experience warranted. Desirable aspects of a uniform scheme would include:

- Statutory definition of the industry to be regulated, such as that used for transportation network companies in California[107] or Arkansas;[108]
- Identification of who may be a statutory independent worker, e.g., one who acts as a driver for a transportation network company;
- In order to recognize the broad impact of major employers, a point at which employers of independent workers will be required to come within the statute, with a presumption of employer / employee status, unless the employer meets all obligations of the statutory dependent worker status, e.g., an employer could utilize common law independent contractors until such time as the employer has 1,000 workers (within the state) characterized as independent contractors, or incurs 100,000 hours per year of independent contractor labor, but thereafter all such workers would be employees unless the employer satisfied the attributes of the independent worker statute;
- Written notice to statutory independent workers, and express acceptance of the status by workers, of how their status differs from employees evidenced by the worker's acknowledgement and express agreement;
- Filing by the employer with state authorities of a notice and certification of its use of statutory independent workers, much as in an artificial entity registration;
- Periodic reports to state authorities of the identities, incomes, and other relevant information regarding statutory independent workers;
- State recognition of what obligations toward workers are affected by the status, e.g., tort liability, insurance requirements, worker's compensation contributions, unemployment insurance, and state income tax withholding.

Absent a concerted push by interested parties such as Uber and Lyft, the likelihood of any movement to solve what appears to be a growing issue seems unlikely. Clearly on the issue of TNC's there has been significant lobbying resulting in multiple state legislation. That, however, has primarily addressed the question of liability insurance coverage, with no real assistance in allocating responsibility attendant to other obligations arising from employee / independent contractor classification. Legislation to address the

[107] CAL. PUB. UTIL. §5431(a) (West, Westlaw through ch. 14 reg. sess. 2016).
[108] ARK. CODE. ANN. § 23-13-702 (West, Westlaw through 2d sess. 2016).

multiple thorny issues which relate to employee status remains largely non-existent, leaving both employers and workers waiting for a straightforward resolution and victims of the dice roll of litigation.