

A WORKER'S SHARE IN THE SHARING ECONOMY: THE CASE FOR EMPLOYEE CLASSIFICATION OF UBER DRIVERS

After the post-World War II industrial labor boom, American companies shifted their focus from steady long-term labor to large capital gains and flexible part-time labor to meet the demands of a rapidly globalizing economy.¹ In the wake of the Great Recession of 2007, this progression produced a bevy of technology-focused startups whose business philosophy depends on shifting risk from the corporate entity onto its largely part-time workforce to maximize profits, minimize risk, and attract investment.² Or—as it is more commonly called—the “sharing economy.”³ These companies capitalize on the average unskilled worker’s access to various common assets—whether they be cars, bedrooms, or other resources—to facilitate a perpetually accessible network of cheap services marketed towards an increasingly impenetrable professional class.⁴

This business model can be lucrative, as shown for Uber. As of 2015, Uber bears a \$50 billion valuation.⁵ But in recent years, companies like Uber have come under heightened scrutiny for their relationships with their workers.⁶ Many depend on classifying workers as independent contractors rather than employees.⁷ This classification in turn avoids both state and federal taxes, unemployment fund contributions, workers’ compensation premiums, benefit plan coverage, and daily costs incurred by their workers.⁸

Courts have slowly developed two primary tests for determining employee classification over the years.⁹ Yet these tests rely on long lists of non-determinative factors, making it difficult for companies to determine if they misclassify their workers by declaring them independent contractors.¹⁰ And different circuits vary application of these tests.¹¹ The disparity in their focus

means that using one test or the other for the same set of circumstances can result in different classifications.¹²

For workers in the sharing economy, a lot rides on their classification. Several federal statutes provide protection only for employees. For example, collective bargaining rights under the National Labor Relations Act (“NLRA”) only accrue for employees.¹³ But these statutes rarely define what it means to be an employee. This grey area in turn incentivizes employers to classify their workers as independent contractors and reap the subsequent tax savings.¹⁴ Companies like Uber have thus exploited unsettled points of agency law to shift both risk and cost onto their workforce as they pursue aggressive globalization campaigns.¹⁵

This Comment argues for employee classification of Uber’s drivers under established agency law principles. Part I of this Comment explores the common law basis for the “right to control” and “entrepreneurial opportunity” employee-classification tests and explains the development of both tests. Part II shows why Uber drivers are employees under either of the two primary employee classification tests. Part III proposes measures which Congress and state legislatures can implement to modernize employee-classification schemes and prevent future abuse.

I. THE BIFURCATED JUDICIAL PROGRESSION OF WORKER CLASSIFICATION TESTS

A. *Common Law Agency Principles and the “Right to Control” Test*

The Restatement provides the agency common law foundation on which both tests rest. It defines a “servant” as “a person employed to perform services in the affairs of another and who . . . is subject to the other’s control or right to control.”¹⁶ It goes on to set out a non-exhaustive list of factors which differentiate between employees and independent contractors.¹⁷ These include how much control an employer can exercise over the details of the work and whether the worker

is engaged in a “distinct occupation or business.”¹⁸ Whether the employer usually supervises the worker, who provides the tools and place of work, and whether workers need to be skilled to work also affect the classification.¹⁹

Several other factors affect the determination, although courts typically accord them lesser weight. These include the length of employment, how the employer pays the worker, whether the work is the regular business of the employer, whether the parties believe they are creating an employer-employee relationship, and whether the employer is a business.²⁰ No single factor is determinative in itself.²¹ In part, the rationale behind these considerations reflect the policy that employers should be liable to others for the actions of their employees.²²

When a statute uses the term “employee,” but gives the term no useful definition, “court[s] must infer . . . that Congress means to incorporate the established [common-law agency] meaning of” the term.²³ This concept applies to many federal statutes from which workers may potentially benefit. For example, the Fair Labor Standards Act (“FLSA”) defines an employee as “any individual employed by an employer.”²⁴ It goes on to define “employ” as including “suffer[ing] or permit[ing] to work.”²⁵

Other statutes offer even vaguer definitions. The Employee Retirement Income Security Act (“ERISA”), for example, states that an “employee” is “any individual employed by an employer.”²⁶ Even less helpfully, the National Labor Relations Act (“NLRA”) merely provides that its provisions apply to employees, but not to independent contractors.²⁷ So when courts hear cases under these statutes, common law agency principles must fill in the gap.

The Supreme Court of the United States in *Community for Creative Non-Violence v. Reid* distinguished the lens through which all other common law factors were to be viewed: the employer’s “right to control the manner and means” of a worker’s efforts to render a service.²⁸

There, a nonprofit organization disputed the copyright status of a statue which it had commissioned from a sculptor and for which both the nonprofit and the sculptor had registered a copyright.²⁹ The Copyright Act of 1976 provides that a “work made for hire” is what is “prepared by an employee with the scope of his or her employment.”³⁰ Considering the Restatement factors, the Court held that the sculptor had been an independent contractor, so the nonprofit could not register a copyright for the statue because it was not a work made for hire.³¹

Several of the Restatement factors bore on the Court’s consideration. These included that sculpting is a skilled occupation, and that the sculptor in this instance had provided his own tools and workplace.³² The nonprofit retained the sculptor for only a short period during which he could pursue other projects as well.³³ And the sculptor had freedom to decide when and how long to work, and whether to hire assistants.³⁴ Lastly, the nonprofit was not a business, it had not payrolled the sculptor, and sculpting was not its regular activity.³⁵

The California Supreme Court came out at the other end of the spectrum in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*.³⁶ Cucumber farmers in that case argued that they did not supervise seasonal share farmers—who they asserted had discretion over when they worked—and thus they were not employees.³⁷ Yet the court found that the cucumber farmers controlled the share farmers’ work because they owned the land, cultivated the crop throughout the year before the share farmers arrived for harvest, transported the cucumbers to market, and dispensed paychecks to the share farmers.³⁸ That the plaintiffs did not supervise the share farmers was not dispositive because the labor was simple and did not require skill.³⁹ And the court considered the fact that the share farmers did not hold themselves out as businesses, had no opportunity for “profit” or “loss,” and did not invest in the work beyond simple hand tools and labor.⁴⁰

The Ninth Circuit's opinion in *National Labor Relations Board v. Friendly Cab Company, Inc.* echoes the case of Uber drivers more closely. There, the court emphasized the employer's prohibition of entrepreneurial pursuits by its workers.⁴¹ The taxi company argued that its drivers were not employees because they rented vehicles, did not work a minimum amount of hours or by set schedules, were defined as "independent contractors" in their vehicle lease agreement, received no benefits, and because the company did not withhold taxes.⁴² But the court rejected this argument, holding instead that the extent of the company's control over the means and manner of its drivers' performance outweighed these factors.⁴³ In turn, the court found that the company's strict disciplinary regime, prohibition of developing entrepreneurial opportunities, requirement that drivers carry advertisements, and direct supervision of its drivers' manner of driving suggested that the drivers were employees.⁴⁴

Similar too is the case of *Alexander v. FedEx Ground Package System, Inc.*⁴⁵ There, the court held that FedEx drivers were employees because of the significant extent of FedEx's right to control its drivers' performance.⁴⁶ It also held that the presence of entrepreneurial opportunities did not undermine the scope of FedEx's control, given that drivers could only pursue those opportunities with FedEx's consent.⁴⁷ And although drivers had to provide their own scanners, they could only purchase them from FedEx and could not work without them.⁴⁸ The court went on to reject the D.C. Circuit's "entrepreneurial opportunity" test in *FedEx Home Delivery v. National Labor Relations Board*.⁴⁹ Thus, the court held that even if FedEx did not exercise control over every single aspect of drivers' performance, the extent of its right to control disposed of the drivers' employee status.⁵⁰

B. A Modernized Interpretation: The “Entrepreneurial Opportunity” Test

The “entrepreneurial opportunity” test proposes that degrees of economic risk are the deciding factor in employee classification determination.⁵¹ The D.C. Circuit, in *Corporate Express Delivery Systems v. National Labor Relations Board*, held that the right-to-control test did not sufficiently answer the worker classification question.⁵² Instead, the court interpreted the common-law factors by whether a worker takes on economic risk during work with a corresponding opportunity to profit—in essence, whether a worker has significant entrepreneurial opportunity for gain or loss.⁵³ In formulating this standard, the court relied on commentary to the Restatement, which reasoned that a full-time cook is an employee even though the cook’s employer has no control over the cooking.⁵⁴

Applying the entrepreneurial opportunity test to the facts of the case, the court held that the plaintiff’s drivers were employees under the NLRA.⁵⁵ The plaintiff argued that its drivers were not employees because they used their own vehicles, received no life or health insurance, and because their contract labelled them independent contractors.⁵⁶ Yet the court rejected this argument, emphasizing that the drivers could not hire people to perform their work or use their personal vehicles for other jobs.⁵⁷ So because the drivers lacked all entrepreneurial opportunity, they were employees.⁵⁸

The D.C. Circuit reached a different result with the same means in *FedEx Home Delivery*.⁵⁹ There, the court rejected the argument that FedEx’s single-route drivers at its Wilmington terminal were employees, even though they had to wear uniforms, abide by vehicle specifications and work schedules, and received fuel reimbursement.⁶⁰ Instead, the court held that the drivers were independent contractors because they provided their own vehicles which they could use for other commercial purposes, could independently incorporate and hire

temporary or replacement drivers, and could assign the contractual rights to their routes.⁶¹ All of this represented enough entrepreneurial opportunity to find independent contractor status.⁶² Thus, despite evidence of FedEx's control over the means and manner of its drivers' performance, the court's opinion turned on the entrepreneurial opportunities available to the drivers.⁶³

C. O'Connor as a Flagship Uber Driver Classification Dispute

The court in *O'Connor v. Uber Technologies, Inc.* developed a model approach for applying a worker classification test to Uber's contractual structure.⁶⁴ There, several Uber drivers filed a class action against Uber in federal district court.⁶⁵ Early in the proceedings, the court issued a written order denying Uber's motion for summary judgment.⁶⁶ In considering the circumstances, the court applied the right-to-control test as formulated in *Borello*.⁶⁷

First, the court noted that the fact that Uber labelled its drivers as "independent contractors" in its service contract was not dispositive.⁶⁸ Uber argued that it was not a transportation company, but was a technology company that acted as an intermediary between individuals seeking transportation and thousands of independent transportation providers.⁶⁹ The court rejected this argument, noting that Uber does not sell its software, but generates revenue through providing transportation.⁷⁰ Uber's application is merely an instrumentality used in the context of its larger business.⁷¹ The court also found that Uber is a transportation company because it claims a "proprietary interest" in its riders, thus forbidding its drivers from soliciting future patronage from riders.⁷²

Furthermore, Uber bills its riders directly without input from its drivers on the cost. It also pays its drivers a portion of the proceeds.⁷³ Lastly, Uber exercises significant control and discretion over the qualification and selection of its drivers. Indeed, Uber terminates drivers who fall below the bottom 5% mark of rated drivers.⁷⁴

The court went on to explain the many facts in dispute that represented the basis for denying summary judgment.⁷⁵ The first dispute concerned whether Uber can fire drivers at will—a factor indicative of an employer-employee relationship in California.⁷⁶ Uber argued that it can only terminate drivers with notice of a material breach of the code of conduct; the plaintiffs in turn alleged that the contract let Uber terminate use of its software at any time.⁷⁷ The parties also disputed whether drivers could work at their leisure.⁷⁸ While Uber alleged that drivers did not have to accept ride requests so long as they accepted one within a set period of days, the plaintiffs cited portions of the Uber driver handbook, which states that drivers may be terminated for rejecting too many trips.⁷⁹

Lastly, the parties disputed whether Uber had the right to control the manner and means of transportation.⁸⁰ Uber argued that handbook requirements for, among other things, driving style, dress, and hygiene were only “suggestions.”⁸¹ But the court noted that there was evidence the drivers could be terminated for failing to follow “suggestions,” and the presence of the rating system represented a substantial method of supervising drivers’ performance.⁸² In contrast, the court observed that the fact that Uber does not control drivers’ hours or frequency of reporting to work weighed in favor of independent contractor status.⁸³ In concluding its order, the court noted that the right-to-control test was somewhat outdated in the face of the sharing economy, and that its application presented significant legal challenges.⁸⁴

II. THE CASE FOR EMPLOYEE CLASSIFICATION OF UBER DRIVERS

Taking the contract in *O'Connor* as a model for the typical Uber contract, courts should find that Uber drivers are employees even if they apply the right-to-control test or the entrepreneurial-opportunity test.⁸⁵ For good reason, too: The evidence of Uber’s control over the means and manner of its drivers’ performance is substantial, given its gatekeeping control of the

essential instrumentality of the Uber software, strict disciplinary regime based on user ratings, and its non-negotiable control over fare-pricing.⁸⁶ Similarly, Uber drivers have little entrepreneurial opportunity while working for Uber, given that Uber prohibits soliciting future fares from passengers, sub-licensing, assigning, or transferring one's Uber license, or permitting third parties from using one's Uber driver account.⁸⁷ And while employee classification may cost Uber a non-trivial amount of its valuation and investment revenue, the public interest as for the macroeconomic effect of shifting risk and cost to Uber drivers—thus depressing its workers' purchase power—outweighs any loss of value sustained by Uber in the short-term.⁸⁸

Uber's right to control its drivers' performance is significant. While drivers provide their own cars, they cannot use them for Uber unless it approves their usage—usually requiring that the cars meet certain aesthetic and functional standards as well as comply with licensing regulations.⁸⁹ Uber also interviews drivers and vets their city knowledge, driving record, and vehicle registration.⁹⁰ While Uber does not necessarily supervise its drivers directly, its actual supervision is more controlling than that in *Alexander*, as Uber follows up on all reviews and comments that riders provide after a completed ride.⁹¹ That discipline and termination may result from consistent low reviews, repeated cancellations of accepted rides, and violations of the code of conduct reflect an extensive disciplinary regime that rivals that in *Friendly Cab*.⁹² While Uber argues that uniform, hygiene, and car cleanliness requirements are suggestions, poor performance of any of these can lead to low ratings and complaints which in turn result in discipline and eventual termination.⁹³

Significant too that Uber controls the fare rates, paid directly to it.⁹⁴ It then retains 20% of the fare as a “service fee” before passing the remainder to its drivers.⁹⁵ As in *Alexander*—where FedEx drivers had to purchase scanners from FedEx to work—Uber drivers simply cannot

perform without access to the Uber smartphone application, over which Uber retains sole and exclusive control.⁹⁶ While Uber has little control over the hours and frequency with which its drivers work, that alone is not dispositive in the face of overwhelming evidence of control over the means and manner of drivers' performance.⁹⁷

Drivers' lack of entrepreneurial opportunities also reveals that they are not independent contractors. That drivers are prohibited from soliciting future business from passengers even if that patronage would be under Uber's name or otherwise reinforces this conclusion. After all, Uber claims a "proprietary interest" in the goodwill of its customers which drivers cannot to generate for themselves—thus, a driver must refer a potential repeat customer to the Uber application.⁹⁸ Uber drivers also may not sublicense or assign or transfer their licenses, preventing formation of a secondary market for accounts like that in *FedEx Home Delivery*.⁹⁹ Admittedly, drivers may use their vehicles for other commercial purposes while not driving for Uber, and are responsible for their own vehicle costs.¹⁰⁰ But this does little to establish that they can pursue other entrepreneurial opportunities while "on the clock" for Uber.¹⁰¹

Common law agency factors cut in favor of employee classification as well.¹⁰² As the court in *O'Connor* observed, labelling one's employees as independent contractors—as the Uber contract does—does not make it so.¹⁰³ And while signing a contract labelling one as an independent contractor may reflect an intent to accept that classification, other factors may cumulatively outweigh the lone factor.¹⁰⁴ Though Uber claims that it is simply a technology company, the *O'Connor* court correctly found that Uber's regular business is providing transportation through the instrumentality of the Uber software.¹⁰⁵ Uber drivers thus engage in a distinct occupation: They drive for Uber—and without them, Uber would have no product or service to sell.¹⁰⁶ Driving is not an activity which requires much skill either, no matter how

knowledgeable one must be of a particular city to work for Uber.¹⁰⁷ And so long as an Uber driver does not violate the code of conduct and remains above the bottom 5% of rated drivers, that driver could work for Uber indefinitely.¹⁰⁸

Uber has released data suggesting that its drivers make generous wages under their setup, purporting that the average driver makes about \$19.04 per hour.¹⁰⁹ Yet when one considers that Uber shifts the costs of, among other things, vehicle insurance, fuel, vehicle maintenance, vehicle rental, and health insurance onto its drivers, such a statistic sounds far less impressive.¹¹⁰ The ramifications for Uber drivers' purchasing power under an independent contractor classification is significant, and only contributes to economic stagnation and industry volatility.¹¹¹ And independent contractor classification lets Uber dodge state and federal taxes as well as pension and healthcare obligations, thus shifting risk and costs onto drivers and frustrating the free flow of interstate commerce.¹¹² The vehicle insurance gap also filters risk down to consumers; few insurance companies will cover Uber drivers' accidents when they have no passenger, thus leaving vulnerable workers with the bill and those injured by the accident without compensation.¹¹³

This argument is not to downplay the effects such a shift in classification will visit upon Uber. Uber employs around 160,000 drivers worldwide.¹¹⁴ Its costs would inevitably rise if it had to pay, among other things, Social Security, Medicare, and unemployment insurance taxes, workers' compensation coverage, and health insurance coverage for its drivers.¹¹⁵ Perhaps it would lose out on overseas investment prospects or have to raise fares.¹¹⁶ And perhaps these costs would dethrone Uber as the most valuable tech startup.¹¹⁷

But with its \$50 billion valuation, Uber would suffer at most a single-digit percentage drop in value if it properly classified its employees.¹¹⁸ In a macroeconomic sense, there is little

evidence to say that this damage outweighs the continuous stagnation of workers' purchasing power and the resulting frustration of interstate commerce. True, it likely would have been difficult for Uber to break into the transportation market in the face of entrenched and traditional incumbents without saving expenditures on employee-classification costs.¹¹⁹ But the competitive nature of the free market does not give Uber *carte blanche* to exploit its drivers. It is in the interest of the free movement of interstate commerce to draw a line in the sand and discourage businesses from shifting risk and costs that it should rightfully shoulder to the vulnerable workforce that facilitates their sole source of revenue.

III. RECOMMENDED LEGISLATIVE ENHANCEMENTS

Employers do not always misclassify employees in bad faith, and the confusion is largely because of the vague description of employees in various federal statutes.¹²⁰ Additionally, the tests that courts apply and the many common law factors associated with them present a confusing web of considerations for employers to contemplate when determining how to classify their workers.¹²¹ Given increasingly complex employer-worker relationships presented by the sharing economy, legislatures must enact more definite and reliable guidelines to both prevent bad faith misclassification of employees and to direct companies towards the proper classification.

Congress should amend relevant federal statutes to include additional detail and provide more concrete guidance on how to classify an employee. While a strict test will prove vulnerable to the shifting needs of our globalized economy, the grey area spawned by overbroad provisions has been well-established. For this reason, Congress should explicitly incorporate the guiding principles of the entrepreneurial-opportunity test. As the court in *Corporate Express* recognized,

such a test is more aware of modern employer-worker relations, particularly given the recent rise of the sharing economy.¹²²

At a minimum, state legislatures should follow the standard set by the Illinois Transportation Network Providers Act (“Illinois Act”).¹²³ While Uber drivers are still independent contractors in Illinois, the state legislature recognized the need for a base level of accountability for the thousands of drivers taking to its streets.¹²⁴ The Illinois Act requires drivers for companies like Uber to carry minimum insurance policies that insure up to nearly double that required for the average driver.¹²⁵ That said, state legislatures should go a step further and require transportation companies to reimburse drivers for at least half of their insurance premiums, if not more. This requirement has a dual effect in that it recognizes the root of common law agency principles—that companies should be responsible for the actions of those who act in the interest of that company—and also provides the public an avenue to compensation if a driver has an accident without carrying a fare.¹²⁶

To further deter misclassification, Congress and state legislatures should pass legislation in the spirit of both the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 and the Employee Misclassification Prevention Act.¹²⁷ The former sought to increase the annual penalty cap for filing erroneous employment tax information from \$250,000 to \$3 million.¹²⁸ An even larger cap would be required to fulfill any sort of punitive or deterrent purpose on successful companies like Uber, and would represent a serious legislative devotion to protecting worker’s rights in stamping out employee misclassification.¹²⁹ The latter, meanwhile, would require employers to maintain records of nonemployees paid for services, thus increasing the transparency and accountability of companies to ensure that they are complying with employee classification standards.¹³⁰

CONCLUSION

While Uber has not necessarily shown bad faith in its classification of its drivers as independent contractors, it is unlikely that such a classification will survive scrutiny under either the right-to-control test or the entrepreneurial-opportunity test. Employee classification of Uber drivers is also a desirable outcome that will protect labor rights, provide substantial benefits and protections to drivers, and stimulate local economies by increasing the purchasing power of drivers. To prevent future misclassification and eliminate the legal grey area established by current legislation and court tests, legislatures should incorporate facets of the entrepreneurial-opportunity test as guiding principles, require transportation companies to reimburse drivers for insurance as a minimum first step, and should increase penalties for future misclassifications.

¹ Kenneth G. Dau-Schmidt, *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, 64 EMORY L.J. 1583, 1588–89, 1594–1599 (2015).

² *Id.*; Corinne C. Miller, *Ridesharing Risks: Drivers and Passengers Take on Uber*, CBA REC. 38, 38–39 (2015); *Peer-to-Peer Rental: The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013) [hereinafter *Peer-to-Peer*], <https://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

³ *Peer-to-Peer*, *supra* note 2.

⁴ *Id.*

⁵ Douglas MacMillan & Telis Demos, *Uber Valued at More than \$50 Billion*, WALL STREET J. (Jul. 31, 2015, 8:50 PM), <https://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457>.

⁶ Robert C. Nagle, *Employers Facing Increased Scrutiny Over Worker Classification*, 20 No. 9 PA. EMP. L. LETTER 1, 1–2 (June 2010).

⁷ *Id.*

⁸ *Id.*

⁹ *See Corp. Exp. Delivery Sys. v. N.L.R.B.*, 292 F.3d 777, 780 (D.C. Cir. 2002); *see also* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 458–59 (1999).

¹⁰ Nagle, *supra* note 6, at 2–3.

¹¹ *Id.* at 3.

¹² *Id.* at 3.

¹³ National Labor Relations Act of 1935, 29 U.S.C. § 152(3) (2012).

¹⁴ Nagle, *supra* note 6, at 1.

¹⁵ Nagle, *supra* note 6, at 1–3; MacMillan & Demos, *supra* note 5.

¹⁶ Restatement (Second) of Agency § 220(1) (1958) (the term “servant” is an archaic term for what is now referred to as an “employee”).

¹⁷ RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW. INST. 1958).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2)).

²² Barron, *supra* note 9, at 459.

²³ *Cnty. For Creative Non-Violence*, 490 U.S. at 739 (internal quotations omitted).

²⁴ Fair Labor Standards Act of 1938, 29 U.S.C. § 203(e)(1) (2012).

²⁵ *Id.* at § 203(g).

²⁶ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(6) (2012).

²⁷ National Labor Relations Act of 1935, 29 U.S.C. § 152(3) (2012) (“The term ‘employee’ shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor . . .”).

²⁸ 490 U.S. at 751.

²⁹ *Id.* at 733–35.

³⁰ Copyright Act of 1976, 17 U.S.C. § 101 (2010).

³¹ *Cnty. For Creative Non-Violence*, 490 U.S. at 751–53.

³² *Id.* at 752.

³³ *Id.* at 752–53.

³⁴ *Id.* at 753.

³⁵ *Id.*

³⁶ *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (Cal. 1989).

³⁷ *Id.* at 356 (arguing that the share farmers were “paid for their production rather than their labor” and that share farmers retained “all legal and actual power” over performing their work).

³⁸ *Id.* (considering that plaintiffs determined the sale price of the cucumbers, supplied bins and boxes to share farmers to store cucumbers, retrieved harvested cucumbers from the share farmers, and maintained documentation on the share farmers’ respective proceeds).

³⁹ *Id.*

⁴⁰ *Id.* at 357–58 (noting that the share farmers “ha[d] no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries.”).

⁴¹ N.L.R.B. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1096–98 (9th Cir. 2008) (citing *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780–81 (D.C. Cir. 2002)).

⁴² *Id.* at 1097–98.

⁴³ *Id.* at 1098.

⁴⁴ *Id.* at 1098–1101 (noting that drivers could not use leased taxis for outside business, were not permitted to solicit customers, were instructed on the model of vehicle to use and how to drive, were disciplined for refusing to accept a dispatch, could be suspended or terminated by a “road manager,” were required to accept parcel delivery vouchers, and had to comply with a dress code).

⁴⁵ *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

⁴⁶ *Id.* at 989–94 (noting that, among other things, FedEx instituted uniform and hygiene requirements, vehicle specification requirements, implicit work schedules, and delivery performance specifications).

⁴⁷ *Id.* at 993–94.

⁴⁸ *Id.* at 995.

⁴⁹ *Id.* at 993–94 (citing *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492 (D.C. Cir. 2009)).

⁵⁰ *Id.* at 989–94.

⁵¹ *See Corp. Exp. Delivery Sys. v. N.L.R.B.*, 292 F.3d 777, 780–81 (D.C. Cir. 2002).

⁵² *Id.* at 779–80 (noting that the right-to-control test would likely lead to a finding of independent contractor status, given that the plaintiff exercised control over its drivers in that drivers could not deviate from the order of stops set out on their route sheets, were required to carry pagers, and were required to wear a uniform).

⁵³ *Id.* at 779–81.

⁵⁴ *Id.* at 780 (citing RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. D (AM. LAW. INST. 1957)).

⁵⁵ *Id.* at 780–81.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ FedEx Home Delivery v. N.L.R.B., 563 F.3d 492 (D.C. Cir. 2009).

⁶⁰ *Id.* at 500–01 (rejecting the proposition that the drivers were employees in light of FedEx’s requirement that drivers complete a driving course and operate under a set work schedule).

⁶¹ *Id.* at 498–500.

⁶² *Id.* (reasoning that simply because drivers had not taken advantage of their entrepreneurial opportunities did not undermine their status as independent contractors).

⁶³ *Id.* at 502–04.

⁶⁴ O’Connor v. Uber Techs., Inc., 82 F.Supp.3d 1133 (N.D. Cal. 2015).

⁶⁵ *Id.* at 1135.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1139 (citing S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341, 350 (Cal. 1989)).

⁶⁸ *Id.* at 1140 (citing Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989 (9th Cir. 2014)).

⁶⁹ *Id.* at 1141; *see also Terms and Conditions, UBER* (Jan. 2, 2016),

<https://www.uber.com/legal/terms/us/> (“YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION . . . OR FUNCTION AS A TRANSPORTATION

CARRIER.”); *see also* *United States Terms and Conditions of Service*, UBER (Dec. 11, 2015) [hereinafter *US Terms & Conditions*], uber.com/legal/business/usa/en-US/ (“CUSTOMER ACKNOWLEDGES AND AGREES THAT THE UBER SERVICE IS A TECHNOLOGY PLATFORM . . . UBER IS NOT A TRANSPORTATION PROVIDER . . .”).

⁷⁰ *O’Connor*, 82 F.Supp.3d at 1141–45 (“Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs . . .”).

⁷¹ *Id.*

⁷² *Id.* at 1142; *see also* Exhibit 3 at 6, *O’Connor v. Uber Techs., Inc.*, 82 F.Supp.3d 1133 (N.D. Cal. 2015) (No. 3:13-cv-03826) (“Zero Tolerance . . . Malicious Solicitation – if a driver blatantly tries to ‘steal’ clients from Uber by offering services outside the Uber system, this is reason for removal.”); *see also* *Driver Deactivation Policy – US ONLY*, UBER (Apr. 21, 2016) [hereinafter *Driver Deactivation Policy*], <https://www.uber.com/legal/deactivation-policy/us-multi-lingual/en/> (“We will take action against a driver for activities such as: Accepting illegal street hails while using the Uber app; Harming the business or brand . . . and Soliciting payment of fares outside the Uber system[.]”).

⁷³ *O’Connor*, 82 F.Supp.3d at 1142; *see also* *US Terms & Conditions*, *supra* note 69 (“Customer shall pay to Uber all User Charges and any applicable Service Fees Uber may charge . . .”).

⁷⁴ *O’Connor*, 82 F.Supp.3d at 1142–43 (noting that during the application process, drivers must undergo “a background check, city knowledge exam, vehicle inspection, and personal interview.”); *see also* Exhibit 29 at 2–3, *O’Connor*, 82 F.Supp.3d 1133 (No. 3:13-cv-03826) (“We will be deactivating Uber accounts regularly of drivers who are in the bottom 5% of all Uber drivers and not performing up to the highest standards.”).

⁷⁵ *O’Connor*, 82 F.Supp.3d at 1148–53.

⁷⁶ *Id.* at 1149.

⁷⁷ *Id.*; see generally *Code of Conduct*, UBER (Jan. 2, 2016),

<https://www.uber.com/legal/community-guidelines/us-en/>.

⁷⁸ *O'Connor*, 82 F.Supp.3d at 1149.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1149–50.

⁸¹ *Id.*; see also Exhibit 20 at 2–4, *O'Connor*, 82 F.Supp.3d 1133 (No. 3:13-cv-03826).

⁸² *O'Connor*, 82 F.Supp.3d at 1150–51; see also Exhibit 29 at 2–3, *O'Connor*, 82 F.Supp.3d 1133 (No. 3:13-cv-03826); see also *Driver Deactivation Policy*, *supra* note 72 (“After every trip, drivers and riders rate each other . . .”).

⁸³ *O'Connor*, 82 F.Supp.3d at 1152.

⁸⁴ *Id.* at 1153.

⁸⁵ *Id.* at 1133–38.

⁸⁶ *Id.* at 1141–45.

⁸⁷ *Id.*

⁸⁸ See National Labor Relations Act of 1935, 29 U.S.C. § 151 (2012) (stating that preventing stabilized wage rates and working conditions burdens interstate commerce by depressing wage rates and the purchasing power of wage earners); Abigail Tracy, *The Massive Costs Uber Faces If All Drivers Become Employees*, FORBES (Jun. 18, 2015, 11:01 am), <https://www.forbes.com/sites/abigailtracy/2015/06/18/the-massive-costs-uber-faces-if-all-drivers-become-employees/#7be376c45898>.

⁸⁹ See Exhibit 28 at 2–3, *O'Connor*, 82 F.Supp.3d 1133 (No. 3:13-cv-03826) (requiring that drivers submit driver license, vehicle insurance, and vehicle registration with application); see

also *Driver Deactivation Policy*, *supra* note 72 (“Uber may permanently deactivate a driver for activities such as . . . [n]ot maintaining valid vehicle registration or driver’s license . . .”).

⁹⁰ *O’Connor*, 82 F.Supp.3d at 1136; *see also* Exhibit 29 at 2–4, *O’Connor*, 82 F.Supp.3d 1133 (No. 3:13-cv-03826) (referencing institution of pre-interview test to assess city knowledge).

⁹¹ *See* *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014) (noting that FedEx drivers were subject to performance review “ride-alongs” by supervisors); *see also* *Driver Deactivation Policy*, *supra* note 72 (“After every trip, drivers and riders rate each other . . .”).

⁹² *N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1098–1101 (9th Cir. 2008).

⁹³ *Compare Alexander*, 765 F.3d at 989 (FedEx drivers found to be employees had uniform and hygiene requirements imposed on them by FedEx) *with O’Connor*, 82 F.Supp.3d at 1150 (noting that failure to comply with Code of Conduct “suggestions” may implicitly lead to termination).

⁹⁴ *O’Connor*, 82 F.Supp.3d at 1142.

⁹⁵ *Id.*

⁹⁶ *Compare Alexander*, 765 F.3d at 986-87 (“The scanners that drivers must use . . . are not readily available from any other source [than FedEx].”) *with O’Connor*, 82 F.Supp.3d at 1153 (“Uber supplies the critical tool of the business—smart phone with the Uber application.”).

⁹⁷ *O’Connor*, 82 F.Supp.3d at 1152.

⁹⁸ *Compare N.L.R.B. v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1098–99 (9th Cir. 2008) (noting that taxi drivers held to be employees were not permitted to solicit outside business or hand out business cards, as the taxi company claimed a proprietary interest in the goodwill of its customers) *with O’Connor* 82 F.Supp.3d at 1142.

⁹⁹ FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 500 (D.C. Cir. 2009); *see Terms and Conditions*, *supra* note 69 (license non-sublicensable, non-transferable; account non-assignable, non-transferable).

¹⁰⁰ *See Terms and Conditions*, *supra* note 69 (drivers responsible for vehicle costs).

¹⁰¹ *Id.*

¹⁰² *See* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW. INST. 1958).

¹⁰³ *O'Connor*, 82 F.Supp.3d at 1140 (citing *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989 (9th Cir. 2014)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1141–45.

¹⁰⁶ *Id.* at 1142 (“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.”).

¹⁰⁷ *Id.* at 1152.

¹⁰⁸ *Id.* at 1142–43

¹⁰⁹ *Tracy*, *supra* note 88.

¹¹⁰ *Miller*, *supra* note 2, at 38–40.

¹¹¹ *See* National Labor Relations Act of 1935, 29 U.S.C. § 151 (2012) (stating that preventing stabilized wage rates and working conditions burdens interstate commerce by depressing wage rates and the purchasing power of wage earners); *see also Tracy*, *supra* note 88.

¹¹² *Tracy*, *supra* note 88.

¹¹³ *Miller*, *supra* note 2, at 40–41.

¹¹⁴ *Tracy*, *supra* note 88.

¹¹⁵ *Id.*

¹¹⁶ See generally MacMillan & Demos, *supra* note 5.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *The Sharing Economy: All Eyes on the Sharing Economy*, *ECONOMIST* (Mar. 9, 2013), <https://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items>.

¹²⁰ Nagle, *supra* note 6, at 2.

¹²¹ *Id.*

¹²² *Corp. Exp. Delivery Sys. v. N.L.R.B.*, 292 F.3d 777, 780–81 (D.C. Cir. 2002).

¹²³ Miller, *supra* note 2, at 40.

¹²⁴ *Id.* at 40, 43.

¹²⁵ *Id.* at 40 (“Illinois TNC drivers are now required to hold a minimum insurance policy of \$50,000 for death and personal injury per person, \$100,000 for death and personal injury per incident, and \$25,000 in property damage. This is in contrast to the state law for all drivers, which requires only \$25,000 for death or personal injury per person, \$50,000 for death and personal injury per incident, and \$20,000 for property damage.”).

¹²⁶ Barron, *supra* note 9, at 459; Miller, *supra* note 2, at 40.

¹²⁷ Nagle, *supra* note 6, at 1–2.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 2.