

3-31-2016

An Uberdilemma: Employees and Independent Contractors in the Sharing Economy

Grant E. Brown

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/endnotes>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

75 Md. L. Rev. Endnotes (2016)

This Article from Volume 75 is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Endnotes by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Comment

AN UBERDILEMMA: EMPLOYEES AND INDEPENDENT CONTRACTORS IN THE SHARING ECONOMY

GRANT E. BROWN*

The sharing economy¹ is a growing industry brought on by the omnipresence of the internet.² With the click of a mouse, or the tap of a finger, one can quickly offer or gain access to assets or services online. Therefore, one of the distinguishing features of the sharing economy is the ease of accessibility for producers and consumers.³

Uber Technologies, Inc. (“Uber”) is one of most successful players in the sharing economy.⁴ Anyone with a car and some spare time to drive has the option of offering his or herself through Uber as a transportation resource to someone who wants a ride; Uber provides a medium (a mobile app) through which these two parties can connect.⁵ On the surface, Uber drivers function like traditional taxi drivers. One major difference,

© 2016 Grant E. Brown.

* J.D. Candidate, 2017, University of Maryland Francis King Carey School of Law. The author would like to thank Professor Marley Weiss for her guidance throughout the writing process. The author would also like to thank the members of *Maryland Law Review*, especially Colin Cloherty, Michael Cianfichi, Hannah Cole-Chu, Michael Collins, and Laura Merkey, for taking the time to supply helpful feedback and edit this Comment. Finally, the author would like to thank Uber for giving him something to write about and oftentimes helping him get to and from law school.

1. One definition of sharing economy is “[a]n economic model in which individuals are able to borrow or rent assets owned by someone else.” *Sharing Economy*, INVESTOPEDIA <http://www.investopedia.com/terms/s/sharing-economy.asp> (last visited Feb. 9, 2016).

2. *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> (“[T]echnology has reduced transaction costs, making sharing assets cheaper and easier than ever—and therefore possible on a much larger scale.”).

3. Thomas Claburn, *The Sharing Economy: Access Is the New Ownership*, INFORMATIONWEEK (Apr. 15, 2015), <http://www.informationweek.com/mobile/mobile-devices/the-sharing-economy-access-is-the-new-ownership/d/d-id/1319946>.

4. Cf. Douglas MacMillan & Telis Demos, *Uber Valued at More Than \$ 50 Billion*, WALL ST. J. (Jul. 31, 2015), <http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457> (“Uber Technologies, Inc. has completed a new round of funding that values the five-year-old ride-hailing company at close to \$51 billion . . .”).

5. *Our Trip History*, UBER, <https://www.uber.com/our-story> (last visited Feb. 2, 2016).

however, is that while traditional taxi drivers are generally considered to be employees,⁶ Uber asserts that its drivers are independent contractors.⁷

The distinction between employees and independent contractors is important for both Uber and its drivers because employees are entitled to more statutory rights and protections than independent contractors.⁸ Uber already faces mounting litigation from its drivers challenging their independent contractor classifications.⁹ With the growth of the sharing economy, it is likely that litigation of this type will continue (if not increase) for Uber and for other service providers with similar employment arrangements.¹⁰ This contentious issue is, therefore, ripe for resolution.

This Comment proposes a test for determining whether Uber drivers are employees or independent contractors. Currently, different jurisdictions and bodies of law apply various methods of distinguishing employees from independent contractors, which in turn leads to inconsistent holdings.¹¹ In an attempt to establish uniformity in this area of the law, this Comment discerns consistent principles of employment relationships and considers which are most applicable to participants in the sharing economy.¹² The findings and recommendations in this Comment may extend to other sharing economy participants; however, this Comment focuses solely on Uber. Specifically, this Comment recommends that courts implement a two-pronged test that queries 1) whether the worker can improve his or her economic opportunity through managerial skills; and, 2) whether the services provided by the worker are integral to the employer's business.¹³ In applying this test to Uber, this Comment concludes that Uber drivers

6. See *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1103 (9th Cir. 2008) (holding that Friendly's taxicab drivers were employees); *but see Ademovic v. Taxi USA, LLC*, 767 S.E.2d 571, 579 (N.C. Ct. App. 2014) (holding that taxi driver for Taxi USA, LLC was an independent contractor).

7. RASIER, LLC, *Software License and Online Services Agreement*, at § 13.1 (2014), https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%2010%202014.pdf (“[T]he relationship between the parties under this Agreement is solely that of independent contractors.”) [hereinafter RASIER, LLC, *Agreement*]. Rasier is a “subsidiary of Uber Technologies, Inc.” *Id.* at *1.

8. See *infra* Part II.A.

9. Jacob Demmitt, *Uber Sued by Former Worker Seeking at Least \$44M on Behalf of All Washington State Uber Drivers*, GEEKWIRE (Nov. 20, 2015), <http://www.geekwire.com/2015/uber-hit-with-another-lawsuit-over-driver-classification-this-time-in-washington-state/>.

10. James B. Shrimp, *Uber and the Heightened Scrutiny of Independent Contractor Status*, LEGAL INTELLIGENCER (Sept. 30, 2015), <http://www.thelegalintelligencer.com/id=1202738521960/Uber-and-the-Heightened-Scrutiny-of-Independent-Contractor-Status?mcode=0&curindex=0&curpage=2> (“Employment lawsuits have been the primary threat against [sharing economy] businesses . . .”).

11. See *infra* Part I.B.

12. See *infra* Part II.

13. See *infra* Part II.C.

should be classified as employees because they cannot use managerial skills to make more money and Uber drivers supply a service integral to Uber's business.¹⁴

I. BACKGROUND

Courts and administrative agencies have reached contrary holdings concerning Uber drivers' status as employees or independent contractors.¹⁵ One reason for the inconsistent driver classification is the various number of tests that courts use to determine whether an Uber driver is an independent contractor or an employee.¹⁶ These inconsistent tests are a result of the many different bodies of employment law.¹⁷ Despite multiple cases under assorted bodies of law, the facts for each case concerning Uber are consistent because a similar contract is signed by each Uber driver before he or she begins working.¹⁸

This Section will examine the relationship between Uber and its drivers, survey some of the tests used to distinguish between employees and independent contractors, and assess how the tests are applied in the context of Uber by courts and administrative agencies in order to illuminate a method that accurately determines whether an Uber driver is an employee or an independent contractor.¹⁹ Part I.A will delve into the relationships between Uber, its drivers, and its customers.²⁰ Specifically, Part I.A.1 explores how Uber drivers come to work for Uber;²¹ whereas, Part I.A.2 looks into how Uber represents itself and its drivers to customers.²² Part I.B will then focus on some of the many tests used to distinguish employees from independent contractors.²³ This Section does not contain an exhaustive review of all the relevant tests, but rather explores some variations of the two main employee/independent contractor tests: the right-to-control test²⁴ and the economic realities test.²⁵ Finally, Part I.C delves

14. *See infra* Part II.C.

15. *Compare* Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at *10 (Cal. Dept. Lab. June 3, 2015) (finding that Uber drivers are employees), *with* Rasier, LLC v. Fla. Dep't of Econ. Opportunity, No. 0026 2825 90-02, at *7 (Fla. Dep't of Econ. Opportunity Sept. 30, 2015) (finding that Uber drivers are independent contractors).

16. *See infra* Part I.B.

17. For example, on the federal level there are the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2015), and the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2015). States also implement their own employment law.

18. *See infra* Part I.A.

19. *See* Part I.

20. *See infra* Part I.A.

21. *See infra* Part I.A.2

22. *See infra* Part I.A.2.

23. *See infra* Part I.B.

24. *See infra* Part I.B.1.

25. *See infra* Part I.B.2.

into two rulings that have already determined an Uber driver's classification.²⁶ Part I.C.1 discusses one California ruling that held that Uber drivers are employees under the California Labor Code.²⁷ Conversely, Part I.C.2 analyzes one case in which a Florida agency held that Uber drivers were independent contractors.²⁸

A. Uber's Relationships with Its Drivers and Its Customers

Before determining what it means to be an employee or independent contractor, it is first important to set forth the facts currently defining the relationship between Uber and its drivers. This Part will therefore examine 1) Uber's relationship with its drivers and 2) how Uber holds itself and its drivers out to its customers. The Uber/driver relationship is important to examine because the nature of that relationship determines whether an Uber driver's agreement resembles that of an employee contract or an independent contractor contract. Uber's relationship with its customers is also an important consideration because one major factor in determining whether an employment relationship exists is whether the purported employee furthers the employer's business objective.²⁹ The relationship between Uber and its customers will clarify whether Uber drivers further Uber's business objective.

1. Uber's Relationship with Its Drivers

Prospective Uber drivers must undergo a thorough application process.³⁰ This process includes having applicants "upload their driver's license information [and] information about their vehicle's registration and insurance," pass both a third-party background check and "city knowledge test," and interview with an Uber employee.³¹ After the prospective driver successfully completes the application, he or she "must sign contracts with Uber or one of Uber's subsidiaries."³²

The contract signed between the driver and Uber or its subsidiary, Rasier, LLC, (hereinafter collectively "Uber") is called the "Software License and Online Services Agreement" (hereinafter "Driver Contract").³³ Uber explains in the Driver Contract that it merely allows the driver to have access to Uber services through which the driver can provide transportation

26. *See infra* Part I.C.

27. *See infra* Part I.C.1.

28. *See infra* Part I.C.2.

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

30. *Id.* at 1136.

31. *Id.*

32. *Id.*

33. RASIER LLC, *Agreement*, *supra* note 7, at *1.

services to Uber users.³⁴ In light of this working model, Uber describes itself as a provider of “peer-to-peer . . . passenger transportation services.”³⁵ The company, nevertheless, seemingly wants to avoid being classified as a transportation company as indicated by the first page of the Driver Contract.³⁶

Regardless of whether Uber is a transportation or technology company, the Driver Contract stipulates certain provisions with which drivers must comply in order for the Driver Contract to continue.³⁷ For example, drivers are required to complete at least one ride per month and are prohibited from allowing third parties to drive with the driver’s Uber ID.³⁸ Uber drivers must also “provide all necessary equipment, tools and other materials, at [their] own expense,”³⁹ and make sure that their vehicle complies with Uber’s vehicle requirements set forth in Section 3.2 of the agreement.⁴⁰ Even though drivers must supply their own equipment, Uber agrees to provide them with the mobile application through which drivers access transportation requests.⁴¹ Drivers are further required to maintain a minimum average rating,⁴² in order to continue under the Driver Contract.⁴³

Uber maintains that it does not “direct or control [the driver] generally or in [his or her] performance under [the Driver Contract].”⁴⁴ The driver, for example, may terminate the Driver Contract whenever he or she wishes.⁴⁵ The driver is also not required to wear a uniform or any type of other Uber insignia.⁴⁶ Finally, the driver is free to “engage in any other

34. *Id.* (“The Uber services enable an authorized transportation provider to seek, receive and fulfill requests for transportation services from an authorized user of Uber’s mobile applications.”).

35. *Id.*; *see also id.* at § 1.13.

36. *Id.* at *1 (stating “[y]ou acknowledge and agree that [Uber] is a technology services provider that does not provide transportation services” in boldface type).

37. *Id.* at § 2.1.

38. *Id.*

39. *Id.* at § 2.2.

40. *Id.* at § 3.2. This Section, concerning vehicle requirements, requires drivers to have a vehicle that is 1) properly registered; 2) owned by the driver or in his lawful possession; 3) suitable to perform transportation services; and 4) in good operating condition. *Id.*

41. *Id.* at § 2.6. Drivers access the mobile app through their own devices, or Uber will provide drivers with such a device. Regardless of which device drivers use, they are responsible for payments on the device. Without this app, drivers would be unable to drive for Uber because the app is the only way to reach Uber customers.

42. *Id.* at § 2.5.1. Uber users are prompted to rate their driver on the mobile app after their ride has been provided. *Id.* The rating scale is set from one to five stars, with five being the best possible rating. *How to Get a 5-Star Rating?*, UBER MELBOURNE, <https://drive.uber.com/melbourne/how-can-we-help/how-to-uber/vicquality/> (last visited Mar. 3, 2016).

43. *Id.* at § 2.5.2.

44. *Id.* at § 2.4.

45. *Id.*

46. *Id.*

occupation or business,” including “us[ing] other software application services in addition to the Uber Services.”⁴⁷

While Uber asserts that it does not exert control over its drivers, Uber retains the right to control the calculation of the fare that the driver receives for his or her services.⁴⁸ In addition, Uber reserves the right to alter the way that it calculates fares, adjust or cancel any fares that have already occurred, and take a service fee from each fare for itself, the amount of which depends upon the territory.⁴⁹ Under the Driver Contract, drivers are not entitled to additional amounts, nor are they allowed to negotiate their fares, unless they are negotiating to receive a lower fare.⁵⁰

Finally, Uber, both through the Driver Contract and through job advertisements, asserts that the relationship between it and the driver is that of an independent contractor.⁵¹ Section 13.1 of the Driver Contract states in pertinent part, “Except as otherwise provided herein . . . , the relationship between the parties under this Agreement is solely that of independent contractors. The parties expressly agree that . . . this Agreement is not an employment agreement”⁵² Job advertisements promulgated by Uber also emphasize that Uber considers its drivers to be independent contractors. For example, on Uber’s website, the company states, “[d]rive with Uber and earn great money as an independent contractor,” “[a]s an independent contractor with Uber, you have the freedom and flexibility to drive whenever you have time,” and “[b]e your own boss and get paid in fares for driving on your own schedule.”⁵³ In addition to explicitly mentioning the independent contractor relationship, these advertisements stress the high level of autonomy belonging to Uber drivers.⁵⁴

2. *Uber’s Relationship with Its Customers and the Public*

A prominent factor used in classifying a person as an employee or an independent contractor is whether the purported employee’s service advances the business objective of the employer.⁵⁵ Looking at the actions, advertisements, and user agreements that Uber directs towards its customers therefore helps to uncover Uber’s actual business model.

47. *Id.*

48. *Id.* at § 4.1 (explaining that the drivers have a right to receive fares, but that their fares will be set by Uber’s “Fare Calculation”).

49. *Id.* at §§ 4.2–4.4.

50. *Id.* at §§ 4.1, 4.7.

51. *Id.* at § 13.1; see also *Uber Needs Partners Like You*, UBER, <https://get.uber.com/drive/> (last visited Feb. 4, 2016).

52. RASIER, LLC, *Agreement*, *supra* note 7, at § 13.1.

53. *Uber Needs Partners Like You*, *supra* note 51.

54. *Id.*

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

There is a disagreement regarding Uber's status as a technology company.⁵⁶ Skeptical courts argue that Uber disseminates advertisements that suggest the company provides transportation services.⁵⁷ One page on Uber's website, for example, states, "Your ride, on demand."⁵⁸ Additionally, through its advertisements, Uber likens its services to that of a taxi company, thereby insinuating that it is in the business of providing transportation services.⁵⁹ The UberBlack service, which provides customers with high-end sedans, also holds itself out as "your own private driver."⁶⁰

On the other hand, language from Uber advertisements and user agreements depict Uber as a technology company.⁶¹ In a job description, for example, Uber says, "Uber is evolving the way the world moves. By seamlessly connecting riders to drivers through our apps, we make cities more accessible"⁶² Furthermore, Uber requires that its users agree to terms in a user agreement that provide in pertinent part, "YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER."⁶³

Nevertheless, some courts and administrative agencies have found that Uber is a transportation company despite its assertions that it is exclusively a technological company.⁶⁴ In *Berwick v. Uber Technologies, Inc.*,⁶⁵ California's Labor Commissioner found that Uber was more than a technological company even though the company represents itself as a technological platform in its user agreement.⁶⁶ Central to the

56. *Id.* at 1137–38.

57. *Id.* at 1141 ("Uber's self-definition as a mere 'technology company' focuses exclusively on the mechanics of its platform. . . . This is an unduly narrow frame.")

58. *Uber Moves Washington D.C.*, UBER, <https://www.uber.com/cities/washington-DC> (last visited Feb. 4, 2016).

59. *Start Riding with Uber*, UBER, <https://www.uber.com/ride> (last visited Feb. 4, 2016) ("Everyday rides that are always smarter than a taxi.")

60. Kate Donahue, *Utah, Your UberBLACK Is Arriving Now!*, UBER (July 30, 2015), <https://newsroom.uber.com/us-utah/utah-uberblack/>.

61. *Our Trip History*, *supra* note 5; *see also Legal: Terms and Conditions*, UBER (Jan. 2, 2016), <https://www.uber.com/legal/usa/terms>.

62. *Regional Email Marketing Manager*, UBER, <https://www.uber.com/careers/list/15276> (last visited Feb. 4, 2016).

63. *Legal: Terms and Conditions*, *supra* note 61. The agreement also provides that "The Services constitute a technological platform." *Id.*

64. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at *9 (CA. Dept. Lab. June 3, 2015).

65. *Id.*

66. *Id.* ("Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation. The reality, however, is that defendants are involved in every aspect of the operation.")

Commissioner's ruling was that Uber exerted substantial control over the transportation side of the business.⁶⁷ The Commissioner also found that the drivers were an integral part to Uber's business of "provid[ing] transportation services to passengers" because the drivers "did the actual transporting of those passengers."⁶⁸

Uber has also applied for transportation network company ("TNC") status in some states.⁶⁹ In California, a TNC is "an organization . . . that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle."⁷⁰ Many other states use a similar definition for TNC.⁷¹ In some states, like Nebraska, organizations must first obtain a permit in order to operate as a TNC.⁷² Uber now lawfully operates as a TNC in Nebraska because the Nebraska Public Service Commission approved Uber's application in 2015.⁷³ Even though Uber argues that it is in the business of technological services, its status as a TNC suggests that it operates, at least in part, as a transportation provider.⁷⁴

B. There Are a Variety of Tests to Determine Whether a Person Is an Employee or an Independent Contractor

The two most prominent tests used to classify a worker as an employee or independent contractor are the right-to-control test and the economic realities test.⁷⁵ Part I.B.1 of this Section surveys the variations of the right-to-control test⁷⁶ and Part I.B.2. lays out the economic realities test.⁷⁷

67. *Id.* Uber vetted its drivers, controlled the tools used by the drivers, monitored driver ratings, and set the price for transportation. *Id.*

68. *Id.* at *8.

69. *In re Rasier, LLC*, 2015 WL 4512882, at *1 (Neb. Pub. Serv. Comm'n July 21, 2015).

70. CAL. PUB. UTIL. CODE. § 5431(a) (West 2015).

71. *See, e.g.*, TENN. CODE ANN. § 65-15-301(4) (West 2015); UTAH CODE ANN. § 13-51-102 (West 2015); OHIO REV. CODE ANN. § 3942.01 (West 2016).

72. NEB. REV. STAT. § 75-324(1) (West 2015).

73. *In re Rasier, supra* note 69, at *2.

74. This argument echoes the court's thought in *O'Connor v. Uber Technologies, Inc.*, that:

Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs, [or] John Deere is technology company because it uses computers and robots to manufacture lawn mowers Indeed very few (if any) firms are *not* technology companies

82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015).

75. *Cajas Commercial Interiors v. Torres-Lizama*, 316 P.3d 389, 394 (Or. Ct. App. 2013) ("In some cases, we have indicated that the economic realities test applies, and in others we have indicated that the right-to-control test applies. . . . [T]he two tests are intended to capture different groups of relationships."). There are, however, other tests for determining whether a person is an employee or an independent contractor, such as the IRS 20-factor test. Also, note that while a certain test may apply in the context of a specific statute (for example, courts use the economic realities test for Fair Labor Standards Act claims and other social welfare legislation), both the right-to-control test and the economic realities test are judge-made law.

76. *See infra* Part I.B.1.

1. *The Right-to-Control Test*

There are many variations of the right-to-control test, including the right to control, necessary control, and entrepreneurial opportunities tests. These variations of the right-to-control test are not exhaustive, but they do provide a survey of the ways different courts determine the right to control and how they apply to employment relationships.

The first variation of the right-to-control test examines the right of the purported employer to control the purported employee.⁷⁸ In *Community for Creative Non-Violence v. Reid*,⁷⁹ the United States Supreme Court adopted the approach set forth in the *Restatement (Second) of Agency*, Section 220(1), which defines an employee⁸⁰ as one who is “employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”⁸¹ The *Reid* Court explained that the right-to-control employment test does not necessarily equate to actual control because there are scenarios in which independent contractors may be subject to actual control; this, however, does not mean that they are employees.⁸²

The *Restatement (Second) of Agency* enumerates ten non-exhaustive factors⁸³ that courts may consider when determining whether the purported employer maintains the right-to-control the worker.⁸⁴ In *Walker v. United*

77. See *infra* Part I.B.2.

78. The U.S. Supreme Court employed this variation of the right-to-control test in *Clackamas Gastroenterology Associates, P.C. v. Wells*. 538 U.S. 440, 448 (2003) (“At common law the relevant factors defining the master-servant relationship focus on the master’s control over the servant.”). This Comment refers to this variation of the right-to-control test, somewhat confusingly, as the right-to-control test.

79. 490 U.S. 730, 751 (1989).

80. The *Restatement (Second) of Agency* does not use the terms “employer” and “employee,” but rather uses the broader terms “master” and “servant.” RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW. INST. 1958).

81. *Id.* § 220(1). Physical control “does not exclusively connote . . . rendering manual labor, but [rather] perform[ing] continuous service for another and who, as to his physical movements, is subject to control or the right to control of the other as to the manner of performing the service.” *Id.* § 220(1) cmt. a.

82. *Reid*, 490 U.S. at 742.

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

84. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW. INST. 1958). These factors include:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employee is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties

States,⁸⁵ for example, the court found an employment relationship in which SAIC, the purported employer, exercised a great amount of control when it demanded that the instructor employees teach only the SAIC curriculum.⁸⁶ The court also considered further factors, such as the fact that the instructors provided services integral to SAIC's business and that they were paid by teaching jobs.⁸⁷

A second variation of the right-to-control test is called the necessary control test.⁸⁸ This test is more probing than the right-to-control test because it examines whether the employer retains control over the employee's performance of the employer's *necessary* business operations, as opposed to control over the employee's performance in general.⁸⁹ Courts developed the necessary control test in order to prevent employers from divesting themselves of control that is irrelevant to the employer's business in an attempt to assert that their diminished control means their workers are independent contractors.⁹⁰ For example, in *S.G. Borello & Sons v. Department of Industrial Relations*,⁹¹ the court determined that workers who harvested vegetables did not require persistent control because "the simplicity of the work . . . makes detailed supervision and discipline unnecessary."⁹² Nevertheless, the lack of unnecessary control did not preclude the court from finding an employment relationship because the employer still maintained "meaningful" control over the business.⁹³ Similar to the right-to-control test, the necessary control test allows courts to assess a variety of factors when distinguishing employees from independent contractors.⁹⁴

believe they are creating the relationship of master and servant; and (j) whether the principal is or is not in business.

Id. (quoting *Moberly v. Day*, 757 N.E.2d 1007, 1010 (Ind. 2001)).

85. 758 F. Supp. 2d 753 (S.D. Ind. 2011).

86. *Id.* at 762. Note that the court uses the term "exercise[s]" which seems to relate more to actual control (actual control means that employer is in the process of controlling the employee; right to control only means that the employer may control the employee, even though the employer might not do so). *Id.* This does not, however, mean that they are not applying the right-to-control test. The employer may, after all, exercise the control that he has the right to exercise.

87. *Id.* at 761.

88. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 991 (9th Cir. 2014) ("California courts have since applied *Borello*'s 'all *necessary* control' test . . .").

89. *S.G. Borello & Sons v. Dep't of Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989).

90. *Id.* ("A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers.")

91. 769 P.2d 399 (Cal. 1989).

92. *Id.* at 408.

93. *Id.*

94. *Id.* at 404 ("[A]dditional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c)

The third variation of the right-to-control test is the entrepreneurial opportunities test.⁹⁵ This test looks at how much control employers have by examining the extent and the type of control *employees* have.⁹⁶ Specifically, the entrepreneurial opportunities test asks “whether the putative independent contractors have a ‘significant entrepreneurial opportunity for gain or loss.’”⁹⁷ Factors that courts consider when looking at entrepreneurial opportunity include (but are not limited to) ownership of equipment, ability to hire employees, and inapplicability of the purported employer’s discipline system.⁹⁸ The entrepreneurial opportunity test still considers the other common law factors that courts use to distinguish employees from independent contractors,⁹⁹ though it aims to make the employment determination less arbitrary.¹⁰⁰ In *FedEx Home Delivery v. NLRB*,¹⁰¹ the D.C. Circuit relied on the entrepreneurial opportunities test to hold that FedEx drivers were independent contractors despite the fact that the FedEx drivers were required to wear uniforms, drive a specific vehicle, and complete a driving course.¹⁰² The court reached its conclusion because the drivers could meaningfully effect their entrepreneurial ability by purchasing and selling routes, managing routes by hiring employees, and even incorporating.¹⁰³

the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.”)

95. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496–97 (D.C. Cir. 2009) (discussing the evolution of the right-to-control test and the complications concerning the definition of control).

96. *Cf. id.* at 497 (citing *Corp. Express Delivery Sys. V. NLRB*, 292 F.3d 777 (D.C. Cir. 2001) (“An important animating principle by which to evaluate [employment] factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism.”). When an employee controls entrepreneurial opportunities, it is because the employer no longer wields the control over that aspect of the work.

97. *Corp. Express Delivery Sys.*, 292 F.3d at 780 (quoting *In re Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522, 1522 (2000)).

98. *FedEx Home Delivery*, 563 F.3d at 498 (citing *Ariz. Republic*, 349 NLRB 1040, 1040–41, 46 (2007)). Note also that entrepreneurial opportunity does not merely encompass actual opportunity, the test looks for potential opportunity as well. *Ariz. Republic*, 349 NLRB at 1045.

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

100. *FedEx Home Delivery*, 563 F.3d at 497 (“[W]hile all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism. Although using this ‘emphasis’ does not make applying the test purely mechanical, the line drawing is easier . . .”).

101. 563 F.3d 492 (D.C. Cir. 2009).

102. *Id.* at 500–01.

103. *Id.* at 504.

2. *The Economic Realities Test*

As demonstrated by the various forms of the right-to-control test, there is not one definitive test that courts use to determine whether an employment relationship exists.¹⁰⁴ Different bodies of law may also require different thresholds of classification for employees and independent contractors.¹⁰⁵ Courts resolving cases under the Fair Labor Standards Act (“FLSA”), for example, apply the economic realities test to determine whether a worker should be classified as an employee or an independent contractor.¹⁰⁶

The economic realities test depends “ultimately, [on] whether, as a matter of economic reality, the individuals ‘are dependent upon the business to which they render service.’”¹⁰⁷ When coming to its conclusion, courts consider the following the six factors, none of which are alone dispositive: 1) the degree of employer’s right-to-control the manner in which work is to be performed; 2) the worker’s economic opportunity for profit and loss depending on managerial skill; 3) the worker’s investment in his equipment/materials required for the task and his ability to hire help; 4) whether the worker utilizes a special skill; 5) the degree of employment permanence; and 6) whether the service rendered is integral to the employer’s business.¹⁰⁸

The economic realities test was developed to expand the coverage of remedial legislation to employees who likely would have been defined as independent contractors under the more stringent right-to-control test.¹⁰⁹ For example, in *Rutherford Food Corp. v. McComb*,¹¹⁰ an early Supreme Court decision applying the FLSA, the Court held that beef deboners were employees of the slaughterhouse where they worked.¹¹¹ Central to the Court’s holding is the notion that the FLSA codified a broader definition of “employee.”¹¹² The Court therefore upheld the Circuit Court’s ruling even though, like independent contractors, the deboners supplied their own tools and got paid commensurate with the amount of meat they deboned.¹¹³

104. *See supra* Part I.B.1.

105. *Cf. Donovan v. DialAmerica Mktg.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (“The Fair Labor Standards Act has the broadest definition of ‘employee.’”).

106. *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981).

107. *Id.* (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

108. *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979).

109. *Barfield v. New York City Health and Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008).

110. 331 U.S. 722 (1947).

111. *Id.* at 730–31.

112. *Id.* at 729 (“This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.” (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947))).

113. *Rutherford Food Corp.*, 331 U.S. at 725, 727, 730.

C. *Courts and Agencies Reach Conflicting Holdings When Determining Whether Uber Drivers Are Employees or Independent Contractors*

Courts and agencies have reached inconsistent holdings regarding the classification of Uber drivers as employees or independent contractors.¹¹⁴ This Part looks at two of these opposing decisions. Part I.C.1 discusses *Berwick v. Uber Technologies, Inc.*,¹¹⁵ in which the California Labor Commission found that Uber drivers were employees, and Part I.C.2 discusses *Rasier, LLC v. Department of Economic Opportunity*,¹¹⁶ in which a Florida state agency determined the Uber driver was classified as an independent contractor.

1. *Berwick v. Uber Technologies, Inc.*

Barbara Ann Berwick entered into a Driver Contract with the defendant, Uber, which set out her duties as a driver for the company.¹¹⁷ Included in the agreement was a description of Uber's expected driver procedures.¹¹⁸ For example, the driver was under no obligation to accept a job request from a customer, but once she did, she was required to follow through with the ride.¹¹⁹ The driver had to supply her own car and was responsible for its maintenance, including ensuring that the car met Uber's minimum requirements.¹²⁰ Uber retained very little control over the hours that the driver worked; the only stipulation required that if the driver was not active for 180 days, her account would be deactivated.¹²¹ Uber also retained the right to terminate the agreement with Berwick.¹²²

In deciding the case, the *Berwick* Commissioner followed California precedent.¹²³ Under California law, workers establish a prima facie case that an employment relationship exists when the worker provides a service for the employer.¹²⁴ To assist this determination, the court is to consider the

114. Compare Part I.C.1 *infra*, with Part I.C.2 *infra*.

115. No. 11-46739 EK, 2015 WL 4153765 (CA. Dept. Lab. June 3, 2015).

116. No. 0026 2825 90-02 (Fla. Dep't of Econ. Opportunity Sept. 30, 2015).

117. *Id.* at *2.

118. *Id.* at *2-4. Also note that the *Berwick* driving agreement is similar, if not identical, to the driver agreement discussed in Part I.A.1 of this Comment. See *supra* Part I.A.1.

119. *Id.* at *2 ("You shall be entitled to accept, reject, and select among the Requests received via the Service.").

120. *Id.* at *3 ("You agree that you shall maintain a vehicle that is a model approved by [Uber]. Any such vehicle shall be no more than ten (10) model years old . . .").

121. *Id.* at *5.

122. *Id.* at *9. ("Defendants monitor the Transportation Drivers' approval ratings and terminate their access to the application if the rating falls below a specific level (4.6 stars).").

123. *Id.* at *6.

124. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) (citing Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010)).

following factors (referred to as the *Borello* factors): whether 1) the worker engages in same type of occupation as the principal; 2) the work is part of principal's normal business; 3) the principal supplies the equipment; 4) the worker provides equipment because he is required to or for his own employees; 5) a special skill is required; 6) the nature of the work, especially in the context of how it is conducted in the locality; 7) the worker's profit is correlated to his managerial skill; 8) the work will be finished quickly or not; 9) the working relationship is permanent; 10) the payment is by time or job; and 11) whether the parties believe they are in an employee-employer relationship.¹²⁵ However, the paramount consideration is whether the employer retains "all necessary control" over the worker.¹²⁶

Uber argued that they were a neutral technological platform and, as such, they retained very little to no control over Berwick.¹²⁷ The Commissioner, however, found otherwise.¹²⁸ Specifically, the Commissioner ruled that Uber was "involved in every aspect of the operation."¹²⁹ Uber controlled the tools the drivers used, such as the smartphone application, and required that the drivers register a car of a certain standard.¹³⁰ Drivers were also limited in their entrepreneurial ability because Uber prohibited them from setting their own fares and they could not hire other drivers who Uber did not already approve.¹³¹ In light of the aforementioned facts, the Commissioner found that Berwick, as a driver, was an employee of Uber because she performed a service for the company and Uber maintained all necessary control over her.¹³²

2. *Rasier, LLC v. Florida Department of Economic Opportunity*

Rasier, LLC v. Florida Department of Economic Opportunity contained a fact pattern similar to that of *Berwick*, but reached a different holding.¹³³ In *Rasier*, the Department of Economic Opportunity, a Florida agency, took this case on appeal after the Department of Revenue determined that Darren McGillis was an employee of Uber.¹³⁴ McGillis

125. *Berwick*, 2015 WL 4153765, at *6-7 (citing *S.G. Borello & Sons v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989)).

126. *O'Connor*, 82 F. Supp. 3d at 1138 (citing *Borello*, 769 P.2d at 404).

127. *Berwick*, 2015 WL 4153765, at *8.

128. *Id.*

129. *Id.* at *9. ("Defendants vet prospective drivers, who must provide to Defendants their personal banking and residence information, as well as their Social Security Number. Drivers [must also] pass Defendants' background and DMV checks.").

130. *Id.*

131. *Id.*

132. *Id.* at *10.

133. *Id.*

134. *Id.* at *1, *4.

signed a Driver Contract similar to the one in contention in *Berwick*.¹³⁵ Nevertheless, the Florida Department of Economic Opportunity found that McGillis and other Uber drivers were independent contractors.¹³⁶ The agency relied on Florida precedent, which uses the right to control test from Section 220 of the *Restatement (Second) of Agency*.¹³⁷ In determining whether a purported employer maintains the right to control the worker, Florida considers the following factors: 1) the business's extent of control over the details of the work; 2) whether the worker is engaged in a distinct business; 3) the kind of occupation; 4) the skill required for the work; 5) whether the worker supplies his/her own tools; 6) the length of employment; 7) whether payment is by time or job; 8) whether the work is part of the employer's regular business; 9) what the parties believed they were creating; and 10) whether the principal is or is not in the business.¹³⁸

Before engaging in an analysis of the employment relationship, the agency suggested that control is the most important consideration for determining whether an employment relationship exists.¹³⁹ In light of this, the agency determined that Uber exerts little control over the driver.¹⁴⁰ Specifically, the agency relied on the driver's discretion to pick the route that he takes on his trips and stated that the driver engages in an "entrepreneurial decision making process" by selecting which rides to take. Furthermore, the agency found that the background checks and instructional videos that Uber requires its drivers to take part in essentially equates to *de minimis* control.¹⁴¹ The agency also placed great emphasis on the contractual intent of the parties,¹⁴² and the Uber contract, which stated that the driver was an independent contractor.¹⁴³ Taking all of these facts into consideration, the agency concluded that the relationship between Uber and its drivers was that of an independent contractor, and recommended that the determination of the Department of Revenue be reversed.¹⁴⁴

135. *See supra* Part I.A.1.

136. *Rasier, LLC*, No. 0026 2825 90-02, at *7.

137. *Id.* at *5 (citing *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla. 1966)).

138. *Rasier, LLC*, No. 0026 2825 90-02, at *5 (quoting *RESTATEMENT (SECOND) OF AGENCY* § 220(2)(a-j) (AM. LAW. INST. 1958)).

139. *Rasier, LLC*, No. 0026 2825 90-02, at *5 ("The relationship of the employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control . . . is the feature that distinguishes an independent contractor from a servant." (citing *Collins v. Federated Mut. Implement and Hardware Ins. Co.*, 247 So.2d 461, 463-64 (Fla. 4th Dist. Ct. App. 1971))).

140. *Rasier, LLC*, No. 0026 2825 90-02, at *6.

141. *Id.* at *6.

142. *Id.* at *5 (quoting *Keith v. News and Sun-Sentinel, Co.*, 667 So.2d 167, 171 (Fla. 1995)).

143. *Rasier, LLC*, No. 0026 2825 90-02, at *6 ("There was an agreement with the Petitioner in which the Drivers are designated as independent contractors.>").

144. *Id.* at *7.

II. ANALYSIS

The variety of different tests that the courts use to distinguish between employees and independent contractors has resulted in courts reaching inconsistent classifications for Uber drivers.¹⁴⁵ Even if the courts applied the same test, different courts (even within the same jurisdiction) could weigh factors differently, even arbitrarily, in similar cases.¹⁴⁶ An elements test, therefore, provides more consistency, which in turn offers fairness and gives employers and employees clearer expectations.¹⁴⁷

In order to develop an effective test, it is important first to lay out the differences between employees and independent contractors and why the classification is important.¹⁴⁸ Part II.A will compare and contrast employees and independent contractors and explain the reasons for providing employees with more statutory entitlements.¹⁴⁹ This Part will also will highlight important considerations that an effective employment test should include. Part II.B will examine the sharing economy and its impact on employment and assesses whether current tests effectively classify sharing economy workers.¹⁵⁰ Finally, Part II.C will recommend a two-pronged elements test in favor of the factors tests that courts have utilized up to this point.¹⁵¹ The first prong, discussed in Part II.C.1, will ask whether workers can strengthen or weaken their economic position through managerial skills.¹⁵² This Part suggests that Uber drivers do not have the opportunity to meaningfully manage themselves to impact their income.¹⁵³ The second prong, discussed in Part II.C.2, will ask whether the worker provides a service that is integral to the employer's business.¹⁵⁴ Because Uber is in the business of providing transportation services, Uber drivers provide a service that is integral to Uber's business.¹⁵⁵ Lastly, Part II.C.3 will argue that the elements test is preferable to the factors test, and further,

145. *See supra* Part I.B–C.

146. *See supra* Part I.B.

147. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twentieth-First-Century: The "Independent Worker"*, THE HAMILTON PROJECT, at 6 (2015) ("The . . . ambiguity in these workers' legal status leads to uncertainty and inefficiency in the labor market that are harmful to both the workers and the intermediaries . . .").

148. This proves to be challenging, however, because even today workers and employers struggle to distinguish the two. John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, 337 (1991) ("Defining the nature of a working relationship between suppliers of services and the parties to whom these services are rendered is one of the most troublesome and important issues facing businesses today.").

149. *See infra* Part II.A.

150. *See infra* Part II.B.

151. *See infra* Part II.C.

152. *See infra* Part II.C.1.

153. *See infra* Part II.C.1.

154. *See infra* Part II.C.2.

155. *See infra* Part II.C.2.

that some of the factors relied on by previous courts are less applicable in the sharing economy.¹⁵⁶

A. *The Employee/Independent Contractor Distinction*

Congressional definitions of “employee” and “employer” are circular. The FLSA, for example, defines an “employee” as “any individual employed by an employer.”¹⁵⁷ The definition of “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee”¹⁵⁸ also offers no clarification of an employment relationship.¹⁵⁹ The National Labor Relations Act (“NLRA”) perhaps provides a clearer definition of “employee” by saying what it is not: “The term ‘employee’ shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor”¹⁶⁰ It is clear that employees are distinct from independent contractors; however, the NLRA’s apophatic definition of “employee” does not help to distinguish one from the other.

While it may be difficult to find a practical, working definition for employee, it is easy to see that employees are entitled to statutory protections that do not extend to independent contractors.¹⁶¹ For example, the purpose of the NLRA is to help remedy “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership”¹⁶² Guaranteeing collective bargaining rights to employees, but not independent contractors, suggests that employees are in a weaker bargaining position; they are more reliant on their employment from a specific employer than are independent contractors.¹⁶³

156. *See infra* Part II.C.3.

157. 29 U.S.C. § 203(e)(1) (2012).

158. *Id.* § 203(d).

159. The FLSA is not the exception. These seemingly obvious definitions are codified in other federal statutes. *See, e.g.*, American with Disabilities Act, 42 U.S.C. § 12111(4) (2012).

160. 29 U.S.C. § 152(3) (2012).

161. *See, e.g.*, Patricia Davidson, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 203 (1984) (stating that Title VII of the Civil Rights Act of 1964 was designed to eliminate discrimination in the workplace, but that only those classified as “employees” could seek to enforce the statute).

162. 29 U.S.C. § 151 (2012).

163. Harris & Krueger, *supra* note 147, at 7 (“Independent contractors control the methods and means of the work they perform for others, make significant capital investments, possibly employ others, and retain the opportunity for profit or loss. For these reasons, independent contractors are expected to have some bargaining power”).

One characteristic of an employee is that they “work for wages or salaries under direct supervision.”¹⁶⁴ This characteristic is consistent with the notion that employees occupy dependent positions and sheds light on why common law employment tests focus on control and economic realities.¹⁶⁵ Statutory entitlements also require employers to make special provisions for employees that are not necessary for independent contractors.¹⁶⁶

Compared to employees, independent contractors function much more autonomously.¹⁶⁷ Independent contractors “undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but . . . upon profits.”¹⁶⁸ It may seem obvious from the name, but independent contractors seem to operate an entity that is entirely separate from the employers’.¹⁶⁹ This distinction explains why common law employment tests ask whether the worker provides a service that is integral to the employer’s business.¹⁷⁰ An independent contractor’s separation from the employer allows the contractor to stand on his own and support himself by contracting his services for jobs. Employees, however, are much more dependent upon their employer because instead of services, they contract their labor.

It is difficult to give set definitions for employees and independent contractors.¹⁷¹ Nevertheless, some consistent principles regarding control arise. The employment context involves an exchange in which the

164. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 322 (2001) (citing H.R. Rep. No. 80-245, at 3020 (1947)).

165. “Work for wages” relates to the economic realities test because the employees are fiscally dependent on their employer, and “under direct supervisions” relates to the employer’s right to control the employee. See *infra* Part II.B.

166. See Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. LEGIS. 295, 295 (2012–13) (“Classifying workers as independent contractors allows companies to avoid paying minimum wage and overtime, the employer’s portion of the Social Security and Medicare taxes, unemployment insurance taxes, worker’s compensation premiums, and circumvent federal antidiscrimination laws.”).

167. Clement L. Hyland & Laura A. Quigley, *Determination of Employee Status Right to Control v. Economic Reality—Is There a Difference?*, FLA. B.J., Jan. 1987, at 43, 43 (explaining that independent contractors “perform services for another according to [their] own method and manner”).

168. See Carlson, *supra* note 164, at 322 (citing H.R. Rep. No. 80-245, at 3020 (1947)).

169. Cf., *Stolze v. Ark. Valley Elec. Co-op. Corp.*, 127 S.W.3d 466, 477 (Ark. 2003) (“The doctrine of non-delegable duty if literally applied destroys the liability barrier between an owner and an independent contractor, and for practical purposes treats the two separate entities as one before the law.” (quoting *Olson v. Kilstofte and Vosejka, Inc.*, 327 F. Supp. 583, 587 (D. Minn. 1971))).

170. *S.G. Borello & Sons v. Dep’t of Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989).

171. Carlson, *supra* note 164, at 296 (“Employment laws by their very terms depend on the identification of an employee and employment relationship. However, these laws are frequently baffling in defining who is an ‘employee’ . . .”).

employee divulges control over a large portion of his or her work life, which may include his or her economic future.¹⁷² In return, the employer provides some economic security.¹⁷³ The employment relationship typically extends indefinitely and the employer often gives the employee instructions on how to complete the work.¹⁷⁴ Because the employer maintains control over the employee, the employee usually has minimal control over his or her work hours.¹⁷⁵

In contrast, independent contractors do not relinquish control over their work life or their economic future.¹⁷⁶ Generally, contracts stipulate specific limitations to an independent contractor's otherwise vast ability to dictate how the job is to be completed.¹⁷⁷ Furthermore, because contracts usually dictate the nature of the relationship between the independent contractor and the hiring party, it is common for an independent contractor's work to extend only for the duration of a specific job as opposed to indefinitely.¹⁷⁸ Finally, independent contractors are generally thought to operate on the periphery of the hiring party's business, rather than fulfilling an integral business operation.¹⁷⁹

B. Employees in the Sharing Economy

The sharing economy gets its name from the notion that people with underused assets share those assets with one another (for a price, of course).¹⁸⁰ This allows people the ability to access assets and services without having to actually own the product or the labor source.¹⁸¹ The unprecedented growth of the sharing economy shows no signs of slowing down.¹⁸² The internet and technology spurred this growth by making

172. Harris & Krueger, *supra* note 147, at 7.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*; see also *Prest-O-Lite Co. v. Skeel*, 106 N.E. 365, 367 (Ind. 1914) (“An independent contractor is one exercising an independent employment under a contract to do certain work by his own methods, without subjection to the control of his employer, except as to the product or result of the work.”).

177. Harris & Krueger, *supra* note 147, at 7.

178. Carlson, *supra* note 164, at 345.

179. Harris & Krueger, *supra* note 147, at 7.

180. *The Rise of the Sharing Economy*, *supra* note 2 (“[T]he core of the sharing economy is people renting things from one another.”).

181. Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 4 (2012).

182. PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES “THE SHARING ECONOMY” 14 (2015), <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> (“PwC’s projections show that five key sharing sectors . . . have the potential to increase global revenues from roughly \$15 billion today to around \$335 billion by 2025.”).

sharing easier and accessible on a large scale, thereby reducing transaction costs.¹⁸³

The sharing economy business model, however, has altered the typical employer/employee relationship, particularly for those who use the sharing economy to offer services.¹⁸⁴ The new model complicates the distinction between independent contractors and employees because “the emerging sharing economy makes it easier to muddy classification categories [due to] the heavy reliance on new technology.”¹⁸⁵ Uber, for example, asserts that it is merely a technology company¹⁸⁶ that connects Uber consumers with Uber drivers and therefore Uber drivers are not employees of Uber.¹⁸⁷ Despite these assertions, Uber acts like something other than a technology service because the company vets its drivers and requires them to provide a high level of service.¹⁸⁸ With this level of control over its drivers, Uber is doing more than just connecting consumers with providers—it is mandating driver compliance, meaning that the drivers operate on Uber’s terms instead of their own.

Uber is nevertheless able to get away with classifying its drivers as independent contractors in certain jurisdictions¹⁸⁹ because the drivers resemble independent contractors in some aspects and employees in others.¹⁹⁰ For example, drivers provide their own cars and “can choose when and whether to work, similar to independent contractors, but on the other hand, drivers face restrictions that are imposed by the intermediary on how much to charge customers.”¹⁹¹ Similar to typical employment relationships, Uber drivers also perform a service that is integral to Uber’s business.¹⁹²

Recognizing that Uber drivers do not fall neatly into one category, the Hamilton Project proposed modernizing labor and employment law by

183. See *The Rise of the Sharing Economy*, *supra* note 2; Molly Cohen & Corey Zehngbot, *What’s Old Becomes New: Regulating the Sharing Economy*, BOSTON, B.J. (Apr. 1, 2014), <http://bostonbarjournal.com/2014/04/01/whats-old-becomes-new-regulating-the-sharing-economy/>.

184. Cf. Gillian B. White, *In the Sharing Economy, No One’s an Employee*, ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/> (“[T]he emerging sharing economy makes it easier to muddy [employment] classification categories . . .”).

185. *Id.*

186. See *supra* Part I.A.2.

187. See *supra* Part I.A.1.

188. *Id.*; see also White, *supra* note 184 (claiming that Uber and Lyft are car services rather than technology companies).

189. See, e.g., *Rasier, LLC v. Fla. Dep’t of Econ. Opportunity*, No. 0026 2825 90-02 (Fla. Dep’t of Econ. Opportunity Sept. 30, 2015).

190. Harris & Krueger, *supra* note 147, at 5.

191. *Id.*

192. Cf. *id.* at 10 (“Lyft would not exist if no drivers were willing to provide car ride services through the Lyft platform.”).

creating a third category of worker: the independent worker.¹⁹³ This Comment does not argue for a third classification, rather, it argues for a simplified employment test that can be applied with more consistency. Nevertheless, the Hamilton Project's reasoning for creating a new class stresses the necessity of creating a simplified employment test. First, companies could purposefully misclassify employees to avoid paying legal benefits, which is detrimental to the worker and gives an unfair competitive advantage to the employer.¹⁹⁴ Second, the ambiguity surrounding classifications leads to uncertainty and legal battles.¹⁹⁵ Finally, employment laws are currently "not harmonized or applied consistently."¹⁹⁶ A simplified employment test that uses elements instead of factors helps to resolve these three issues.

C. Courts Should Implement a Two-Prong Test to Classify Workers as Employees or Independent Contractors

This Comment aims to create a workable two-pronged test that can be applied to employment relationships in the sharing economy. Part II.C.1 discusses the first prong of this test and applies the test to Uber and its drivers.¹⁹⁷ The first prong queries whether the worker has the ability to improve his or her economic standing by exercising managerial skill. Part II.C.1 argues that an Uber driver's limited managerial skills prevents the driver from bettering his economic situation, which is reminiscent of an employment relationship.¹⁹⁸ Part II.C.2 sets forth the second prong of the test, which asks whether the worker provides a service that is integral to the employer's business.¹⁹⁹ Uber drivers also satisfy this prong of the test because Uber provides a transportation service.²⁰⁰ Finally, Part II.C.3 explains why an elements test is preferable to the factor tests currently applied by the courts.²⁰¹

193. *Id.* at 5. The Hamilton Project is an economic policy initiative at the Brookings Institution. *About THP*, THE HAMILTON PROJECT, <http://www.hamiltonproject.org/about/> (last visited Jan. 15, 2016).

194. Harris & Krueger, *supra* note 147, at 5 ("[I]t is important that, if these new intermediaries are to exceed and expand, it is a result of their superior technology, efficiency, or service, not because their technology or business model enables regulatory arbitrage.").

195. *Id.* at 6.

196. *Id.*

197. *See infra* Part II.C.1.

198. *See infra* Part II.C.1.

199. *See infra* Part II.C.2.

200. *See infra* Part II.C.2.

201. *See infra* Part II.C.3.

1. *Limited Ability to Improve Economic Opportunity Through Managerial Skills Is Indicative of an Employment Relationship*

The first prong of this Comment's proposed test asks whether the worker has a limited opportunity to impact his or her economic potential through managerial skills. An affirmative answer to this question suggests that the worker is an employee. This prong is an important determination because it recognizes that economic autonomy is a vital feature in many employment tests.²⁰² In the context of Uber, this prong is satisfied because Uber drivers employ little to no managerial skills and therefore cannot improve their economic condition through such skills.

Employment tests, such as the entrepreneurial opportunity test and economic realities test, show that the courts are more likely to find that a worker is an independent contractor when he has a high degree of economic autonomy.²⁰³ Courts that apply the entrepreneurial opportunities test focus on whether "the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss,'" which means that independent contractors rely on themselves, as opposed to an employer, to earn money.²⁰⁴

In *Corporate Express Delivery Systems v. NLRB*,²⁰⁵ the court noted that control was an unwieldy factor, not always determinant of employment status.²⁰⁶ In reaching this conclusion, the *Corporate Express* court relied on the *Restatement (Second) of Agency*,²⁰⁷ which states that "[i]n some types of cases . . . the employer [may] not exercise control. Thus the full-time cook is regarded as a servant although it is understood that the employer shall not exercise control."²⁰⁸ Because control was not necessarily determinative of an employment relationship, the court found that the entrepreneurial factor was a better indicator of whether one was an independent contractor.²⁰⁹ The ability to make money by "working smarter, not just harder," therefore, is a reliable method of determining whether an employment relationship exists.²¹⁰

202. Recall the economic realities test, as well as the entrepreneurial opportunities variation of the right-to-control test. See *infra* Part I.B.1–2.

203. See *infra* Part I.B.1–2.

204. *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (quoting *In re Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522, 1527 (2000)).

205. 292 F.3d 777 (D.C. Cir. 2002).

206. *Id.* at 780.

207. *Id.* Note that the text of the opinion cites to Section 202 of the Restatement, but this is erroneous because the court actually discusses Section 220. *Id.*

208. RESTATEMENT (SECOND) OF AGENCY § 220(1), cmt. d (AM. LAW INST. 1958).

209. *Corp. Express Delivery Sys.*, 292 F.3d at 780. In addition to the cook example, the court showed that the inverse may be true—that an independent contractor who runs his own lawn care business may be subject to control and strict supervision from his or her clients. *Id.*

210. *Id.*

The economic realities test also shows that economic autonomy is an important consideration in the employment context. Legislation subject to the economic realities test is generally remedial in nature.²¹¹ Social welfare legislation receives this broader test because “it is important to compensate or provide protection to those who look to their employer for financial security and well-being.”²¹² This belief that employees are dependent upon their employers is encompassed in this prong because those who possess the ability to directly affect their income through managerial skills do not rely on their employers and function independently.

Finally, the use of managerial skills to improve economic opportunity is inherent in other traditional factors that show a worker is an independent contractor.²¹³ For example, one of the most prominent factors among all of the employee/independent contractor tests assesses the extent to which the employer can control the worker.²¹⁴ In the context of this prong, a worker’s ability to use his or her managerial skills to improve his own economic opportunity inversely affects an employer’s right to control that worker. In other words, the more control a worker asserts over himself, the less control an employer has over that worker.

Applying the first prong to the Uber context, Uber drivers cannot improve their economic position through managerial skill. First, Uber drivers have little economic autonomy because they can realistically only work to make more money by working more hours. Moreover, because they are unable to set their own fares, drivers are limited in services they can offer to make rides more or less expensive.²¹⁵ Second, drivers essentially lack any managerial skill because they are unable to hire drivers to operate under their name.²¹⁶ Finally, being an Uber driver does not

211. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988) (“The [FLSA] definition [of employee] is necessarily a broad one in accordance with the remedial purpose of the Act.”).

212. Myra H. Barron, *Who Is an Independent Contractor? Who Is an Employee?*, 14 LAB. LAW. 457, 460 (1999).

213. *See, e.g.,* *Linguist v. Hodges*, 94 N.E. 94, 94 (Ill. 1911) (“One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant.” (quoting *Hale v. Johnson*, 80 Ill. 185, 186 (1875))).

214. *See supra* Part I.B.1.

215. RASIER, LLC, *Agreement*, *supra* note 7, at § 4.1.

216. Substitution of labor is closely tied to managerial skills and is often indicative of an independent contractor relationship. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 (D.C. Cir. 2009) (finding the drivers’ ability to hire other drivers strong evidence of an employment relationship); *see also Determining Who is an Employee*, 16 No. 6 ANDREWS EMP’T LITIG. REP. 3 (2001) (“Employees do not hire assistants to help them do their work for their employer. Independent contractors can and often do hire their own assistants or employees to help them in their work.”).

require any special skill, let alone any managerial skill—one simply must only be legally allowed to drive. Taking into consideration an Uber driver’s inability to use managerial skills to improve his or her economic opportunity, Uber drivers satisfy the first prong of the proposed test.

2. *Services That Are Integral to the Employer’s Business Also Suggests That an Employment Relationship Exists*

The second prong of this proposed test inquires whether the worker provides a service that is integral to the employer’s business. This prong is a necessary component to an employment relations test because 1) it is a factor in most factor tests (and normally it is given extra consideration)²¹⁷ and 2) it highlights a key characteristic of the employment relationship: an employee’s dependence on his employer.²¹⁸ Because Uber drivers provide a service that is integral to Uber, they satisfy the second prong of this test.

The “integral to employer’s business” factor appears in the many variations of the right-to-control test,²¹⁹ and the economic realities test.²²⁰ In *Borello*, the court noted that “the modern tendency is to find employment when the work being done is an integral part of the regular business of the employer.”²²¹ Additionally, in California, a finding that service has been provided to an employer suffices on its own to establish a prima facie case of employment.²²²

The prominence of the “integral to employer’s business” factor, however, stems from more than its popularity with the courts; rather, it emphasizes a characteristic that is at the core of the employment relationship, namely that employees do not operate an independent business.²²³ The “integral to employer’s business” prong encompasses the spirit of other factors. Take, for example, “the length of time for which the person is employed.”²²⁴ Independent contractors usually operate for a set amount of time to complete a certain job.²²⁵ Once this job is complete, an independent contractor’s work is finished, yet the business for which he

217. See *supra* Part I.B.

218. Harris & Krueger, *supra* note 147, at 7.

219. RESTATEMENT (SECOND) OF AGENCY § 220(2)(h) (AM. LAW. INST. 1958) (right to control); *S.G. Borello & Sons v. Dep’t of Indus. Relations*, 769 P.2d 399, 408 (Cal. 1989) (necessary control).

220. *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979) (“[W]hether the service rendered is an integral part of the of the alleged employer’s business.”).

221. 769 P.2d at 408–09 (citation omitted).

222. *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (“[U]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee.”).

223. See *supra* Part II.A.

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

225. Harris & Krueger, *supra* note 147, at 7.

performed that work carries on. Compare this to employees who work indefinitely.²²⁶ Without this source of indefinite labor, employers would likely be unable to function. Therefore, whether work is integral to the employer's business will be reflected in the duration of the employment.²²⁷

Applying the second prong to the context of Uber, drivers perform a service integral to Uber's business. Uber would likely assert that it is a neutral technology company like it does in its User Agreements²²⁸ and past litigation.²²⁹ Central to Uber's assertion is that it merely provides a platform for consumers to connect with drivers, that they own no cars and employs no drivers.²³⁰

Despite these contentions, Uber is undoubtedly in the transportation business. First, Uber's business is specific. It does not connect all consumers with all service providers, rather it only creates connections for transportation. Second, in Uber's advertisements the company represents itself as a transportation company.²³¹ Finally, Uber is "deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, . . . and setting prices."²³² Because Uber is more accurately defined as a transportation company, its drivers perform a service that is integral to Uber's business. Simply put, Uber would not exist if it had no drivers.²³³

3. *A Non-Exhaustive Factors Test May Lead to Inconsistent Classifications and Some Factors Previously Relied on in Employment Cases May Be Inapplicable in the Sharing Economy*

Imprecise tests are common in law,²³⁴ but "we accept such uncertainty as the price of a system that permits treating each case as unique."²³⁵ This does not mean, however, that uncertainty is preferable when the option for certainty exists.²³⁶ In fact, the current "flexible" standard for employee

226. *Id.*

227. A similar argument could be made for the "method of payment" factor. See RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) (AM. LAW INST. 1958).

228. *Legal, supra* note 61.

229. *O'Connor v. Uber Techs., Inc.*, 82 F.Supp.3d 1133, 1137 (N.D. Cal. 2015).

230. *Id.*

231. *Id.* ("Uber has previously referred to itself as an 'On-Demand Car Service,' and goes by the tagline 'Everyone's Private Driver.'").

232. *Id.*

233. *Id.* at 1142 ("Uber . . . would not be a viable business entity without its drivers.").

234. The "reasonable person" standard in a negligence cause of action, for example, cannot be reduced to an equation.

235. See *Carlson, supra* note 164, at 336.

236. *Id.* (arguing that there are two objections to the notion that classification uncertainty is workable: 1) there are usually tests available that would suit the legislative purpose of a given

classification means that businesses may struggle to correctly classify its workers, and may suffer expensive penalties as a result.²³⁷ For example, an employer who classifies its workers as independent contractors by relying on contractual intent and the fact that the worker supplies his own tools will be sorely disappointed when the court makes its decision relying on other factors, such as control over worker appearance and the level of skill required for the job.²³⁸

Moreover, the factors test applied to the employment relationship is subject to abuse because “[a] fact found controlling in one combination may have a minor importance in another.”²³⁹ The reality is that “too many case conclusions are driven by a predetermined desired outcome rather than by objective analysis.”²⁴⁰ The result is that similarly situated workers are classified differently, not because of different facts, but because of different jurisdictions and opinions.²⁴¹ This Comment, for example, examined two Uber cases in which state agencies classified drivers with similar operating agreements differently.²⁴² California’s Labor Commissioner and Florida’s Department of Economic Opportunity even applied a common law right-to-control test (albeit, they did apply different variations).²⁴³ In *Berwick*, the Commissioner used the necessary control test to find that Uber exerted necessary control over the drivers by setting fares, restricting their ability to hire others, and requiring drivers to register their cars.²⁴⁴ Conversely, in *Rasier*, the Florida agency applying the right-to-control test found that Uber exerted little control because the drivers retained the ability to choose which route to drive and they could select their own hours.²⁴⁵ The latter’s analysis offers a very stringent interpretation of control emphasizing petty aspects of

statute and offer more clarity, and 2) legal uncertainty encourages employers to misclassify their employees and test the limits of the law).

237. Karen R. Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 93 (2010).

238. See, e.g., *Alexander v. FedEx Ground Package System*, 765 F.3d 981, 989–91 (9th Cir. 2014) (showing that an operating agreement labeling the relationship as an independent contractor relationship and the workers’ ability to hire employees to complete driving routes was not dispositive of an independent contractor relationship because FedEx still maintained substantial control over how the business operated).

239. *Harger v. Structural Servs. Inc.*, 916 P.2d 1324, 1334 (N.M. 1996); see also *Richardson v. APAC-Miss., Inc.*, 631 So. 2d 143, 150 (Miss. 1994). (“[T]he various tests to determine the type of relationship are themselves generalities which can be viewed quite differently, depending upon which judge is applying them.”).

240. *Harris & Krueger*, *supra* note 147, at 6.

241. *Id.*

242. See *supra* Part I.C.

243. See *supra* Part I.C.

244. *Berwick v. Uber Technologies, Inc.*, No. 11-46739 EK, 2015 WL 4153765 at *9 (Cal. Dept. Lab. 2015).

245. *Rasier, LLC v. Fla. Dep’t of Econ. Opportunity*, No. 0026 2825 90-02, at *6 (Fla. Dep’t of Econ. Opportunity Sept. 30, 2015).

a driver's job and most likely reflects the judge's opinion rather than the reality.

Employment relationships are changing from their traditional 9-to-5, in-office workday, and therefore employer-employee relationships look unlike those of the past.²⁴⁶ The changing face of employment relationships means that companies more often struggle to correctly classify employees.²⁴⁷ Innovation and technology provoke this confusion because "the more innovative a company is, the more likely it is to use non-traditional forms of employment."²⁴⁸ The sharing economy (with its indisputable connection to technology), therefore, finds itself enmeshed with non-traditional employment.²⁴⁹

Narrowing the factor tests down to a two-pronged elements test allows courts to accurately define an employment relationship without letting the workers fall victim to the realities of non-traditional employment. For example, one common factor relied on by courts, "whether the employer or the workman supplies the instruments,"²⁵⁰ may be less indicative of an independent contractor relationship today because many people that use their personal laptops and smartphones for work should still be classified as employees. Another common factor states that whereas "[e]mployees work pursuant to a schedule set by the employer[,] [i]ndependent contractors generally set their own hours."²⁵¹ In the context of Uber, Uber exerts a lot of control over the driver while he or she is on the clock.²⁵² It seems superficial, if not unfair, to say a driver's ability to select his or her own hours overrides more other, apparent forms of control, like vetting the driver and maintaining a 4.6 driver rating.²⁵³ Discarding the factors test allows for less arbitrary judicial classification.

Finally, an elements test does not necessarily lead to rigid application. The desirability of a factors test lies in the fact that "uncertainty [acts] as the price of a system that permits treating each case as unique."²⁵⁴ But the two-pronged test that this Comment proposes also allows fluidity between different fact patterns.²⁵⁵ The proposed elements test, however, offers

246. Harned, et al., *supra* note 237, at 116 ("Businesses worldwide are experimenting with flexible work arrangements.").

247. *Id.* at 93-94 ("Audits for such misclassifications are becoming more frequent, indicating that more and more business owners struggle because of [th]e uncertainty in the law.").

248. *Id.* at 94.

249. *See supra* Part II.B.

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

251. *Determining Who Is an Employee, supra* note 216.

252. *See supra* Part II.C.1.

253. *See supra* Part I.A.1. This is especially important because Uber would likely be without a large portion of their driving fleet if they did not allow their drivers to select their own hours.

254. Carlson, *supra* note 164, at 336.

255. For example, take a hypothetical new mobile application, Electricians4Hire. The application puts homeowners with faulty wiring and damaged outlets in touch with electricians. If

fewer opportunities for judges and juries to impose their own personal views into the law.²⁵⁶

III. CONCLUSION

The current methods of determining whether one is an employee or independent contractor are inconsistent, at best.²⁵⁷ Such inconsistency is problematic because it leads to unfair and unpredictable results.²⁵⁸ Workers in the sharing economy are at a particular disadvantage because the nature of the work often allows people to work according to their own schedule.²⁵⁹ This one factor gives pro-independent contractor courts enough ammunition to declare that workers, like Uber drivers, are independent contractors. The reality, however, is that the nature of work is changing, as illustrated by the sharing economy's dismantling of the traditional nine-to-five workday.²⁶⁰

This Comment develops a new employee/independent contractor classification test that is intended to strike at the heart of what it means to be one or the other, and stabilize the current employee/independent contractor backdrop.²⁶¹ The test is a two-prong test that first asks whether the worker has a limited means to improve his economic opportunity through managerial skill and then asks if the worker's duties play an integral role in the business of the purported employer. Uber drivers satisfy both of these prongs, and should therefore be classified as employees.

This Comment is not intended to be a smear campaign against Uber; in fact, Uber serves an important role in our economy. Today's job market can be challenging for employees who work shifts that vary weekly. Many employees who lack a set working schedule will have an even greater difficulty finding extra part-time jobs due to unpredictable hours. Uber gives people facing this predicament a means to supplement their income.

the app stops there, it appears as though the participating electricians are independent contractors. The electricians would have to set their own prices, select their own hours, perhaps offer exceptional customer service to get a five-star review, and even advertise the work they do ("I do it all, including working with high voltage generators" compared to "I only run wire"). If the app were to go further, however, and require participating electricians to do a specific type of work (e.g. "You must be able to work with generators"), or sets the price for the electrician, the electrician cannot do anything to gain an entrepreneurial advantage. In fact, the only option for the electrician would be to continue "grinding away"—working on Electricians4Hire's terms. Applying the first prong of this test would likely reveal that the first example is an independent contractor and the latter is an employee.

256. Carlson, *supra* note 164, at 336 ("Important questions [regarding employee classification] frequently depend on the tests that can yield different results depending on the personal views of the judges or jurors.").

257. *See supra* Part I.C.

258. *See supra* Part II.C.3.

259. *See supra* Part II.B.

260. *See supra* Part II.B.

261. *See supra* Part II.C.

Nevertheless, Uber drivers are limited in what they can do to improve their income at Uber, bar driving more often, and they also provide a service to Uber, that but for them, Uber would be inoperable.²⁶² At the end of the day, Uber drivers operate like employees with the unique perk of choosing their own schedule.

262. *See supra* Part II.C.