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Whitney Rutherford

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NOTE

FITTING A SQUARE PEG INTO A ROUND HOLE: ALEXANDER V. FEDEX GROUND PACKAGE SYSTEMS & THE SHARING ECONOMY

Whitney Rutherford[†]

ABSTRACT

The debate regarding how best to classify workers, employee or independent contractor, for the purpose of guaranteed protections has exploded into a new century. In 2014, the Ninth Circuit classified FedEx delivery drivers as employees in Alexander v. FedEx Ground Package Systems, 765 F.3d 981 (9th Cir. 2014), and, in doing so, set the modern stage for classifying workers in the fledgling sharing economy. The Ninth Circuit marched the FedEx business model through the California law right-to-control test and its complex set of factors. It held that the plaintiff FedEx drivers were employees due to the control FedEx could wield over its drivers and the integral role drivers play in FedEx's business model. Yet applying this same test to sharing economy companies reveals that the right-to-control test, along with its grab bag of factors, does not offer a sensible way to classify sharing economy workers.

The sharing economy business model purposefully straddles the intersection between control and freedom. It facilitates individual connections while imposing quality control mechanisms. This model has disrupted stagnant arenas, replete with underused resources, birthing both quick-to-fizzle unicorns and newly-minted business behemoths. Nevertheless, the sharing economy model will be shaped by federal and state courts (whether by judgment or settlement) using twentieth century tests to alter a decidedly twenty-first century approach to business.

This Note will first analyze the Alexander decision and outline the California law test, before applying that test to the Uber and Lyft class actions and other pending sharing economy cases. Through analyzing the Alexander paradigm regarding employment status, comparing it to the other

[†] *Managing Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 11. J.D. Candidate, Liberty University School of Law (2017). This Note is written with much gratitude to my parents for the education they provided to me, knowing in their boundless wisdom well before I did that I would be attending law school and writing this Note one day, and to the Virginia Department of Motor Vehicles for allowing me to spend so much time in the summer of 2015 digging into how the sharing economy worked.

contemporary employment status tests, and then applying it to sharing economy litigation, this Note argues that the current employment status test does not adequately address the unique growing pains of the sharing economy because it fails to account for the workers' goals and the intentionally balanced business model.

Underlying this discussion is the fundamental question of who is protected by employment status laws and why in the context of the sharing economy. Measured steps should be taken to shake free from the two-classification system where the sharing economy is concerned. It is more important to develop a nuanced sense of why workers are engaged in the sharing economy and whether a business can be merely a facilitator of market connections than to engage in rapid fire litigation over classification. Additionally, each branch of government involved should have considered implementing a safe space approach before imposing or denying protections for sharing economy workers. Ultimately, however, time seems to be running out for the fledgling sharing economy as juries and settlement agreements decide how to fit a square peg into one of two round holes.

INTRODUCTION

The largest sharing economy company¹ in the world is plowing through its ninth year.² However, in the last two years alone that same embattled company, Uber, has been named in more than 173 lawsuits relating to its business model.³ Uber is just one of the companies that has married

1. Rebecca Blumstein, *Travis Kalanick Says Uber Runs on Passion and Resilience*, WALL ST. J. (Oct. 26, 2015), <http://www.wsj.com/articles/travis-kalanick-says-uber-runs-on-passion-and-resilience-1445911352>; *Our Trip History*, UBER, <https://www.uber.com/our-story/> (last visited Sept. 2, 2016). The "sharing economy" is a phenomenon that goes by and overlaps with many names, including collaborative consumption, gig economy, and on-demand economy. *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>. Whatever it is called, it is a market built on the foundation of tapping into unused personal and real property resources and "sharing" them with others, generally to create or augment personal income. *Id.*

2. Leila Abboud & Jeremy Wagstaff, *Legal Troubles, Market Realities Threaten Uber's Global Push*, REUTERS (Oct. 5, 2015), <http://www.reuters.com/article/2015/10/05/uber-global-idUSL1N1250MP20151005>.

3. Abboud & Wagstaff, *supra* note 2; Kristen Brown, *Uber Is Facing a Staggering Number of Lawsuits*, FUSION (Jan. 25, 2016), <http://fusion.net/story/257423/everyone-is-suing-uber/>.

technological advances to the most basic daily tasks⁴ and immediately faced backlash on many fronts, including false advertising, fraud, and unfair competition.⁵ Yet it is the question of employment status that strikes at the heart of its business model.⁶

This Note will analyze the case that most recently set the stage for the sharing economy lawsuits: the Ninth Circuit's *Alexander v. FedEx Ground Package Systems*, 765 F.3d 981 (9th Cir. 2014). The *Alexander* decision outlined the California law test that was to be applied in the Uber and Lyft class actions and other pending sharing economy cases. The author will discuss the *Alexander* paradigm of classifying workers, compare it to the other employment status tests, apply it to sharing economy litigation, and finally discuss whether the current tests adequately address the sharing economy model.

II. ALEXANDER V. FEDEX GROUND PACKAGE SYSTEMS

The battle in America over how to protect the most vulnerable workers, and ultimately how to classify them, began at least a century before the sharing economy was born.⁷ This question remains contentious today, because employment classification shapes the relationship between the worker, the hiring party, and third parties. Most importantly, in today's society, the classification will determine what protections the hiring party must provide and what expenses and duties the hiring party owes the worker.⁸

While each state and the federal system places a slightly different gloss on the common law employment status test, the key jurisdiction for many of the sharing economy cases is the Ninth Circuit, specifically, the federal districts courts in California.⁹ In late 2014, after nearly ten years of

4. John Koetsier, *The Sharing Economy Has Created 17 Billion-Dollar Companies (and 10 Unicorns)*, VENTUREBEAT (June 4, 2015), <http://venturebeat.com/2015/06/04/the-sharing-economy-has-created-17-billion-dollar-companies-and-10-unicorns/>.

5. See, e.g., *Boston Cab Dispatch, Inc. v. Uber Techs. Inc.*, No. 13-10769-NMG, 2014 WL 1338148 (D. Mass. Feb. 28, 2014) (alleging Uber violated state laws against unfair competition and the federal Racketeer Influenced and Corrupt Organizations Act).

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

7. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION (Dec. 22 2015), <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm>.

8. See, e.g., *O'Connor*, 82 F. Supp. 3d at 1133-34.

9. See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *O'Connor*, 82 F. Supp. 3d at 1133; *Singer v. Postmates, Inc.*, No. 15-1284 (N.D. Cal. Mar. 19, 2015); *Cobarruvias v. Maplebear, Inc.*, 143 F. Supp. 3d 930 (2015) (N.D. Cal. 2015).

litigation, the Ninth Circuit decided a case that will affect each of the sharing economy companies within the Ninth Circuit's jurisdiction: *Alexander v. FedEx Ground Shipping Systems*.¹⁰

A. *The Alexander Class Action*

In *Alexander v. FedEx Ground Shipping Systems*, the Ninth Circuit applied the California law employment status test to more than 2,000 FedEx drivers who sued seeking minimum guaranteed protections under the California Labor Code and held that the drivers must be classified as employees.¹¹ The Ninth Circuit's reasoning in this case is indicative of how sharing economy companies would be analyzed, but also serves as a useful illustration of the similarities and differences between a company like FedEx and its sharing economy counterparts like Uber.

1. The Drivers' Relationship with FedEx

The plaintiff drivers in *Alexander* were full-time delivery drivers for FedEx in California from 2000 to 2007.¹² FedEx characterized the drivers as independent contractors.¹³ FedEx's Operating Agreement governed the drivers' relationship with the company.¹⁴ The Operating Agreement provided that the "manner and means" of reaching the "mutual business objectives of the two parties" was "within the discretion of the driver" and that FedEx did not have authority to impose any terms or conditions on the drivers.¹⁵

However, the relationship was also subject to FedEx's policies and procedures, which took a far more hands-on approach to the "manner and means" of carrying out those "mutual business objectives."¹⁶ Alongside dozens of miscellaneous requirements, the Operating Agreement and FedEx policies and procedures required drivers to pick up and deliver packages within their "Primary Service Areas," prescribed the window of time to pick up packages, provided the scanners with which drivers

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

11. *Id.* at 987, 997-98.

12. *Id.* at 984. The drivers worked for both FedEx Ground and FedEx Home Delivery, but the differences between the divisions did not matter to the Ninth Circuit decision and also do not matter in the context of this Note. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 984.

communicated with FedEx, and designed and recommended delivery routes to its drivers.¹⁷

Beyond package policies, FedEx also structured drivers' workloads to adhere to a nine and a half to eleven hour workday.¹⁸ FedEx instructed managers to allocate deliveries to adhere to that timeframe.¹⁹ FedEx set a time by which drivers were required to return at the end of the day.²⁰ Additionally, FedEx trained its drivers in interacting with customers and delivering packages in order to "foster the professional image and good reputation of FedEx."²¹ Following the professional image theme, the drivers' managers were authorized to perform up to four performance evaluations each year, including a ride-along to assess details of the drivers' performance and then provide recommendations to the drivers to improve their performance.²² While many provisions of the Operating Agreement purported to give the drivers freedom in carrying out their tasks, the Operating Agreement simultaneously subjected most individual decisions to receiving FedEx's consent prior to acting.²³

FedEx also regulated the appearance of the trucks and drivers. FedEx prescribed a uniform, logo, and grooming code for the drivers.²⁴ Similarly, it prescribed the color, logo, numbers, and insignia on the truck.²⁵ However, even with all this, unless FedEx expressly agreed to pay for certain expenses in the Operating Agreement, drivers were required to cover the cost of vehicle maintenance.²⁶ The drivers presented the Operating Agreement and FedEx policies and procedures as evidence for their claim that FedEx has misclassified them as independent contractors.²⁷

17. *Id.* at 984-85.

18. *Alexander*, 765 F.3d at 985.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 985.

23. *Id.* at 985-86.

24. *Alexander*, 765 F.3d at 987.

25. *Id.* at 986.

26. *Id.*

27. *Id.* at 984.

2. Procedural History

Half a decade before the first Uber passenger²⁸ or the first Lyft pink mustache,²⁹ more than 2,000 FedEx full-time delivery drivers filed a class action lawsuit in the California Superior Court.³⁰ The drivers asserted claims under the California Labor Code³¹ for employment expenses, unpaid wages, and failure to pay overtime, among others, and under the federal Family and Medical Leave Act.³² Both the state and federal claims turned on one question: the drivers' employment status.³³

FedEx removed the class action to the Northern District of California based on diversity of the parties shortly before the Judicial Panel on Multidistrict Litigation (MDL) consolidated it with similar cases filed in a total of forty states.³⁴ The MDL court certified a class only for the plaintiff's claims under California law.³⁵ The drivers in all the MDL cases moved for partial summary judgment on the question of employment status, and, in this case as well as most others, FedEx cross-moved for summary judgment.³⁶ With the key question of employment status ripe for decision as a matter of law, the MDL court granted FedEx's motion for summary judgment: the drivers were independent contractors.³⁷

The MDL court stated that it applied the common law test from *S.G. Borrello & Sons, Inc. v. Department of Industrial Relations*³⁸ but "ultimately focused on the *entrepreneurial opportunities* FedEx afforded" to the drivers.³⁹ FedEx's right to control aspects of the drivers' work did not persuade the MDL court; rather, the court reasoned that the dispositive fact was the drivers' "class-wide ability to own and operate distinct businesses,

28. *Our Trip History*, UBER, <https://www.uber.com/our-story/> (last visited Sept. 2, 2016) (discussing the founding of Uber in 2008).

29. *Lyft Day in San Francisco*, LYFT (July 15, 2013), <http://blog.lyft.com/posts/2013/7/15/lyft-day-in-san-francisco?rq=founded> (discussing the San Francisco celebration of the founding of Lyft in 2012).

30. *Alexander*, 765 F.3d at 984, 987.

31. CAL. LAB. CODE §§ 201, 221, 223, 226.7, 450, 510, 1194, 2802.

32. *Alexander*, 765 F.3d at 987.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 987.

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

39. *Alexander*, 765 F.3d at 988 (emphasis added).

own multiple routes, and profit accordingly.”⁴⁰ The MDL court granted FedEx’s motion and remanded the case to the Northern District of California.⁴¹ After settling the federal Family and Medical Leave Act claims, the drivers appealed the MDL’s grant of summary judgment to FedEx on the question of employment status to the Ninth Circuit.⁴²

B. *The Ninth Circuit’s Decision*

Nine years later, the Ninth Circuit Court of Appeals heard the case.⁴³ The Ninth Circuit’s review was “far from simple.”⁴⁴ Ultimately, it reversed the MDL court and held as a matter of law that the FedEx drivers were employees.⁴⁵ The Ninth Circuit rejected the MDL court’s emphasis on “entrepreneurial opportunities”⁴⁶ and employed California’s 1989 right-to-control test as articulated in *Borello*.⁴⁷ The right-to-control test provides guiding principles and factors to consider in determining whether workers are employees or independent contractors, primarily focusing on the right to control the work.⁴⁸

The dispositive factor in the right-to-control test is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”⁴⁹ Along with the right to control the manner and means of performing the work, strong evidence of employee status under the right-to-control test is “[t]he right to terminate at will, without cause.”⁵⁰ These two factors are the focus of the right-to-control test, but the *Borello* court added eight additional factors:

[1] [W]hether the one performing services is engaged in a distinct occupation or business; [2] 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; [3] the skill required in the particular occupation;

40. *Id.* (quoting the MDL court opinion).

41. *Id.* at 987.

42. *Id.*

43. *Id.*

44. *Id.* at 997 (Trott, J., concurring).

45. *Alexander*, 765 F.3d at 988.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

[4] whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; [5] the length of time for which the services are to be performed; [6] the method of payment, whether by the time or by the job; [7] whether or not the work is a part of the regular business of the principal; and [8] whether or not the parties believe they are creating the relationship of employer-employee.⁵¹

While the Ninth Circuit noted that the factors are intertwined,⁵² Judge Fletcher analyzed each factor individually, canvassing FedEx's Operating Agreement as well as the accompanying extrinsic evidence showing how the Operating Agreement affected the drivers' daily work.⁵³ The Ninth Circuit focused on depth of control FedEx exercised over the more than 2,000 drivers in the class.⁵⁴

The court began with the control over appearance, scrutinizing how FedEx's policies micromanaged drivers "from their hats down to their shoes and socks."⁵⁵ Then, the court discussed FedEx's control over drivers' time, noting that the drivers were expected to work from nine and a half to eleven hours each working day and that the FedEx managers could allocate workloads to fit within that range.⁵⁶ The requirements defined the way FedEx drivers would work, even though the Operating Agreement disclaimed authority to set the drivers' hours.⁵⁷ Moreover, the Ninth Circuit reasoned that FedEx had the right to, and indeed did, control how and when the drivers delivered packages as well as the standards for delivery.⁵⁸ Even though FedEx argued that there were many aspects of the work that it did not control, like guaranteeing drivers followed a specific route or demanding drivers adhere to ride-along recommendations, the Ninth Circuit found that the independent contractor status was inappropriate because FedEx's control reached far beyond just the fruits of the work.⁵⁹

Since the Ninth Circuit found that the right-to-control factor weighed strongly toward employee status, the court examined each of the other

51. *Alexander*, 765 F.3d at 989.

52. *Id.*

53. *Id.* at 989-97.

54. *Id.* at 989-90.

55. *Id.* at 989.

56. *Id.* at 989-90.

57. *Alexander*, 765 F.3d at 989-90.

58. *Id.* at 990.

59. *Id.*

Borello factors as “secondary factors.”⁶⁰ Because FedEx retained “all necessary control over the operation as a whole,” no other factor mandated a different result.⁶¹

Nonetheless, several factors did favor FedEx.⁶² The strongest factor favoring independent contractor status was that FedEx did have a broad right to terminate, even if it was not technically the right to terminate at will.⁶³ Moreover, who provides the tools and equipment also favored FedEx, because the drivers provided their own vehicles and FedEx did not require them to buy FedEx equipment.⁶⁴ How FedEx paid the drivers favored neither party, because the complex payment scheme was fixed and did not easily compare to an hourly or per job payment method.⁶⁵

All of the other factors—distinct occupation or business, who directed the work performed, how much skill the work required, the length of time required to perform the services, and whether the work was a part of the principal’s regular business—favored the drivers.⁶⁶ They all performed essentially the same tasks at FedEx’s direction and did so without demonstrating a high level of skill.⁶⁷ And the tasks were central to FedEx’s existence: without delivery drivers, there would not be FedEx ground delivery.⁶⁸ Thus, while the other *Borello* factors provided fodder for both parties’ arguments, the court ruled that “employee” was the right classification for the FedEx drivers.⁶⁹

Ultimately, the Ninth Circuit found “powerful evidence” indicating that FedEx had the right to control the manner in which the drivers performed their work and indeed did control many critical aspects of the work.⁷⁰ Since the right to control is the principal employment test under California law⁷¹ and none of the other *Borello* right-to-control factors tipped towards holding that the drivers were independent contractors, the court held that

60. *Id.* at 994.

61. *Id.* (quoting *JKH Enters., Inc. v. Dep’t of Indus. Relations*, 48 Cal. Rptr. 3d 563 (Cal. App. 6th Dist. 2006)) (emphasis removed).

62. *Id.* at 994-96.

63. *Alexander*, 765 F.3d at 994.

64. *Id.* at 995.

65. *Id.* at 996.

66. *Id.* at 995-96.

67. *Id.* at 995.

68. *Id.*

69. *Alexander*, 765 F.3d at 997.

70. *Id.* at 994.

71. *Id.* at 988.

the drivers were employees.⁷² It reversed the Multidistrict Litigation Court's grant of summary judgment and remanded the case to the district court to enter summary judgment for the drivers on the question of their employment status.⁷³

C. FedEx and the Drivers Settle

After the Ninth Circuit remanded the case to the District Court for the Northern District of California, the drivers reached a settlement with FedEx.⁷⁴ On June 12, 2015, FedEx announced that it had agreed with the more than 2,000 drivers to settle their claims under the California Labor Code for \$228 million.⁷⁵ This settlement received final approval in June 2016.⁷⁶ The settlement has been said to rival how much "the United States Department of Labor has collected in back wages annually through nationwide enforcement of wage and hour law during the last seven years."⁷⁷

Read in isolation, thinking of nothing beyond the FedEx drivers' facts, the employment status test appears to be imminently reasonable, even if detailed. In fact, *Alexander* is not even the only case that has challenged the label FedEx attaches to drivers using a similar right-to-control test.⁷⁸ Yet it is a significant settlement when compared to other employment status decisions—and there are plenty of other employment status lawsuits to choose from, helmed by the same firm suing Uber.⁷⁹ This case cannot be viewed in isolation or just within the context of a few megalithic

72. *Id.* at 994.

73. *Id.* at 988.

74. FedEx Corp., Current Report (Form 8-K) (June 8, 2015).

75. *Id.*

76. *Dean Alexander et al. v. FedEx Ground Package System, Inc.*, CLASS ACTION SETTLEMENT, <https://alexander-v-fedexground-settlement.com/mainpage/Home.aspx> (last visited Oct. 24, 2016) (providing claimants information regarding the pending settlement).

77. Robert W. Wood, *FedEx Settles Independent Contractor Mislabeling Case For \$228 Million*, FORBES (June 16, 2015), <http://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/>. In June, FedEx agreed to a second \$240 million settlement to end employment classification litigation in twenty other states, including New York, Pennsylvania, and Indiana. Kurt Orzeck, *FedEx to Pay \$240M to End Driver Wage Claims in 20 States*, LAW360 (June 15, 2016), <http://www.law360.com/articles/807629/fedex-to-pay-240m-to-end-driver-wage-claims-in-20-states>.

78. See *Craig v. FedEx Ground Package Sys.*, 792 F.3d 818 (7th Cir. 2015); Orzeck, *supra* note 77.

79. *Independent Contractor Misclassification*, LICHTEN & LISS-RIORDAN, P.C., <http://www.lrlaw.com/independent-contractor/> (last visited Oct. 31, 2016).

corporations being ordered to tighten up their classification standards. This is a case that set immediate precedent for what Uber, and other sharing economy companies, faced as the federal courts in California heard their cases.⁸⁰

III. *ALEXANDER* IN CONTEXT: THE OTHER TESTS

Before analyzing the sharing economy cases in light of the Ninth Circuit's analysis in *Alexander*, the broader field of tests for how to classify a worker should be reviewed. The D.C. Circuit's entrepreneurial opportunities test presents a counterpoint to the traditional right-to-control test. The federal interpretation of the Fair Labor Standards Act, on the other hand, offers the broadest definition of employee. Finally, each state has its own approach to classifying workers whether by a test similar to the right-to-control test or by the legislature mandating that some workers be classified according to a statute.

A. *The D.C. Circuit's Entrepreneurial Opportunities Test*

As the Ninth Circuit noted in *Alexander*, FedEx relied on the D.C. Circuit's entrepreneurial opportunities test in arguing its cross-motion for partial summary judgment, and the MDL court was persuaded by this argument.⁸¹ In *FedEx Home Delivery v. NLRB*, the D.C. Circuit assessed the employment status of FedEx drivers in the context of a labor dispute.⁸² The drivers had elected "the union" as its collective bargaining representative, but FedEx refused to negotiate with the union, arguing its drivers were independent contractors, not employees.⁸³

When faced with classifying FedEx drivers under federal law, the D.C. Circuit noted that the common law employment status factors under agency theory applied and the principal factor at common law was the right to control the manner and means of the work.⁸⁴ But after reviewing the lengthy list of common law factors, the D.C. Circuit reasoned that the common law factors were unwieldy and impractical for decisively

80. While beyond the scope of this Note, the *Alexander* decision in the Ninth Circuit will almost certainly be used as persuasive precedent in the dozens of other pending FedEx driver cases nationwide. See *Synopsis by State, FEDEX GROUND DRIVERS LAWSUIT*, <http://fedexdriverslawsuit.com/synopsis-by-state/> (last visited Dec. 22, 2015).

81. *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 988, 993 (9th Cir. 2014).

82. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009).

83. *Id.* at 495.

84. *Id.* at 495-98.

distinguishing between employees and independent contractors—particularly the right to control factor.⁸⁵ Thus, the D.C. Circuit shifted its emphasis away from applying a list of factors to examining the extent of the entrepreneurial opportunities available to the driver.⁸⁶

The entrepreneurial opportunities test focuses on whether the “putative independent contractors have ‘significant entrepreneurial opportunity for gain or loss.’”⁸⁷ The court noted that this would not be the first time that the National Labor Relations Board and the D.C. Circuit itself had emphasized entrepreneurial opportunities.⁸⁸ Moreover, the court recognized that the fact that there is no single concise, precise definition of an independent contractor has been a “long-recognized rub.”⁸⁹

The court submitted that there is not any “shorthand formula” or “magic phrase” that will determine a worker’s employment status—it must be determined by closely analyzing that particular factual setting.⁹⁰ In fact, the court acknowledged that when many of its cases had spoken in terms of “an employer’s right to exercise control,” it was considering a “meta-question, as it were, focused on the sorts of controls employers could use without transforming a contractor into an employee.”⁹¹ Essentially, control was close, but not perfect— “[i]t was as if the sheet music just didn’t quite match the tune.”⁹²

Thus, the court chose to rely on entrepreneurial opportunities.⁹³ The D.C. Circuit reasoned that it would retain the common law factors but use them in light of an emphasis on entrepreneurialism, because “it is not the degree of supervision under which one labors but [] the degree to which one functions as an entrepreneur . . . that better illuminates one’s [employment] status.”⁹⁴

85. *Id.* at 497.

86. *Id.*

87. *Id.* (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002)).

88. *FedEx Home Delivery*, 563 F.3d at 497.

89. *Id.* at 496.

90. *Id.*

91. *Id.*

92. *Id.* at 497.

93. *Id.*

94. *FedEx Home Delivery*, 563 F.3d at 503.

B. *Federal Fair Labor Standards Act*

Constantly in the background in employment status conflicts, and often central to the lawsuit, is the federal Fair Labor Standards Act.⁹⁵ The Fair Labor Standards Act was the culmination of a long battle in dire economic circumstances to establish a minimum wage, overtime pay, and recordkeeping employment standards that would apply to both private and public employers.⁹⁶ The Act ensured that “[c]overed nonexempt workers” receive the federal minimum wage of \$7.25 per hour as of 2009.⁹⁷ However, the Fair Labor Standards Act has impacted far more than the bottom line of covered workers’ paychecks; it has affects the way that workers are classified even today.⁹⁸

Pursuant to its regulatory authority under the Fair Labor Standards Act,⁹⁹ the U.S. Department of Labor (DOL) released a guide to the 2015 federal view of employment status.¹⁰⁰ The DOL began by noting that the Fair Labor Standards Act features an expansive definition of employ: “to suffer or permit to work.”¹⁰¹ According to the DOL, this definition must be understood broadly and in light of the federal courts’ multi-factor “economic realities” test.¹⁰² While the test lists factors, the dispositive one is “whether [a] worker is economically dependent on the employer.”¹⁰³ “A worker who is economically dependent on an employer is suffered or permitted to work by the employer.”¹⁰⁴ Thus, most workers in modern America will be “employees” because they are “dependent” on a particular employer by virtue of being “permitted to work by the employer.”¹⁰⁵ Moreover, the DOL guide notes, “[a] true independent contractor’s work, on the other hand, is unlikely to be integral to the employer’s business.”¹⁰⁶

95. Fair Labor Standards Act, 29 U.S.C. §§ 201-262 (2012).

96. *Compliance Assistance: Wages and the Fair Labor Standards Act (FLSA)*, UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/flsa/> (last visited Oct. 20, 2015).

97. *Id.*

98. See DAVID WEIL, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, ADMINISTRATOR’S INTERPRETATION NO. 2015-1 (July 15, 2015).

99. Fair Labor Standards Act, 29 U.S.C. §§ 201-262 (2015).

100. WEIL, *supra* note 98.

101. *Id.* (citing 29 U.S.C. § 203(g)).

102. *Id.* at 2.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 6.

This is the inverse of the D.C. Circuit's entrepreneurial opportunities focus. While that test focuses on the driver's external opportunities relating to the business, the FLSA test is concerned only with the relationship between the hiring party and the worker. The DOL will continue to capitalize on this expansive test for employment status, reasoning that Congress specifically designed the Fair Labor Standards Act to capture as many workers within its reach as possible.¹⁰⁷

C. Common Law Tests for Employment Status & State Law

The traditional test for whether a worker is an employee or independent contractor is the common law agency factors.¹⁰⁸ The common law factors introduced the right to control the work concept alongside a non-exhaustive list of additional influencing factors.¹⁰⁹ These factors are echoed in the *Alexander* decision and in the tests discussed below, but each jurisdiction has placed its own gloss on the common law test either through case law or by statute.¹¹⁰ This is also true in employment status cases decided under federal law.¹¹¹

107. *Id.* at 3 (citing *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945)).

108. See RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (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 employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.).

Id.

109. *Id.*

110. See, e.g., *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 988-90, 992, 994-97 (9th Cir. 2014).

111. Fair Labor Standards Act, 29 U.S.C. §§ 201-262 (2015).

Notably, several state legislatures have circumvented the application of their jurisdiction's common law employment status test by designating the drivers in sharing economy companies as independent contractors through each state's transportation network company statutes, such as North Carolina, Arkansas, and Indiana.¹¹² Other state legislators in states such as Alabama and Florida have proposed such a statutory presumption in pending legislation.¹¹³ Other states have remained silent as to classification as they pass laws regarding the sharing economy companies.¹¹⁴ At this point, only two states have not addressed the sharing economy in the context of transportation network companies through legislation.¹¹⁵

The Ninth Circuit's test in *Alexander* and the tests articulated here have at least one thing in common: a hunt for who is in control. If anything, the tug-of-war over which common law factors to employ and which to emphasize reveals that the employment status question is a constantly simmering issue. The federal law would decide the conflict in favor of the broadest possible employee status test, but at least some courts would like to reassess how to define the employment relationship.

IV. APPLICATION: THE *ALEXANDER* MODEL V. THE SHARING ECONOMY

The *Alexander* class action and the other contemporary worker classification tests have been applied to the sharing economy throughout the last several years. To understand the task facing the plaintiff's counsel, the sharing economy company's counsel, and perhaps juries, the *Alexander* classification test must be applied to sharing economy lawsuits.

A. O'Connor v. Uber Technologies, Inc.

With an understanding of the controlling test and competing standards, the California Uber class action lawsuit begs for analysis.¹¹⁶ In the fall of

112. ARK. CODE ANN. § 23-13-719 (2015); IND. CODE § 8-2.1-17-6.5 (2015); 2015 N.C. SESS. LAWS 237.

113. See, e.g., H.B. 509, 2015 Leg. (Ala. 2015); H.B. 509, 2016 Leg. (Fla. 2016).

114. See, e.g., VA. CODE ANN. § 46.2-2099.45-.53 (2015).

115. *Transportation Network Company: States with Enacted Legislation*, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, <http://viewer.zmags.com/publication/60841263#/60841263/1>. The Property Casualty Insurers Association of America has mapped the individual state responses to transportation network companies, noting that only two states have failed to take any action regarding transportation network companies and the progress in each of the other forty-eight states. *Id.*

116. While the California Uber class action provides the most range for this application, note that Uber simultaneously faced a class action in Massachusetts regarding driver

2013, four Uber drivers,¹¹⁷ putative class members at the time, sued Uber Technologies for failure to remit gratuities to the drivers and incorrect employment classification.¹¹⁸ In 2015, Judge Edward Chen of the Northern District certified the drivers as a class.¹¹⁹ This class could include approximately 160,000 drivers, since Judge Chen invalidated an arbitration clause in an Uber contract, which would have blocked drivers from flocking to join the class.¹²⁰ Uber immediately appealed this ruling and the Ninth Circuit granted Uber's request for appeal on April 5, 2016.¹²¹ *Why* the drivers were certified as a class in the first place is the key to this lawsuit's progression: the issue of employment status is what bound the unique drivers together and, Judge Chen held, that question is capable of resolution through class action.¹²²

Uber moved for summary judgment that the drivers were independent contractors as a matter of law.¹²³ Judge Chen denied Uber's motion, holding that the drivers were "Uber's presumptive employees because they 'perform

classification. *Yucesoy v. Uber Techs., Inc.*, 109 F. Supp. 3d 1259, 1261 (N.D. Cal. 2015). Class action lawsuits based on driver classification were also pending against Uber in several other states, such as Florida and Michigan. *See, e.g., Lamour v. Uber Techs., Inc.*, No. 1:16-cv-21449 (S.D. Fla. Apr. 22, 2016); *Zawada v. Uber Techs., Inc.*, No. 2: 16-cv-11334 (E.D. Mich. Apr. 12, 2016).

117. The drivers suing Uber drove for UberBlack and uberX services; in the former, drivers use black sedans or other limousine-like vehicles to transport passengers, which the drivers rented from various local companies, whereas the uberX drivers use their own vehicles to transport passengers. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135-36 (N.D. Cal. 2015).

118. Second Amended Class Action Complaint, *O'Connor*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

119. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *37 (N.D. Cal. Sept. 1, 2015) (order granting in part and denying in part plaintiffs' supplemental motion for class certification).

120. *Id.* at *33; *see also* Joel Rosenblatt & Pamela MacLean, *Uber Judge Taps Brakes on Drivers' Lawsuit Outcome*, SFGATE (Dec. 24, 2015), <http://www.sfgate.com/business/article/Uber-judge-taps-brakes-on-drivers-lawsuit-6720120.php>.

121. *Uber Lawsuit*, LICHTEN & LISS-RIORDAN, P.C., <http://uberlawsuit.com> (last visited Oct. 13, 2016).

122. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *25-30 (N.D. Cal. Sept. 1, 2015).

123. *O'Connor*, 82 F. Supp. 3d at 1135 (N.D. Cal. 2015). While this Note will analyze the Uber class action lawsuit under federal law, pending in the Northern District, this is not the first time the Uber dispute has been brought to California's attention. At the state level, the California Labor Commission ruled that an individual Uber driver was an employee. *Berwick v. Uber Techs. Inc.*, 80 Cal. Comp. Cases 936 (W.C.A.B. 2015).

services' for the benefit of Uber."¹²⁴ (This echoed the broad federal view of employ—the Uber drivers are “permitted to work” on the Uber platform.) However, the court also held that the question of employment status was a mixed question of law and fact and appropriate for a jury to decide.¹²⁵ Thus, the District Court for the Northern District of California scheduled to hear the drivers' class action in a five-week jury trial in June 2016.¹²⁶

Uber's relationship with its drivers was poised to be reviewed under the *S.G. Borello & Sons, Inc.* test, just as in *Alexander*.¹²⁷ In his order denying summary judgment, Judge Chen determined that the same factors would apply to Uber's policies and practices, after determining as a threshold matter that the Uber drivers are “presumptive employees.”¹²⁸ The dispositive factor for the jury to consider was to be “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”¹²⁹ Uber's “right to terminate at will, without cause”¹³⁰ would be considered. While these two factors would again be the focus of the right-to-control test, the jury could also look to the eight other factors:

[1] [W]hether the one performing services is engaged in a distinct occupation or business; [2] 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; [3] the skill required in the particular occupation; [4] whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; [5] the length of time for which the services are to be performed; [6] the method of payment, whether by the time or by the job; [7] whether or not the work is a part of the regular business of the principal; and [8] whether or not the parties believe they are creating the relationship of employer-employee.¹³¹

124. *O'Connor*, 82 F. Supp. 3d at 1135 (N.D. Cal. 2015).

125. *Id.*

126. *Uber Lawsuit*, LICHEN & LISS-RIORDAN, P.C., <http://uberlawsuit.com> (last visited Oct. 13, 2016).

127. *O'Connor*, 82 F. Supp. 3d at 1138.

128. *Id.* at 1138, 1141, 1143.

129. *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 988 (9th Cir. 2014).

130. *Id.*

131. *Id.* at 989.

There are undoubtedly similarities between the services FedEx and Uber deliver—in most instances, Uber simply switches parcels in favor of people and today Uber aims to be a competitor in the package delivery space as well.¹³² But when applied to the Uber class action, the awkwardness of applying the right-to-control test to a sharing economy company surfaced before a jury was ever empaneled, as seen through Judge Chen’s class certification and summary judgment rulings.

It is critical that before ever reaching the question of whether the drivers are employees or independent contractors, Judge Chen ruled as a threshold matter that the drivers are *presumptively* Uber employees simply because they perform services for the benefit of the defendant.¹³³ There is nothing further necessary to establish the prima facie case of employer-employee relationship.¹³⁴ The threshold question is just as simple as a showing that the drivers performed services for the benefit of Uber.¹³⁵ Because the Northern District judge viewed Uber’s vision of its own platform as “fatally flawed,” and viewed the drivers as undoubtedly providing a service to Uber, it was “abundantly clear” the drivers are presumptive employees.¹³⁶ This holding shifted the burden of proving that the drivers were in fact independent contractors, and *not* employees, to the defendant Uber.¹³⁷

From the stance of presumptive employee status, the next step in analysis was the infamous right-to-control test.¹³⁸ Uber argued that it purposefully retained minimal control over the drivers, while the drivers “vigorously dispute[d]” this argument by pointing to Uber’s standards and

132. Uber is has rapidly expanded into the property transport space. It currently delivers both packages through UberRUSH and food through UberEATS in addition to people. UBER RUSH, <https://rush.uber.com/how-it-works> (last visited Dec. 1, 2016); UBER EATS, <http://ubereats.com/eats/dc/> (last visited Jan. 25, 2016). Uber has also been known to sporadically deliver ice cream, barbeque, kittens, and roses, among other items, as a part of its aggressive advertising throughout the United States and globally. Sarah Haydu, *Clear Your Calendars—#UberKITTENS Are Back*, UBER NEWSROOM (Oct. 28, 2015), <https://newsroom.uber.com/2015/10/uber-kittens-are-back/>; *Here’s The Scoop: #UberIceCream is Back*, UBER NEWSROOM (July 21, 2015), <https://newsroom.uber.com/2015/07/icecream2015/>; Sarah Haydu, *Uber Gets Romantic*, UBER NEWSROOM (Feb. 11, 2013), <http://newsroom.uber.com/2013/02/romanceondemand/>; Ryan Graves, *Uber’s Bringing #OMGUBERBBQ to Austin*, UBER NEWSROOM (Mar. 8, 2012), <https://newsroom.uber.com/2012/03/ubers-bringing-omguberbbq-to-austin/>.

133. O’Connor, 82 F. Supp. 3d at 1135.

134. *Id.* at 1138.

135. *Id.*

136. *Id.* at 1141-43.

137. *Id.* at 1138.

138. *Id.*

supervision.¹³⁹ Admittedly, both sides have a point. Once the driver is admitted into the Uber network, his or her independence soars far above what FedEx drivers experience. Uber drivers set their own hours.¹⁴⁰ Uber drivers drive their own vehicles or personally rent a vehicle.¹⁴¹ Uber drivers choose their own locations to work that may change from day to day.¹⁴² The most striking initial difference between FedEx drivers and Uber drivers is that the latter may determine whether they will work *at all* on any given day or for even short bursts of time as opposed to a fixed or regulated schedule.¹⁴³

But at the same time, like any other company delivering a service, Uber has a detailed process for adding drivers, monitoring their performance through their software platform, and terminating drivers who fail to meet Uber's standards.¹⁴⁴ It sets the drivers' fares, charges riders solely through its software, forbids the drivers from arranging rides outside of the software, and also will not allow passengers to request specific drivers.¹⁴⁵ Additionally, Uber sets a variety of minimum requirements, apparently geared toward maintaining active drivers on its platform, such as requiring uberX drivers to provide at least one ride every 180 days.¹⁴⁶

Like FedEx, Uber does not technically have the right to terminate drivers at will.¹⁴⁷ However, in contrast to FedEx, where performance reviews are internal, Uber uses a rider review approach: the rider publically reviews the driver.¹⁴⁸ Yet the drivers pointed to an Addendum which stated that "Uber will have the right" to restrict the "driver from accessing or using the Driver app"¹⁴⁹

The murky analysis thickened with the factors Judge Chen referred to as "secondary indicia."¹⁵⁰ Whether Uber drivers are engaged in a distinct occupation or business depends on the vision of the company the jury accepts, just as it depended on the competing visions of FedEx presented to

139. *O'Connor*, 82 F. Supp. 3d at 1138.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1152.

144. *Id.*

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

146. *Id.* at 1149.

147. *Id.* at 1143.

148. *Id.* at 1150-51.

149. *Id.* at 1149.

150. *Id.* at 1139.

the Ninth Circuit.¹⁵¹ If the jury accepted the drivers' vision—definitively the more traditional vision—then each driver is simply an employee of a greater transportation company.

However, if a jury were to accept Uber's vision, that it is a technology company and not a transportation company,¹⁵² then each driver operates its own little insulated business, meaning that there were approximately 160,000 little Uber-driving businesses in the United States at that time in 2015.¹⁵³ Moreover, if Uber CEO Travis Kalanick's vision for Uber's growth were accepted, the drivers themselves may not be integral to the business: Uber is currently following the route to a driverless service.¹⁵⁴ To Kalanick, the question is whether "you want to be part of the future or do you want to resist the future;" he does not intend for Uber to be a part of the "taxi industry before us."¹⁵⁵

The type of work Uber drivers engage in is not the kind of occupation in which a principal directs the work, but nor is it work that a specialist would perform without supervision. This factor is tied to the requisite skill required to be an Uber driver. The kind of occupation and the skill needed

151. History becomes particularly interesting and relevant to the analysis here. While today, FedEx may be viewed as a household name that everyone knows for the cardboard boxes dropped on your doorstep, FedEx too began as one man's idea for transforming the "information technology industry." *Connecting People and Possibilities: The History of FedEx*, FEDEX, <http://about.van.fedex.com/our-story/history-timeline/history/> (last visited Nov. 27, 2015).

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

153. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 1-2 (Princeton University Industrial Relations Section, Working Paper No. 587, 2015).

154. Max Chafkin, *Uber's First Self-Driving Fleet Arrives in Pittsburgh This Month*, BLOOMBERG (Aug. 18, 2016), <http://www.bloomberg.com/news/features/2016-08-18/uber-s-first-self-driving-fleet-arrives-in-pittsburgh-this-month-is06r7on>; Ben Gilbert, *Uber's CEO Gave Us a Lot of Clues About What the Future Looks Like*, TECHINSIDER (Sept. 11, 2015), <http://www.techinsider.io/ubers-future-is-driverless-cars-2015-9>.

The landscape of how and where Uber will compete in the self-driving car race is constantly changing; while Uber's self-driving fleet is on the road in Pittsburgh, Uber recently moved its self-driving operation out of California and into Arizona after an ugly regulatory fight and ultimate ban in its home state. See Eric Newcomer & Ellen Huet, *Uber Ships Self-Driving Cars to Arizona After California Ban*, BLOOMBERG (Dec. 22, 2016), <https://www.bloomberg.com/news/articles/2016-12-22/uber-pulls-self-driving-cars-from-california-for-arizona>; Christopher Mele, *In a Retreat, Uber Ends Its Self-Driving Car Experiment in San Francisco*, N.Y. TIMES (Dec. 21, 2016), http://www.nytimes.com/2016/12/21/technology/san-francisco-california-uber-driverless-car.html?_r=0.

155. *Id.*

is one of the most straightforward factors: driving.¹⁵⁶ Uber connects rider and driver.¹⁵⁷ Then, the driver *drives*.¹⁵⁸ The only skill required is to maintain compliance with the state's driver's license laws and with Uber's driver policies.¹⁵⁹ However, it should be noted that, like FedEx's standards for delivering packages, Uber sets standards for how the driver will manage each trip and monitors performance through the aforementioned driver reviews.¹⁶⁰

The next factor most clearly showed the imbalance of the right-to-control test in the sharing economy context. The driver supplies the instrumentalities, tools, and the place of work for themselves: it is the driver's car and the driver's location.¹⁶¹ Yet the key "tool" is the Uber application (hereinafter "app")—one cannot be an Uber driver without the Uber app.¹⁶² The driver brings the tools to the relationship and controls those tools while performing the work but must use the specified platform Uber provides for the service or face penalties.¹⁶³

Moreover, as Judge Chen noted, Uber even provided its drivers with smartphones to access its platform in some instances.¹⁶⁴ Thus, not unlike FedEx providing the drivers with every package and the tools to communicate with FedEx, Uber too ensured its drivers use a streamlined process by providing the application. Yet the streamlined presentation of the service generally stops at the application. Unlike FedEx's control of driver and truck appearance, Uber drivers and vehicles vary based on the driver.¹⁶⁵ In fact, rather than using FedEx's approach of controlling both driver and truck appearance, Uber bases part of its services on the differences between vehicles through its uberX and uberBlack services.¹⁶⁶

As to length of time and method of payment, Uber drivers may set their own hours and number of rides accepted, but Uber counterbalances this freedom by requiring drivers provide at least one ride within a specified period of time and indicates that all ride requests should be accepted when

156. UBER, <https://get.uber.com/drive/> (last visited Dec. 22, 2015).

157. *Id.*

158. *Id.*

159. *Id.*

160. *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1150 (N.D. Cal. 2015).

161. *Id.* at 1138.

162. UBER, <https://get.uber.com/drive/> (last visited Dec. 22, 2015).

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

164. *Id.* at 1153.

165. *See generally* UBER, <https://get.uber.com/drive/> (last visited Oct. 13, 2016).

166. *See generally* *O'Connor*, 82 F. Supp. 3d at 1135-36.

the driver is logged into the Uber platform.¹⁶⁷ Uber drivers are paid by the time spent driving, but Uber sets the fees and the percentage of the fare that it keeps and what payment it will remit to the driver.¹⁶⁸ Thus, the theme of counterbalancing freedom and quality control continues. Uber seemingly *intentionally* juxtaposes the traditional employer-employee model against the freewheeling peer-to-peer model.

Who performs the regular work of the company again drew out the competing views of Uber as a company. Uber did not characterize itself as a transportation business or as a ridesharing business.¹⁶⁹ Rather Uber argued that it is a “technology company” that provides a “lead generation platform” that *other businesses* providing transportation can use to connect drivers with riders.¹⁷⁰ To support its characterization, Uber submitted that it does not own the vehicles—and contended that it does not employ the drivers.¹⁷¹

The drivers characterized their relationship with Uber differently. They argued that Uber is a transportation company that employs them as drivers to complete not just the regular, but the absolutely integral work of the company.¹⁷² To support their view, the drivers pointed to how Uber holds itself out to the world, referring to itself as an “On-Demand Car Service” and using the tagline “Everyone’s Private Driver.”¹⁷³

The Transportation Provider Service Agreement and the Driver Addendum Relating to Uber Services squarely addressed the final factor: what relationship the worker and the company thought they were forming. The Agreement and the Addendum both stated that the relationship between the drivers and Uber “is solely that of independent contracting parties” and that the parties “expressly agree that this Agreement is not an employment agreement or employment relationship.”¹⁷⁴ But given the fight over every other aspect of their relationship, the words on the page were not dispositive.¹⁷⁵

Bear in mind, however, that regardless of the clash of factors, the opening foray into the analysis has already been completed: Uber drivers were

167. *O'Connor*, 82 F. Supp. 3d at 1138-53.

168. *Id.* at 1136-37.

169. *Id.* at 1137.

170. *Id.*

171. *Id.*

172. *Id.*

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

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

175. This is not the first time Uber has discovered that words on a page are not dispositive. The court dispensed with its arbitration clause first, allowing more drivers the opportunity to join the class. *See Rosenblatt & MacLean, supra* note 120.

presumptively Uber employees. If the case were to reach trial, a jury would use the same paradigm employed in *Alexander* to similarly march Uber through the right-to-control test and accompanying factors, ultimately determining which direction this pinhead balancing act tipped.

In an unsurprisingly turn of events, rather than reach trial in June 2016 as scheduled, the parties agreed to a settlement.¹⁷⁶ “Uber has agreed to pay \$84 million, plus an additional \$16 million contingent on an initial public offering (IPO) reaching one-and-a-half times Uber’s most recent valuation (i.e., about \$93.75 billion)” as settlement for the wages, expenses, and tips that the drivers claimed went unpaid because they were classified as independent contractors.¹⁷⁷ After three years of litigation, this settlement would leave the core issues unchanged: Uber could describe what type of company it was however it liked and Uber drivers would continue as independent contractors.¹⁷⁸

Yet on August 18, Judge Chen rejected the proposed settlement, concluding that it was “not fair, adequate, and reasonable” because it was a “substantial discount” on the value of the drivers’ claims.¹⁷⁹ And so the case marched forward.¹⁸⁰ As Uber hunts a settlement that will not disturb its operating model, Liss-Riordan’s team also seeks a settlement agreement to preserve the large number of drivers currently involved in the suit.¹⁸¹ Despite Judge Chen rejecting the settlement agreement, even he agreed that “[s]everal factors pointed in favor of employment status” and “several

176. *O’Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4400737, at *1-2 (N.D. Cal. Aug. 18, 2016) (order denying plaintiffs’ motion for preliminary approval).

177. *Id.* at 4. Judge Chen also rejected this settlement agreement for the Massachusetts Uber class action in the same order. *Yucesoy v. Uber Techs., Inc.*, No. 15-cv-00262-EMC (N.D. Cal. Aug. 18, 2016) (order denying plaintiffs’ motion for preliminary approval).

178. *O’Connor*, 2016 WL 4400737, at *10; *Growing and Growing Up*, UBER NEWSROOM (Apr. 21, 2016), <https://newsroom.uber.com/growing-and-growing-up/>. Perturbed by the settlement amount and unchanged driver classification, drivers and counsel representing individual class members spoke out against the lawyer at the helm of the class action, Shannon Liss-Riordan, taking aim at her fee. Aarti Shahani, *Under Pressure, Lawyer For Uber Drivers Slashes Her Fees*, NPR (June 14, 2016), <http://www.npr.org/sections/alltechconsidered/2016/06/14/482041499/under-attack-lawyer-rep-ing-uber-drivers-slashes-her-fees>. While Liss-Riordan’s legal team was permitted to seek up to twenty-five percent of the settlement, \$21 to \$25 million, Liss-Riordan reduced the fee request to only \$10 million. *O’Connor*, 2016 WL 4400737, at *4.

179. *O’Connor*, 2016 WL 4400737, at *14.

180. *Uber Lawsuit*, LICHTEN & LISS-RIORDAN, P.C., <http://uberlawsuit.com> (last visited Oct. 13, 2016). As of November 18, 2016, the case was stayed pending Uber’s appeals regarding the arbitration clause issue. *Id.*

181. Dan Levine & Heather Somerville, *U.S. Judge Rejects Uber’s Driver Expenses Settlement*, REUTERS (Aug. 18, 2016), <http://www.reuters.com/article/us-uber-drivers-lawsuit-idUSKCN10T2CK>.

factors favored independent contractor status”¹⁸² If the case were to be placed before a jury, the judge wrote, the outcome “cannot be predicted with any certainty.”¹⁸³

B. *Cotter v. Lyft, Inc.*

Lyft drivers have been just as busy as Uber drivers, forming a class and challenging their “independent contractor” classification in the Northern District of California.¹⁸⁴ And the Northern District again denied summary judgment to both plaintiff and defendant.¹⁸⁵ However, unlike Judge Chen’s order denying summary judgment, Judge Vince Chhabria explicitly noted that the Lyft model did not fit either employee or independent contractor classification.¹⁸⁶ Lyft’s drivers were not really either—thus, another California jury would hear a mixed bag of “great consequence”¹⁸⁷ on employment status.¹⁸⁸

Lyft uses the same business model as Uber, complete with the same purposeful freedom for its drivers while demanding certain minimum quality standards.¹⁸⁹ While Lyft could be analyzed all on its own, the competing visions present in the Uber lawsuit run through the Lyft lawsuit as well.¹⁹⁰ Not unlike Kalanick’s goals for Uber, Lyft CEO Logan Green believes that millennials will not see a reason to buy cars within five years and the on-demand ride model will be affected by the shift.¹⁹¹

On a practical level, Lyft drivers use their own vehicles and set their own hours, but Lyft also unilaterally sets how much Lyft will retain from each ride.¹⁹² Additionally, Lyft drivers are “central, not tangential, to Lyft’s

182. *O’Connor*, 2016 WL 4400737, at *10.

183. *Id.*

184. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015).

185. *Id.* at 1070.

186. *Id.* at 1069.

187. *Id.*

188. *Id.* at 1081.

189. *Id.* at 1071.

190. *Cotter*, 60 F. Supp. 3d at 1078. Running parallel to Uber’s “Everyone’s Private Driver” catchphrase, Lyft markets itself as “Your friend with a car.” *Id.* at 1070.

191. Nathan McAlone, *Here’s Why the President of Lyft Thinks Most Millennials Will Abandon Car Ownership in the Next Five Years*, BUSINESS INSIDER (July 8, 2015), <http://www.businessinsider.com/lyft-president-most-millennials-wont-own-car-in-five-years-2015-7>.

192. *Cotter*, 60 F. Supp. 3d at 1070-71.

business.”¹⁹³ Notably, Lyft controlled how many drivers can log onto the app to provide rides at any given time.¹⁹⁴ A driver may simply tap to open the app on her smartphone, but Lyft could restrict the driver’s access if it deemed enough drivers were logged into the app.¹⁹⁵

The ultimate question here is also that of vision. The issue is whether Lyft’s control of the drivers appears to the jury to lean more classically employee-employer relationship or if the jury chooses to see a broader vision for the company. In Judge Chhabria’s words, “As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes.”¹⁹⁶

Mirroring the California Uber class action, as of August 2016, a jury will not have to try to fit Lyft’s model into either round hole, because Lyft and the class reached a settlement agreement.¹⁹⁷ Lyft retained its independent contractor classification in exchange for paying \$27 million to the members of the class.¹⁹⁸ Unlike Judge Chen rejecting the parties’ settlement agreement, Judge Chhabria granted preliminary approval of the settlement agreement in July and scheduled a fairness hearing for December 2016.¹⁹⁹ On December 1, Judge Chhabria indicated that, while he is likely to approve the settlement, further notice to class members was required.²⁰⁰ Like the proposed Uber settlement,²⁰¹ this settlement punts the question of how the drivers should be classified, if at all, in favor of paying a class that could range upwards of 100,000 members who provided a Lyft ride in California within the applicable timeframe.²⁰²

193. *Id.* at 1069.

194. *Id.* at 1071.

195. *Id.*

196. *Id.* at 1081.

197. *COTTER V. LYFT, INC.*, No. 3:13-cv-04065-VC, 2016 WL 3561742, at *1 (N.D. CAL. JUNE 23, 2016) (ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT); JOEL ROSENBLATT, *LYFT’S \$27 MILLION ACCORD WITH DRIVERS WINS COURT APPROVAL*, BLOOMBERG TECHNOLOGY (JUNE 23, 2016), [HTTP://WWW.BLOOMBERG.COM/NEWS/ARTICLES/2016-06-23/LYFT-S-27-MILLION-SETTLEMENT-WITH-DRIVERS-WINS-COURT-APPROVAL](http://www.bloomberg.com/news/articles/2016-06-23/lyft-s-27-million-settlement-with-drivers-wins-court-approval).

198. *Cotter*, 2016 WL 3561742, at *4; Rosenblatt, *supra* note 197.

199. *Cotter*, 2016 WL 3561742, at *5.

200. *Lyft Driver Lawsuit*, GARDEN CITY GROUP, LLC, <http://www.lyftdriverlawsuit.com/faq.php?search=hearing> (last visited Dec. 10, 2016).

201. *O’Connor v. Uber Techs., Inc.*, No. 13-cv-03826-EMC, 2016 WL 4400737, at *6 (N.D. Cal. Aug. 18, 2016).

202. *Cotter*, 2016 WL 3561742, at *1.

C. Beyond Transportation Network Companies

While Uber has joined the property transportation space in addition to human transportation,²⁰³ other sharing economy companies sprouted to tackle the property transportation arena. Regardless of which company carries groceries, or documents, or gifts, or coffee, each faces the same question of employment status. In the wake of the *Alexander* decision, and general uncertainty as to how the many courts deciding the question of employment status will rule, at least one budding sharing economy company bowed out of existence. Three companies that present helpful examples for applying the *Alexander* test outside of the Uber space are Postmates, Instacart, and the now-defunct Homejoy.

Generally speaking, Postmates, Instacart, and others straddle the line between being a solely parcel delivery company, like FedEx, and a human transportation company like Uber or Lyft, because they deliver run-of-the-mill packages and services in cities across the United States.²⁰⁴ Rather than being focused on bulk package delivery or long-haul shipping, these companies make 7-11 runs, fight the lines at Wal-Mart, and even deliver your Starbucks on demand.²⁰⁵ Like Uber or Lyft, the couriers use their own vehicles (or bikes), set their own hours, and choose when and where they will make deliveries to customers.²⁰⁶ However, the overarching company maintains and provides the platform that generates the connections, sets the thresholds for becoming a courier, and monitors each transaction through the platform.²⁰⁷ The appeal of a uniform brand, reliable app, and less random service provider may draw both worker and customer to these companies, but it also places the company facilitating the connections in the crosshairs of the roiling debate over whether the workers are independent contractors or employees.

Plaintiffs Sherry Singer and Ryan Williams, through Liss-Riordan's legal team, filed a complaint in the Northern District of California in March 2015, claiming that Postmates violated both the FLSA and the California Labor Code by misclassifying Postmates' couriers as independent

203. See UBER EATS, <http://ubereats.com/eats/dc/> (last visited Jan. 25, 2016).

204. *About Postmates*, POSTMATES, <https://about.postmates.com/> (last visited Nov. 1, 2015); INSTACART, <https://www.shoppers.instacart.com/> (last visited Nov. 1, 2015).

205. POSTMATES, *supra* note 204; INSTACART, *supra* note 204.

206. POSTMATES, <https://postmates.com/apply> (last visited Sept. 25, 2016); INSTACART, *supra* note 204.

207. POSTMATES, *supra* note 204; INSTACART, *supra* note 204.

contractors.²⁰⁸ The first *Alexander* hurdle would not be difficult for the putative plaintiffs to clear: the couriers supply a service, or a benefit, to the company.²⁰⁹ Without couriers, connections between consumers and everyday items would not be made. According to the *Singer* complaint, “without the couriers, Postmates’s business would not exist.”²¹⁰

The vision question is also less in play here than regarding Uber or Lyft, because the mission appears to be limited to providing convenience in receiving normal packages. Yet, at a bare minimum, advertising and recruiting rest on the premise of *freedom* in managing one’s own work.²¹¹ Nevertheless, the fight will again boil down to who has the right to control the package delivery process and the additional indicia of worker status.

Some sharing economy companies will not wait to see how the Northern District of California, or possibly further into the future the Ninth Circuit, rules on the issue of employment status. Homejoy, the sharing economy start-up focused on sourcing home cleaning services through its smartphone app, closed its doors just months after the summary judgment ruling.²¹² Homejoy attributed its closing at least partially to the *Alexander* ruling.²¹³

On the other hand, Instacart decided to preemptively offer employee status to a portion of its shoppers who operate in-stores in large U.S. cities.²¹⁴ The company stated that it recognized the need for more monitoring of its shoppers and that some shoppers would find the

208. *Singer v. Postmates, Inc.*, No. 15-1284 (N.D. Cal. Mar. 19, 2015). Shannon Liss-Riordan has also filed lawsuits against Washio, Shyp, Homejoy, and Caviar that are each sharing economy companies specializing in delivering laundry, shipping packages, cleaning homes, and delivering food, respectively. Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation Of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 588 (2016); Biz Carson, *The Lawyer Fighting for Uber And Lyft Employees Is Taking the Fight to Four More Companies*, BUSINESS INSIDER (July 1, 2015), <http://www.businessinsider.com/postmates-shyp-and-washio-hit-with-legal-action-from-contractors-2015-7>. These cases are ongoing as of December 2016.

209. POSTMATES, *supra* note 204; INSTACART, *supra* note 204.

210. *Singer*, No. 15-1284 (N.D. Cal. Mar. 19, 2015).

211. POSTMATES, *supra* note 204, INSTACART, *supra* note 204.

212. Tracey Lien, *Homejoy Shuts Down Amid Lawsuit Over Worker Misclassification*, L.A. TIMES (July 17, 2015), <http://www.latimes.com/business/technology/la-fi-tn-homejoy-shuts-down-20150717-story.html>.

213. *Id.*

214. Davey Alba, *Instacart Shoppers Can Now Choose to Be Real Employees*, WIRED (June 22, 2015), <http://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees/>.

additional stability attractive.²¹⁵ Additionally, Shyp, a company that picks up, ships, and delivers packages on demand, reclassified its workers as employees in July 2015.²¹⁶ The company stated that the move was an investment in its relationship with its couriers.²¹⁷ Moreover, while the company estimated “hundreds of people” work for it (declining to offer specific numbers) and it is expanding throughout the United States in cities, it was still small enough to make the shift without dramatically altering its operations.²¹⁸ The reclassification may have been the best investment the company could make: the same week of the announcement of reclassification, a complaint had been filed against the company alleging worker misclassification.²¹⁹ While these reactions are not dispositive of how potentially destructive a jury verdict (or several jury verdicts) in favor of employee status could be, it is indicative of how closely sharing economy companies are monitoring the courts deciding the fate of their business model.

V. RECOMMENDATIONS: CARVING OUT A SPACE FOR THE SHARING ECONOMY

One might be tempted to ask, as this author has, why not wait and see how a jury handles the mixed bag factors analysis when applied to one of the sharing economy company cases? Or why not wait and see if the market will shift away from the sharing economy or replace drivers altogether with autonomous vehicles? However, this review and application are warranted regardless of how these cases end or the next few years unfold, for no more reason than the fact that the *S.G. Borello & Sons, Inc.* test employed in *Alexander* is an outdated approach to a burgeoning business model. Yet states continue to apply an identical or slightly modified test and the federal authoritative agency has only broadened the definition of “employee.” The companies are balancing near the middle of the twentieth century weighing system. The traditional bright line (or perhaps smudged line) of right-to-control is an exercise in squishing a square peg into a round hole.

Moreover, are these really facts that should be dedicated to a jury, judge, or to an appellate panel? Judges Chen and Chhabria were correct: it is a mixed bag as to the factors of control and, particularly, vision of the

215. *Id.*

216. Davey Alba, *Shyp Makes Couriers Employees Before It's Too Big to Change*, WIRED (July 1, 2015), <http://www.wired.com/2015/07/shyp-makes-couriers-employees-big-change/>.

217. *Id.*

218. *Id.*

219. *Id.*

company. Thus, it is exactly the type of case traditionally dedicated to jury decision—but only because Uber and Lyft, and their sharing economy counterparts, *purposefully* created this situation. They chose a model that balances the need to provide consistent services with as much freedom for its drivers as possible.

In the Uber class action, the class representatives themselves joined the ranks of Uber drivers as side jobs,²²⁰ using Uber's model for the freedom it purportedly provided. Thus, a jury may be presented with a scale that is barely leaning one way or the other²²¹ and will be able to tip the scales for an entire business model as the sharing economy watches with baited breath. Perhaps this is the appeal of the jury in the American system. But, maybe, it is also what topples innovation.

Zooming away from the outdated legal test, the years of litigation ending in settlement agreements or endless appeals also do little to progress the law or protect workers' rights in this space. Even assuming *arguendo* that a settlement or jury verdict would eventually lead to better protected sharing economy workers, the resources that are shifted in the meantime to lawyers and the court system offset at least some of this benefit.

As seen previously, this test is already reverberating through the sharing economy,²²² particularly when paired with the even broader standard at the federal level.²²³ Perhaps it is the right test for companies still operating under the same assumptions that were present when the tests were crafted, but there may be a less burdensome approach for the future—one that does not leave the workers out in the cold. Initially, a broader lens approach to reshaping the current classification tests would be helpful. However, carving out a temporary safe space for the sharing economy to grow or fail on its own and to demonstrate whether they are technology companies or something else may be more reasonable than a mad dash to fix workers' status through class actions or legislation.

A. A Classification of Their Own

“These statutes are designed to protect workers,” wrote Judge Chhabria.²²⁴ The judge was referring to the statutory minimum protections

220. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135-36 (N.D. Cal. 2015).

221. O'Connor v. Uber Techs., Inc., No. 13-cv-03826-EMC, 2016 WL 4400737, at *10 (N.D. Cal. Aug. 18, 2016).

222. Lien, *supra* note 212.

223. WEIL, *supra* note 98.

224. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015).

that California law requires employers to provide for employees.²²⁵ The principle of protecting workers indelibly marks the employment status conversation in every state. The United States has grappled with this principle and, more specifically, how best to execute it for nearly one hundred years.²²⁶ In the past year, the sharing economy has become ripe ground for political stunts; politicians have endorsed or critiqued the sharing economy business model as either American ingenuity or an unstable option for hardworking people.²²⁷ Today, according to the 2015 1099 Economy Workforce Report, thirty-four percent of the American workforce has a freelance job, and that percentage is set to continue growing.²²⁸ The approach to protecting those charged with handling the simplest sharing economy tasks will inevitably influence whether the sharing economy ultimately shifts Americans' approach to basic tasks, blends in with current tools, or drifts away—even if it is only one moving piece in a puzzle of factors.

Before proposing a solution, it is appropriate to pause and note the basic question: who to protect and how? This question needs to be answered anew in the context of the sharing economy. While this Note is not an exhaustive analysis of all sharing economy companies, reviewing the Uber experience is useful to understand the different identity of sharing economy workers.

Uber drivers are not uniformly like the FedEx drivers who enter a contract with FedEx for full-time employment as their primary source of income.²²⁹ Some are certainly using Uber for full-time employment, but many others are college and graduate students, freelancers, small business owners, retirees, or people with multiple part-time jobs.²³⁰ In a survey of Uber drivers commissioned by Uber, Benenson Strategy Group found that seventy-three percent of the 601 respondents wanted a job where they could

225. *Id.*

226. *Compliance Assistance: Celebrating 75 Years of the Fair Labor Standards Act: A Working Papers Series*, UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, <http://www.dol.gov/whd/flsa/75event/index.htm> (last visited Nov. 20, 2015).

227. Micheal Barbaro & Ashley Parker, *Candidates Will Hail A Ride, But Not Necessarily the Uber Labor Model*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/Us/Politics/Presidential-Candidates-Hail-Uber-Rides-Doubts-On-Model.Html?R=0>.

228. Alison Griswold, *Young Twentysomethings May Have a Leg Up in the 1099 Economy*, SLATE (May 22, 2015), http://www.slate.com/blogs/moneybox/2015/05/22/_1099_economy_workforce_report_why_twentysomethings_may_have_a_leg_up.html; see also REQUESTS FOR STARTUPS, 2015 1099 ECONOMY WORKFORCE REPORT (MAY 20, 2015), <https://gumroad.com/l/rfsreport>.

229. *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 990 (9th Cir. 2014).

230. Hall & Krueger, *supra* note 153, at 10-11.

choose their own schedules and be “your own boss.”²³¹ In 2015, Uber Technologies’ Jonathan Hall undertook, in partnership with Princeton University’s Alan Krueger, to canvas just who drives for Uber.²³² While assessing the Uber driving force, the researchers noted that the freedom Uber drivers enjoy in choosing when, where, and how often to work creates a wrinkle in determining just how many drivers there are at any given time.²³³ Unlike the predominant legal analysis, these researchers set out to determine what motivates individuals to become Uber drivers.²³⁴ Critical to any assessment of employment status is one result their research uncovered:

[A] tremendous amount of sorting takes place in the sharing economy, and, by dint of their backgrounds, family circumstances, and other pursuits, Uber’s driver-partners are well matched to the type of work they are doing. Notably, Uber’s driver-partners are attracted to the flexible schedules that driving on the Uber platform affords. The hours that driver-partners spend using the Uber platform can, and do, vary considerably from day to day and week to week, depending on workers’ desires in light of market conditions. In addition, most driver-partners do not turn to Uber out of desperation or because they face an absence of other opportunities in the job market – only eight percent were unemployed just before they started working with the Uber platform – but rather because the nature of the work, the flexibility, and the compensation appeals to them.²³⁵

More specifically, even though Uber drivers have been compared to other delivery drivers and most pointedly to taxicab drivers,²³⁶ “Uber’s driver-partners are spread throughout the age distribution, mirroring the workforce as a whole rather than taxi drivers or chauffeurs.”²³⁷ Also, rather than an older, minority, or less educated workforce, nineteen percent of Uber drivers were found to be less than thirty years old.²³⁸ Uber drivers were also more likely to identify as White Non-Hispanic than other races, and

231. *The Driver Roadmap Where Uber Driver-Partners Have Been, And Where They’re Going*, BENENSON STRATEGY GROUP (2014), <http://www.bsgco.com/insights/uber-the-driver-roadmap>.

232. Hall & Krueger, *supra* note 153, at 1.

233. *Id.*

234. *Id.*

235. *Id.* at 2.

236. *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141-42 (N.D. Cal. 2015).

237. Hall & Krueger, *supra* note 153, at 7.

238. *Id.*

forty-eight percent of Uber drivers have a college education or higher.²³⁹ Indeed, seven percent of Uber's drivers are current students, "mostly taking classes toward a four-year college degree or higher."²⁴⁰

Beyond driver demographics, Uber drivers also fit into three distinct categories regarding employment: "driver-partners who are partnering with Uber and have no other job (38 percent), driver-partners who work full-time on another job and partner with Uber (31 percent), and driver-partners who have a part-time job apart from Uber and partner with Uber (30 percent) (Q23)."²⁴¹ However, despite the variety of employment statuses outside of Uber, seventy-four percent of respondents stated that a motivation for driving for Uber was to supplement income sources that were instable or insecure.²⁴² Thus, the drivers cannot be uniformly categorized as traditional employees or independent contractors, but are instead distinguished into three diverse groups reflected in why they choose to join Uber. Even though researchers—admittedly connected to Uber—recognize the needs and numbers of the drivers are constantly in flux, a jury will be tasked with classifying a diverse class of drivers into an employment status that will, presumably, best match what their relationship with Uber was years ago.

The Uber numbers alone show that the individuals driving for Uber are not uniformly seeking a full-time job as a driver, nor are they uniformly dependent on Uber. The drivers themselves are a mixed bag as to how much each depends on Uber for income, steady work hours, or other motivations. Thus, the question becomes apparent: do they fit either of the traditional employment status molds? Should they be forced to fit?

Given the mixed motivations and needs of Uber drivers, a third classification would be appropriate for these workers who are not seeking stability or protection, but rather a way to tap into their underused resources, which is the founding principle of the sharing economy. Lyft executives have recognized this need; rather than simply insisting on an independent contractor classification, company representatives have acknowledged that America faces "the same issues" it did when it passed minimum wage guarantees, but that a "third way" is needed.²⁴³ Lyft acknowledged that America has minimum wage laws and a host of other

239. *Id.* at 9.

240. *Id.*

241. *Id.* at 10.

242. *Id.* at 11.

243. Gillian White, *In the Sharing Economy, No One's an Employee*, THE ATLANTIC (June 8, 2015), <http://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/>.

employer requirements to protect workers for a reason—“[t]here are a whole lot of people who are trying to pay their bills, pay their rent, and put food on the table,” as Liss-Riordan argued—but that not all workers should be viewed as having the exact same challenges and needs that could be solved by checking one of two classification boxes.²⁴⁴

Recognizing that there may be another reason to contract with a company than economic dependence on it, the D.C. Circuit and the MDL court moved toward a third approach focused on entrepreneurial opportunities.²⁴⁵ While not creating a new status for workers, this test would at a minimum consider the variety of reasons *why* an Uber or Lyft driver, or Instacart shopper, or Postmate worker joined the platform and which traditional classification best facilitates those goals.²⁴⁶ This would provide an alternative to stalling the analysis at the difficult right-of-control issue.

Whether the focus is on entrepreneurial opportunities or simply on drawing out the motivations and needs of the workers, a new classification test would consider more than just who controls the terms and the instrumentalities of work. “Entrepreneurial opportunities” is certainly the current test that diverges most clearly from a broad “services to the employer” or “benefit to the employer” approach, instead looking into why workers chose to contract with the hiring party in the first place.²⁴⁷

Moreover, a test that considered the workers’ individualized situations would also diffuse the pile of class action lawsuits based on the premise that all of the workers share the commonality²⁴⁸ that their work is integral to the sharing economy company. The business model itself concedes that workers are integral to the platform’s existence; without underused resources, whether property or time, the start-ups would not have become ubiquitous within American culture so quickly. A test better suited to today’s climate would place less emphasis on the connector and more emphasis on why the worker is willing to help make those connections.

While a new threshold question or factor may be useful, a different classification may be necessary to avoid holdings that workers are presumptively employees. Admittedly, this, like many other potentially effective solutions, is not a comfortable fit; molding a new classification or

244. *Id.*

245. *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 988 (9th Cir. 2014); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

246. *Id.*

247. *FedEx Home Delivery*, 563 F.3d at 503.

248. See *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *25-30 (N.D. Cal. Sept. 1, 2015).

test for these workers may create a gray area of legal protection. Yet it is worth considering whether the tests developed when America first tackled the concept of worker protections—during the Great Depression era, when Superman was brand new, the Volkswagen Beetle had just been developed, and World War II loomed—may not be the correct fit for a new generation of companies.

B. Temporary Safe Space Approach

The time is ripe to reassess the understanding of the sharing economy business model and its relationship to current employment status tests, but it may also be wiser to refrain from imposing a label on a business relationship in a race to solve our society's economic challenges.²⁴⁹ While worker protections are necessary, freezing the legal onslaught may offer the best opportunity for the sharing economy to either provide for workers on its own or allow it to move back out of the on-demand space.

As a part of their research, Hall and Krueger recognized that the “United States surely has serious labor market challenges as a result of rising wage inequality and stagnant middle class wage growth, but these problems appear to be independent of the growth of contingent and alternative working relationships.”²⁵⁰ In other words, alternative working relationships are not the only, or even the primary, antagonist of labor market challenges. Some of the central arguments in the debate over who to protect and how to protect them focus on the rise of income insecurity and income inequality, but the sharing economy may not be mature enough to regulate those income issues effectively.²⁵¹

A simple comparison to the current growth of the sharing economy is the nascent days of the Internet. One response to uncertainty and explosive growth of the Internet was to carve out room for its growth without state and local taxation for using the Internet.²⁵² The Internet Tax Freedom Act was passed in 1998 and was subsequently extended for the better part of two decades.²⁵³ This Act gave the Internet space to burgeon and find its place in the average American household without undue pressures early in its consumer use.²⁵⁴

249. See Hall & Krueger, *supra* note 153, at 6-7.

250. *Id.*

251. *Id.* at 6.

252. JEFFREY M. STUPAK, THE INTERNET TAX FREEDOM ACT: IN BRIEF 1-6 (Congressional Research Service 2016), <https://www.fas.org/sgp/crs/misc/R43772.pdf>.

253. *Id.*

254. *Id.*

While in 2016 this issue is rife with federalism concerns, tax considerations, and inequitable treatment of Internet services issues, its original purpose was to avoid burdensome taxation of a tool foreign to most Americans and one of the wildest disruptions of the twentieth century. This safe space for Internet growth is also an example of relatively drastic action to avoid adverse consequences in a growing arena. Today, the idea that the Internet needs shielding and protecting may be far less potent than in 1998, but modern society has had the opportunity to see it explode.

Another safe space approach, albeit without freezing taxation, may be a saving grace to the sharing economy. While the sharing economy problem is fundamentally different than the first days of the internet in that it is an employment classification question, the same premise applies: a too hasty or ill-considered move could alter the current use and future evolution of the technology backing the sharing economy. In fact, a de facto “safe space” could have been carved out when the sharing economy class actions began in 2015: the Northern District of California judges in the Uber and Lyft class actions could have failed to find the requisite commonality among thousands of individual drivers from different cities, counties, and economic conditions who drove at diverse times, in a variety of places, and in differing amounts.²⁵⁵ Litigation for the rights of workers may have been far less appealing in a one-by-one approach to reaching judgments.

This safe space might be as informal as hesitation before granting class certification, as grassroots-born as a lobbying effort to cease labeling sharing economy workers in state houses, or as formal as a federal law specifically addressing sharing economy worker classification. The third option is incredibly unlikely due to the current DOL approach to worker classification.²⁵⁶ Yet as the sharing economy grows, a principled stay of action would be one approach to avoid juries or settlements determining whether the companies will continue to grow, fail, and shift more clearly into one of the traditional approaches as they evolve.

VI. CONCLUSION

The discussion of how to classify workers has wound its way into a new century. The Ninth Circuit set the stage for the upcoming sharing economy trials with its 2014 *Alexander* decision, applying the factor-based right-to-control test to classifying workers. Yet applying the test to the pending sharing economy cases reveals that neither independent contractor nor

255. See *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *25-30 (N.D. Cal. Sept. 1, 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

256. WEIL, *supra* note 98.

employee classification genuinely fits the sharing economy workers. The new business model purposefully straddles the intersection between control and freedom, facilitating personal connections while imposing quality control mechanisms. In the years to come, the sharing economy model will be shaped by federal and state law decisions, using the twentieth century tests to alter a decidedly different approach to business.

Thus, the fundamental question of who is protected by employment status laws and why must be considered in new light. Despite the human desire for bright lines, courts and legislators moving forward should begin to shake free of the two-classification system to consider the worker's goals and the need for flexibility. More far-reaching solutions may be needed to quell the rapid fire litigation aimed at pushing these companies into a clear-cut contractor or employee scenario, allowing the sharing economy to either continue to grow or fizzle out on its own. Regardless, it appears to be increasingly unlikely that a new approach will be used as juries are empaneled that could fundamentally alter this new model before many of its largest companies reach their tenth birthday.