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AB-5 and Drive: Worker Classification in the Gig Economy

Kai Thordarson*

ABSTRACT

Gig-economy platforms such as Uber and Lyft rely on their drivers as the backbone of their ride-sharing operations. These drivers, typically classified as independent contractors, are in a state of regulatory flux regarding their worker classification. Due to the novelty of the worker-employee relationship in gig-economy platforms, these drivers exist in a regulatory gray area. California, with its very recent (and very controversial) Assembly Bill 5, has changed its operative worker-classification formulation to the worker-friendly “ABC” test in an attempt to statutorily modernize the burgeoning industry. In addition to analyzing the range of tests and their effect on the gig industry, this note will examine both the potential for the addition of a third “hybrid” worker classification category and California’s judicial evolution from the common law “Right to Control” test to the “ABC” test to determine if it is a trend or an aberration.

INTRODUCTION

Uber and Lyft are app-based transportation platforms that allow smartphone users to connect to and travel with nearby drivers.1 Rather than paying the driver after the trip is completed, riders store their credit card information on the app, and their credit card is immediately charged once the ride is completed.2 Riders are offered an upfront price, consisting of a base

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charge and a cost per mile and cost per minute.3 Both platforms have algorithms that increase prices when the demand for drivers exceeds the number of available drivers on the road.4 Uber and Lyft take roughly 22 and 27 percent of the total trip fare, respectively, and the rest is distributed to the driver.5

Before they can start accepting trip requests, Uber and Lyft drivers must apply and be approved online.6 Uber and Lyft drivers receive approximately 70% of the fares paid by passengers.7 Drivers are drawn to ride-sharing platforms primarily because of their flexibility: drivers use their own cars, choose their own hours and territory, and need not wear a uniform.8 Both Uber and Lyft accentuate the freedom that their platform provides, boasting that drivers are given the opportunity to “be their own boss.”9 Furthermore, the barriers to entry are low: UberX drivers are required to merely (1) maintain a valid driver’s license and have proof of insurance, (2) have at least one year of driving experience in the United States, (3) meet the minimum age to drive in the city, and (4) use an eligible four-door vehicle.10 Uber has even abandoned its requirement that drivers accept at least eighty percent of their trip requests to maintain employment.11 Owing in part to the flexibility and accessibility of the program, most Uber drivers have either a

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7. Lekach, supra note 5.
full-time or part-time job apart from Uber. Similarly, ninety percent of Lyft drivers work fewer than twenty hours per week.

Uber and Lyft drivers are hired as independent contractors, and Uber has gone as far as claiming that they are a “technology company” and not a “transportation company.” In their Guidelines for Third Party Data Requests, Uber describes itself as a “technology company that has developed an app that connects users (riders) with third party transportation providers.” In one sense, this characterization can be seen as straightforward and reasonable. After all, it could be argued that Uber and Lyft merely facilitate a transaction between consumer and supplier, and the supplier has a wide degree of discretion concerning their work. However, courts have been reluctant to accept this interpretation. In 2015, the California Northern District Court rejected Uber’s argument that it was merely a “technology company,” pointing to the fact that “Uber does not simply sell software; it sells rides.” Moreover, Uber gains its revenues from customers requesting rides, not on the distribution of its software.

Courts have also pushed back against the notion that Uber and Lyft driver’s freedom to choose their hours indicates a lack of control by the companies, stating that the more relevant inquiry is the degree of control that the platform can exercise while drivers are on duty. Ultimately, gig economy platforms’ unique business model as facilitators between consumers and suppliers provides uncertainty when fit into the current worker classification framework, an uncertainty that courts have had to grapple with since the inception of ride-sharing.

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12. Jonathan V. Hall & Alan B. Krueger, An Analysis of the Labor market For Uber’s Driver-Partners in the United States (Princeton Univ., Indus. Relations Section, Working Paper No. 587, 2015) (quoting that A December 2014 survey found that, “Uber’s driver-partners fall into three roughly equal-sized groups: 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].”).


17. O’Connor, 82 F. Supp. 3d at 1141.

18. Id.

19. Id. at 1152.

The 2010s saw a dramatic rise in the popularity of the so-called “gig” (or “on-demand”) economy. Similar to the social media explosion of the decade before, apps like Uber and Lyft evolved from Silicon Valley start-ups to industry giants, breathing life into a brand-new sector of the economy. Their employees, known as “gig workers” because of their unorthodox and somewhat informal relationship with their employer, are in a tenuous position regarding their legal classification as workers.

Employee classifications determine whether workers have access to the protections of labor and employment laws, such as minimum wage, the right to organize, and unemployment compensation.21 According to the Department of Labor, “employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds.”22 The high-profile ride-hailing platform Uber classifies its workers as “independent contractors” rather than “workers,” meaning that they do not have access to such benefits.23 Uber claims that workers pick their service because “they love being their own boss,” but many employees find that the denial of benefits has relegated them to a much lower position.24 In courtrooms across America, legal disputes continue between drivers and Uber concerning worker-classifications and their resultant benefits.25

Importantly, this area of jurisprudence affects not only Uber and Lyft drivers, but workers directly involved in the tech industry as well. Increasingly, computer-based work has been subject to the “crowd-work” or “crowd-sourced” model, wherein complicated digital work is broken down and distributed to employees piecemeal so that issues can be resolved with greater efficiency.26 Like Uber drivers, crowd-sourced employees are typically classified as independent contractors, though the scope of their employment and their relationship with their employer varies.27 Other lines of work will be affected profoundly by worker-classification law as well,

24. Id. at 384.
25. Cherry & Aloisi, supra note 21, at 646.
27. Malik, supra note 6, at 1751.
such as independent truckers and freelance writers. Though the primary focus of this paper lies with the workers in the on-demand economy, it is important to also consider the effects of worker-classifications in crowd-sourced and other models.

This paper aims to produce a comparative analysis of worker-classification employment tests that govern the gig economy by analyzing economic, social, legislative, and judicial trends towards recognizing gig workers as employees rather than independent contractors and the consequent far-reaching implications for both platforms and workers in the industry. Furthermore, it will feature both an examination the possibility of a third “hybrid” worker classification as well as a study of California’s transition from the common law to the ABC test.

FROM “CONTROL” TO ABC: THE RANGE OF TESTS

The “Right to Control” Tests

Common Law Agency

The Common Law Agency “Right to Control” test finds its origins in the Restatement (First) of Agency. The motive for discerning worker status in agency law emerged out of the doctrine of respondeat superior. In order to define when an employer had vicarious liability for the tortious acts of its agents, the American Law Institute adopted a test that was reflective of common law practices in 1933. Section 220 of the Restatement defined a servant as “a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other’s control or right to control.” This rubric was supplemented by a flexible ad hoc multifactor test, ostensibly to guide courts in determining the existence of a relationship that is “not capable of exact definition.” The American Law Institute listed the following factors for consideration:

30. Id. at 126.
31. RESTATEMENT (FIRST) OF AGENCY § 220 (AM. LAW INST. 1933).
32. Id.
33. Id.
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; and

(i) whether or not the parties believe they are creating the relationship of master and servant.

Not all factors must be met, and no formula exists as to how much weight to be given to each factor, or how each factor should be balanced. The most determinant factor, however, came to be the employer’s control over the nature and performance of the work.

Federally, the common law agency test enjoys wide adherence. With some slight variations, the test is used to determine “employee” status in ERISA, COBRA, ADA, USERRA, OSHA, NLRA and FLSA claims. Variations of the test are also utilized in a significant minority of states, including Texas, New York, and Florida.

35. Id.
However, the “Right to Control” test has received more than its fair share of criticism. Opponents of the test have noted that reliance on the control of the employer causes courts to base their opinions on easily measured, quantitative factors, resulting in a “mechanistic” and rigid analysis of the employment relationship.38 Furthermore, critics argue that the test places far too much weight on the formal employment relationship structure between an employer and a putative employee, rather than focusing on the reality of the arrangement.39 This encourages courts to collapse the wide range of possible employment relationships into one convenient category: independent contractor.40

A fundamental issue with determining worker classification based on employer control and formal employment relationship structure is that it creates an opportunity for employers to contort the terms and conditions of employment to restrict employment benefits to workers.41 The test unfairly benefits employers by limiting its analysis to only those factors which are evaluated from the employer’s perspective, leaving factors relating to the worker’s dependence on the employer completely out of the analytical framework.42

Furthermore, the common law agency test is outdated. With modern business models such as crowd-sourcing,43 factors such as whether the employer provides the “the instrumentalities, tools, and the place of work” have become meaningless.44 While these factors may have been relevant at the time of their inception, the rise in ‘telecommuting’ (working from a remote location) has rendered them anachronistic.45

Finally, there is a fundamental incongruence between the purposes for which the common law agency test was created and the purposes of the statutes to which it is now applied. Statutes creating employee benefits such as workers compensation and Title VII protection contain language that evinces a broad, remedial intent to encompass the overwhelming majority of the working population.46 In contrast, the common law agency test was

39. Id. at 84.
40. Id. at 85.
41. Id. at 86.
42. Id.
43. See Cherry, supra note 26, at 956.
44. Restatement (First) of Agency § 220(e) (Am. Law Inst. 1933).
46. See S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations, 48 Cal. 3d 341, 359 (1989); see Dowd, supra note at 38, at 86.
created in order to determine whether the hirer should be held vicariously liable for the injuries to third parties caused by a worker.\textsuperscript{47} In that context, the rubric of control is undoubtedly crucial, because the degree of control exercised by the hiring entity may justify the imposition of vicarious liability.\textsuperscript{48}

A great deal of legislation for the protection of employees in the 20th-century adopted the “independent contractor” distinction as an express or implied limitation on coverage, and either expressly or impliedly insert the common law “Right of Control” test in the statutory definition of “employ.”\textsuperscript{49} However, several state courts have decided that despite an express emphasis on “control” as the principle distinction between employee and independent contractor, statutes should still be read with a consideration of the remedial purposes of the statute.\textsuperscript{50} In a case interpreting Alaska’s Workmen’s Compensation Act, the Alaskan Supreme Court rejected the test, stating that it was “too narrow a criterion for determination of employee status in light of the rationale of compensation acts.”\textsuperscript{51}

The NLRA and Federal Statutory Interpretation

Federally, this mismatch in statutory purpose is attributable to both poor legislative drafting and Congressional reactionism. Federal cases involving the interpretation of New Deal social welfare legislation in the first half of the 20th century used statutory purpose as a primary touchstone in their analysis.\textsuperscript{52} In both \textit{Hearst} and \textit{Silk}, the Supreme Court was tasked with interpreting the term “employee” in both the National Labor Relations Act (“NLRA”) and the Social Security Act (“SSA”), respectively.\textsuperscript{53} In both cases, the Court was forced to engage in protracted discussion of statutory interpretation primarily because of circular, unhelpful statutory definitions.\textsuperscript{54} For both the NLRA and the SSA, the Court chose a definition of the term

\begin{quote}
\textsuperscript{47} Restatement (First) of Agency \S 220 cmt. b (Am. Law Inst. 1933).
\textsuperscript{48} Borello, 48 Cal. 3d at 350.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 352-53; See, e.g., Grothe v. Olafson, 659 P.2d 602, 605 (Alaska 1983) (“control of details” definition repealed in 1959).
\textsuperscript{53} Hearst, 322 U.S. at 122; Silk, 331 U.S. at 712.
\textsuperscript{54} See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (“definition of ‘employee’ as ‘any individual employed by an employer,’ 29 U. S. C. \S 1002(6), is completely circular and explains nothing’); see Silk, 331 U.S. at 711 (“Employment’ means ‘any service, of whatever nature, performed . . . by an employee for his employer, except . . . agricultural labor . . .’”).
\end{quote}
that reflected the broad, remedial purposes of the statute at issue, pointing out that the purported simplicity of a uniform application of the common law test was counterproductive.55

After the decisions in Hearst and Silk, Congress amended the statute to clarify that the common law agency test was the proper analytical framework for determining the meaning of “employee.”56 Between 1947 and 1949, the Republican-led Eightieth Congress took it upon itself to roll back New Deal labor and employment protections, seeking to contain union power and reprivatize collective bargaining.57 In the House Report detailing Congress’ opposition to the Supreme Court’s interpretation of “employee” in the NLRA in Hearst, the Court was accused of overreliance on the NLRB’s purportedly aggressively expansive definition of the term, stating that Congress had intended “employee” to be interpreted “according to all standard dictionaries,” meaning “someone who works for another for hire.”58

However, the legislative history of the NLRA, which predates the Eightieth Congress, suggests otherwise. During the House Debates before the NLRA was passed in 1935, the bill’s sponsor stated, “We are talking about all the working people of the country. We say that we want all workers to have the right to bargain collectively.”59 The drafters of the bill understood that modern business structures had evolved past the need for a simple employee-independent contractor distinction, and instead strove for a more adaptable test capable of consistent application.60 The House Report stresses that even workers with multiple employers or fewer than ten fellow employees should be afforded bargaining power, recognizing that, “in some industries, such as motion pictures and trucking, employee units of 3, 2, and even 1 are not at all uncommon.”61

Even the opponents of the NLRA at the time of its drafting did not take issue with the meaning of “employee” in the bill.62 James Emery, the General Counsel of the National Association of Manufacturers, opposed the bill during the Senate hearings but implicitly acknowledged that taxi workers would benefit as “employees” protected by the NLRA.63 Now, with help

55. Hearst, 322 U.S. at 122; Silk, 331 U.S. at 712.
56. Darden, 503 U.S. at 324-25.
60. Id.
61. Id.
62. Id. at 84.
63. Id.
from the passage of the Labor Management Relations Act, workers across the transportation industry, including taxi and FedEx drivers, are “independent contractors” under the NLRA.64

Despite the text of the NLRA and the legislative history indicating a resistance against the implementation of a patchwork plan for determining workers’ rights to organize and collectively bargain, the pro-business bent of the Eightieth Congress effectively precluded the right to organize for workers in the transportation industry.65 Now, the omission of a statutory definition of “employee” in congressional enactments can be read as legislative shorthand for the imposition of the common law agency test.66

The IRS “Right to Control” Test

The IRS common law variation of the “right to control” test, adopted in 1987, originally included twenty factors culled from examinations and rulings.67 Worker classification is important to the IRS because an independent contractor’s earnings are subject to a self-employment tax, whereas an employer must withhold income taxes and pay Social Security, Medicare taxes and unemployment tax on wages paid to an employee.68 In 2004, because of the difficulty of applying the abundance of factors and their waning relevance due to changes in business practices, the IRS opted for a modernized and more organized formulation.69 Instead of twenty free-floating factors, the test now groups evidence into three categories: behavioral control, financial control, and relationship of the parties.70 Though the categories simplify the test, each of the three categories contains several subfactors for courts to consider, leaving a total of thirteen possible factors for the court to analyze.71

64. Id. at 90.
65. Id. at 86. See Hearst, 322 U.S. at 123.
66. See, e. g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-740 (1989) (“[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981))).
69. Supra note 67.
70. Id.
71. I.R.S., BEHAVIORAL CONTROL, https://www.irs.gov/businesses/small-businesses-self-employed/behavioral-control, (“When and where to do the work, what tools or equipment to use, what workers to hire or to assist with the work, where to purchase supplies and services, what work must be performed by a specified individual, what order or sequence to follow..."
The behavioral control category refers to facts that show whether the employer has a right to control or direct the work in which the worker is engaged. The IRS is careful to point out that the business does not have to exercise control over the way the work is done, it need only have the right to exercise that control. The financial control category concerns whether the employer has a right to direct or control the financial and business aspects of the worker’s job, including the employer’s investment in equipment, unreimbursed expenses, and the method of payment. Finally, the type of relationship factor depends on both the business and worker’s perception of their relationship: the existence of employee-type benefits, the permanency of the relationship, and whether the services provided are a key activity of the business.

Unlike the ABC test, which in some states requires that freedom from control be contractually demonstrated, the IRS test focuses on the material facts and circumstances of the worker relationship itself and deemphasizes “the designation or description of the relationship by the parties.” For the type of relationship factor, the IRS clarifies that a written contract describing the relationship between the parties is relevant evidence, but a designation of independent contractor or employee status in a written contract is insufficient to determine worker status.
The ABC Test

A common formulation of the three-factor ABC test requires an employer to prove that the worker is: A) free from the control and direction of the employer, B) performs work that is outside the hirer’s usual business, and C) customarily engages in a separate and independent business or trade. Failing any one of the three factors means that the worker should be classified as an employee and the employer, depending on the jurisdiction, would be required to pay the state minimum wage, payroll taxes, worker’s compensation, disability, overtime and paid leave. Variations of the ABC test are present in more than thirty-eight states, most notably California, Massachusetts, and New Jersey. Most states limit the test’s application to specific areas, such as worker’s compensation or unemployment compensation.

Notably, the ABC test has the novel function of placing the onus on the employer to prove that an independent contractor relationship exists. The universal presumption against employers (which is part of the ABC formulation in all but two states that adhere to the test) provides more structure to the test in the sense that it requires an employer to prove the legitimacy of the employment relationship in both typical and atypical business structures. With the ABC test, courts no longer need to tailor their analysis to well-established business structures and can rely on the employer’s justification for the worker’s status. This has the additional beneficial effect of overreaching unconventional business structures that may have been created for the purpose of circumventing the law.

Finally, an across-the-board implementation of the ABC test would provide great advantages for states. Many states have a patchwork of separate tests for worker classification in different statutory areas, such as those governing claims and benefits, taxes, unemployment insurance, or workers compensation. Though this would require a federal acceptance of the ABC test, a uniform application of the ABC tests across all statutory

81. Pearce & Silva, supra note 45, at 27.
82. Ehisen, supra note 80.
83. Deknatel & Hoff-Downing, supra note 76, at 71.
84. Pearce & Silva, supra note 45, at 27.
85. Deknatel & Hoff-Downing, supra note 76, at 71.
86. Id. at 72.
87. Id. at 73.
areas would simplify compliance for employers. The shift to systematic implementation of the ABC test represents not only a shift to a more simplified and fairer test, but also a unified and consistent standard across all relevant law.

However, the ABC test has been criticized for merely hiding the “right to control” factors that it displaces. In New Jersey, the state’s supreme court interpreted factor A, “free from control or direction over the performance of such service,” as incorporating several of the factors from the IRS’s twenty-factor “right to control” test. Thus, prong A of the ABC test can entail some of the same uncertainties and ambiguities as the common law formulation. Without the guidance of multifactor tests for control, the ABC test has been criticized for sacrificing flexibility for clarity and uniformity. The binary, all-or-nothing approach that the test presents can be problematic when an employer fails to meet all three requirements, despite overwhelming evidence that the worker is an independent contractor rather than an employee. Ultimately, these critiques boil down to the tension between the worker-employer relationship, which necessarily exists on a spectrum, and the binary determinations of a court implementing the ABC test.

**PENALTIES AS A MECHANISM FOR COMPLIANCE**

ABC tests often include strict enforcement measures to disincetivize worker misclassification. Under the common law scheme, a misclassifying business is penalized with back taxes, back pay, and benefits that merely place the business in the same position they would have been if they had properly classified the worker. In contrast, states utilizing the ABC test have enforced harsher punitive measures such as fines and potential criminal liability. Seven states have implemented increased penalties for any

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88. PEARCE & SILVA, note 45, at 29.
89. Id.
93. Id.
94. PEARCE & SILVA, note 45, at 28-29.
96. Id. at 75, 77.
business that violates the statute and eight states have implemented civil penalties for businesses that intentionally violate the statute.97

Ten states have implemented criminal liability for intentional misclassification.98 Criminal liability could be an effective tool for state governments to penalize large-scale offenders with off-the-book workforces and insolvency to protect them from back taxes or fines.99 In New Mexico and New York, violation of the statute is a misdemeanor subject to prosecution by the state attorney general.100 Connecticut, New Jersey, Illinois, and Utah have subjected violating businesses to low-level felonies.101 Massachusetts and New York allow for fines up to $50,000 for intentional violations, though New York had only prosecuted six cases through 2010.102 Nevertheless, the added enforcement measures provide greater discouragement for intentional misclassification.

BRIGHT-LINE VS. MULTIFACTOR

The central point of tension between the variations of the common law “right to control” tests and the ABC test is the difference in the number of factors courts must assess. The simple three-pronged approach of the ABC test clarifies the law and instructs employers in how to comply.103 A lower number of applicable factors prevents courts from selectively ignoring some factors in favor of others.104 Furthermore, the reduction in factors eliminates the most easily manipulated factors, such as intent or location, used by employers seeking to circumvent worker-classification standards.105 By dividing their workforce into categories and varying the working conditions of each group according to the multifactor test, a business could contort the employment relationship and force its workers into the independent contractor classification.106 Each of the ABC test’s criteria are dispositive, forcing courts to focus on the factors presented, rather than whatever factors appear pertinent to the case at hand.107

97. Id. at 75.
98. Id. at 77.
99. Id.
100. Id.
101. Id.
102. Id.
104. Pearce & Silva, supra note 45, at 28; see Pinsof, supra note 103, at 368.
105. Pearce & Silva, supra note 45, at 28.
106. Dynamex Operations West, INC. v. The Superior Court of Los Angeles County, 4 Cal. 5th 903, 955 (2018).
107. Pearce & Silva, supra note 45, at 28.
Without guidance on how to weigh the abundance of factors in the multifactor tests, judges are left with broad discretion to conduct their analysis, creating room for an unsound degree of subjectivity. This has the compound effect of lessening predictability for businesses and workers. The unpredictability of multifactor tests is illustrated in a pair of factually similar cases involving FedEx delivery drivers. In *FedEx Home Delivery v. NLRB*, United States Court of Appeals for the District of Columbia Circuit placed heavy emphasis on the drivers’ “entrepreneurial opportunity for gain or loss” as a primary touchstone in their analysis. Focusing on the drivers’ ability to choose their own hours and breaks, what routes they follow, and the fact that contractors could contract multiple routes and hire, compensate, and dismiss their own workers, the court found that the FedEx drivers were independent contractors.

In *Alexander v. FedEx Ground Package Sys., Inc.*, the United States Court of Appeals for the Ninth Circuit considered and ultimately rejected the D.C. Court’s “entrepreneurial opportunity” rationale. Despite using the same common law agency factors, the Ninth Circuit ruled that “entrepreneurial opportunities do not undermine a finding of employee status.” Instead, the court emphasized FedEx’s “great deal of control” over the worker’s operations, including its control of the appearance of workers and their vehicles, the assignment of specific service areas, and the requirement that drivers work 9.5-11 hours a day, holding that the FedEx drivers were employees. This example demonstrates the varying and unpredictable results that can arise from use of the same multifactor tests.

**“HYBRID” WORK CLASSIFICATIONS: A THIRD CATEGORY?**

Some commentators have proposed a “hybrid” work classification category to supplement the independent contractor-worker dichotomy. In a report sponsored by the Hamilton project, former Deputy Secretary of Labor Seth Harris and Princeton economist, Alan Krueger advocate for a hybrid “independent worker” category as a default classification for gig workers. Under this “independent worker” category, workers would be afforded civil

108. *Id.* at 17.
109. *Id.* at 18.
111. *Id.* at 499.
113. *See id. at 989.; see also FedEx Home Delivery, 385 F.3d at 506.
114. *Alexander*, 765 F.3d at 987.
115. *Id.* at 990.
rights protections, tax withholding, employer contributions for payroll taxes, worker’s compensation, the right to organize and bargain collectively under the National Labor Relations Act, 117 and the antidiscrimination protections of Title VII, 118 but excluded from unemployment insurance benefits and hours-based benefits such as overtime and minimum wage. 119 One of the foremost principles that guides their recommendation is the “immeasurability of work hours” for gig workers. 120 The difficulty with measuring work hours for Uber and Lyft drivers, Harris and Krueger argue, emerges from the ambiguity of time spent waiting between rides. 121 Drivers could be spending that time working for another gig platform or for personal use, making accurate work hour measurement impossible. 122

In a report for the Economic Policy Institute, Ross Eisenbrey and Lawrence Mishel push back against this contention, arguing it downplays the role that big data plays in the gig economy. 123 Uber and Lyft both routinely track driver work hours when they present information to the public, basing their measurements on the amount of time the app was turned on. 124 Uber assumes that drivers are “active” when their app is turned on, monitoring acceptance rates and dismissing drivers who do not maintain a sufficient acceptance rate. 125 Moreover, a ride request that is not accepted within 15 seconds is treated as refused, meaning that Harris and Krueger’s claim that a driver could engage in personal work or work for another platform rests on shaky ground. 126

Still, proponents argue that third category would be an apt adjustment to the rapidly changing digital marketplace. 127 This hybrid work classification would fit the needs of workers in an increasingly casual work economy without placing an undue burden on their employers. 128 By automatically sorting gig workers into a hybrid “dependent contractors” category, the uncertainty surrounding worker classification in the gig economy would be eliminated. 129 This would resolve litigation across the

119. HARRIS & KRUEGER, supra note 116, at 2.
120. Id. at 13.
121. Id. at 2.
122. Id.
123. EISENREY & MISHEL, supra note 11.
124. Id.
125. Id.
126. Id.
127. CHERRY & ALOISI, supra note 21, at 646.
128. Id. at 647.
129. Id.
board, freeing up the resources of both the judicial system and on-demand platforms.\footnote{130}

However, the creation of a “hybrid” worker classification for workers in the gig economy would necessitate a distinction between the worker rights that are included or excluded under that category. Excluding gig workers from minimum compensation protections would likely alienate the drivers that are already struggling with low pay.\footnote{131} Furthermore, the creation of a third category makes predictability difficult for workers and employers, as the third category introduces yet another uncertainty to a formerly binary system that was already complicated enough. When applied, it often makes for another intricate test courts and employers must grapple with.\footnote{132}

Beyond the issue of benefits, legislative creation of a hybrid worker classification category, as a practical matter, would be an incredible feat. Debates over which rights to include under the category would likely be hotly contested, and given that the law typically lags behind technological advances, the resultant legislation may quickly become outdated.\footnote{133} The likelihood of judges creating such a category by way of judicial carveout is slim, due to the way in which the statutes are written, and would require extreme judicial activism.\footnote{134} With the abundance and complexity of these issues, it seems unlikely that the hybrid worker classification category will come to fruition in the United States.

\section*{CALIFORNIA}

California, with numerous metropolitan hubs, is a boon for the on-demand economy. Uber’s net impact on California is $390 million annually and Uber rider benefits have been calculated to save $3.9 billion annually in “amenity benefits” (“including improved comfort, safety, weather protection, time and cost certainty/reliability, and flexibility of schedule and destination choice”) and cost and time savings.\footnote{135} However, Uber’s ubiquitous presence and low barriers to entry have had a devastating

\footnote{130. Id.}
\footnote{132. See Cherry & Aloisi, supra note 21, at 660, (“Lavoratore parasubordinato” test).}
\footnote{133. See Stephen Mergenthaler & Katherine Garrett-Cox, World Econ. Forum, Values and the Fourth Industrial Revolution: Connecting the Dots Between Value, Values, Profit and Purpose 6 (2016) (“Given the Fourth Industrial Revolution’s extraordinarishly fast technological and social change, relying only on government legislation and incentives to ensure the right outcomes is ill advised.”).}
\footnote{134. Cherry & Aloisi, supra note 21, at 681.}
\footnote{135. Econ. Dev. Research Group, Uber’s Economic Impact in California (2016).}
impact on the taxi industry in California, causing the value of taxi medallions in San Francisco to plummet.\textsuperscript{136} Furthermore, Uber and Lyft driver’s classification as independent contractor allows the companies to avoid certain payroll taxes, insurance, and administrative expenses.\textsuperscript{137} With the passage Assembly Bill 5 ("AB5"), Uber and other gig economy platforms are at the center of public debate on worker classification in the state, with arguments raging over whether the impact of the legislation will be a net harm or a net good. However, before delving into the nuts and bolts of AB5, it is important to review the recent history of worker-classification law in the state in order to better understand the evolution of worker-classification law in California. As a state that has moved from the common law agency test to the ABC test, California may be an instructive example for other states to do the same.

In 1989, the Supreme Court of California decided a landmark worker-classification case concerning the workers’ compensation coverage of seasonal workers. In \textit{Borello}, the workers contracted with the growers in a “sharefarmer” agreement, wherein the workers were to manage their own labor, share the profit or loss from the crop yield, and agreed in writing that they were not employees.\textsuperscript{138} The California Workers’ Compensation Act mandated the use of the common-law “control-of-work” ("control") test to determine if a worker was an “employee” as defined by the statute: “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”\textsuperscript{139}

Aware of the dangers of a rigid and isolated application of the “control” factor alone, the California Supreme Court decided to follow previous decisions that supplemented the test with additional factors adopted from the Second Restatement of Agency “Right to Control” Test.\textsuperscript{140} The court followed common law rulings that recognized the right to discharge at will, without cause creates a strong evidence in support of an employment relationship.

However, finding that the common law and statutory differences between “independent contractors” and “employees” were substantial (the common law test was designed to define an employer’s liability for injuries caused by his employee), the California Supreme Court was justified in
making a slight departure from common law principles.\textsuperscript{141} The tension between common law and statutory purpose prompted the court to follow the path laid out by other states in worker-classification cases by considering the remedial statutory purpose of the statute.\textsuperscript{142} The court then identified four primary purposes of the California Workers’ Compensation Act: “(1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee’s work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees’ injuries.”\textsuperscript{143} Unrestrained by federal Congressional resistance to a more liberal definition of “employee”, the court concluded that the Act intended comprehensive coverage of injuries in employment and set out to perform its analysis.\textsuperscript{144}

However, after diagnosing the fundamental purposes of the statute, the Supreme Court of California clarified that it was not adopting “detailed new standards for examination of the issue.”\textsuperscript{145} Concluding that it was permissible to utilize the factors set out in previous cases while according deference to the Act’s purposes, the court found that growers had failed to meet their burden of proving that the workers were “independent contractors.”\textsuperscript{146} Already, deference to statutory purpose in the “control” test evinced a progressive trend towards granting “employee” classification to workers performing simple labor. By formulating the “control” test in a way that was reflective of legislative intent, \textit{Borello} effectuated a worker-classification scheme that was aligned with the progressive interests of Californians. After \textit{Dynamex}, it was clear that this trend was not an aberration.

\textit{Dynamex}, decided 29 years after \textit{Borello}, represents a significant shift in the landscape of worker-classification law in California and a further embracement of a progressive attitude towards the granting of “employee” status. \textit{Dynamex} concerned a same-day courier and delivery service that converted all of its delivery drivers to independent contractors, requiring the drivers to pay for their own vehicles and transportation expenses, including tolls, vehicle maintenance, fuel, and vehicle liability insurance, as well as all taxes and workers’ compensation insurance.\textsuperscript{147} Two drivers sued, alleging

\begin{footnotesize}
\begin{enumerate}
\item Id. at 352.
\item Id.
\item Id. at 354.
\item Id.
\item Id.
\item Id. at 360.
\item Id. at 356.
\item Dynamex Operations West, Inc. v. Superior Court of Los Angeles County, 4 Cal. 5th 903, 917 (2018).
\end{enumerate}
\end{footnotesize}
that they were misclassified as independent contractors and that as a result, Dynamex was violating the provisions of an Industrial Welfare Commission wage order governing the transportation industry.\textsuperscript{148}

The Supreme Court of California held that the “suffer or permit to work” definition of “employ” in the wage order is the proper rubric for evaluating whether a worker is an independent contractor or employee for purposes of the obligations set forth in the wage order, but diverged from the multi-factor test from \textit{Borello} and the decisions before it.\textsuperscript{149} Launching into a lengthy summary of pre-\textit{Borello} worker-classification cases and \textit{Borello} itself, the court characterizes \textit{Borello} not as a case exemplifying the common law standard for distinguishing employees from independent contractors, but as a case that resolves such issues by looking to the purpose and scope of the particular statute.\textsuperscript{150}

With the \textit{Borello} emphasis on statutory purpose in mind, the court set out to distill the primary objectives of the Industrial Welfare Commission’s wage orders, finding that the wage orders were adopted to protect worker health and safety and ensure that workers are afforded a level of wages and working conditions that allow them to obtain at least a subsistence standard of living.\textsuperscript{151} The legislature found these measures necessary due to the unequal bargaining power between hiring businesses and individual workers and the likelihood that workers would accept substandard wages and working conditions.\textsuperscript{152}

The wage orders also serve the dual purpose of guaranteeing that law-abiding businesses will not be hurt by unfair competition from businesses that provide substandard wages and working conditions for their employees.\textsuperscript{153} Recognizing that the remedial purposes of the wage order would not be achieved without a scope that would be broad enough to eliminate inadequate wages and working conditions, the court concluded that the suffer or permit to work standard must be interpreted broadly to include as “employees” any worker that can reasonably be viewed as working in the hiring entity’s business.\textsuperscript{154}

The court notes that federal courts have recognized that the standard should be broader and more inclusive than the preexisting common law test for worker-classifications when interpreting the suffer or permit to work
The court then undertakes an evaluation of the existing common law standards for distinguishing “employee” from “independent contractor,” acknowledging that there are advantages to the multifactor, totality-of-the-circumstances approach that Borello and other common law tests have utilized. However, the flexibility of the multifactor test presents significant problems (most of which have been addressed under the “Bright-Line vs. Multifactor” heading), especially in the wage and hour context.

Finally, the court points out that California’s adoption of the suffer or permit to work standard predates the FLSA, meaning that California’s IWC never intended to adopt the economic reality test that federal agencies use. In fact, prior decisions in California had expressly declined to use that test, noting that California wage orders are intended to provide broader protection than those under the federal standard.

Importantly, this issue presents a significant judicial roadblock for other states that included the suffer or permit to work standard after the enactment of the FLSA and had been interpreted to incorporate the economic reality test. After launching into a discussion of the various benefits of the ABC test, the California Supreme Court concluded that the ABC test is most consistent with the history and purpose of the suffer or permit to work standard in California’s wage orders.

California’s path from the common law agency test to the ABC test essentially boils down to the embracement of statutory purpose. This path was paved with deference to the intended reach of the remedial purposes of the California Worker’s Compensation Act and the Industrial Welfare Commission’s wage orders in Borello and Dynamex respectively, first by formulating the common law test in a way that reflected legislative intent, and then replacing it with the ABC test when it was clear that the common law test could not comport with the purpose of the statute at issue. As pointed out in Dynamex, other states who have adopted their definition of “employee” from any of the myriad of federal labor protection laws may find it difficult to change their test with the governing federal common law standard looming over them. Altogether, those states may be forced to...
confront this issue by legislative amendment. Whether or not the ABC test is incorporated federally, the road from the common law to the ABC test necessitates an embrace of statutory purpose.

**ASSEMBLY BILL NO. 5**

California’s Assembly Bill 5 provides that for the purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a worker is considered an employee rather than an independent contractor unless the employer meets the three dictates of the ABC test: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity’s business; (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. If they do not, those workers are entitled to benefits (unemployment insurance, work injury compensation, break time, paid sick leave, and minimum wage) and the right to unionize. The law is estimated to cover more than half of the independent contractors in California, but reclassification is not automatic. Instead, independent contractors must challenge their classification by filing lawsuits or complaints with the appropriate government agency. The law also empowers city attorneys to pursue lawsuits against noncompliant businesses.

The law does not provide an employee presumption for everyone. Workers in certain specified areas are exempted from coverage, and a vast majority of them are subject to the *Borello* test rather than the ABC test if the applicable criteria are met. For instance, certain medical professionals (physicians, surgeons, dentists, podiatrists, psychologists, or veterinarians licensed by the State of California) performing medical services for a health

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163. [CAL. LAB. CODE § 2750.3(a)(1) (repealed Sept. 2020)].
165. Id.
166. Id. at 46-7; see EMPLOYMENT DEV. DEP’T, HELP US FIGHT FRAUD, https://www.edd.ca.gov/payroll_taxes/Help_Fight_Fraud.htm.
care entity are subject to the Borello test.169 Outside of these occupational exemptions, workers providing “professional services” (marketing professionals, human resources administrators, graphic designers, grant writers, fine artists, travel agents, freelance writers, IRS tax professionals, esthetician, electrologist, barbers and cosmetologists, freelance photographers, and payment processing agents) are also subject to the Borello test,170 provided that the hiring entity proves the existence of six factors.171 The rationale behind this exemption is to allow a contracting business to receive services from a worker employed by another business, with the contract between the contracting business and the professional service provider being governed by the Borello test.172

There are similar exemptions that apply the Borello test for real estate licensees and repossession agencies;173 work performed by a business entity formed as a sole proprietor, partnership, LLC, or corporation for a contracting business;174 subcontractors in the construction industry;175 relationships between referral agencies and service providers;176 and individuals performing services with a licensed “motor club.”177 These exemptions signify an attempt on the part of the legislature to address the rigidity of the ABC test in situations where it would create major inequities or cause undue economic turmoil.

Companies that rely on gig workers would like an exemption as well. On December 30, 2019, Uber and its gig economy affiliate, Postmates, filed

169. CAL. LAB. CODE § 2750.3(B)(2) (repealed Sept. 2020).
170. CAL. LAB. CODE § 2750.3(c)(2) (repealed Sept. 2020), (Note: additional restrictions may apply).
171. CAL. LAB. CODE § 2750.3(c)(1) (repealed Sept. 2020), (“(A) The individual maintains a business location, which may include the individual’s residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity. (B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession. (C) The individual has the ability to set or negotiate their own rates for the services performed. (D) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual’s own hours. (E) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work. (F) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.”)
172. Sarchet, supra note 168.
173. CAL. LAB. CODE § 2750.3(d) (repealed Sept. 2020).
174. CAL. LAB. CODE § 2750.3(e) (repealed Sept. 2020).
175. CAL. LAB. CODE § 2750.3(f) (repealed Sept. 2020) (Note: additional restrictions apply).
176. CAL. LAB. CODE § 2750.3(g) (repealed Sept. 2020).
177. CAL. LAB. CODE § 2750.3(h) (repealed Sept. 2020).
a lawsuit against the state of California, aiming to have AB5 declared invalid or to exempt them from coverage. The lawsuit, filed two days before AB5 was set to take effect, alleges that the law is unconstitutional and unfairly targets gig economy companies and their workers. More specifically, Uber said in a statement that it brought the challenge “on the basis of lack of equal protection and due process under both federal and state law.” Judge Dolly M. Gee, presiding over the District Court for the Central District of California, refused to grant an preliminary injunction, noting that though Uber and Postmates had shown some measure of irreparable harm, public interest and the balance of equities weighed in favor of California enforcing the legislation. Uber made a statement declaring that it is reviewing the decision and deciding whether or not it will pursue an appeal.

Uber isn’t alone in its criticism of AB5. In the months preceding the enactment of the law and in its immediate wake, AB5 was the recipient of harsh criticism from various legal scholars and commentators. Larry Buhl, writing for the Business Insider, points out that hiring businesses in California may start to outsource some of their labor to neighboring states. A media company has already placed an ad looking for out-of-state journalists to cover stories about California. Another article warns future retirees not to rely on gig work or a contractual relationship with a former employer as supplemental income, as companies may not want to provide benefits for employees that are not full time. Others share concern that small businesses, rather than tech giants like Uber, will feel the brunt of the law.

In response to the uncertainty that AB5 has spawned, citizens and lawmakers are desperately searching for ways to address the myriad of issues that have come forward in AB5’s wake. Two months after the bill took effect, 34 pieces of legislation were introduced to the California legislature.

178. Dara Kerr, Uber’s Last-Minute Bid to Beat Gig Worker Law is Latest of Many Tries, CNET (Jan. 1, 2020).
179. Id.
182. Jim Wilson, Judge Refuses to Block California’s Gig Worker Law During Suit, N.Y. TIMES (Feb. 10, 2020).
183. Larry Buhl, California is Attempting a Massive Labor Experiment that Could Grow into a Disaster for Millions of Workers, BUSINESS INSIDER (Nov. 16, 2019).
184. Id.
185. Chris Carosa, Will California’s AB5 Law Gag Your Gig Retirement?, FORBES (Feb. 27, 2020).
most of which aiming at expanding the list of exempted occupations under the law.\textsuperscript{187} A federal judge has already granted a preliminary injunction to prevent AB5 from applying to independent truckers in the state.\textsuperscript{188}

Unwilling to accept the massive financial losses that AB5 could entail, Uber has launched its “Project Luigi,” a semi-clandestine scheme to build Uber’s claim that drivers are sufficiently free and independent, and thus are independent contractors under AB5.\textsuperscript{189} Some of these features (which are only available to California drivers) have already been unveiled, such as the ability to see estimated fares upfront, decline trips upfront based on inadequacy of fares without penalty, and the addition of a “favorite” option, which would allow a rider to prioritize chosen drivers and establish a direct link between them, allowing the driver a “first pass” to accept a scheduled trip.\textsuperscript{190} By shifting its business model within the jurisdiction, the changes seek to provide drivers with more autonomy and a more direct relationship with their clients, thereby strengthening its claim that drivers are more like independent contractors than they are employees. Although this may satisfy prong A of the ABC test (free from the control and direction of the employer), Uber may have difficulties proving prongs B and C, unless it can convince a court that it is a software company rather than a ride-provider, which has already been resisted by courts.\textsuperscript{191}

\textbf{CONCLUSION}

It is difficult to predict how AB5 will impact gig workers and the companies they work for in California. In a brief three-month period, the law has been the subject of heated debate, countless proposed amendments, and a high-profile lawsuit. If Uber’s “Project Luigi” fails and it chooses not to pursue an appeal on its failed preliminary injunction, stock prices will fall and the company will take a financial hit, but the international tech giant will likely survive. The success of AB5’s implementation will have a rippling effect on other states such as New Jersey, whose Senate bill 4204, which mimics AB5, is the subject of much debate in the state.\textsuperscript{192}

\textsuperscript{187} John Myers, \textit{A Flood of Proposed Changes to California’s AB 5 Awaits State Lawmakers}, L.A. TIMES (Feb. 28, 2020).

\textsuperscript{188} Id.

\textsuperscript{189} Faiz Siddiqui, \textit{Uber’s Secret Project to Bolster Its Case Against AB5, California’s Gig-Worker Law}, WASH. POST (Jan. 6, 2020).

\textsuperscript{190} Id.

\textsuperscript{191} See O’Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015).

\textsuperscript{192} Terrence T. MacDonald, \textit{Debate to Continue over NJ Bill Rewriting Rules for Freelance Workers, Contractors}, NORTHJERSEY.COM (Dec. 18, 2019).
The creation of a third “intermediate” worker classification, while innovative, may bring more complications than it does solutions because it would undermine predictability for businesses and introduce yet another test for employers and courts to interpret. Furthermore, the legislative effort required to create a third category of worker classifications could prove to be insurmountable.

Despite its rigidity, the worker-friendly ABC test best effectuates the intent of Congress when it enacted broad, remedial New Deal labor protections almost a century ago. California’s focus on statutory purpose when it adopted the ABC test in *Dynamex* may be instructive to other states, but without an incorporation of the ABC test at the federal level, some state judicial systems may be hamstrung in making this change, as their state labor protections were enacted after the passage of the Congressional legislation.