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**Employment Status of Uber and Lyft Drivers:
Unsettlingly Settled**

Jillian Kaltner*

ABSTRACT

Uber and Lyft drivers are part of a vast pool of workers in the new economy who exist in the legal grey area between independent contractors and employees. Because these workers are currently classified as independent contractors, they are without the protections and benefits that are guaranteed to employees. Instead, these drivers are saddled with significant work risks including: no minimum wage or overtime pay, no Title VII protections from workplace discrimination, and no access to social insurances like unemployment insurance and disability pay. Some scholars have called for the creation of a third intermediary category between employee and independent contractor to classify workers in the gig-economy. In this ‘independent worker’ category, workers would be treated in part as employees and in part as independent contractors. However, this idea has been largely criticized by scholars who argue that the answer to the uncertainties between independent contractor and employee is not to create more blurry-lined categories.

This article will discuss the precarity of the modern independent contractor Uber or Lyft driver. Next, I will argue that the answer to the employment status of Uber and Lyft drivers is an equitable application of the widely accepted Economic Realities Test. Through this test it is clear that the drivers, and other gig-economy workers like them, are in danger of being misclassified as independent contractors. Finally, I will conclude that while there has been much ongoing litigation regarding the employment status of these drivers, given supplemental litigation regarding arbitration agreements like the ones used by Uber and Lyft, and the current political climate it is unlikely that the drivers will see a change in their employment status anytime soon.

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I. INTRODUCTION

As of August 2016, there are seventy pending federal lawsuits against Uber and even more in state courts.¹ The suits range from price fixing, to accessibility issues, to general safety and liability claims.² However, the most significant of these claims are by drivers who fervently insist that they are being misclassified as independent contractors instead of employees. As a result of their status as independent contractors, the drivers are being denied employment benefits guaranteed to them by law including: minimum wage, protection against workplace discrimination under Title VII, and social insurances like unemployment insurance and disability pay.³ Lyft, Uber's main competitor, has faced similar challenges over their drivers' employment status.⁴ Many legal scholars argue that these ride-share drivers have a strong legal claim over the alleged misclassification, however drivers have faced significant roadblocks to becoming employees.

Shannon Liss-Riordan has spearheaded two of the most recent class action lawsuits over employment status against Uber and Lyft. Liss-Riordan's suit against Uber took over three years and contained 385,000 drivers from both Massachusetts and California who sought to be classified as employees.⁵ However despite her work, Liss-Riordan drew criticism for agreeing to a \$100- million settlement that included minor policy changes from Uber, but did not include changing drivers' employment status.⁶ District Judge Edward M. Chen rejected the settlement, stating that if the case did in fact go to trial and the drivers were found to be misclassified employees, the damages could be more than \$1 billion.⁷ The judge in Liss-Riordan's lawsuit against Lyft just recently approved a \$27-million settlement which would be dispersed between a growing class of Lyft drivers that is currently upwards of 95,000.⁸ However, still the settlement does not answer the question of employee status.⁹ In response to criticism, Liss-

1. Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN (Aug. 11, 2016, 10:30 AM), <http://money.cnn.com/2016/08/11/technology/uber-lawsuits/>.

2. *Id.*

3. Biz Carson, *This Lawyer Fought for FedEx Drivers and Strippers. Now She's Standing up for Uber Drivers*, BUSINESS INSIDER: TECH INSIDER (May, 27, 2015, 4:26 PM), <http://www.businessinsider.com/shannon-liss-riordan-the-lawyer-behind-ubers-lawsuit-2015-5>.

4. See Samantha Masunga, *Judge Gives Final Approval of \$27- Million Settlement in Lyft Class-Action Lawsuit*, L.A. TIMES (Mar. 17, 2017, 9:55 AM), <http://www.latimes.com/business/la-fi-lyft-settlement-20170317-story.html>.

5. Robert Mclean, *Uber Will Pay Up to \$100 Million to Settle Labor Suits*, CNN (Apr. 22, 2016, 2:34 AM), http://money.cnn.com/2016/04/22/technology/uber-drivers-labor-settlement/index.html?iid=H_BN_News.

6. Uber's policy change was allowing drivers to display signs in their cars requesting tips. Chris Isidore, *Judge Rejects \$100 Million Settlement Between Uber and Drivers*, CNN (Aug. 19, 2016, 9:29 AM), <http://money.cnn.com/2016/08/19/technology/uber-drivers-class-action-settlement/>.

7. *Id.*

8. Masunga, *supra* note 4, at 1.

9. *Id.*

Riordan has argued that if these cases were to go to trial, it is unclear if juries would respond favorably to drivers' quest for employee status.¹⁰

Liss-Riordan's fear of uncertainty if these lawsuits were to proceed to a jury trial is not unfounded. The line between employee and independent contractor is a particularly unclear one, which has been increasingly blurred by the prolific growth of the gig-economy.¹¹ Adding to the uncertainty is the fact that there is no one test that is used to determine employee status.¹² The most prominent current employment status tests are the Common Law Agency test, the Economic Realities Test, and the ABC test.¹³ The Common Law Agency test focuses on the alleged employers exercise of control over the "manner and means" of a worker's job.¹⁴ The ABC test looks at three factors: "(1) whether the worker is free from direction or control, (2) whether the worker performs the work off the premises of the business, and (3) whether the worker is engaged in a 'customarily' independent trade."¹⁵ Finally, the Economic Realities, test which is endorsed by the U.S. Department of Labor,¹⁶ considers both control and the workers economic dependence on the alleged employer.¹⁷

Despite best intentions, Liss-Riordan's settlements might have had an unintended stagnating effect on the fight to become employees. As will be discussed in the final section of this paper, given the current political climate and other ongoing litigation regarding arbitration agreements, unfortunately for Lyft and Uber drivers their current status as independent contractors appears settled.

10. Masunga, *supra* note 4, at 1.

11. See, V. B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105:101 CALIF. L. REV. 101, 103 (2017) (challenging the duality of the worker classification in employment law).

12. For an in-depth description of when and how workers became categorized into employees and independent contractors for the purposes of employment regulation, see *Id.* Part I.

13. Dubal, *supra* note 11, at 108.

14. *Id.*

15. *Id.*

16. U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 201501: THE APPLICATION OF THE FAIR LABOR STANDARDS ACT'S "SUFFER OR PERMIT" STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS (2015), https://www.blr.com/html_email/AI2015-1.pdf.

17. Dubal, *supra* note 11, at 108.

II. DANGERS OF DRIVERS' CURRENT EMPLOYMENT STATUS

A. RATE FIXING AND NO MINIMUM WAGE

Lyft and Uber drivers do not receive minimum wage as guaranteed to employees by the FLSA.¹⁸ The two companies opt instead for a rate fixing model, in which the company sets the rates for how much each ride will cost.¹⁹ Rate fixing combined with a lack of minimum wage protections is a dangerous model that often makes wage fluctuation the norm for drivers.²⁰

Uber's website touts that, in short, Uber drivers²¹ can earn "as much as [they] want."²² However, further investigation into the pricing model shows a far more complicated algorithm for how much a driver can make "(base fare + time rate + distance rate)* surge multiplier)-Uber fee + tolls and other fees."²³ In other words, Uber sets the base fare, the rate per time, the rate for distance, whether or not a surge pricing is in effect, the Uber fee, and whether other fees are applicable.²⁴ In fact the only part of the payment model that Uber doesn't control is the cost of tolls.²⁵ This runs directly against their claim of drivers being in control of how much they make.

Lyft's "How Your Pay is Calculated" webpage provides a similar pricing model.²⁶ The breakdown includes a list of the items that contribute to the overall price of a ride: base fare (what Lyft charges the passenger to start the ride), cost per minute (what the driver earns per minute in the region where the ride starts), and cost per mile (what driver earns per mile in the region where the ride starts).²⁷ Additionally, when there is high demand for drivers, the cost off a ride may be increased using Lyft's Prime Time pricing.²⁸ Finally, taken out of the driver's pay for each ride is a 20-to-25% commission

18. V. B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38:1 BERKELEY J. EMP. & LAB. L. 73, 128 (2017) (discussing how unregulated competition undermined drivers' wages).

19. Aarti Shahani, *Uber Plans To Kill Surge Pricing, Though Drivers Say it Makes Job Worth It*, NPR (May 3, 2016, 4:36 AM), <http://www.npr.org/sections/alltechconsidered/2016/05/03/476513775/uber-plans-to-kill-surge-pricing-though-drivers-say-it-makes-job-worth-it>.

20. *Id.*

21. UBER, <https://www.uber.com> (last visited Oct. 6, 2017) (Uber's website refers to the drivers as "drivers with Uber," presumably to reinforce a degree of separation. I will use "drivers with Uber" and "Uber drivers" interchangeably).

22. *How Much Do Drivers With Uber Make?*, UBER, <https://www.uber.com/info/how-much-do-drivers-with-uber-make/> (last visited Mar. 8, 2017).

23. *How are Fares Calculated*, UBER HELP, <https://help.uber.com/h/33ed4293-383c-4d73-a610-d171d3aa5a78> (last visited Oct. 30, 2017).

24. *See id.*

25. *See id.*

26. *How Your Pay is Calculated*, LYFT, <https://thehub.lyft.com/blog/how-your-pay-is-calculated> (last visited Oct. 30, 2017).

27. *Id.*

28. *Id.* Lyft's prime time pricing and Uber's surge pricing will be discussed at length below.

fee that goes directly to Lyft.²⁹ Similarly to Uber, Lyft sets the base fare, cost per minute, and cost per mile, and Lyft commission fee of each ride.

Unfortunately for Uber and Lyft drivers, the amount of control that the companies exercise over the pricing model, has lead to unsettling wage instability. Many driver's believe their wages have been a casualty in what is seen as Uber and Lyft's never-ending competition to be dubbed the least expensive ride-share app.³⁰ Uber's explanation for the fare cuts like the significant one that occurred in 2015, was that in the winter, less people download the app and call cars.³¹ Therefore, fare cuts were needed to get more people riding with Uber, thereby increasing the overall earning for drivers.³² This was not how it worked in practice. Instead, Uber drivers complained of having to work far longer hours for less money.³³ In fact, Uber has had to create a guarantee program so that drivers can get reimbursements for lost wages that result from the fare cuts.³⁴ However, strict limitations put on who is able to receive stipulations have made it difficult for drivers to become a part of the program.³⁵ These limitations include drivers having to accept nine out of ten rides and at least one ride an hour.³⁶ Additionally, even if drivers were able to meet the stipulations, the reimbursements failed to make up for the pay loss that resulted from the fare cuts.³⁷

The final act of rate fixing done by Uber and Lyft is known as surge pricing³⁸ or prime time.³⁹ These mechanisms allow Uber and Lyft to increase the cost of a ride based on demand for drivers in the area.⁴⁰ Occasions that drive up the demand for drivers in the area are things like inclement weather, sporting events, social events, and conventions.⁴¹ For Uber drivers, increased fares that result from high demand are an integral part of how much money they make.⁴² According to one Uber driver, Nathan Sapp, surge

29. *Id.*

30. See Jack Smith IV, *Uber Drivers Are Scrambling to Make Ends Meet After Latest Fare Cuts*, OBSERVER (Feb. 9, 2015, 3:22 PM), <http://observer.com/2015/02/uber-drivers-are-scrambling-to-make-ends-meet-after-latest-fare-cuts/> (article discusses Uber's 2015 fare cuts and their effect on drivers).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Uber's surge pricing is calculated by multiplying the normal cost of a far by a surge multiplier. For example, \$20.00 (base fare) x 1.5 (surge multiplier) = \$30.00 (gross fare). See *supra* note 22, at 6.

39. Lyft's prime time pricing is calculated by adding an extra percentage onto a base ride amount. For example, \$20.00 base fare + 50% (prime time) = \$30.00 (gross fare). See LYFT HELP, <https://help.lyft.com/hc/en-us/articles/214586017> (last visited Mar. 8, 2017).

40. Shahani, *supra* note 19, at 2.

41. *Id.*

42. *Id.*

pricing is roughly a quarter of his monthly income.⁴³ Many drivers keep their ear to the ground for upcoming social events, crowded bar scenes, and sporting events so that they can be present at times they predict a surge will occur.⁴⁴ Sapp kept in touch with local fraternities and sororities at the Indiana University campus at Bloomington so that he would be on notice of where and when high population events were occurring.⁴⁵

Despite driver's reliance on surge and prime time pricing, Lyft and Uber are constantly attempting to find ways to curtail the two mechanisms.⁴⁶ This is in large part due to the same reasons that they rate fix their ride pricing at such low numbers, namely because they want to be the least expensive ride-sharing app. Additionally, customer reactions to prime time and surge pricing have been largely negative, leading to the advent of "how to avoid surge-pricing" online articles.⁴⁷ This has had an abysmal effect on the drivers, who already lacked FLSA minimum wage protections.⁴⁸ With advancements in technology, Uber is hoping to create algorithms that could get rid of surge pricing all together.⁴⁹ More specifically, the algorithm would be able to predict where surge pricing is likely to happen, and then redirect enough drivers into the surge area to even out the demand for drivers.⁵⁰ This would eliminate the need for surge or prime time pricing all together.

Unfortunately for the drivers, the success of their corporations are largely hinged on their ability to edge out the competition by lowering prices. Because drivers are classified as independent contractors, this corporate need is without the typical counterbalance of FLSA minimum wage protections. This is a recipe for wage reduction and instability for Uber and Lyft drivers.

B. NO TITLE VII PROTECTIONS

1. Ratings and Racial Bias

Title VII of the Civil Rights Act came into being in 1964 under President Lyndon B. Johnson.⁵¹ The act prohibited employment discrimination on the basis of "race, color, religion, national origin, or sex."⁵² Since its advent and implementation, Title VII has become the back bone of protection from

43. *Id.*

44. *Id.*

45. *Id.*

46. Shahani, *supra* note 19, at 2.

47. Priya Anand, *How To Beat Uber's Surge-Pricing Algorithm (And Lyft's Too)*, BUZZFEED (Sept. 20, 2016, 4:16 PM), https://www.buzzfeed.com/priya/how-to-beat-ubers-surge-pricing-algorithm-and-lyfts-too?utm_term=.fi8Eb2O60#.sgX8G0Z1K(article describes strategies to avoid paying higher rates for Uber and Lyft during peak times).

48. Shahani, *supra* note 19, at 2.

49. *Id.*

50. *Id.*

51. Jacqueline A. Berrien, *Statement on 50th Anniversary of the Civil Rights Act of 1964*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 2, 2014), <https://www.eeoc.gov/eeoc/history/cra50th/>.

52. *Id.*

discrimination within the workplace.⁵³ The power of Title VII in the work place is only so far as the worker is classified as an employee. In other words, independent contractors like Uber and Lyft drivers are not protected from work place discrimination under Title VII.⁵⁴ As Noah Zatz pointed out, this is especially troubling given how Uber and Lyft use a customer based rating system to determine who can continue driving for them.⁵⁵

Uber and Lyft both use a similar scale of rating as quality control for their drivers. According to Uber's website, at the end of each ride customers are prompted to rate their driver on a one to five scale.⁵⁶ Ratings are then averaged based on the number of rides a driver has given.⁵⁷ If a driver's rating falls too low (it is not specified on the website how low), Uber will deactivate their account thus ending the "partnership" between Uber and the driver.⁵⁸ Uber drivers also rate their passengers.⁵⁹ Lyft's rating system works similarly. According to Lyft's website, after each ride the passenger and driver both rate each other on a five star scale.⁶⁰ If a rider rates a driver a four or below, they will be prompted to choose feedback from a four item menu that includes "navigation, safety, cleanliness and friendliness."⁶¹ Each week, Lyft emails their drivers any feedback they have received from passengers.⁶² If a Lyft driver's rating falls too low, the driver will be deactivated.⁶³

The rating system used by these corporations means that whether a driver will be deactivated based on low scores is in the hands of the riders that they pick up. This creates a risk that pervasive everyday racism may effect a driver's ability to work.⁶⁴ Consider the example provided by Noah Zatz, in which a "dark skinned immigrant with a Muslim- sounding name" drives a passenger to the airport compared to a "cheerfully underemployed, native born white recent college graduate."⁶⁵ These two drivers' rates and therefore whether they would be de-activated as a driver could very likely be effected by their race, color, religion, national origin, or sex. Because their drivers

53. *Id.*

54. Carson, *supra* note 3, at 2.

55. Noah Zatz, *Beyond Misclassification: Gig Economy Discrimination Outside of Employment Law*, ON LABOR, WORKERS, UNIONS AND POLITICS (Jan. 19, 2016), <https://onlabor.org/2016/01/19/beyond-misclassification-gig-economy-discrimination-outside-employment-law/>.

56. *Star Ratings*, UBER, <https://www.uber.com/info/driver-ratings/>, (last visited Oct. 30, 2017).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Driver and Passenger Ratings*, LYFT HELP, <https://help.lyft.com/hc/en-us/articles/213586008-Driver-and-Passenger-Ratings>, (last visited Oct. 30, 2017).

61. *Id.*

62. *Id.*

63. *Id.*

64. Zatz, *supra* note 55, at 1.

65. *Id.*

have no Title VII protection, they are unable to file suit to rectify this shortcoming. On the other hand, if a normal taxi company kept white drivers on board and fired Middle Eastern ones because their passengers were more comfortable with white people, they would likely be universally condemned and forced to reckon with a substantial Title VII lawsuit.

Uber and Lyft drivers would likely be limited in the types of claims they could file if they were granted employee status.⁶⁶ This is because it would likely be impossible for drivers to prove discriminatory intent on behalf of Uber and Lyft.⁶⁷ However, they would likely be able to bring a plausible disparate impact case. Disparate impact cases require a facially neutral policy that has a disparate impact on a protected class.⁶⁸ Here, the facially neutral policy would be Uber and Lyft's rating systems. The disparate impact would be that people with protected class status were receiving lower rates because of their protected traits (race, color, religion, national origin, sex) and they were being terminated because of this. Supreme Court jurisprudence, including the holding of *Arizona Governing Committee*⁶⁹ has already indicated that discrimination that is shopped out by an employer to a third party still violates Title VII.⁷⁰ Additionally, other courts have routinely directed employers to take affirmative action "to monitor, prevent and correct sex- and race-based harassment of workers by customers."⁷¹ In applying this jurisprudence to Uber and Lyft, it is possible that drivers would have legal claims that would be tenable enough to bring to court.

Regardless of the success of driver's Title VII claims in court, the mere accessibility to the statute could serve to vastly improve the experience of drivers. Uber and Lyft are companies that are grounded in instantly accessible technology.⁷² Both of these companies have a "voracious appetite for data gathering and analysis[.]"⁷³ It would be possible for the platforms to take steps to screen out racial biases within their rating system.⁷⁴ For example, if a Lyft rider scores a driver a rating of 4 or below they are prompted to give criticism as reasoning for their rating.⁷⁵ Similarly, Uber prompts riders to give ratings with the option to provide textualized feedback.⁷⁶ Thus it would be very possible to screen out and adjust for

66. *Id.*

67. Zatz, *supra* note 55, at 1.

68. See 42 U.S.C. §2000e-2(k) (LEXIS through Pub. L. No. 115-71).

69. *Ariz. Governing Comm. For Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 462 U.S. 1073 (1983). Held that an employer who paid employees lump sum without regard to sex, but then directed the employees to convert the sum into an annuity via an outside vendor who discriminated based on sex violated Title VII.

70. Zatz, *supra* note 55, at 2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See *Driver and Passenger Ratings*, *supra* note 60, at 3.

76. See *Star Ratings*, *supra* note 56, at 5.

various types of bias based on low ratings and textualized commentary, as well as to screen out customers with a habit of biased based rankings.⁷⁷

2. Problems for Women Drivers

The ridesharing economy has faced significant difficulty in getting women⁷⁸ to join their driving fleets. Only 14%⁷⁹ of U.S. Uber drivers are females.⁸⁰ Lyft has a considerably higher, but still concerning 30% female drivers.⁸¹ This is generally on par with the percentage of female in the U.S. Taxi/Chauffeur industry which ranges around 12.7%.⁸² However, this is an issue for Uber and Lyft, who tout themselves as modern large scale job creators, despite the fact that their workers are disproportionately male.⁸³

There are many reasons why women have declined to join the Uber and Lyft workforce, however generally the most significant is safety. There are countless examples of women drivers who have been harassed/assaulted physically or sexually by male passengers.⁸⁴ These experiences include sexual propositions, grabbing driver's faces, thighs and breasts, and non-sexual physical assaults.⁸⁵ These types of situations are especially dangerous because they happen in the close quarters of a moving car.⁸⁶ The risks are compounded by what some drivers argue is a failure of the apps safety features.⁸⁷

For example, a female driver in Atlanta who reached out to the company after she was sexually assaulted, claimed Uber did not remove the passenger or respond to her via email for over a week later and until a reporter reached out to Uber about the incident.⁸⁸ Another female driver in Arizona who was scared by a passenger who got into her car while strung out on LSD, claimed she was not able to block the passenger, and received a request to pick the same passenger up again.⁸⁹

Beyond the safety concerns, there are practical limitations that effect

77. Zatz, *supra* note 55, at 3.

78. For the purposes of this section, the term "women" will be used in reference to problems facing both sex-based and self-identifying women driving for Uber and Lyft. The term "female" will be used only in reference to the statistical data.

79. Number is based off of January 22, 2015, study conducted by Uber. Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver- Partners in the United States*, IRS WORKING PAPERS, (Jan. 22, 2015).

80. Ellen Huet, *Why Aren't There More Female Uber And Lyft Drivers?*, FORBES (Apr. 9, 2015, 11:00 AM), <https://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drive-rs/#3ccb8b23a28e>.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

female driver's ability to prosper driving for the company.⁹⁰ For example, both Uber and Lyft provide special bonuses for late-night drivers.⁹¹ In order to receive the pay out, the drivers have to accept 90% of the ride requests.⁹² Similar restrictions were placed on Uber's 2015 guarantee program that provided reimbursements for lost wages that resulted from fare cuts.⁹³ These policies are hostile to female drivers who tend to avoid night shifts for fear of their physical safety.⁹⁴ Furthermore, women drivers who are on the road late at night are pressured into accepting fares even if they seem sketchy in order to meet the bonus requirements.⁹⁵ Finally, Uber⁹⁶ and Lyft's⁹⁷ lost-and-found policy allow riders to contact their drivers directly regarding a lost item. This feature has been used by passengers to harass female drivers even after the ride is over.⁹⁸

Uber has recognized its problem with recruiting female drivers and has tried to draw more in, however not without facing significant pushback.⁹⁹ In March 2015, Uber announced that it would be partnering with the UN Women in an attempt to create one million new jobs for women by the year 2020.¹⁰⁰ However, this goal rejected by union groups who asserted "we fail to see how a million precarious informal jobs could contribute to women's economic empowerment."¹⁰¹ As a result, shortly after Uber's announcement, UN Women formally announced that they would not be collaborating with Uber.¹⁰² Uber has since said that they are still committed to the goal of one million jobs for women and more generally economic opportunity for women globally.¹⁰³

Uber has a major problem with women in the workforce, and the root of the problems can largely be tied back to independent contractor status. First and foremost, women are faced with the perception of physical risk from passengers and a lack of regulated ways to combat these threats.¹⁰⁴ Uber and

90. *Id.*

91. *Id.*

92. Huet, *supra* note 80.

93. Jack Smith IV, *supra* note 30. In order to qualify for the reimbursements, drivers had to accept nine out of ten rides and at least one ride per hour.

94. Jack Smith IV, *supra* note 30.

95. *Id.*

96. *Contact My Driver About A Lost Item*, UBER, <https://help.uber.com/h/53539bde-f6f4-4909-85de-fa0b99f82be0> (last visited Oct. 30, 2017).

97. *Lost & Found*, LYFT, <https://help.lyft.com/hc/en-us/articles/213583958-Lost-Found> (last visited Oct. 30, 2017)

98. Huet, *supra* note 80.

99. Ellen Huet, *UN Women Backs Away From Uber Partnership A Week After Announcement*, FORBES (Mar. 20, 2015), <https://www.forbes.com/sites/ellenhuet/2015/03/20/un-women-backs-away-from-uber-partnership/#6f3b7d32f047>.

100. *Id.*

101. *UN Women + Uber = A Vision for Precarious Work*, PUBLIC SERVICES INTERNATIONAL (March 12, 2015), <http://www.world-psi.org/en/un-women-uber-vision-precarious-work>.

102. Huet, *supra* note 99.

103. *Id.*

104. *Id.*

Lyft's disjointed reporting and rating systems are not enough to guarantee safety or protection for female drivers. Additionally, female drivers are scarcely able to comply with the bonus programs that Uber and Lyft provide for drivers who are willing to drive at night and accept 90% of rides no matter how unnerving the circumstances.¹⁰⁵ Driving at night and accepting high rates of passengers is a luxury that female drivers who are worried about their physical safety are not able to afford.¹⁰⁶ Nevertheless, this is a risk that many female drivers, who are not guaranteed minimum wage have to take in order to make ends meet.¹⁰⁷

It is unclear what legal action women drivers would be able to take if they were considered employees and granted Title VII protections. However, it is a safe wager that Uber and Lyft, corporations who pride themselves on modernity, would be doing a lot more to enjoin women into their workforce and protect their safety and dignity on the job. This would be beneficial not only for the drivers, but also Uber and Lyft who have seen many women based competitors crop up as a reaction to their women problems.¹⁰⁸

C. LACK OF SOCIAL INSURANCES

In general, employers have to contribute to a program called Unemployment Insurance,¹⁰⁹ which provides benefits to unemployed former employees who have been laid off.¹¹⁰ There are several eligibility requirements for who can claim unemployment insurance, including: the person must be physically able and available to work, willing to immediately accept work, and actively looking for work.¹¹¹ Arguably one of the most important eligibility requirements, especially as applied to Uber and Lyft, is that the employee is fired, rather than quitting by their own volition.¹¹² There is only one exception for the quitting preclusion, and that is if there was "good cause for leaving the employment AND the individual made all reasonable attempts to keep their job" (emphasis original).¹¹³ Individuals

105. Huet, *supra* note 80.

106. *Id.*

107. Huet, *supra* note 80.

108. *Id.*

109. Unemployment insurance has many regulations and intricacies regarding how much employers have to pay, where they pay the amount to, and the validity of various unemployment insurance claims. Uber and Lyft drivers are independent contractors and therefore unable to receive unemployment insurance. As a result, for the purpose of this paper unemployment insurance will only be discussed in a broad terms.

110. Kathleen Pender, *The Real Differences Between Contractors and Employees*, S. F. CHRON. (Sept. 18, 2015), <http://www.sfchronicle.com/business/networth/article/The-real-differences-between-contractors-and-6514962.php>.

111. *Meeting Eligibility Requirements: Filing a UI Claim*, STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT (last visited Oct. 30, 2017), <http://www.edd.ca.gov/unemployment/Eligibility.htm>.

112. *Id.*

113. *Id.*

who receive unemployment insurance can receive a minimum weekly benefit amount of \$40.00 and a maximum amount of \$450.00.¹¹⁴

Uber and Lyft's benefit from avoiding unemployment insurance is two-fold. First, because their drivers are independent contractors, Uber and Lyft do not have to pay into state or federal unemployment insurance funds.¹¹⁵ This is especially significant given that unemployment insurance tax rates will often increase based on the number of employees who have filed a claim.

The second benefit Uber and Lyft get from not being beholden to unemployment insurance is that they are able to continue with their arbitrary means of rating as the basis for deactivating drivers. When drivers are deactivated without notice, it can often leave them stranded without any source of income or the social safety nets that are provided to their employee analogs.¹¹⁶ The commonness of this occurrence is deeply troubling. Uber's website as updated in April of 2016 lists out several broad ways a driver can be deactivated.¹¹⁷ These ways include but are not limited to: quality, star ratings, cancellation rates, acceptance rates, safety, drugs or alcohol use while driving, compliance with the law, unacceptable activities, fraud, inaccurate personal information, and discrimination.¹¹⁸ While Uber's website touts that it recognizes the importance of clear deactivation policies,¹¹⁹ the categories listed on the websites are extremely broad.

Even worse, in practice these deactivation policies have been applied with little clarity to drivers. For example, a driver was deactivated for "making hateful statements" against Uber.¹²⁰ Refusing to allow a service animal in your car is also grounds for deactivation.¹²¹ Other grounds include having someone else riding along in your car, cancelling a ride because the distance is too short, giving away free rides to family and friends, averaging

114. *Id.*

115. See UNDERSTANDING EMPLOYMENT TAXES, <https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes> (last visited Oct. 30, 2017).

116. Ellen Huet, *How Uber's Shady Firing Policy Could Backfire on The Company*, FORBES (Oct. 30, 2014), <https://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/#38ec22ae1527>.

117. *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en/> (last visited Oct. 30, 2017).

118. *Id.*

119. *Id.*

120. Avery Hartmans, *10 Things That Can Get Your Uber Driver Kicked off the App*, BUSINESS INSIDER (Aug. 4, 2016), <http://www.businessinsider.com/10-things-that-get-uber-drivers-deactivated-2016-8/#10-refusing-to-allow-service-animals-in-the-car-10>.

Christopher Ortiz was deactivated from Uber in October 2014 for tweeting "Driving for Uber, not much safer than driving a taxi." Uber has stated that the deactivation was a mistake made by local team. See Ellen Huet, *Uber Deactivated A Driver for Tweeting a Negative Story About Uber*, FORBES (Oct. 16, 2014, 7:31 PM), <https://www.forbes.com/sites/ellenhuet/2014/10/16/uber-driver-deactivated-over-tweet/#2c6a289f6a4c>. However, since then other drivers have alleged that they have been suspiciously deactivated after criticizing Uber in public online forums. Ellen Huet, *How Uber's Shady Firing Policy Could Backfire on The Company*, FORBES (Oct. 30, 2014), <https://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/#38ec22ae1527>.

121. *Id.*

lower than a 4.6 star rating, and promoting a competitor.¹²² Many drivers have complained that the quality control reasons for deactivation, such as rating below a 4.6 leave the drivers at whim of highly subjective passenger ratings.¹²³

The risk of deactivation for these seemingly mundane behaviors is only exacerbated by the fact that Uber drivers receive no training by Uber before they begin driving.¹²⁴ It would be difficult for an independent contractor driver to know that refusing to allow a service animal their vehicle, is grounds for immediate dismissal. Similarly, an act as innocent as giving family or friends rides that you do not charge for, also seems to be an activity that an independent contractor should be able to without being deactivated. Nevertheless, without clear policy or training, many Uber and Lyft drivers have been left to piece together what will get them deactivated.¹²⁵

Because of Uber and Lyft's deactivation policies, the two companies are a hotbed of unemployment insurance claims. They have a habit of terminating workers without good cause, stranding them without any source of income. Nevertheless, because of independent contractor status, Uber and Lyft are able to continue their practice without out any repercussions.

III. PROPOSED ALTERNATIVES TO GRANTING EMPLOYEE STATUS

A. INDEPENDENT WORKER

Some have argued that the solution to aforementioned problems is not giving drivers employee status, but rather by implementing a "third" category between employee and independent contractor, known as an "independent worker."¹²⁶ This category is a sort of hybrid that combines "arms-length independent business relationships [. . .] with some elements of the traditional employee-employer relationship."¹²⁷ More specifically, Krueger and Harris advocate for the creation¹²⁸ of a legal category of workers who would have the freedom to organize and collectively bargain, civil rights protections, and tax withholding and employer contributions for payroll

122. Hartmans, *supra* note 120.

123. *See*, Huet *supra* note 120.

124. Hartmans, *supra* note 120.

125. Huet, *supra* note 120.

126. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* THE HAMILTON PROJECT, Dec. 2015, at 1.

127. *Id.* (abstract).

128. *Id.* Krueger and Harris discuss the creation of the "independent worker" category as if it is a new idea. However, intermediary categories that blend employer and independent contractor elements have existed throughout the world for several decades. Prominent countries that have used this category with varying degrees of success include Canada, Italy, and Spain, Germany and Japan. *See*, Miriam A. Cherry & Antonio Aliosi, *Dependent Contractors' in the Gig Economy: A Comparative Approach*, ST. LOUIS U. SCH. OF LAW LEGAL RESEARCH PAPER SERIES, Oct. 22, 2016, at 1,1.

taxes.¹²⁹ However, independent workers would not receive minimum wage, overtime pay, or healthcare eligibility.¹³⁰ Harris and Krueger also argue that in order to ensure its accuracy and effectiveness, the “independent worker” category should be created by Congress instead of through the courts.¹³¹ The “independent worker” category idea is set forth specifically with Uber and Lyft drivers in mind.¹³²

The creation of this category fails in many key aspects. First, it fails to acknowledge the risk that in creating a third category, a greater opportunity is created for employers who do not want the burden of having to provide their employees with all of the rights guaranteed to them by law, to move employees into the “independent worker” category. Harris and Krueger acknowledge that under the current system, some employers attempt to reorganize so that they can classify their employees as independent contractors and avoid providing benefits.¹³³ However they fail to acknowledge how the creation of a third intermediate category would solve this problem. On the contrary, Miriam A Cherry and Antonio Aliosi have argued that the creation of a third category could lead to increased downward misclassification in which businesses would begin shuffling more employees into the “independent worker” category.¹³⁴ This is exactly what happened when Italy created a third category of workers in 1973.¹³⁵ Within a decade, Italy saw an erosion of employment protections for jobs that were traditionally always classified as employer-employee relationships.¹³⁶ Given that Krueger and Harris admit is a penchant for some American employers to misclassify their employees as independent contractors, they fail to address how creating an intermediary category wouldn't lead to increased issues of misclassification.

The second reason that the “independent worker” category fails is because it is based on the hardline position that it is impossible for Uber and Lyft to monitor how many hours a driver works. Harris and Krueger use this faulty premise as grounds to deny “independent workers” FLSA protections like minimum wage and overtime pay, as well as access to social insurances.¹³⁷ On the contrary, Uber and Lyft are quite apt at data

129. Harris & Krueger, *supra* note 126 at 2. I will not be discussing tax withholding and employer contribution for payroll taxes as they are outside of the focus of this note.

130. *Id.* at 13.

131. *Id.* at 15.

132. *Id.* at 5. Harris and Krueger state that Uber and Lyft drivers are the archetypal example of an “independent worker” much of the article addresses drivers.

133. Harris & Krueger, *supra* note 126, at 7.

134. Miriam A. Cherry & Antonio Aliosi, *Dependent Contractors' in the Gig Economy: A Comparative Approach*, ST. LOUIS U. SCH. OF LAW LEGAL RESEARCH PAPER SERIES, Oct. 22, 2016, at 1, 3.

135. *Id.* at 19.

136. *Id.*

137. *See* Harris & Krueger, *supra* note 126, at 13.

collection.¹³⁸ In fact, both Uber and Lyft have said in public statements that they track their driver's work hours.¹³⁹ Thus, the idea that the companies are unable to track work hours is largely unfounded.

Harris and Krueger make a secondary claim that it would be impossible to know if drivers with their app on were actually working or engaging in "personal tasks."¹⁴⁰ However, again, this claim is not true. Once the app is turned on, Uber and Lyft drivers receive requests for rides,¹⁴¹ if they deny those request to do "personal tasks" Uber and Lyft would be notified and the driver could be reprimanded. It is already well documented as both Uber and Lyft's policy that they track ride acceptance rates, and if a driver does not consistently accept a high percentage of rides, their apps will be deactivated.¹⁴² Furthermore, Uber and Lyft already track a driver's geographical location, when a passenger is picked up, and how long each ride is in order to calculate ride fares.¹⁴³ Thus it is already well within the power of Uber and Lyft to accurately track the number of hours a driver works so that driver could be granted minimum wage, overtime pay, and social insurances.

The third reason that the creation of the "independent worker" category fails is because it fails to provide any solutions for what is the basis of precarious work for Uber and Lyft drivers. More specifically, it grants drivers the right to unionize and not be discriminated against, while denying vital benefits such as minimum wage, overtime pay and social insurances. The precarity of Uber and Lyft drivers is not simply in the fact that they can not unionize. In fact, as of 2016 only 10.7% of workers in America were members of unions.¹⁴⁴ Granting the right to not be discriminated against in their employment is important, however it largely pales in comparison to minimum wage, overtime pay and social insurances. To support the implementation of Harris and Krueger's independent worker category would be to resign Uber and Lyft drivers to still precarious second class pseudo-

138. See Zatz, *supra* note 55.

139. Ross Eisenrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New 'Independent Worker' Category*, ECONOMIC POLICY INSTITUTE (Mar. 17, 2016) <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>. Uber's chief advisor and board member, David Plouffe noted the average number of hours a week Uber Drivers drive. In Lyft's January 2016 press release regarding their recent court settlement which confirmed they were also able to track weekly driver hours.

140. See, Harris & Krueger *supra* note 126, at 13.

141. Eisenrey & Mishel, *supra* note 139. When an Uber or Lyft driver's app is on, they are engaged with the app in a very real sense. They are notified of rides in the area which they must timely accept or deny.

142. See *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en/> (last visited Oct. 30, 2017); *Acceptance Rate*, LYFT, <https://help.lyft.com/hc/en-us/articles/214218167-Acceptance-Rate> (last visited Oct. 30, 2017).

143. See *How Are Fares Calculated* *supra* note 23; see *How Your Pay is Calculated* *supra* note 26.

144. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBER SUMMARY, USDL-17-0107, (Jan. 26, 2017).

employment with little more than the right to unionize. This is not a solution to the problem at hand, but rather a distraction that's greatest achievement would be appeasing the growing outcry regarding worker misclassification.

B. PORTABLE BENEFITS

An equally ineffectual solution are "portable benefits," that have been supported by groups like the Freelancers Union.¹⁴⁵ In May 2016, the Freelancers agreed to consult with Uber to create "portable benefits" that individual drivers would be able to buy into.¹⁴⁶ Essentially what it meant was Uber and Lyft drivers would remain independent contractors, but would be able to buy protections afforded to normal employees like unemployment insurance and workers compensation plans.¹⁴⁷ In other words, these drivers, who are not being paid minimum wage, who have to pay the costs of smart phones and phone plans, hybrid car insurance policies,¹⁴⁸ wear and tear on their vehicles, and gas would now have to buy their way into employment benefits.¹⁴⁹ While the goal of the Freelancers Union in providing portable benefits is admirable, as applied to Uber and Lyft drivers it is unsatisfactory to continue to classify them as independent contractors with only the option to buy their way into basic employment rights.

IV. SOLUTION: ECONOMIC REALITIES TEST

The Economic Realities test, as endorsed by the U.S. Department of Labor should be used to determine whether Uber and Lyft drivers are employees or independent contractors. Prior to the courts and the Department of Labor's embrace of the Economic Realities Test, the Common Law Right to Control test was used to determine employment status.¹⁵⁰ However, in drafting the Fair Labor and Standards Act, Congress rejected the Common Law Control test, instead defining "employ" broadly

145. The Freelancers Union is a nonprofit organization that aims to educate, advocate on behalf of, and serve the needs of independent contractors. The organization was founded in 2003 by Sara Horowitz and currently has more than 350,000 members. FREELANCERS UNION: ABOUT SARA HOROWITZ, <https://www.freelancersunion.org/about/sara-horowitz/>, (last visited Oct. 30, 2017).

Freelancers Union is not an officially recognized union under the NLRA, but rather an education and advocacy group. Dubal, *supra* note 11, at 133 (footnote).

146. Dubal, *supra* note 11, at 133.

147. *Id.*

148. When a vehicle is being used for purposes beyond personal use, like Uber or Lyft driving, personal insurance policies will not cover the costs if an accident occurs. Thus if Uber and Lyft drivers want to be covered in case of an accident, they need to purchase hybrid commercial and personal insurance policies. The cost of these policies vary, but they are noticeably more expensive than normal insurance policies. *Rideshare Insurance for Drivers: Where to Buy, What it Covers*, NERDWALLET (Mar. 21, 2017), <https://www.nerdwallet.com/blog/insurance/best-ridesharing-insurance/>.

149. *See*, Dubal, *supra* note 11 at 133.

150. U.S DEP'T OF LABOR, *supra* note 16, at 1.

as “to suffer or permit work.”¹⁵¹ As noted by the Department of Labor, the Economic Realities Test and its reliance on both control factors and worker economic reliance accurately encapsulates the definition of “to suffer or permit work.”¹⁵² In other words, the Department noted that a worker who is “economically dependent” on an employer is one who has “suffered or permitted work,” thus Congress and the Economic Reality test’s definition of “employ” squarely align.¹⁵³

Not only is the Economic Realities appropriate because of its definitional overlap with congress’s FLSA, but it also aligns in terms of broad scope. The “suffer or permit work” definition as set forth by Congress was specifically designed to “ensure as broad of a scope” of coverage as possible.¹⁵⁴ The Supreme Court has also consistently acknowledged and upheld congress’s purposefully broad standards;

See *Rosenwasser*, 323 U.S. at 362-63 (“A broader or more comprehensive coverage of employees . . . would be difficult to frame.”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (“employ” is defined with “striking breadth”). The Supreme Court “has consistently construed the Act ‘liberally to apply to the furthest reaches consistent with congressional direction,’ recognizing that broad coverage is essential to accomplish the [Act’s] goal” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)) (internal citation omitted).¹⁵⁵

Thus the Economic Realities test overlaps in both the definition of to “suffer or permit work” and the statutes purposeful broadness. Because of the aforementioned, and in accordance with the Department of Labor’s recommendations, the Economic Realities test is the appropriate test to apply in determining whether Uber and Lyft drivers are independent contractors or employees.

The economic realities test typically consists of six interrelated factors, none of which are singularly determinative.¹⁵⁶ They include:

(A) the extent to which the work performed is an integral part of the employer’s business; (B) the worker’s opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control

151. *Id.* at 1–2.

152. U.S. DEP’T OF LABOR, *supra* note 16, at 2.

153. *See id.*

154. U.S. DEP’T OF LABOR, *supra* note 16, at 3.

155. *Id.* at 3.

156. *Id.* at 3.

exercised or retained by the employer.¹⁵⁷

At the heart of the Economic Realities test is whether the worker is economically dependent on an employer, or whether the worker is within the narrow subset of workers who are truly in businesses for themselves.¹⁵⁸ In applying the Economic Realities test, it is clear that Uber and Lyft drivers should be considered employees.

A) The extent to which the work performed is an integral part of the employer's business

Uber describes itself as an app that was developed so that people could request cars whenever they want.¹⁵⁹ Lyft similarly describes itself as an app that “matches drivers with passengers who request rides.”¹⁶⁰ However, it would be remiss to pretend that driving cars for Uber or Lyft was not an integral part of a platform that provides rides to passengers. The Department of Labor's guidelines further provide that work can be integral even if it is done by “hundreds or thousands of workers.”¹⁶¹ As a point of comparison, the Department of Labor makes the distinction between carpenter and a software developer who work with a construction company. A carpenter who works for a construction company would obviously be an integral part of the employer's business of building houses.¹⁶² A software developer who created software to help the construction company keep track of scheduling, supplies, and material orders would *not* be doing work that was an integral part of that employer's business.¹⁶³ Other lower courts have agreed, holding that cake decorators performed integral work at a custom order bakeshop,¹⁶⁴ and picking pickles¹⁶⁵ is an integral part of the pickle business.¹⁶⁶ Despite their claims of being a technology company, Uber and Lyft simply would not be able to provide the service of driving others, without the actual drivers. Thus, the driving performed by Uber and Lyft drivers is an integral part of the companies' businesses.

157. *Id.* at 4.

158. U.S. DEP'T OF LABOR, *supra* note 16, at 4.

159. *Our Trip History*, UBER, <https://www.uber.com/our-story/> (last visited Oct. 30, 2017).

160. *What is Lyft*, LYFT, <https://www.lyft.com/drive-with-lyft> (last visited Oct. 30, 2017).

161. U.S. DEP'T OF LABOR, *supra* note 16, at 6.

162. *Id.* at 7.

163. *Id.*

164. *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989) (holding that cake decorators who worked at a custom cake decorating shop were performing an integral part of the employer's business).

165. *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1537–38 (7th Cir. 1987) (“[I]t does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business”).

166. U.S. DEP'T OF LABOR, *supra* note 16, at 6.

B) The worker's opportunity for profit or loss based on depending on his or her managerial skill

This factor does not focus on the worker's ability to work more or less hours on their own volition, but rather whether the worker exercises managerial skills that effect their opportunity for profit and loss.¹⁶⁷ Uber and Lyft both tout that because their drivers are in charge of their own schedules, they can make as much or as little money as they want.¹⁶⁸ However, this is true for normal employees who also have the opportunity to increase their income by working more hours or taking overtime shifts.¹⁶⁹ Rather, this factor asks whether the worker can make decisions to hire others, purchase material or equipment, or advertise in a way that would affect their opportunity for profit or loss beyond just the current job they are in.¹⁷⁰ This is the difference between a janitor who does not independently solicit work from other clients, does not advertise services, and cleans office spaces that he is assigned, compared to a janitor who produces his own advertising, negotiates contracts, and can hire helpers to clean offices that he chooses.¹⁷¹

In applying that analytical framework, it is clear that Uber and Lyft drivers do not have the ability to exercise their own managerial skill to increase their profit or loss as is required by this factor. Yes, drivers can work more hours and attempt to do their job as well as possible to increase customer ratings and potential tips.¹⁷² However, that is not managerial skill under the Economic Realities test. Uber and Lyft drivers are assigned by the corporation to a rider, they can not personally advertise for further opportunities outside of their current ride in order to increase profits. Additionally, they have no say in the 'contract' they have with the rider.¹⁷³ In other words, they can not choose how much they want to charge, what route to take, or even who they want to pick up. The drivers sign into the app, are given a task, complete the task, and are assigned another task by the company. A driver's opportunity to increase profits through managerial skill is meaningfully limited, and thus they resemble employees.

167. U.S. DEP'T OF LABOR, *supra* note 16, at 8.

168. See *How Are Fares Calculated supra* note 23; see *How Your Pay is Calculated supra* note 26.

169. U.S. DEP'T OF LABOR, *supra* note 16, at 8.

170. *Id.*

171. *Id.* at 8–9.

172. Lyft has always had an option to provide drivers with tips. *How to Tip Your Driver*, LYFT (Oct. 30, 2017), <https://help.lyft.com/hc/en-us/articles/213583978-How-to-Tip-Your-Driver>. Uber does not have a tipping option. However, as a result of the class action lawsuit by Shannon Liss-Riordan against Uber that was discussed above, in Massachusetts and California riders now have the option to tip their drivers after the ride. Stephanie Rosenbloom, *To Tip or Not to Tip Your Uber Driver*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/22/travel/uber-taxi-tipping.html>.

173. See discussion of rate fixing model *supra*, note 23, 26.

C) The extent of the relative investments of the employer and the worker

The relative investment factor focuses on the “nature and extent” of the investment that the worker and employer have put into the business.¹⁷⁴ For a worker to be considered an independent contractor, they will have had to have made a significant investment (relative to that of the employer), and as a result of the investment bare some risk of loss. Investments in tools¹⁷⁵ and equipment,¹⁷⁶ both big and small, have been used in the consideration of this factor.¹⁷⁷ Looking at Uber and Lyft drivers, it is unclear what investment, if any, they have made. Most drivers use their own personal vehicles and cellphones while driving. It is possible that some of the drivers have gone out of their way to purchase vehicles or cellphones in order to drive, however because the vehicles double for personal use it would not be solely considered a business expenditure.

Uber and Lyft drivers do pay for their own cellphone plans, gas, insurance, and wear and tear on their vehicles.¹⁷⁸ However this investment does not cause drivers to bare risk of loss. Thus, Uber and Lyft driver's use of their personal vehicles and cellphones can not entirely be said to be an “investment” in their job that differs from a normal employee who uses their car and cellphone during work (i.e., outside salesperson). On the contrary, Uber and Lyft have made significant investments into their overall businesses. They are massive corporations with office space in San Francisco, world-wide marketing campaigns, lawyers, engineers, and policy makers. Similarly, Uber and Lyft bare significant risk on their investment into their business. This includes liability to regulatory agencies, future shareholders, and any other people they have business contracts with. In comparison, Uber and Lyft's investment into their companies is massive when compared to that of their drivers.

D) Whether the work performed requires special skills and initiative

The special skill and initiative factor makes a similar inquiry as the managerial skills factor, in that it considers the worker's “business skills, judgement, and initiative” to determine employment status.¹⁷⁹ Courts¹⁸⁰

174. U.S. DEP'T OF LABOR, *supra* note 16, at 9.

175. *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (holding that strawberry grower's investment into light farming equipment was minimal when compared to employer's investment in land and machinery).

176. *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) (holding that \$35,000-\$40,000 investment of workers to buy rig equipment was not significant enough when compared to the massive equipment expenditures by the employer in its own business).

177. U.S. DEP'T OF LABOR, *supra* note 16, at 9.

178. *Dubal*, *supra* note 11, at 121.

179. *See* U.S. DEP'T OF LABOR, *supra* note 16, at 10.

180. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2nd Cir. 1988) (reasoning that in order for nurses to be considered independent contractors, they have to exercise their skills in

have stated that for business skills to be indicative of independent contractor status, they must be exercised in some independent way.¹⁸¹ Furthermore, mere efficiency in performing work is not sufficient to satisfy this factor.¹⁸² A useful comparison is a skilled carpenter who provides his services to a construction firm, and is told when to work and where.¹⁸³ He doesn't make independent judgments on the job site, order the materials, do bidding for the next job, or determine the sequence of work.¹⁸⁴ Compare to an independent carpenter who works for a variety of construction companies, markets his services, and orders his own materials complete jobs that he chooses to work on.¹⁸⁵ Uber and Lyft drivers resemble the first carpenter. They are assigned a task, told how to complete it (what route to take), they do not set their own price,¹⁸⁶ and they can exercise no significant business skill or initiative other than doing their job effectively. Because of the lack of opportunity to exercise any business skill or initiative, this factor weighs in favor of employee classification.

E) Permanency of the relationship

Increased permanency increases the chances that a worker will be considered an employee.¹⁸⁷ An indefinite work relationship would be that of a typical at-will employee as opposed to an independent contractor who typically works from project to project.¹⁸⁸ The Department of Labor also notes that if an independent contractor is hired on to work continuously on projects, their work relationship can resemble that of an employee.¹⁸⁹ Many Uber and Lyft drivers work for their respective companies continuously, however it would be inaccurate to generally define the relationship as indefinite. However, as the Department of Labor noted, the transience of a given employment relationship should always be considered within the context of the industry itself.¹⁹⁰ For example, nurses have an especially transient workforce in that the nature of their profession dictates that they switch employers frequently.¹⁹¹ So in context of their profession, the lack of permanence of nurses' employment relationship does not necessarily mean they are independent contractors.¹⁹² The gig-economy itself lends itself to

an independent way that demonstrates business like initiative).

181. U.S. DEP'T OF LABOR, *supra* note 16, at 11.

182. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 305 (5th Cir. 1998) (reasoning efficiency in performing work is not the type of initiative that is indicative of independent contractor status).

183. U.S. DEP'T OF LABOR, *supra* note 16, at 11.

184. *Id.*

185. U.S. DEP'T OF LABOR, *supra* note 16, at 11.

186. *See supra* note 172 for discussion of tipping.

187. U.S. DEP'T OF LABOR, *supra* note 16, at 11.

188. *Id.* at 12.

189. *Id.*

190. *Id.*

191. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2nd Cir. 1988).

192. U.S. DEP'T OF LABOR, *supra* note 16, at 11.

transience,¹⁹³ and therefore the permanence of the drivers' relationship with Uber and Lyft should be considered within that context. Nevertheless, this is one of the factors in the Economic Realities Test that does not weigh heavily in favor of gaining employee status.

F) The degree of control exercised or retained by the employer

The final factor in the Economic Realities Test analysis asks whether the worker actually controls meaningful aspects of their work so much so that it can reasonably be said that they are truly an "independent business person."¹⁹⁴ Control should also be analyzed in the context of whether the worker works from home or offsite.¹⁹⁵ Finally, modern technological advances that allow companies to maintain significant monitoring and control over their workers without much engagement should also be considered.¹⁹⁶

Uber and Lyft use technology to exercise an exceptional amount of control over their drivers. Once signed into the app, Uber and Lyft tell drivers which passengers to pick up,¹⁹⁷ where to bring them/what route to take,¹⁹⁸ how much each the driver will be paid for the ride,¹⁹⁹ standards of driver behavior within the car,²⁰⁰ procedures for if something is left behind in the driver's car,²⁰¹ and then uses their technology to add another passenger to the driver's queue.²⁰² The behavioral standards that Uber and Lyft impose on their drivers are extensive. As discussed previously they include but are not limited to: requiring drivers to pick up passengers with service animals, limiting drivers' ability to give free rides to family or friends, forbidding driver's from having non-passengers riding along in their car, inability to

193. There are multiple websites that dictate to gig-economy workers how they can successfully driver for Uber, Lyft, and other food delivery services. Scott Van Maldegiam, *How To Drive For Uber and Lyft at the Same Time*, THE RIDESHARE GUY, (July 18, 2016), <http://therideshareguy.com/how-to-drive-for-uber-and-lyft-at-the-same-time/>; *Drive for Uber and Lyft at the Same Time*, RIDESHAREAPPS.COM, (last updated Feb. 10, 2016), <https://ride-shareapps.com/drive-for-uber-and-lyft-at-the-same-time/>.

194. U.S. DEP'T OF LABOR, *supra* note 16, at 13.

195. *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1384 (3rd Cir. 1985), reasoning that the fact workers were able to make their own hours and experienced little direct supervision are largely insignificant in the analysis given that such circumstances are typical of homeworkers.

196. *Id.*

197. Eisenrey & Mishel, *supra* note 139, stating that when an Uber or Lyft driver's app is on they are notified of rides in the area which they must timely accept or deny.

198. *How To Navigate a Ride*, LYFT, <https://help.lyft.com/hc/en-us/articles/213585858-How-to-Navigate-a-Ride> (last visited Oct. 30, 2017); *see also Let The App Be Your Guide*, UBER <https://www.uber.com/drive/partner-app/> (last visited Oct. 30, 2017).

199. *See supra* note 23, 26.

200. *See supra*, note 56, 60 for extended discussion of Uber and Lyft's driver rating system.

201. *See supra* note 96, 97 for extended discussion of Uber and Lyft's lost and found systems.

202. Eisenrey & Mishel, *supra* note 139, discussing that when an Uber or Lyft driver's phone application is on they are notified of rides in the area which they must timely accept or deny.

cancel a ride because the distance is too short, and inability to promote a competitor.²⁰³ Finally, drivers are constantly monitored through an extensive rating system, which gives drivers passenger *and* company commentary on their behavior²⁰⁴ and notifies the driver if they are in danger of falling below what the company considers to be an acceptable rating.²⁰⁵ In fact, the only aspect that Uber and Lyft do not exercise control over is when drivers drive.²⁰⁶ However, courts have held²⁰⁷ merely not determining the workers' hours is not indicative of independent contractor status, as the modern trend is towards flexibility of work schedule.²⁰⁸ Uber and Lyft use technology to exercise control over most aspects of the drivers work, and thus this factor tends towards employee status.

V. CONCLUSION

The Economic Realities Test is not a perfect test. Its critics have argued that the test has led to inconsistent results.²⁰⁹ Additionally, critics have noted that in applying the test, it tends to leave out workers who do not have a single job or boss and are arguably the most economically vulnerable.²¹⁰ The most notable of these vulnerable workers are day laborers.²¹¹ Critics are right in that the Economic Realities test at times does not answer the call of the most vulnerable. However, as of now it is perhaps the broadest scoped and most widely utilized test to determine who is an employee and who is an independent contractor.²¹² As a test that emphasizes qualitative approach and contextual understanding based on the type of work,²¹³ it leaves much room for courts to infuse equitable principles into the employment status analysis. This is not to ignore the plight of day laborers and other workers who find themselves perennially trapped in the lowest rungs of the workforce. Rather it is to say that if employee status is ever to reach those vulnerable workers, it will likely via through an extension of a practical examination like the Economic Realities test.

Through the application of the Economic Realities test done above, it is clear that Uber and Lyft drivers should be classified as employees. The work

203. Hartmans, *supra* note 120.

204. *See supra* note 56, 60.

205. Hartmans, *supra* note 120.

206. Both websites tout that drivers are their own bosses. *See* Lyft, *supra* note 160; GET THERE, YOUR DAY BELONGS TO YOU, <https://www.uber.com/> (last visited Oct. 30, 2017).

207. *See* Snell, 875 F.2d at 806 (reasoning that flexibility in work schedules is common and not indicative of independent contracting itself); *see also* Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984) (arguing that a relatively flexible work schedule alone, does not mean a worker is not an employee).

208. U.S. DEP'T OF LABOR, *supra* note 16, at 13.

209. *See* Dubal, *supra* note 11; *see also* Zatz, *supra* note 55.

210. *Id.*

211. *Id.*

212. U.S. DEP'T OF LABOR, *supra* note 16, at 13.

213. *See generally*, U.S. DEP'T OF LABOR, *supra* note 16.

the drivers perform is an integral part of both companies ridesharing business. Drivers do not have the ability to exercise their own managerial skill to affect profit or loss, and the drivers do not exercise any specialized business judgement. Additionally, drivers' use of their personal cars or cellphones is a negligible investment when compared to Uber and Lyft's investment into their own corporations. It is true that driver's relationship with Lyft and Uber can not in general be characterized as exhibiting permanence. However, in returning to the final factor, once a driver has chosen to work and turn his or her app on, Uber and Lyft use technology to exercise control over nearly all aspects of the drivers work, from the significant to the mundane. The heart of the Economic Realities inquiry is whether the worker is truly in business for themselves, or rather an economically dependent employee who works for an employer. Uber and Lyft drivers are the latter.

Despite all of the aforementioned, given the current political climate and ongoing litigation around the issue, Uber and Lyft drivers should not expect to gain employee status all that soon. There are currently two ways that drivers could gain employee status. The first is through a class action lawsuit that encompasses so many drivers that Uber and Lyft would have to change their national employment policy. This would be similar to what recently happen in the UK, in which a ruling by a London employment tribunal held that Uber was misclassifying drivers as "self-employed" and that they must be classified as "workers."²¹⁴ In the U.S. there have been class action lawsuits against Uber and Lyft to gain employee status, however as noted previously the two most significant are currently in the process of being monetarily settled without changing drivers' employee status.²¹⁵ While neither of these lawsuits bar further litigation on the issue, there is a tangential case regarding arbitration agreements that could eliminate the ability to amass a large plaintiff class of Uber or Lyft drivers.

When a driver signs up to work for Uber or Lyft, they sign a standard contract which includes provisions that prevent the drivers from joining class action lawsuits.²¹⁶ More specifically, the contract includes an arbitration agreement that prevents the drivers from taking disputes to court and other

214. In the UK, the term "worker" is the equivalent of an American "employee" and "self-employed" is the equivalent of an "independent contractor." Chris Johnston, *Uber Drivers Win Key Employment Case*, BBC (Oct. 28, 2016), <http://www.bbc.com/news/business-37802386>.

215. Shannon Liss-Riordan is currently negotiating a \$100-million settlement in a lawsuit against Uber with a class of 385,000 drivers. She also just got approval for a \$27-million lawsuit against Lyft with roughly 95,000 putting in claims for payment. Neither of these settlements include a change in employment status. See introduction for extended discussion of the two lawsuits.

216. Joel Rosenblatt, *Uber's Drivers Win the Backing of U.S. Labor Watchdog*, BLOOMBERG TECHNOLOGY, (Nov. 2, 2016), <https://www.bloomberg.com/news/articles/2016-11-02/u-s-labor-panel-backs-uber-drivers-in-class-action-fight>.

provisions that prevent workers from leveraging class action lawsuits.²¹⁷ The driver members of the current class actions led by Liss-Riordan were only allowed to proceed because their lawyer found holes in the earlier versions of Uber and Lyft's contracts.²¹⁸ These holes have since been closed, and have already prevented class action suits against the companies from proceeding in Arizona, Florida, Ohio and Maryland.²¹⁹ There is a case heading to the Supreme Court, *Ernst & Young LLP v. Morris*,²²⁰ that would likely affect the validity of Uber and Lyft's arbitration agreements.²²¹ After Justice Scalia's death, it was believed that the justices would be split on the validity of arbitration agreements like Uber's. Thus, whoever was nominated onto the Supreme Court to fill Justice Scalia's seat would likely be the deciding vote.²²² Given President Trump's nomination of pro-business Justice Neil Gorsuch, it is unlikely the decision will bode well for Uber and Lyft drivers.

The other way Uber and Lyft drivers can gain employee status is if the federal government filed a suit on behalf of the drivers. This was not a particularly far off alternative in 2016. Under the leadership of Jenny Yang, the Equal Employment Opportunity Commission made advancing workers rights in the gig economy its primary focus of the coming year.²²³ In fact, Shannon Liss-Riordan has filed a claim with the EEOC on behalf of an Uber driver that alleged he was deactivated from the app unfairly as a result of racial biases.²²⁴ However, it is unclear whether or not a claim on these

217. Joel Rosenblatt, *Uber, Lyft Driver Settlements Signal Gig Economy Victories Ahead*, BLOOMBERG TECHNOLOGY (June 2, 2016), <https://www.bloomberg.com/news/articles/2016-06-02/uber-lyft-driver-settlements-signal-gig-economy-victories-ahead>.

218. *Id.*

219. Rosenblatt, *supra* note 217.

220. This case was brought by two employees of Ernst & Young who signed a "concerted action waiver" as a condition of their employment. The waiver mandated that all disputes against the company go to mandatory arbitration. The Plaintiffs filed a class and collective action claim under the FLSA alleging employee misclassification and denial of overtime pay. Ernst & Young sought to enforce the arbitration agreement. Plaintiffs argued was unlawful under the Nation Labor Relations Act, Ernst & Young argued the agreements were valid under the Federal Arbitration Act. Two other cases dealing with similar arbitration agreements, *Epic Systems Corp v. Lewis* and *National Labor Relations Board v. Murphy Oil USA, Inc.* were consolidated with *Morris*. The question before the court is "Whether the collective bargaining provision of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis." *Ernst & Young LLP v. Morris*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/ernst-young-llp-v-morris/> (last visited Nov. 3, 2107)

221. Masunga, *supra* note 4.

222. *Id.*

223. Jon Weinberg, *Gig News: EEOC Strategic Enforcement Plan Prioritizes Gig Economy*, ON LABOR: WORKERS, UNIONS, AND POLITICS (Nov. 30, 2016), <https://onlabor.org/2016/11/30/gig-news-eooc-strategic-enforcement-plan-prioritizes-gig-economy/>.

224. Dan Adams, *Boston-Based Attorney Argues Uber's Star Ratings Are Racially Biased*, BOSTON GLOBE, (Oct. 7, 2016), <https://www.bostonglobe.com/business/2016/10/06/attorney-for-uber-drivers-says-star-ratings-are-raciallybiased/R28mqWL6ShjMFB5xAr3uGL/story.html> (discussing driver Thomas Liu's termination from the app after his rating fell below a

grounds would affect drivers' employee status. This is especially the case, given that the issue could be remedied by something as simple as Uber agreeing to look at factors beyond ratings prior to termination.²²⁵ It is also possible for the NLRB to file a suit on behalf of Uber and Lyft drivers. However, given the current political climate it is not entirely likely that a federal agency will take it upon itself to step into the thicket of regulating big businesses in the gig-economy by asserting rights on behalf of their independent contractors.

In sum, despite clear warning signs that Uber and Lyft drivers are being misclassified as independent contractors, their current employment status is unsettlingly settled.

4.6. Liu argued that his average customer rating was unfairly influenced by customer bias against Asians. As a result, Liss-Riordan filed a claim to the EEOC on Liu's behalf alleging that Uber's rating system is racially discriminatory because of passenger biases).

225. Adams, *supra* note 224.