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# The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard

*John A. Pearce II*<sup>\*</sup>  
*Jonathan P. Silva*<sup>†</sup>

## INTRODUCTION

Technology is transforming modern employment as new, disruptive ways of conducting business are redefining how the employer-employee relationship functions. Despite these changes, the employment classification laws in the United States, which are based on archaic concepts of a master-servant relationship, have failed to keep pace with the changing commercial environment. The result is that employers, workers, and judges are unclear about the distinctions between independent contractors and employees, and the rights and privileges that come with each respective classification.

After assessing the current legal framework in the United States and its history, this article explores a two-component solution to the problem of 21<sup>st</sup> Century worker classification. We begin with a detailed analysis of the ABC test, which presumes a worker is an employee unless the service performed is without control by the employer, outside of the employer's usual course of business, and that which the worker is customarily engaged in through an independently established enterprise. Now established as the most popular legal methodology for distinguishing between employees and independent

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contractors, we argue that the three-part ABC test can be uniformly applied as a definitional structure to all employment-related statutes.

Used alone, however, the ABC test perpetuates a deficiency. The test cannot be used to evaluate situations where workers functionally serve as independent contractors but are economically vulnerable because of a dependence on a single employer or single group of employers.

Consequently, as the second component of an improved legal standard, we discuss the creation of a third employment classification category — namely, the dependent contractor. Modeled on Canadian law, a dependent contractor classification allows legislatures to confer select employment rights to protect contractors who are vulnerable because of their economic dependence on their employer. Replacing the current legal frameworks in the U.S. with a combination of the ABC test and the dependent contractor classification would provide the basis for substantial improvements in worker classification.

## I. THE IMPORTANCE OF PROPER EMPLOYEE CLASSIFICATION

According to a 2015 joint report by the United States Bureau of Labor Statistics and the Government Accountability Office, approximately 12.9% of the United States workforce is classified as independent contractors.<sup>1</sup> This represents a significant increase over the past twenty years, particularly in the last decade. From 1995 to 2005, the percentage of the workforce identified as independent contractors increased from 6.7% to 7.4% (having dipped down to 6.3% in 1999).<sup>2</sup> But in the ten years from 2005 to 2015, the rate of independent contractors as a percentage of the workforce nearly doubled.

The dramatic rise in workers who classify as independent contractors instead of employees has important economic ramifications for both employers and workers. Independent contractors can be less expensive for companies to employ than traditional employees, sometimes by as much as 30 percent.<sup>3</sup> While employers incur multiple expenses when workers are employees, they do not incur the same expenses when the work is done by independent contractors. Specific expenses that are not incurred by the company when independent contractors are used to doing the work include

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1. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNING, AND BENEFITS 16 (2015) [hereinafter GAO, *Contingent Workforce*].

2. *Ibid.*

3. Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 352 (2016).

employment tax, the costs of providing health insurance, retirement plans and other benefits, and worker's compensation.<sup>4</sup> Independent contractors, on the other hand, must self-fund their own benefits and insurance.

The claim that a business's economic motivations led to classifying workers as independent contractors has been the basis for numerous legal challenges by gig-economy workers claiming that they were improperly classified as independent contractors and that the nature of their work makes them employees.<sup>5</sup> A gig is a single project that a worker is hired to do, and they are extremely common in the digital marketplace.<sup>6</sup> The applicable legal rules, however, make it difficult for businesses and workers to assess whether a worker is an independent contractor or an employee. The current federal tests for addressing misclassification of workers are "complex, subjective, and differ from law to law."<sup>7</sup> Contemporary legal challenges have not led to a published judicial opinion that provides a conclusive answer to the question of whether gig-workers are independent contractors or not.<sup>8</sup> Instead, these cases have either settled or been left for juries to decide, leaving workers, businesses, judges, and scholars insisting on legal reform that provides a bright line distinction between an independent contractor and an employee.

Recent court rulings involving FedEx Ground highlight the variety of potentially applicable employee-classification tests that currently exist in employment law. In *FedEx Home Delivery v. N.L.R.B.* (2009), FedEx Home Delivery refused to bargain with its drivers, contending that they were not "employees" under the National Labor Relations Act of 1968.<sup>9</sup> The National Labor Relations Board subsequently cited FedEx for violating the Act.<sup>10</sup> On

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4. *Id.* at 351–52; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 8 (2006) (providing a table of key federal and state agencies and laws that affect workers, many of which can have a financial impact on employers).

5. *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1688 (2016) (discussing multiple legal challenges brought against Uber based on the wages it pays its drivers).

6. Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., WORKING IN A GIG ECONOMY (2016), <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy-.htm> [<https://perma.cc/ZWQ4-6K4K>].

7. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006).

8. As of the writing of this paper, there is a case in the Northern District of California that went through trial in October 2017 and the decision is currently pending. *See* *Lawson v. Grubhub*, case no. 3:15-cv-05128 (N.D. Cal. 2017) (Magistrate Judge Jacqueline Scott-Corley).

9. *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 495, 497 (D.C. Cir. 2009).

10. *Ibid.*

review of the Board's decision, the United States Court of Appeals for the District of Columbia Circuit found that FedEx drivers shared "characteristics of entrepreneurial potential" and should, therefore, be classified as independent contractors.<sup>11</sup> In its decision, the court stated that it was shifting its emphasis to entrepreneurial potential as an "animating principle" when evaluating the remaining factors of its common-law test.

While the case progressed through the appeals process, FedEx drivers filed several class-action lawsuits across the United States alleging unreimbursed employment expenses, illegal wage deductions, and unpaid overtime as a result of their misclassification as independent contractors. In 2014, the United States Court of Appeals for the Ninth Circuit decided that a California-based class of 2,300 drivers working for FedEx were in fact misclassified as independent contractors under the "right-to-control" test.<sup>12</sup> This test derives from previous cases in which the right-to-control hinged on "whether the person to whom the service [was] rendered had the right to control" the means of accomplishing the desired result.<sup>13</sup> After initially vowing to appeal the decision to the U.S. Supreme Court, FedEx settled the case in 2015 for \$228M.

The Internal Revenue Service promulgates yet another test — workers are independent contractors if they are "in an independent trade, business, or profession in which they offer their services to the general public."<sup>14</sup> Doctors, veterinarians, lawyers, accountants, and construction subcontractors are examples of such self-employed workers. Whether specific workers are independent contractors or employees depends on the facts of each case. Typically, a worker is an independent contractor if the payer retains only the right to decide the result of the work and not the right to dictate what the workers will do and how they will do it. On the other hand, workers are not independent contractors if the employer maintains the legal right to control the details of how the services are performed, including what workers will do and how they will do it, even if they have freedom of action over some aspects of the work, such as when it will be performed.

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11. Locke Lorde LLC, *D.C. Circuit Addresses Independent Contractor Status in A Recent NLRB Petition for Enforcement in a Significant Labor Law Decision*, LEXOLOGY (Sept. 13, 2017, 9:30 PM), <https://www.lexology.com/library/detail.aspx?g=77867554-93fa-405f-8a25-6a9841b39cb7> [https://perma.cc/R7MN-V9WB].

12. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014).

13. Chelsea Fitzgerald, Note, *When Tech Startups Outgrow the 1099 Model: Moving Firms Out of the Kiddie Pool*, 18 VAND. J. ENT. & TECH. L. 629, 652 (2016).

14. *Independent Contractor Defined*, INTERNAL REVENUE SERVICE (last updated Oct. 31, 2017), <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> [https://perma.cc/22B9-T6YC].

This article begins with the history of the modern legal distinctions between employees and independent contractors. This history helps to explain why current legal tests often cause confusion when they are used to classify workers in the gig economy. After discussing the deficiencies of current legal tests used for classifying workers and cases that highlight the struggles, we discuss a two-component option for an improved legal standard.

## II. A BRIEF HISTORY OF THE LEGAL CLASSIFICATION OF INDEPENDENT CONTRACTORS

### A. ORIGINS IN 19TH-CENTURY COMMON LAW AND SUBSEQUENT DEVELOPMENT.

Historically, employment classification was important almost exclusively in determining employer liability for accidents of employees.<sup>15</sup> Prior to 1880, nearly all cases where worker status was disputed involved common-law torts rather than statutory protections for workers.<sup>16</sup> The common law defined employment by the master-servant relationship.<sup>17</sup> However, there was no straightforward definition of servant or employee.

The Restatement (First) of Agency (1933), regarded as “the first significant and authoritative statement addressing the problem of worker status,” offered no definition of employee, distinguishing employees from independent contractors solely for the purpose of tort liability under the doctrine of *respondeat superior*.<sup>18</sup> Latin for “let the superior make answer,” the *respondeat superior* doctrine (also known as the master-servant rule) holds an employer responsible for wrongful actions committed by their employees.<sup>19</sup> *Respondeat superior* operates under the presumption that because employers control the physical actions of their employees, they should be responsible for tortious actions their employees commit.<sup>20</sup> Accordingly, to determine employer liability under *respondeat superior*,

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15. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 315 (2001).

16. *Ibid.*

17. See RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958); RESTATEMENT OF EMPLOYMENT LAW § 1.01: CONDITIONS OF EXISTENCE OF EMPLOYMENT RELATIONSHIP cmt. d-e (AM. LAW INST. 2015).

18. Carlson, *supra* note 15, at 315.

19. *Respondeat Superior*, BLACK'S LAW DICTIONARY (10th ed. 2014).

20. RESTATEMENT OF EMPLOYMENT LAW § 1.01: CONDITIONS OF EXISTENCE OF EMPLOYMENT RELATIONSHIP, cmt. d-e (2017).

judges determined whether the worker who committed the tort acted under the “order, control, and direction” of the employer as their servant/employee.<sup>21</sup> This “right-to-control” test was the general rule for distinguishing between employees and independent contractors in the late 19th century.<sup>22</sup>

The importance of the classification of workers dramatically increased in the early 20th century because of the impact that New Deal legislation had on the employer-employee relationship.<sup>23</sup> Classifications no longer solely impacted who was liable to a third party in a tort dispute; they became essential in determining which statutory rights and benefits workers were owed.<sup>24</sup> New Deal-era legislation (and nearly all similar statutes since) depended on the independent contractor/employee classifications to define the scope of the statute’s coverage.<sup>25</sup> However, this legislation provided no definitions to aid in determining which type of workers were eligible to receive benefits and protection.<sup>26</sup> For example, the National Labor Relations Act of 1935, also called the Wagner Act, states that “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer.”<sup>27</sup>

The Supreme Court struggled with the Wagner Act’s lack of a useful “employee” definition in *N.L.R.B. v. Hearst Publications*, where the National Labor Relations Board attempted to assert its authority under the Wagner Act in a dispute between several Los Angeles newspapers and a union of newsboys.<sup>28</sup> The newspaper-publisher respondents in *Hearst* argued that because Congress did not provide a definition of an employee, the Supreme Court needed to apply only the common-law control test in

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21. *Sproul v. Hemmingway*, 31 Mass. 1, 5, 14 Pick. 1 (1833).

22. *See Singer Mfg. Co v. Rahn*, 132 U.S. 518, 523–524 (1889).

23. *See Carlson*, *supra* note 15, at 315.

24. *See Pinsof*, *supra* note 3, at 348.

25. *See id.* at 348 (discussing the history of the common law control test and the employee/independent contractor distinction). Examples of statutes that cover workers classified as employees but not those who are independent contractors are the: National Labor Relations Act (NLRA), Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), Employee Retirement Security Act (ERISA), and Americans with Disabilities Act (ADA). Micah Prieb Stoltzfus Jost, Note, *Independent Contractors, Employees, and Entrepreneurialism under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 313 n.3 (2011).

26. *Carlson*, *supra* note 15, at 315.

27. The National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §151(3) (West)) (also known as the Wagner Act).

28. *N.L.R.B. v. Hearst Publ'ns*, 322 U.S. 111, 120 (1944).

determining if the newsboys were employees, and therefore covered by the statute, or if they were independent contractors.<sup>29</sup>

The Court explained that it did not want to decide the case by expanding the classification test used in tort cases to all applications where distinguishing employees from independent contractors was an issue.<sup>30</sup> Instead of relying exclusively on the common-law test, the Supreme Court also looked at the statutory purpose for context.<sup>31</sup> The Court, in turn, gave more deference to policy concerns for protecting disadvantaged workers underlying new statutory law rather than relying on a strict common-law analysis.<sup>32</sup>

In response, Congress passed the Taft-Hartley Act of 1947, which rejected the statutory purpose approach and reinstated the common-law distinctions for classifying workers.<sup>33</sup> By doing so, Congress made clear their preference for the use of the common-law right-to-control test that originated in tort cases for legally distinguishing between employees and independent contractors.

## B. MODERN TESTS FOR DISTINGUISHING BETWEEN INDEPENDENT CONTRACTORS AND EMPLOYEES

The right-to-control test is the predominant analysis applied when classifying workers. It is applicable in any situation related to employment

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29. *Ibid.*

30. *Id.* at 121 (“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.”)

31. *Id.* at 124 (stating that “the term ‘employee’ . . . ‘takes color from its surroundings’ . . . and derives meaning from the context of that statute, which ‘must be read in light of the mischief to be corrected and the end to be attained.’”) (internal citation omitted).

32. *See id.* at 128 (“[W]hen the . . . economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.”).

33. *See N.L.R.B. v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (“The obvious purpose of [the Taft-Hartley] amendment was to have the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (reaffirming that Congress’s intent is using the common law approach to determine employee status under a statute and not rely on “the mischief to be corrected and the end to be attained” by the statute) (quoting *Hearst Publ’ns*, 322 U.S. at 124).



where no statutory definition of employment has been given or where the given definition is only nominal.<sup>34</sup>

In contrast, the common-law agency test is best articulated by the Restatement (Second) of Agency § 220, which has been adopted by most courts, including the Supreme Court in *Community for Creative Non-Violence v. Reid*.<sup>35</sup> The Restatement defines an employee as “[a] servant hired to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”<sup>36</sup> It then sets out a non-exhaustive list of ten factors to consider in distinguishing whether the worker is acting as an employee or as an independent contractor.<sup>37</sup> The factors are:

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

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34. *Darden*, 503 U.S. 322–23 (“Where 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 . . . . In the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”) (internal citations omitted).

35. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989) (citing RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958)).

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

37. *Ibid.*

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- (I) whether or not the parties believe they are creating the relation of master and servant; and  
(j) Whether the principal is or is not in business.<sup>38</sup>

The factors are considered simultaneously to determine the pertinent facts of the relationship with no one factor being decisive.<sup>39</sup>

While the right-to-control test is foundational, and the Restatement's agency test is the predominant articulation of the test, several other legal tests for the classification of workers exist and may be applied depending on the circumstances of each particular case. The economic realities test, the hybrid test, and the IRS twenty-factor test are a few prominent variations of the common law right-to-control test. The economic realities test, used in connection with federal statutes including the Fair Labor Standards Act, looks to a variety of factors related to the worker's economic reliance on the employer.<sup>40</sup> The hybrid test combines the common-law test and the economic reliance test, emphasizing the former while still relying on factors from the latter.<sup>41</sup> The IRS test, used primarily for tax cases, is a more expansive version of the common-law test with a wider array of factors to consider.<sup>42</sup>

While some of the factors and the weight assigned to each factor differ, the tests all originate from the common law right-to-control test. Control and the other basic factors used by current legal tests for distinguishing employees from independent contractors were identified by the late 1800s, and have remained unchanged since despite the dramatic revolution of employer-employee relationship since then.<sup>43</sup> Control by the employer, the basis for distinguishing between employees and independent contractors for *respondeat superior* liability in tort law, emerged as the most important

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38. *Ibid.*

39. *N.L.R.B. v. United Ins. Co of Am.*, 390 U.S. 254, 258 (1968).

40. 133 Am. Jur. Trials 213, §13 (Originally published in 2014) (listing a number of nonexclusive factors courts consider: "1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.").

41. *Id.* at § 18.

42. Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

43. See Carlson *supra* note 15, at 310 (stating that "control over work was never the exclusive test of status for either respondeat superior or other statutory purposes. [B]y the end of the nineteenth century the courts had already identified and assembled most of the other basic 'factors' recognized today as evidencing one or the other type of worker status").

factor in determining classification in modern statutory schemes.<sup>44</sup> The consideration of other factors as early as the 1890s, however, reveals a recognition by courts of the reality and variability of working relationships.<sup>45</sup> This appreciation of the complexity involved also divulges an acknowledgment by courts that they lack a clear method for distinguishing between employees and independent contractors.<sup>46</sup> Rather than clarifying, the additional factors compounded the uncertainty of the legal tests.<sup>47</sup> Further complicating the matter, the enactment of statutes intended to protect workers led to courts relying more heavily on factors other than control to classify workers as employees under those statutes than they did for cases imposing tort liability on employers.<sup>48</sup> As new legal and factual frameworks have emerged, the expanded tort law test has created a pattern of misclassification because this legal relic was not created to address and adapt to the complexity of modern working relationships.

### III. Critiques of the Current Classification Systems

Since the Great Recession in 2009, many U.S. businesses reconfigured their organizational structures, resulting in significant changes to the proportion of workers categorized as independent contractors.<sup>49</sup> Employment rose by six percent, but staffing hires grew by 41% as companies increasingly classified workers as independent contractors.<sup>50</sup> As of 2010, approximately 40.4% of the U.S. labor force was comprised of workers in contingent or alternative arrangements. This number is up from

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44. *Ibid.*

45. *Id.* See, e.g., *Waters v. Pioneer Fuel Co.*, 52 Minn. 474 (1893), for a *respondeat superior* case where the Minnesota Supreme Court considered a long list of factors in addition to the usual test of control. These factors included: manner of compensation, the continuous nature of employment, the exclusivity of the relationship, the employer's control over the circumstances of the work, who contributed resources necessary to accomplish the job, length of employment, and a comparison in treatment to the employer's full-time employees.

46. See *Carlson supra* note 15, at 311 ("But if *Waters* is an early example of a court's appreciation of the complexity and variability of personal services relationship, it is also an early confession that the judiciary lack a set of definitions that will clearly distinguish an "employee/servant" from an "independent contractor." Rather, a court must hope to know each when it sees it.").

47. See *id.* at 311.

48. *Ibid.*

49. See *Cunningham-Parmeter supra* note 5, at 1676 (citing Catherine Ruckelshaus et al., *Who's The Boss: Restoring Accountability For Labor Standards in Outsourced Work*, NAT'L EMP'T LAW CTR., 3-5, 19 (2014)).

50. *Id.* at 1676 n.11.

30.6% in 2005.<sup>51</sup> The GAO's broadest definition of workers in such arrangements provides that they are "individuals who maintain work arrangements without traditional employers or regular, full-time schedules — regardless of how long their jobs may last."<sup>52</sup> While independent contractors are not the only type of employment arrangement included under this broad definition — the definition includes agency temps and day laborers, for example — "most" of those included are independent contractors or standard part-time workers.<sup>53</sup>

Although the trend toward classifying individuals as contingent workers intensified following the recession and gave rise to suggestions that the trend reflects cost-saving measures,<sup>54</sup> there is no evidence that such classification changes are strictly for the purpose of cost saving. According to Yale management professor James Baron, using independent contractors gives companies advantages in handling uncertainty in demand and future conditions, as well as allowing the flexibility to scale up or down.<sup>55</sup> Nevertheless, workers caught in this setting are often given fewer benefits, have few statutory protections, and more commonly experience employment law violations.<sup>56</sup> More generally, important components of America's social safety net, like Social Security and unemployment compensation, receive

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51. *Id.*

52. GAO, *Contingent Workforce*, *supra* note 1, 4. The definition of this category is extremely broad. The estimated total includes independent contractors, self-employed workers, and standard part-time workers (many of whom have long-term employment stability), and those with work schedules that are variable, unpredictable, or both — such as agency temps, direct-hire temps, on-call workers, and day laborers.

53. *Id.* at 6 ("Our understanding of the contingent workforce is also shaped by the multiple definitions used to measure its size and characteristics. Current definitions of contingent employment typically highlight instability in scheduling and employment duration, and features of the employer-employee relationship to varying degrees, focusing on alternative employment arrangements such as those characterizing independent contractors, employees of temporary help agencies and other groups.").

54. See, e.g., Cunningham-Parmeter, *supra* note 5, at 1676 ("Although the strategic use of contractors existed long before the most recent economic downturn, the Great Recession dramatically increased this trend.").

55. Josh Eidelson, *FedEx Ground Says Its Drivers Aren't Employees. The Courts Will Decide*, BLOOMBERG BUSINESSWEEK, Oct. 17, 2014, <http://www.bloomberg.com/bw/articles/2014-10-16/fedex-ground-says-its-drivers-arent-employees-dot-the-courts-will-decide> [<https://perma.cc/U2NZ-DQ3T>].

56. GAO, *Contingent Workforce*, *supra* note 1, 3, 37 (2015) ("Because contingent work can be unstable, or may afford fewer worker protections depending on a worker's particular employment arrangement, it tends to lead to lower earnings, fewer benefits, and a greater reliance on public assistance than standard work. ... While current data on contingent workers' access to work-provided benefits are limited...data show that core contingent workers, as well as others who are not in standard full-time arrangements, report significantly lower satisfaction with their fringe benefits."); Cunningham-Parmeter, *supra* note 5, at 1676 ("Regrettably for workers caught in these settings, employment law violations represent a common practice.").

fewer contributions from firms.<sup>57</sup> The scope of these issues is likely only to increase in the coming years as eighty-percent of large corporations plan to increase their use of a flexible workforce substantially and the number of contingent workers in the U.S., when broadly defined, is expected to continue at the forty-percent level through 2020.<sup>58</sup>

As work relationships continue to drift from the traditional paradigms for which employment law was constructed, the law needs to adapt to handle the changes.<sup>59</sup> The current legal systems for distinguishing between independent contractors and employees have already come under increased scrutiny in recent years, with legal scholars calling for reform.<sup>60</sup> In the view of critics, the lack of clear direction for distinguishing between employees and independent contractors provided by the current legal systems limits the reach of protective statutes and therefore hinders the exercise of employment rights in the modern workplace.<sup>61</sup> Consequently, the current classification system is prone to misclassify workers who fall outside the traditional binary employment scheme.<sup>62</sup>

#### A. MISCLASSIFICATION

The independent-contractor designation has historically been given to entrepreneurial individuals with specialized skills that demanded higher pay

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57. GAO, *Contingent Workforce*, *supra* note 1, 3, 37; Cunningham-Parmeter, *supra* note 5, at 1676.

58. INTUIT, INTUIT 2020 REPORT: TWENTY TRENDS THAT WILL SHAPE THE NEXT DECADE 20–21 (2010), [https://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit\\_2020\\_report.pdf](https://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf) [<https://perma.cc/DS5N-CYHJ>]; *see* GAO, *Contingent Workforce*, *supra* note 1, 4 (“Applying a broad definition to analysis of 2005 [Contingent Work Supplement] data, our prior work estimated that 30.6 percent of the employed workforce could be considered contingent. Applying this broad definition to our analysis of data from the [General Social Survey], we estimate that such contingent workers comprised 35.3 percent of employed workers in 2006 and 40.4 percent in 2010.”).

59. *See* Catherine Ruckelshaus et al., *Who's The Boss: Restoring Accountability For Labor Standards in Outsourced Work*, NAT'L EMP'T LAW CTR., 1, 3–4 (2014) (“This restructuring of employment arrangements may well foreshadow a future of work different from the employer-employee paradigm around which many of our labor standards were constructed, but it should not spell the end of living wage jobs or business responsibility for work and workers.”).

60. *See, e.g.*, Carlson, *supra* note 15, at 298; Cunningham-Parmeter, *supra* note 5, at 1676; Pinosof, *supra* note 3, at 344; Jost, *supra* note 25, at 315, 316.

61. *See* Julia Tomassetti, *The Contracting/producing Ambiguity and the Collapse of the Means/ends Distinction in Employment*, 66 S.C. L. REV. 315, 357 n.260 (2014) (citing KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS*, 5, 6 (Cambridge Univ. Press 2004) (“[W]ork arrangements characteristic of the new era place stress on the existing labor laws and employment institutions that were designed for an earlier age.”)).

62. *See infra* parts IIIA and IIIB.

on the open market.<sup>63</sup> Because of the high level of skill held by independent contractors, legislatures rationalized that this group of laborers was not as vulnerable as their less-skilled counterparts and therefore did not need the protections of employment law.<sup>64</sup> Some examples of industries where independent contracting is common are technology and construction. In recent years, however, independent contracting has expanded into industries that have not normally relied on independent contractors, such as home health care, janitorial services, and food service.<sup>65</sup> The combination of increased independent-contractor classification and the lack of clear statutory definitions and legal tests for distinguishing between employees and independent contractors leaves the door open for workers to be classified by employers as independent contractors, even though it might not be the appropriate designation.

Misclassification of employees as independent contractors has been a persistent problem in recent years.<sup>66</sup> Government revenue and workforce agencies have historically been lax in their enforcement of worker classification but, recently, the government has become more interested in cracking down on misclassification.<sup>67</sup> The inattentiveness to worker misclassification, however, contributed to the widespread lack of understanding of the legal distinctions between independent contractors and employees.<sup>68</sup>

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63. Cunningham-Parmeter, *supra* note 5, at 1684.

64. Carlson, *supra* note 15, at 356 (“For example, lawmakers may assume that employees are a class of persons who suffer problems targeted by employment law and who need the protection of these laws, while independent contractors are not.”); Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contracts in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1030–31 (2016) (“As a result, employees required statutory protections ‘as a check against the bargaining advantage employers [had] over [them] — particularly unskilled, lower-wage employees — and the corresponding ability employers would otherwise have [had] to dictate the terms and conditions of the work.’ Independent contractors, by contrast, were presumably in a ‘far more advantageous position’ with respect to bargaining power since they could ‘readily . . . sever [a] business relationship’ when faced with unfair treatment or working conditions.”) (quoting *Cotter v. Lyft Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. Mar. 11, 2015) (Judge Vince Chhabria)).

65. Eidelson, *supra* note 55.

66. See generally *Misclassification of Employees as Independent Contractors*, U.S. DEP’T OF LAB., WAGE AND HOUR DIV. (Dec. 7, 2016), <https://www.dol.gov/whd/workers/misclassification/> [https://perma.cc/Q9KG-FNTH].

67. See RICHARD J REIBSTEIN, ET AL., *THE 2015 WHITE PAPER ON INDEPENDENT CONTRACTOR MISCLASSIFICATION: HOW COMPANIES CAN MINIMIZE THE RISKS*, at 4 (Pepper Hamilton LLP, 2015) (“Prior to the recent crackdown on independent contractor misclassification, years of lax enforcement by governmental revenue and workforce agencies contributed greatly to the classification and misclassification of employees as independent contractors.”) [http://www.pepperlaw.com/uploads/files/ic-misclassification-n\\_minimizerisk\\_04\\_2015.pdf](http://www.pepperlaw.com/uploads/files/ic-misclassification-n_minimizerisk_04_2015.pdf) [https://perma.cc/UQ2C-96UL].

68. *Ibid.*

The vast majority of misclassifications result from the business either being confused by the numerous legal requirements, or because the business has not paid attention to those legal requirements.<sup>69</sup> According to studies performed by the Department of Labor in 2000 and 2005, approximately one in three businesses misclassify at least one worker, and at least one in ten private sector workers are misclassified.<sup>70</sup> According to state audits in 2012, there were approximately 700,000 misclassified workers in New York, 250,000 in Massachusetts, 370,000 in Illinois, 450,000 in Ohio, 580,000 in Pennsylvania and 214,000 in Virginia, to name a few.<sup>71</sup> In providing this data, the AFL-CIO noted that these numbers likely underestimate the actual numbers because accurate data is hard to acquire since businesses do not voluntarily report misclassification and no government agency has conducted comprehensive research.<sup>72</sup> These statistics indicate that hundreds of thousands of businesses exposed themselves to liability for failure to comply with federal and state labor, benefits, and tax laws and that hundreds of thousands of workers are unwittingly deprived of employment benefits.

#### B. CONFUSION AND AMBIGUITY IN THE LAW LEADING TO INCONSISTENT RESULTS

Since the law provides no clear definition or method for determining if a worker should be classified as an employee or an independent contractor, the resolution of this ambiguity when initially hiring an employee is often left to the judgment of the business. When initially hiring workers, employers determine the individual's classification and are in a position to take advantage of the surrounding legal ambiguity by retaining control over what matters most to them, "while using other factors of independent contractor status as a counterbalance."<sup>73</sup> The economic incentives for

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69. *Id.* ("[T]he overwhelming number of businesses that misclassify employees as independent contracts has simply paid insufficient attention to the legal requirements or do not understand the laws in this area, either because they have mistaken conceptions of the laws or because they are confused by the array of different laws at the federal and state levels.")

70. Caroline Frederickson, *Is Your Uber Driver an Independent Contractor or an Employee? It Makes a Difference*, L.A. TIMES (June 5, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-fredrickson-are-uber-drivers-independent-contractors-or-employees-20150605-story.html> [https://perma.cc/UZ5C-EPPR].

71. AFL-CIO DEP'T FOR PROF'L EMPS, THE MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, at 4 (June 2016), <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf> [https://perma.cc/XBX3-BNY7].

72. *Ibid.*

73. Carlson, *supra* note 15, at 29.

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businesses encourage employers to classify workers as independent contractors in ambiguous instances. Workers do have grounds to raise a legal challenge to any determination, but only after being hired and suffering some type of damage, in addition to facing the imposing costs of a legal challenge. The concern of businesses that they may violate the law is lessened as courts struggle to apply myriad tests and factors in resolving disputes around employment designation. Decision making is especially challenging when applied in the context of the gig economy.

As our discussion has revealed, the legal standards used to classify workers are often confusing and ambiguous.<sup>74</sup> Three primary reasons explain the confusion and ambiguity. *First*, it is not always clear which test is proper for use in given circumstances. *Second*, all of the tests require a complex multifactor analysis that can lead to different results in substantially similar factual circumstances. *Third*, the tests require consideration of some factors that some courts feel are inapplicable and outdated.

The determination of which test to use is dependent on the statute and jurisdiction involved. The two tests with the widest application used by the courts are the common law right-to-control test and the economic realities test. However, where the laws and regulations of a particular agency govern a case, the particular tests used by that agency control. For example, the IRS uses its own test for tax cases and the Department of Labor often uses multiple different tests for its agency decisions.<sup>75</sup> Unlike the IRS test, which has clear application only to tax cases and is used in every tax case where worker classification is at issue, there is no clear delineation of when the economic realities test or the common law right-to-control test should be applied.

If a statute provides no specific definition of a term that has a settled common law meaning, or the statute provides only a nominal definition, the general principle that courts follow is to infer that Congress meant to incorporate the common law definition.<sup>76</sup> An employee is defined under the common law by the right-to-control test. Thus, following the general principle requires the application of the right-to-control test where the statute does not provide a clear definition. Furthermore, since nearly all federal employment statutes provide the same nominal definition for employee —

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74. See Part III, section A. See also Jost, *supra* note 25, at 349–50.

75. See Jost, *supra* note 25, at 349–50; Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

76. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, at 322–23 (1992).



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“any individual employed by an employer” — the common law right-to-control test should always be applied.<sup>77</sup>

However, the Supreme Court has determined that in cases under the Fair Labor Standards Act (“FLSA”) the more expansive approach of the economic realities test can be used.<sup>78</sup> Although the FLSA defines the term “employee” as merely “any employee,” the economic realities test has merit because the FLSA also defines the verb “employ” expansively to mean “suffer or permit to work.” The breadth of the “employ” definition makes the statute applicable to some persons who would normally be excluded under a strict application of traditional common law principles.<sup>79</sup> The Supreme Court has been clear that the textual asymmetry in definitions of the FLSA compared to other employment statutes precludes the use of the economic realities test in analyzing the definition of employment under other statutes.<sup>80</sup>

Despite this apparently clear delineation of when the right-to-control test might apply versus the economic realities test, an abundance of case law muddles the line. For example, in *Juino v. Livingston Par. Fire Dist. No. 5*, the United States Court of Appeals for the Fifth Circuit employed a hybrid of the right-to-control test and the economic realities test in determining whether a volunteer firefighter bringing a sexual harassment claim was an employee within the meaning of Title VII of the Civil Rights Act.<sup>81</sup> In its analysis, the Court of Appeals for the Fifth Circuit applied both the common law right-to-control test and the economic realities test to determine if the employment relationship was one of an employee or an independent contractor.<sup>82</sup> The court used the two tests despite Title VII providing no additional statutory definitions of employment the way the FLSA does,

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77. See, e.g., 29 U.S.C.A. § 152(3) (West 2017) (National Labor Relations Act) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise”); 29 U.S.C.A. § 203(e)(1) (West 2017) (Fair Labor Standards Act) (“the term ‘employee’ means any individual employed by an employer”); 42 U.S.C.A. § 2000e(f) (West 2017) (Equal Employment Opportunity Act) (“The term ‘employee’ means an individual employed by an employer”); 29 U.S.C.A. § 630(f) (West 2017) (Age Discrimination in Employment) (“The term ‘employee’ means an individual employed by an employer”).

78. *Darden*, 503 U.S. at 326 (discussing *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), where the Court created the economic realities test to handle classification of employees under the FLSA).

79. *Ibid.*

80. *Id.* at 326 (rejecting respondent’s argument in *Rutherford* for the use of the economic realities test for a broader reading of employee, the Court stated, “ERISA lacks any such provision, however, and the textual asymmetry precludes reliance on FLSA cases when construing ERISA concepts of ‘employee.’”).

81. See *Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431 (5th Cir. 2013).

82. See *id.* at 434.

which is how the Supreme Court justified the use of the economic realities test's more expansive analysis in FLSA cases.<sup>83</sup>

The Court of Appeals for the Fifth Circuit is not alone in blurring the line between where the right-to-control test should be applied versus the economic realities test. The Courts of Appeal for the Ninth and Tenth Circuits both have applied variations of the economic realities test to statutes with definitions asymmetric to those in the FLSA, and then added elements of the common law right-to-control test into their analysis.<sup>84</sup> The result has been the development of a body of law that provides answers on a worker-by-worker basis and gives little actionable direction on which employers and workers can confidently rely as a guide to ensure compliance with the law.

Once a court goes through the complicated and time-consuming process of determining which test to use, it must next apply complex tests involving a large number of factors. The tests vary in length and number of factors, ranging from the five exclusive factors of the economic realities tests, the smallest test a court may consider, up to the twenty nonexclusive factors comprising the IRS balancing test.<sup>85</sup> While the factors may vary slightly between tests, many factors within any one test are similar and therefore can be overlapping, confusing the courts. Whether evaluating a case using five factors or twenty factors, the analysis often involves a combination of objective and subjective judgments with no clear direction about the weight each factor should be given.<sup>86</sup> Because there is no clear guidance on how judges should weigh the factors and because of the sometimes-subjective nature of the analysis, the answer to a question of worker classification depends heavily on the individual interpretations by the people conducting the analysis. This makes it difficult for employers and employees to

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83. Compare *id.* at 434 (applying both tests in *Juino*), with *Darden*, 503 U.S. at 326 (rejecting the respondent's reliance on *Rutherford*, a FLSA decision, explaining that ERISA lacked the expansive definition of "employ" contained in the FLSA). See also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (defining "employee" nominally and lacking any provision defining "employ").

84. See, e.g., *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 305 (10th Cir. 1992) (applying both the economic realities test and the right-to-control test in determining employment classification under the Age Discrimination in Employment Act). See also *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1041 (9th Cir. 2014) (applying both the economic realities test and the right-to-control test in order to determine if FedEx drivers were employees or independent contractors).

85. See *Jost*, *supra* note 25, at 351–52.

86. *Id.* (citing a 2007 report by the Joint Committee on Taxation which stated "Under the common-law test, some of the relevant factors may support employment status, while some may indicate independent contractor status, and there are no rules for the weight that any particular factor is given. In addition, some of the relevant factors involve an examination of objective facts, while others involve and examination of subjective facts. . . .") (internal citation omitted).

determine how they should define their relationship to be in accordance with the law, and also makes it difficult to generate predictable and consistent outcomes if a case is taken to court.

There are multiple illustrations of how the application of the same test can lead to different results despite substantially similar factual circumstances. One such illustration is shown in how courts handled recent cases involving FedEx drivers. In *FedEx Home Delivery v. N.L.R.B.*, the United States Court of Appeals for the District of Columbia Circuit determined that under the common law right-to-control test FedEx drivers were independent contractors.<sup>87</sup> In determining the type of control FedEx exercised over the drivers, the court focused on the entrepreneurial opportunity of the drivers to increase their individual earnings.<sup>88</sup> The court focused on entrepreneurial opportunity as a tool for determining if FedEx's relationship to the drivers was more analogous to a relationship between independent businesses or an employer-employee relationship. Using this framework, the court found that the ability of drivers to have multiple routes, to hire help in servicing those routes, to sell those routes, as well as the expressed contractual intent of the parties all were dispositive in determining that the drivers were independent contractors.<sup>89</sup> The court also determined that although the controls FedEx retained over particulars — such as the appearance of the driver, the appearance of the truck, and the ability of FedEx to reconfigure routes — were significant, they were not sufficient evidence to determine that an employment relationship existed.<sup>90</sup>

At odds with the *FedEx Home Delivery v. N.L.R.B.* decision is the determination by the United States Court of Appeals for the Ninth Circuit in *Alexander v. FedEx Ground Package Sys., Inc.*, which analyzed the work relationship using the same common law right-to-control test.<sup>91</sup> *Alexander* explicitly considered and rejected the analysis used by the D.C. court in *FedEx Home Delivery v. N.L.R.B.*<sup>92</sup> *Alexander* focused on FedEx's control over the manner and means drivers used to perform their delivery services, stating that control as an employer may still exist even if a business may permit flexible and entrepreneurial opportunity to the worker.<sup>93</sup> The court, in *Alexander*, found that FedEx exercised excessive control over the

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87. See *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 504 (D.C. Cir. 2009).

88. *Id.* at 497–98.

89. *Id.* at 504.

90. *Id.* at 500–01.

91. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014).

92. *Id.* at 993.

93. *Id.* at 990–91.

relationship with its drivers, citing as examples the company's control over the trucks' appearance (clean, white, and covered in FedEx logos); control over the driver's appearance, dictating their entire wardrobe and setting hygiene requirements; control over working hours based on required package pick-up and drop-off times; and control over routes, including how and when drivers deliver packages.<sup>94</sup>

The panel in *Alexander* was not convinced by the entrepreneurial opportunities *FedEx Home\_Delivery v. N.L.R.B.* relied on to determine that FedEx drivers were independent contractors. *Alexander* reasoned that FedEx retained some control over these opportunities since it could refuse proposed replacement drivers, refuse a driver request to take additional routes, and refuse to allow a driver to sell his or her route.<sup>95</sup> This example shows that courts have achieved different results by applying the same analytical factors.<sup>96</sup>

A second challenge in applying the complex multifactor tests is that since the 1800s, when most of the tests originated, modern technologies have rendered the tests outdated and easily manipulated, resulting in the misclassification of employees as independent contractors.<sup>97</sup> Many secondary factors, such as who provides the tools or equipment necessary for getting the job done, are equivocally applied and provide no aid to the court's analysis.<sup>98</sup> One such factor is who provides a vehicle necessary for the work. Generally, employers are viewed as providing the tools necessary for their employees to perform a job while independent contractors supply their own tools. However, a California court, for example, has ruled that a

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94. *Id.* at 989–90.

95. *Id.* at 994.

96. *See also, e.g., Crew One Prods., Inc. v. N.L.R.B.*, 811 F.3d 1305, 1312–13 (11th Cir. 2016) (discussing that other circuits, such as the Second and Seventh, would disagree with the weight the court was giving to the failure to withhold employment taxes as a strong indicator that it was an independent contractor relationship; and stating that the Independent Contractor Agreement between the worker and the business was evidence of intent for an independent contractor relationship); *but see Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (“Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”).

97. Carlson, *supra* note 15, at 310.

98. *See Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1080 (N.D. Cal. Mar. 11, 2015) (Judge Vince Chhabria) (discussing how secondary factors in the right-to-control test cut both way and can be equivocal).

worker providing a car that is necessary for performing the job can still be considered an employee.<sup>99</sup>

Another example of an outdated factor included in most tests is the location of where the work is being performed.<sup>100</sup> Historically, an inference was drawn that since employers had more control over a worker performing his or her duties at the employer's place of business, workers on premises were more likely to be employees than independent contractors.<sup>101</sup> The rise in telecommuting (working from a remote location) is making this factor less relevant as a determinant in worker classification. The number of Americans who telecommute rose by 79% between 2005 and 2012.<sup>102</sup> Approximately 30 million Americans telecommute at least once a week.<sup>103</sup> Because the current legal framework considers the location where the work is performed, a salaried office worker that both the employer and the worker intend to be considered an employee could fail this prong and be considered an independent contractor if the individual works from home. Modern technology often makes location irrelevant as a factor, and its continued use in the law produces ambiguity to an area of law where the employer struggles to understand its compliance requirements.

While workers may "fall clearly on one side or on the other, by whatever test may be applied[,]" there are many incidents of employment where the facts weigh partly in favor of an independent-contractor designation and partly in favor of an employee designation.<sup>104</sup> However, the complex nature of the current legal classification system, with its numerous multi-factor tests that can produce disparate results in similar circumstances, provides no clear direction that businesses and workers can rely on to ensure that the workers will be classified as both parties expect.

### C. APPLICATION TO WORKERS IN THE MODERN ECONOMY

The complexity of the legal tests and their shortcomings are even more apparent when applying them in the context of the modern gig economy. The modern gig economy, also referred to as the sharing economy or the on-

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99. See *e.g.*, *Gonzalez v. Workers' Comp. Appeals Bd.*, 54 Cal. Rptr. 2d 308, 312–13 (1996) (noting that a newspaper delivery person providing their own van in order to deliver newspapers did not weigh in favor of a determination of independent contractor status).

100. See *e.g.*, *Pinsof*, *supra* note 3, at 350–51.

101. See *Pinsof*, *supra* note 3, at 363.

102. See Alina Tugend, *It's Unclearly Defined, but Telecommuting Is Fast on the Rise*, N.Y. TIMES, Mar. 8, 2014, at B6.

103. *Id.*

104. *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 126 (1944).

demand business model, has many facets. It includes peer-to-peer transactions such as those through Airbnb that connect users with a home or bedroom for rent with customers looking for a short-term space to rent.<sup>105</sup> It also includes businesses conducting operations through the use of short-term, task-oriented employment usually facilitated by technology, such as Lyft and Uber.<sup>106</sup> Gigs vary greatly in terms of duration, from a simple task like completing a five-minute survey to contracting on a multiyear project, to working potentially indefinitely as a driver for Uber.<sup>107</sup> Gig workers can be found in a wide variety of fields such as art and design, computer and information technology, construction and extraction, media and communications, and transportation and material moving.<sup>108</sup>

Statistical employment data on gig workers is difficult to find and distinguish because it is often aggregated into other categories of contingent or alternative employment, with independent contractor being the most common form of employment in these categories.<sup>109</sup> Despite the fact that contingent employment in the U.S. grew to 40 percent in 2010,<sup>110</sup> it constitutes only a small portion of the U.S. economy. On the other hand, the gig economy grew ten-fold from 2012 to 2015.<sup>111</sup> The portion of the gig economy resulting from peer-to-peer transactions is worth approximately \$26 billion.<sup>112</sup> Uber, the fastest growing start-up in the world, is valued at over \$50 billion.<sup>113</sup> Overall, the gig economy dramatically illustrates the expansive growth in businesses classifying many of their workers as independent contractors.<sup>114</sup>

At first glance, the classification of gig economy workers as independent contractors appears fitting because their jobs allow workers greater flexibility and less control from employers than traditional

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105. Torpey & Hogan, *supra* note 6.

106. *Ibid.*

107. *Ibid.*

108. *Ibid.*

109. *Ibid.*

110. GAO, *Contingent Workforce*, *supra* note 1, 4.

111. DIANA FARRELL & FIONA GREIG, JP MORGAN CHASE & CO. INSTITUTE, PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY BIG DATA ON INCOME VOLATILITY (2016), <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf> [<https://perma.cc/P3Z4-PH7A>].

112. *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<https://perma.cc/9PGZ-98BY>].

113. See Cunningham-Parmeter, *supra* note 5, at 1684.

114. *Ibid.*

employment.<sup>115</sup> However, employers in the gig economy can exert powerful influences over working conditions, including the setting of non-negotiable wage rates and strict behavior codes, while maintaining the ability to hire and fire workers in ways that are reflective of traditional employer-employee relationships.<sup>116</sup> Although anybody hiring a worker is entitled to influence the subsequent working conditions, courts consider the level of influence or control that a hiring party retains in dictating those conditions as determinative in classifying workers as independent contractors or employees.

The task of legally classifying gig economy workers is a 21st century problem, but the tools available for courts to use are 20th century tests that are not capable of properly addressing this unique group.<sup>117</sup> Some of the factors in the worker-classification legal tests favor categorizing gig economy workers as employees while other factors favor classification as an independent contractor.<sup>118</sup> Gig workers often do not appear to fit the traditional common law definition of a servant (employee) performing services under the physical control of a master because, for example, of the flexibility a gig-worker to only perform work at their leisure.<sup>119</sup> However, they also do not clearly fit the definition of independent contractors — someone “who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it”, such as when a gig-worker must comply with strict policies set by the company they are performing work for.<sup>120</sup>

The flexibility of the gig employment creates the possibility of having a variety of individualized worker arrangements within the same company. For example, one Uber driver may occasionally drive a couple hours a week, while another may regularly spend 40 or more hours working for Uber. Despite this diversity, gig-workers within the same firm often share the same blanket classification of independent contractors. Such blanket classifications have begun to be challenged in courts, most notably between Uber and its drivers in litigation centered on, for example, the drivers seeking

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115. *Id.*, at 1686.

116. *Ibid.*

117. *Cotter*, 60 F. Supp. 3d at 1082.

118. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. Mar. 11, 2015) (Judge Vince Chhabria); *O’Connor v. Uber Techs., Inc.*, 82 F.Supp. 3d 1133, 1153 (N.D. Cal. Mar. 11, 2015) (Judge Edward M. Chen).

119. RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. LAW INST. 1958) (“[A] servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”).

120. *Independent Contractor*, BLACK’S LAW DICTIONARY (10th ed. 2014).

employment status in order to get a statutory minimum wage benefit or Uber asserting independent contractor status in order to avoid liability for tortious actions of drivers.<sup>121</sup>

As of mid-2017, no U.S. court ruled as a matter of law in a case centered on the status of a gig economy worker. The most comprehensive treatments of the issue were in two cases from the U.S. District Court for the Northern District of California, one of which dealt with Uber drivers and the other with Lyft drivers.<sup>122</sup> In both *Cotter v. Lyft* and *O'Connor v. Uber Technologies*, summary judgment motions were brought by Uber/Lyft before the court regarding whether the classification of the companies' drivers can be determined as a matter of law.<sup>123</sup> In making a summary judgment determination, the court must find there to be no genuine dispute on a material fact and then apply the law in a light most favorable to the non-moving party.<sup>124</sup> In applying a right-to-control test to the facts of the case, the court in *Cotter* determined that it could not rule that Lyft drivers were independent contractors as a matter of law because there was not a clear legal answer based on the facts presented.<sup>125</sup> The most important factor in the analysis, control, favored a ruling that an employee-employer relationship existed and so the court could not rule in favor of Lyft.<sup>126</sup> However, when some of the secondary factors in the common law right-to-control test were applied, the court also could not conclude that the drivers were employees, ultimately denying the motion for summary judgment.<sup>127</sup> The facts that drivers enjoyed flexibility in the work arrangements, that they could accept or reject ride requests, that they could choose which parts of San Francisco

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121. See *O'Connor v. Uber Techs., Inc.*, 82 F.Supp. 3d 1133, 1153 (N.D. Cal. Mar. 11, 2015) (Judge Edward M. Chen); *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222 (D.D.C. Sept. 10, 2015) (Judge James E. Boasberg); *In re Uber Techs., Inc., Wage & Hour Employment Practices*, 158 F. Supp. 3d 1372 (J.P.M.L. 2016); *Lavitman v. Uber Techs., Inc.*, No. SUCV201204490, 2015 WL 728187 (Mass. Super. Jan. 26, 2015); *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at \*1 (W.D. Tex. Feb. 20, 2015) (Judge Xavier Rodriguez); *Cunningham-Parmeter*, *supra* note 5, at 1688.

122. See *O'Connor*, 82 F. Supp. 3d 1133; *Cotter*, 60 F. Supp. 3d 1067.

123. *O'Connor*, 82 F. Supp. 3d at 1135 (“Pending before the Court is Uber’s motion for summary judgment that Plaintiffs are independent contractors as a matter of law.”); *Cotter*, 60 F.Supp.3d at 1069 (“The question in this case is whether Lyft drivers are “employees” or “independent contractors” under California law.”).

124. F.R.C.P. 56.

125. *Cotter*, 60 F. Supp. 3d at 1079.

126. *Cotter*, 60 F. Supp. 3d at 1079 (“It would be difficult to rule as a matter of law that the plaintiffs were independent contractors when the most important factor for discerning the relationship under California law, namely, the right of control, tends to cut the other way.”).

127. *Id.* at 1081.



in which they drove, and that they had minimal contact with Lyft management, all favored classification as independent contractors.<sup>128</sup>

As more than one reasonable inference could be drawn from the facts, the court chose to exercise its discretion and deferred determination of whether the drivers were employees or independent contractors to the jury. The jury's job is then to weigh the intertwined factors of the common law test based on the particular facts.<sup>129</sup> This process was also followed in *O'Connor* where the court could not rule as a matter of law on the status of Uber drivers and so denied the summary judgment motion, leaving the final determination of how to balance the factors to a jury.<sup>130</sup>

Dicta offered by the judges in both *Cotter* and *O'Conner* expressed dissatisfaction with the common law right-to-control test to ride-sharing workers. *Cotter* called the test "outmoded," stating that it "provides nothing remotely close to a clear answer" when classifying workers in the 21<sup>st</sup> century.<sup>131</sup> The court stated it might be better to permit some Lyft workers to be classified as employees and others as independent contractors, or even to create a third classification for them.<sup>132</sup> In *O'Connor*, the court asserts it would have liked to consider other factors in its analysis since the common law test evolved under an "economic model very different from the new 'sharing economy.'"<sup>133</sup> However, it was precluded from including different factors, such as the proportion of revenues generated and shared by the parties, their relative bargaining power, and range of alternatives available to each because these factors are not expressly included in the common law's right-to-control test.<sup>134</sup> Both opinions call for legislative reform of the current classification system.<sup>135</sup> However, until reform occurs, the courts must task juries with the responsibility of classifying gig workers, who do not always fit squarely into either a classification of employees or of

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128. *Id.* at 1079, 1081.

129. *Id.* at 1077.

130. *See O'Connor*, 82 F. Supp. 3d at 1145–53.

131. *Cotter*, 60 F. Supp. 3d at 1081–82.

132. *Ibid.*

133. *O'Connor*, 82 F. Supp. 3d at 1153.

134. *Ibid.*

135. *Cotter*, 60 F. Supp. 3d at 1082 ("But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this."); *O'Connor*, 80 F. Supp. 3d at 1153 ("It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called 'sharing economy.' Until then, this Court is tasked with applying the traditional multifactor test . . .").

independent contractors, because the courts have an insufficient basis on which to reach their own decisions.<sup>136</sup>

Uber Technologies, Inc., creator of the mobile ride-sharing app, states that it is a technology company providing a platform that connects transportation businesses with passengers looking for a ride.<sup>137</sup> Uber relies on arrangements with “transportation providers,” people hired as independent contractors, to service Uber’s customers.<sup>138</sup> Prospective drivers are required to have a car and a license, fill out a short application, pass a background check, and successfully complete a one-hour interview with an Uber employee in order to be hired as a transportation provider.<sup>139</sup> After that, drivers set their own schedules by logging onto their account on the Uber mobile app, which is software designed to run on smartphones and other mobile devices, and they can start receiving requests by Uber users looking to hire them for a ride. These drivers experience little oversight from Uber.<sup>140</sup>

The Uber employment opportunity is an exemplar in the rising gig economy companies where businesses utilize technology to connect with workers in new ways. Gig-economy workers, such as Uber drivers, are often hired by employers as independent contractors, even though the nature of their work may not necessarily meet traditional definitions or self-evidently meet traditional tests for an independent contractor classification. As a result, such businesses often have greater risks of exposure to the penalties associated with misclassification of workers.<sup>141</sup>

As the biggest and one of the more influential companies in the gig economy, Uber’s labeling of its 160,000 drivers (as of 2016) as independent contractors sets a standard that many other gig economy companies have emulated.<sup>142</sup> TaskRabbit and Lyft are examples of companies that followed Uber’s example in classifying their workers as independent contractors.<sup>143</sup>

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136. *Cotter*, 60 F. Supp. 3d at 1082 (“As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes.”).

137. *O’Connor v. Uber Techs., Inc.*, 82 F.Supp. 3d 1133, 1137 (N.D. Cal. Mar. 11, 2015) (Judge Edward M. Chen).

138. *Ibid.*

139. *Id.* at 1336 (discussing the application process for prospective Uber drivers).

140. *Id.* at 1338.

141. REIBSTEIN ET AL., *supra* note 67, at 4 (“Some of the businesses that have the greatest risks of exposure are those using an “on demand” business model in the “sharing” economy, deploying workers paid on a 1099 basis that are available at times when the demand for services rise.”).

142. NAT’L EMP’T LAW PROJECT, EMPLOYERS IN THE ON-DEMAND ECONOMY 1 (2016), <http://www.nelp.org/content/uploads/Fact-Sheet-Employers-in-the-On-Demand-Economy.pdf> [<https://perma.cc/74SC-5BEZ>].

143. See *Cunningham-Parmeter*, *supra* note 5, at 1686.

However, not all businesses in the gig economy rely on independent contracting to run their businesses; many companies define their gig workers as employees.<sup>144</sup> In fact, some companies that originally self-classified their workers as independent contractors, such as grocery delivery service Instacart, restructured their employment contracts and elected to change the classification of their workers to employees.<sup>145</sup> Moreover, recent legal challenges by Uber and Lyft drivers for violations of working conditions and low wages are raising the profile of worker-classification questions as they concern gig workers.<sup>146</sup>

#### IV. A TWO-COMPONENT OPTION FOR EMPLOYMENT CLASSIFICATIONS

Clear statutory definitions are integral to the successful distinction between employees and independent contractors.<sup>147</sup> Without clear definitions, businesses seeking to use the distinction legitimately will struggle to comply with the law, workers will be less likely to understand if they are misclassified, and government agencies will need to expend resources to impose penalties for violations and increase enforcement mechanisms.<sup>148</sup> However, statutory definitions must not only help to prevent misclassification; they must lead to the determination of clear and fair tests to be applied by courts interpreting the laws.<sup>149</sup> Successful reform requires the establishment of a unified standard test that is consistently used to interpret all legal scenarios that depend upon distinguishing between independent contractors and employees.<sup>150</sup>

##### A. USE OF THE ABC TEST AS A UNIFORM STANDARD

The first component of the proposed two-component option for an improved legal standard would be the legislative adoption of the ABC Test for all statutes that are intended to distinguish employees from independent

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144. See NAT'L EMP'T LAW PROJECT, *supra* note 142.

145. *Ibid.*

146. Cunningham-Parmeter, *supra* note 5, at 1687; *see also* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. Mar. 11, 2015) (Judge Vince Chhabria).

147. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 64 (2015).

148. *Id.* at 65.

149. *Ibid.*

150. *Ibid.*

contractors. Originating in Maine in 1935, the ABC Test has become the dominant reform for state independent contractor definitions since Massachusetts adopted it in 2004. However, it has yet to be adopted at the federal level.<sup>151</sup> The ABC Test is a simplified version of the common law “right to control” test.<sup>152</sup> While it varies slightly from state to state, the ABC Test creates a rebuttable presumption in favor of employment that can be overcome only by analyzing the three prongs of the test.<sup>153</sup> This succinct test requires employers to show: (A) that “the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact,” (B) that “the service is performed outside the usual course of the business of the employer,” and, (C) that “the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.”<sup>154</sup>

The ABC test has been “clearly favored” by state legislatures with 16 states using it to transform their legal definitions of an independent contractor between 2004 and 2016. In total, 38 states have adopted some form of the ABC Test.<sup>155</sup> There are a number of reasons why the ABC test is popular, including the following four. *First*, the presumption of employment “mak[es] it more difficult for unscrupulous employers to misclassify employees as independent contractors to avoid legal obligations.”<sup>156</sup> The presumption of employment puts the onus on employers, who are usually the party with the most control over the facets of the relationship, to prove that a legitimate employment relationship exists.<sup>157</sup> The universal application of a presumption against employers allows the ABC Test to apply to both typical and atypical business structures because

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151. *Ibid.*

152. *Ibid.*

153. *Ibid.*

154. MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2004); *see also* Deknatel & Hoff-Downing, *supra* note 147, at 65.

155. Howard Sokol, *New York's Fair Play Act Changes Rules of the Road for the Commercial Goods Transportation Industry*, HOLLAND & KNIGHT ALERT (Jan. 31, 2014), <https://www.hklaw.com/publications/New-Yorks-Fair-Play-Act-Changes-Rules-of-the-Road-for-the-Commercial-Goods-Transportation-Industry-01-31-2014/> [https://perma.cc/XK23-PGCM]; U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE LAW COMPARISON ch. 1, at 5–7 (2016), <https://www.unemploymentinsurance.doleta.gov/unemploy/pdf/uilawcompar/2016/coverage.pdf> [https://perma.cc/36LV-622K].

156. *See* Karen R. Harned, et al., *Creating A Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 102 (2010).

157. Deknatel & Hoff-Downing, *supra* note 147, at 71.

it requires employers to justify how their classification fits within the boundaries of the independent contractor definition.<sup>158</sup>

*Second*, the ABC Test eliminates the most easily manipulated factors, such as intent and location, in favor of a concise test of three dispositive factors, all of which must be satisfied.<sup>159</sup> In applying other types of tests, courts often ignore some factors in favor of others.<sup>160</sup> With the ABC Test, the three prongs act as a simple checklist of objective factors for courts to apply.<sup>161</sup> To successfully rebut the presumption of employment, an employer must prove that all three criteria are met for a worker to be considered an independent contractor.<sup>162</sup> Failure to prove any one of the three prongs results in classification as an employee.<sup>163</sup> The simplicity of both the small number of prongs and how they are collectively applied makes the ABC Test more user-friendly to judges, workers, and businesses compared to the complexity of current common-law tests.

*Third*, the ABC Tests often include strict enforcement measures, including both potential civil liability and potential criminal liability, to discourage business from misclassifying workers.<sup>164</sup> Under the common-law scheme, the penalty for misclassification is the assessment of back taxes, back pay, and benefits that place the employer in the same position they would have been in had the classification been made properly in the first place.<sup>165</sup> In contrast, the ABC Test provides additional penalties in the form

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158. *Id.* at 71–72.

159. See Pinosof, *supra* note 3, at 370; MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2004).

160. See, e.g., Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1646 (2006) (explaining that “multifactor tests of ten or even eight factors appear to ask too much of the judge’s ability simultaneously to weigh competing concerns and may simply result in the stampeding of less significant factors”); O’Connor v. Uber Techs., Inc., 82 F.Supp. 3d 1133 (N.D. Cal. Mar. 11, 2015) (Judge Edward M. Chen) (the court found some factors to be outdated in their application); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. Mar. 11, 2015) (Judge Vince Chhabria) (skipping a thorough analysis of all secondary factors, focusing primarily on the factor of control).

161. See, e.g., Ruggiero v. Am. United Life Ins. Co., 137 F. Supp. 3d 104, 117 (D. Mass. 2015) (Judge Douglas P. Woodlock) (applying the Massachusetts ABC Test to determine whether an insurance agent was an independent contractor); Carpet Remnant Warehouse, Inc. v. N.J. Dept. of Labor, 125 N.J. 567 (1991) (applying New Jersey’s ABC Test as to whether carpet installers were employees or independent contractors).

162. *Id.* at 581 (“If the Department determines that the relationship falls within that definition [of employment], then the party challenging the Department’s classification must establish the existence of all three criteria of the ABC Test.”) (internal citations omitted).

163. *Id.* at 581 (“Conversely, the failure to satisfy any one of the three criteria results in an ‘employment’ classification.”).

164. *Ibid.*; see also Deknatel & Hoff-Downing, *supra* note 147, at 77 (discussing the various “Enforcement” statutes and strategies employed by states using ABC statutes).

165. *Id.* at 75.

of fines and potential criminal liability, with the type of enforcement varying widely among states.<sup>166</sup> These additional penalties provide an incentive for employers to more carefully consider how they classify employees because the tests provide an additional penalty rather than just a reset.

*Last*, a major advantage of the ABC Test is that it is most effective when applied as a universal basis for distinguishing between employees and independent contractors.<sup>167</sup> Distinct areas of state statutory systems often rely on different definitions of employee and independent contractor.<sup>168</sup> The differing definitions can mean, for example, that workers who may be considered employees under tax statutes may be considered independent contractors under workers' compensation law. The uniformity that the ABC Test can bring to the definitions across all relevant laws will help provide consistent expectations that are simpler to comply with for employers and workers.<sup>169</sup>

Despite its several and important advantages, the ABC Test is unfortunately not a flawless solution. The employment presumption is a difficult barrier to overcome, putting a heavier burden of proof on employers as opposed to their burden under the common-law test. The ABC Test is also criticized for being deceptively simple since it may only hide the other right-to-control factors that it replaces. For example, in *Carpet Remnant Warehouse v. New Jersey Dept. of Labor*, the New Jersey Supreme Court applied several common-law control factors in evaluating prong A of the ABC Test.<sup>170</sup> The court also looked at the twenty-factor IRS Test for guidance in evaluating the element of control as well.<sup>171</sup> Finally, the inflexibility of the ABC Test may give rise to circumstances where overwhelming evidence suggests that a person should not be classified as an employee nonetheless classifies the person as such because of an inability to satisfy any one of the ABC Test's prongs.<sup>172</sup> This situation highlights the

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166. *Id.*

167. *See id.* at 53.

168. *Id.* at 65 ("Across the nation, many states include contrasting definitions within distinct areas of their statutory systems . . .").

169. *See id.* at 53.

170. *Carpet Remnant Warehouse*, 125 N.J. at 590 ("The doctrine of control is derived from the common law . . . Specific factors indicative of control include whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally.").

171. *Id.* at 590.

172. *Id.* at 589 ("We recognize, however, that circumstances may arise in which a person clearly ineligible to collect unemployment benefits may nevertheless be unable to satisfy one of the standards of the ABC test.").

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harsh reality that the binary system for categorizing workers recognizes only the extreme ends of what in reality is a continuum from employee to independent contractor.

#### B. USE OF A DEPENDENT CONTRACTOR CLASSIFICATION TO BREAK FROM THE BINARY SYSTEM

A promising approach to addressing the shortcomings of traditional binary classification schemes, including ABC Tests, is the second component of a proposed integrative option for an improved legal standard. It involves the adoption of a third category of workers — the dependent contractor. The key distinction between independent contractors and dependent contractors is the extent to which the workers depend on the employer for their total annual income. Workers who have multiple sources of income would typically receive the independent contractor designation, while workers who were heavily reliant on one or a few employers for their income would typically receive the dependent contractor designation. The underlying logic is that the greater the dependence of the worker on the employer, the greater the power the employer has in dictating the nature of their relationship.<sup>173</sup>

The creation of the classification of dependent contractor provides an option for courts when handling workers whose employment relationship is in the gray area between an employee and an independent contractor. Such a distinction would allow statutes to confer some employment rights on individuals who do not fit into a traditional employer-employee relationship.<sup>174</sup>

Many gig economy workers might be appropriately classified as dependent contractors. Gig economy workers are often considered independent contractors although they may be entirely economically dependent on piecing together different gigs to produce their income. One difficulty in classifying gig workers is the wide variety of involvement, and economic dependence gig workers have on multiple peer-to-peer marketplaces or on a single firm. Lyft drivers are considered to be independent contractors whether they drive sporadically in their free time to supplement the income of another job or they spend 40 or more hours driving for Lyft and rely on that income exclusively. Although most gig workers are

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173. See *O'Connor v. Uber Techs., Inc.*, 82 F.Supp. 3d 1133, 1153 (N.D. Cal. Mar. 11, 2015) (Judge Edward M. Chen).

174. See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. Mar. 11, 2015) (Judge Vince Chhabria).

not dependent exclusively on the income they generate from internet or app-based<sup>175</sup> platforms, a 2015 study by JP Morgan Chase found that approximately one-fourth of gig workers earned more than 75 percent of their income through online labor platforms.<sup>176</sup> A dependent contractor classification would allow all Lyft drivers to be considered contractors, but would give extra employment protections to a worker driving full time, to name but one example.

In adopting the dependent contractor classification, the United States could look to Canadian law. Canada and the US have similar common-law histories in defining employee because of their shared roots in British common law.<sup>177</sup> Canada's common-law test for distinguishing between independent contractors and employees is very similar to the U.S. tests in that they look at control, ownership of tools, and the chance of profit and risk of loss.<sup>178</sup> However, as early as 1936, Canadian courts recognized an intermediate position of the dependent contractor on the employee and independent contractor continuum — where a master-servant relationship does not exist, but the economic dependence of the worker warrants additional legal protection.<sup>179</sup> Under Canadian labor law, a dependent contractor is defined as a person who:

whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are in, relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person.<sup>180</sup>

Economic dependence is demonstrated by a worker-employer relationship that is “complete or near-complete exclusivity.”<sup>181</sup> Once economic dependence is established, the general employee versus

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175. “App” is short for an application, which are typically small, specialized programs that can be downloaded onto mobile devices.

176. FARRELL & GREIG, *supra* note 111, at 24.

177. Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for Dependent Contractors*, 26 BERKELEY J. EMP. & LAB. L. 143, 153 (2005).

178. *Id.* (citing *Montreal v. Montreal Locomotive Works Ltd.* (1946), [1947] 1 D.L.R. 161 (Can. P.C.)).

179. See *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, para. 29–30 (Can. On.) (discussing the history of Ontario's dependent contractor designation and the differences between employees, dependent contractors and independent contractors).

180. Canada Labour Code, R.S.C. 1985, c L-2, s.3.

181. *McKee*, 2009 ONCA 916, para. 30.



independent contract test is applied to determine if the worker is a dependent contractor or an employee.<sup>182</sup> However, since dependent contractors are included within the definition of employee, they are allowed to receive many of the same benefits and rights as employees — notably, in Canada, the right to collective bargaining.<sup>183</sup>

In the Canadian context, *Riverside Door & Trim Inc. v. Carpenters and Allied Workers (UBCJA, Local 27)*, raised the question of whether or not a worker was a dependent contractor or an independent contractor.<sup>184</sup> The respondent in *Riverside Door & Trim* manufactured carpentry materials to be used in residential construction and then subcontracted out the installation of the materials.<sup>185</sup> On behalf of two of these subcontractors, the union brought a challenge stating that they should be considered dependent contractors and therefore added to the list of employees for purposes of collective bargaining.<sup>186</sup>

There was no dispute that the subcontractors, who ran their own sole proprietorships, were contractors.<sup>187</sup> The manufacturing company tried asserting that because they were registered businesses, hired their own employees, and made a profit they should be considered independent contractors; however, the court found those assertions to be boilerplate pleadings not supported by facts with which to demonstrate that there is no dependent relationship.<sup>188</sup> The court went on to explain that the proper process is that a party must plead sufficient material facts to support the asserted conclusion if proven in order to proceed further into litigation and absent such assertion, the material facts pleaded by the worker's controls.<sup>189</sup> In this particular case, the workers asserted that they registered as sole proprietorships at the request of the manufacturer after working for the manufacturer for some time and that they had worked almost exclusively for the manufacturer for the past year.<sup>190</sup> Applying the statutory definition of a dependent contractor to these facts, the court ultimately concluded that the

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182. *Id.* at para. 31–36.

183. Canada Labour Code, R.S.C. 1985, c L-2.

184. *Riverside Door & Trim Inc. v. Carpenters and Allied Workers (UBCJA, Local 27)*, 2017 CarswellOnt 4075, para. 7 (Can. Ont. L.R.B.) (WL).

185. *Id.* at para. 4.

186. *Id.* at para. 3–5.

187. *Id.* at para. 5.

188. *Id.* at para. 8–15.

189. *Id.* at para. 16–21.

190. *Id.* at para. 22.

two contractors were dependent contractors and were entitled to collective bargaining rights.<sup>191</sup>

*Riverside* is illustrative of some of the strengths of a legal framework for classifying workers that include a dependent contractor category. It shows how the legal system can operate to protect an individual running an independent business that is economically dependent on a single employer who provides them some rights that are ordinarily given only to bona fide employees, such as the right to collective bargaining. This case also highlights how presumptions against an employer act as a higher standard of proof, which adds an extra layer of protection to workers.

However, the *Riverside* case also shows that adding a dependent contractor classification shifts the categorization problem rather than outright resolving it. The workers in *Riverside* were deemed to have dependent contractor status under collective bargaining legislation, but that conclusion had no bearing on their status under other labor and employment laws. A system with a dependent contractor classification relies on legislative determinations of which statutory rights and protections ordinarily afforded only to employees will also be granted to dependent contractors. The general practice in Canada has been to maintain the employee-independent contractor distinction and then either extend or reduce coverage to workers who fall inside or outside the definition of dependent contractor through additional legislation and regulation.<sup>192</sup> As such, dependent contractors in most Canadian provinces have rights of collective bargaining and are protected by employment standards laws; but, dependent contractor rights and obligations are less settled in areas such as employment equity, occupational health and safety, workers' compensation, pension and retirement plans, employment insurance, and income taxes.<sup>193</sup>

Consequently, this system does not offer a universal solution and can be based on the political influence of particular groups rather than the public policy.<sup>194</sup> Legislatures have the discretion to adopt broad definitions of employee and dependent contractor or limited definitions based on industry

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191. *Id.* at para. 28.

192. Judy Fudge et al., *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada*, 10 CAN. LAB. & EMP. L.J. 193, 226 (2003).

193. For a thorough discussion of Canadian workers' rights under these various areas of law, see *id.* at 198–225.

194. *Id.* at 226 (“Although this piecemeal approach has benefited particular groups of workers in specific ways . . . it has significant limitations. The most obvious is that the process of inclusion and exclusion are *ad hoc* and dependent on factors that have little to do with public policy and more to do with political power.”).

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or occupation.<sup>195</sup> In addition to determining precisely how to distinguish the legal rights of dependent contractors, the dependent contractor classification requires the establishment of distinctions among three categories of workers rather than just two. Adding a third category thus increases the burden on regulators and judges to determine the difference between dependent and independent contractors, in addition to the determination of employee or contractor.<sup>196</sup>

Despite these challenges, a three-category system would be functionally better than the binary system that exists in the United States and is, therefore, worthy of exploring. A three-category system would give more flexibility for courts and legislatures to grant protections to potentially disadvantaged workers who otherwise would not qualify for protection. Even though such a system may be enacted on an *ad hoc*, piecemeal basis, having some benefits is better than having no benefits and legislatures would be further empowered to shape employment laws over time according to the evolution of labor relationships.

A three-category legal framework could be beneficial because it would recognize and account for a large and growing number of worker-employer relationships that exist in the modern economy, such as conflicts involving gig-economy workers who are hard to classify under the current binary system. Although there is potential for great disparity in the economic dependence gig workers have within the same firm, American law treats their gig workers and having no distinctions. Application of the Canadian-style legal regime in the U.S. could allow the economically dependent gig workers to receive employment protections without disrupting the independent contractor status of their less-dependent counterparts. This solution would benefit full-time workers by giving them statutory protection but preserve the ability of the employers to use the independent contractor distinction without fear of negative repercussions from misclassification.

## V. CONCLUSION

The current legal systems in the United States for distinguishing between independent contractors and employees need to be updated to accommodate modern employment practices. The right-to-control test and the economic reliance test are derived from common-law principles that were formulated in the 1800s based on simple master-servant relationships, and

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195. *Id.* at 206.

196. *Id.* at 227.

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they need modifications to handle the complexities of 21st century employment as offered to gig-economy workers.

The number and uncertainty of current legal frameworks for classifying workers frustrate employer compliance and judicial enforcement. Definitions and tests for determining whether a worker is an independent contractor or an employee vary dramatically based on the law that is applied, leaving open the possibility for a worker to be considered an independent contractor under some laws and tests while being considered an employee under others. This confusion produces dramatic economic consequences for both workers and employers. It is essential for businesses to know how to properly classify their workers in order to implement particular business models and avoid exposure to liability for non-compliance. Likewise, workers should not be deprived of important legal protections and benefits as a result of being misclassified.

A promising two-component solution would be to replace the myriad of old tests with one based on the ABC Test, and modified to benefit from the design features of dependent contractor laws. The ABC Test is a serviceable mechanism for determining the definitional differences between a contractor and an employee. However, establishing a middle-ground designation of dependent contractor would allow economically vulnerable contractors to be granted some legal protections.

By bolstering the ABC Test with the ability to classify a worker as a dependent contractor, a worker whose circumstances do not meet the high standards for a designation of independent contractor may avoid an equally inappropriate classification as an employee. Instead, such workers could be defined as dependent contractors because they satisfy some, but not all, of the ABC Test's prongs. Similarly, the ABC Test removes some of the politics inherent in the dependent contractor status because it would provide an objective and testable definition that can be used in statutes that legislatures determine include protections for dependent contractors.

In short, the ABC Test provides a clear method of distinguishing between the different categories of workers, while legislatures could retain the flexibility to determine which employment statutes will be strengthened by a ternary classification. This proposed two-component solution is unique and not without its own faults, but it could represent a superior option for workers, contractors, employers, and the courts because of its clarity and flexibility.

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