An Uber Dilemma: The Conflict Between the Seattle Rideshare Ordinance, the NLRA, and For-Hire Driver Worker Classification

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The City of Seattle is no stranger to progressive policymaking. After making headlines in 2014 by passing a $15 an hour minimum wage law, it is once again in the news—this time by helping Uber drivers to unionize. In December 2015, the Seattle City Council unanimously approved a proposal giving Uber drivers the ability to certify a “driver representative organization” despite their status as independent contractors. The new app-based drivers association, a teamsters union, now must show it has majority support from Seattle’s Uber drivers to be designated as their collective bargaining representative. But, assuming it gets to this point, can—and should—Seattle’s new law stand up in court?

This article will address issues relating to the tug-o-war between contingent workers and employers, and how Uber and other similarly-structured businesses should address this dilemma. The ever-increasingly popular trend of classifying workers as independent contractors rather than employees has created a hotbed...
of litigation in recent years,\(^6\) while courts have struggled to make the distinction between the two.\(^7\) Worker classification is increasingly blurred by the inception of the "gig economy,"\(^8\) "on-demand economy,"\(^9\) "sharing economy,"\(^10\) or whatever else you choose to call it.

In the wake of the Great Recession,\(^11\) a growing number of these on-demand companies have erred on the side of classifying workers as independent contractors rather than employees (or, in some cases, deliberately misclassifying

\(^{6.}\) See infra Part II.

\(^{7.}\) See infra Part II.

\(^{8.}\) Will Rinehart & Ben Gitis, Independent Contractors and the Emerging Gig Economy, AM. ACTION FORUM, (July 29, 2015), http://www.americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy/. The gig economy is "[a] common phrase for the businesses and workers that are marked by alternative jobs that are usually temporary and influenced by technology . . . . Gig workers are mostly independent contractors and freelancers[, but could also include] agency temps, on-call workers, contract company workers, self-employed workers, and standard part-time workers." Id.

\(^{9.}\) "On-demand services encompass all digitally based marketplaces (primarily mobile) that offer convenient access to and/or fulfillment of goods and services." Powering the Future of the On-Demand Economy, ON-DEMAND ECON., https://theondemandeconomy.org (last visited Oct. 27, 2016).


\(^{11.}\) The Great Recession was a period of general economic decline during the late 2000s, which is generally considered the largest downturn since the Great Depression. The term “Great Recession” applies to both the U.S. recession—officially lasting from December 2007 to June 2009—and the ensuing global recession in 2009. See generally David B. Grusky et al., The Consequences of the Great Recession, in THE GREAT RECESSION 3–20 (David B. Grusky et al. eds., 2011); Neil Fligstein & Adam Goldstein, The Roots of the Great Recession, in THE GREAT RECESSION 21–55 (David B. Grusky et al. eds., 2011).
workers as independent contractors\textsuperscript{12}) due to ambiguities in the law.\textsuperscript{13} As companies contract out of activities to be performed by other businesses,\textsuperscript{14} the employment relationship between workers and businesses increasingly fissures apart.\textsuperscript{15} For example, in order to trim expenses and streamline operations, more

\textsuperscript{12}Although there was no evidence of intent to misclassify, \textit{Vizcaino v. Microsoft Corp.} is recognized as the unequivocal case example of employee misclassification. \textit{See generally Vizcaino v. Microsoft Corp.}, 97 F.3d 1187 (9th Cir. 1996); Mark Berger, \textit{Rethinking the Legal Oversight of Benefit Program Exclusions}, 33 RUTGERS L.J. 227 (2002); Steven J. Arsenault et al., \textit{An Employee by Any Other Name Does Not Smell as Sweet: A Continuing Drama}, 16 LAB. LAW. 285, 288, 290, 298 (2000); Paul Kellogg, \textit{Independent Contractor or Employee: Vizcaino v. Microsoft Corp.}, 35 HOUS. L. REV. 1775, 1776, 1778–79 & n.13–14 (1999).

\textsuperscript{13}\textit{See} Steven Greenhouse, \textit{U.S. Cracks Down on 'Contractors' as a Tax Dodge}, N.Y. TIMES (Feb. 17, 2010), www.nytimes.com/2010/02/18/business/18workers.html?pagewanted=all (noting companies that classify employees as independent contractors avoid paying Social Security, Medicare, and unemployment insurance taxes for such workers). “One federal study concluded that employers illegally passed off 3.4 million regular workers as contractors, while the Labor Department estimates that up to 30 percent of companies misclassify employees.” \textit{Id.} However, Greenhouse notes that certain employers deny misclassifying employees deliberately, as businesses claim that laws are unclear to distinguish between employee and independent contractor. \textit{Id.}

\textsuperscript{14}David Weil, \textit{The Fissured Workplace}, U.S. DEP’T OF LAB. BLOG (Oct. 17, 2014), http://blog.dol.gov/2014/10/17/the-fissured-workplace (noting that the blurred lines from the fissured workplace often make employees “unaware for whom they actually work,” while also making compliance with wage and hour laws a difficult task).

\textsuperscript{15}\textit{See} Seth D. Harris & Alan B. Krueger, \textit{A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”}, HAMILTON PROJECT 2, 5, 7, 15, 17–22 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf. (proposing a new legal category called “independent workers” for new and emerging work relationships arising in the “online gig economy” which do not easily fit into the existing legal definitions of “employee” and “independent contractor” and that “independent workers” should be qualified for many protections that employees receive, including the freedom to organize and collectively bargain, civil rights protections, tax withholding, and employer contributions for payroll taxes, while conceding that “independent workers” would not qualify for hours-based benefits such as overtime, minimum wage, and unemployment insurance benefits); \textit{cf.} Ross Eisenbrey & Lawrence Mishel, \textit{Uber Business Model Does Not Justify a New 'Independent Worker' Category}, ECON. POL’Y INST. (Mar. 17, 2016), http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/ (contending that Harris & Krueger’s claim that “the immeasurability of work hours for some digital app relationships requires a third employment status other than employee or independent contractor is empirically flawed. . . . We disagree with the proposal to deny minimum wage and overtime protections to Uber drivers and see no need for a third employment status. Our conclusion that Uber exerts substantial controls over a driver’s time while the driver is on the app also has implications for whether Uber drivers should be considered employees. Rather than pursue a legislative fix . . . a better approach is simply to establish the Uber and Lyft drivers and similar workers are employees with all attendant rights.”); Benjamin Sachs, \textit{Do We Need an
and more businesses are turning to the use of "subcontractors, temporary agencies, labor brokers, franchising, licensing, and third-party management." However, businesses that misclassify their workers as independent contractors enjoy an unfair economic advantage by lowering their costs of doing business. Such practices enable them to avoid dealing with minimum wage and overtime laws, while also circumventing liability for claims of discrimination, retaliation, and harassment. Misclassified workers also "often are denied access to critical benefits and protections to which they are entitled, such as family and medical leave, vacation, health insurance, unemployment insurance, and safe workplaces." Moreover, worker misclassification causes billions of dollars in tax revenue losses due to underreporting and non-filing, while unemployment compensation programs also lose out on funding from employers, which are required to pay federal and state unemployment taxes only for employees.

This article will analyze these workplace issues in the context of the Uber business model, recent related litigation on worker classification, and the Seattle...


19. Misclassification of Employees as Independent Contractors, supra note 16. In addition to impairing workers’ interests, employee misclassification also generates substantial losses to federal and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers’ compensation funds—in essence, hurting taxpayers and undermining the economy. Id. But see Heather Long, Uber Tests Program to Help Drivers Save for Retirement, CNN MONEY (Aug. 24, 2016), http://money.cnn.com/2016/08/24/investing/uber-save-for-retirement-betterment/ ("Uber is partnering with investment app Betterment to allow some of its drivers to sign up for free retirement accounts. . . . Starting [August 24, 2016], Uber drivers in four places – Seattle, Chicago, Boston, and New Jersey – will be able to sign up for a Betterment IRA (individual retirement account). All fees will be waived for the first year.").

rider’s tasks. First, Part II of this article will provide the reader with a brief overview of worker classification law, essential to understanding why working relationships in the sharing economy are so convoluted. Part III narrows this analysis to focus on the geographic jurisdiction of the issue at hand: Washington state and the Ninth Circuit. Next, Part IV fleshes out the specifics of the Seattle rideshare ordinance, and Part V samples some influential administrative findings and court rulings involving Uber worker classification. Thereafter, Part VI of this article provides a critical analysis of the Uber business model by examining contractual provisions and current practices. This article concludes with workable recommendations and an outlook on the future of Uber and the rideshare independent contractor.

II. A BRIEF PRIMER ON WORKER CLASSIFICATION LAW

In the midst of today’s swelling on-demand economy, the contemporary workplace and workforce has become increasingly complex. Worker classification is neither an emerging issue, nor an issue in need of further

21. See Katy Steinmetz, Exclusive: See How Big the Gig Economy Really Is, TIME (Jan. 6, 2016), http://time.com/4169532/sharing-economy-poll/ (acknowledging varying terms of “sharing economy,” “gig economy,” and “on-demand economy”); More than 90 million people, or 44% of U.S. adults have participated in on-demand transactions with 42% reporting that they have consumed such services and 22% reporting they have provided such services. Id. This also shows that most offerors are users. Id.; see also David Schepp, Just How Big is the “gig economy”? CBS MONEYWATCH (Jan. 8, 2016, 4:28 PM), http://www.cbsnews.com/news/just-how-big-is-the-gig-economy/; Geoff Nunberg, Goodbye Jobs, Hello ‘Gigs': How One Word Sums Up A New Economic Reality, NPR COMMENTARY (Jan. 11, 2016, 1:23 PM), http://www.npr.org/2016/01/11/460698077/goodbye-jobs-hello-gigs-nunbergs-word-of-the-year-sums-up-a-new-economic-reality; Arun Sundararajan, The ‘Gig Economy’ is Coming. What Will It Mean for Work?, GUARDIAN (July 25, 2015), http://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy; Gerald Friedman, The Rise of the American Gig Economy, DOLLARS & SENSE, March/April 2014, at 28.


23. See NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 113 (1944). “[Hearst’s] argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true.” Id. at 120.
incessant scholarly discussion. Much has been written on this topic, and this section will not gratuitously expound upon what has already been stated and restated. Rather, this section will offer a brief synopsis of the different multi-factor tests and recent case law developments in the context of the National Labor Relations Act (hereinafter “NLRA”) in order for the reader to formulate his or her own analysis of worker classification in the context of Uber and other similarly structured rideshare businesses.

A. Worker Classification Tests in a Nutshell

“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 one of independent entrepreneurial dealing.” This quote, from the Supreme Court’s 1944 opinion for NLRB v. Heart Publications still holds true today. “The question [of]
whether a worker is an independent contractor or an employee cannot be answered in the abstract and there is no uniform doctrinal test . . . . Instead, the issue must be examined in the context of the legislative purpose of the particular statutory rights at issue.”

Section 2(3) of the NLRA, defining “employee,” reads as follows:

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, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

main selling spot, unilaterally controlled the number of papers the newsboy was required to take each day, effectively fixed the newsboys’ compensation, and prescribed the broad terms and conditions of the newsboys’ day in a number of ways. Id. at 115-18, 132. The Court rejected, as inconsistent with creating uniform national labor policy, the newspaper’s argument that the newsboys were independent contractors within the common law meaning of that term and therefore that they should be excluded from the NLRA’s statutory definition of employee. Id. at 120. The Court explained that adopting a common law approach would lead to a “patchwork plan for securing freedom of employees’ organization and of collective bargaining” because the definition of independent contractor and employee were not uniform in either rule or application, as the company’s fallacious approach assumed. Id. at 123. The Court also rejected the newspaper’s argument that independent contractors should be exempted from the statutory definition of employee on grounds that such a narrow construction of the statutory term employee was inconsistent with “the history, terms and purpose of the legislation.” Id. at 124. In the Court’s view, when drafting the NLRA “[c]ongress . . . was not thinking solely of the immediate technical relation of employer and employee.” Id. Hearst stands as a departure from the common law, in which the Board asserted its authority to reform work law in line with modern workplace practices.

Similar to the Fair Labor Standards Act, the NLRA’s definition of “employee” is rather circular. The National Labor Relations Board (hereinafter “the Board”) and the courts have developed various multi-factored approaches, set forth below, for interpreting this unhelpful definition. However, these approaches have been incongruously construed and indiscriminately applied such that they are often criticized for their lack of predictability.

1. The Right-to-Control Test

Historically, under the doctrine of respondeat superior, employers were held liable only for the torts committed by workers over whom the employer exercised significant control. This was justified under the reasoning that an employer exercising control over its workers should be responsible to others for the actions of its workers. This common law right-to-control test—derived from agency law—focuses on the employer’s right to control the means and manner of the worker’s performance, taking into account the scope and duration of employment and the supervisory control over the details of the work.

For example, the Internal Revenue Service uses the right-to-control test to distinguish employees from independent contractors. The IRS articulates the common law control factors into three categories: (1) behavioral control (including instructions and training that the business gives to the worker), (2) . . .
financial control, and (3) the type of relationship. Similarly, the Board defines the right-to-control test as follows:

In determining the status of persons alleged to be independent contractors, the Board has consistently held that the [NLRA] required the application of the right-to-control test. Where the one for whom the services are performed restrains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the result is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

In applying the right-to-control test, the Board analyzes certain common law factors established in the Restatement (Second) of Agency, including:

1. the extent of control which, by the agreement, the employer may exercise over the detail of the work;
2. whether the worker is engaged in a distinct occupation or business;
3. the kind of occupation and whether it is typically done under the direction of the employer;
4. the skill required in the particular occupation;
5. whether the employer supplies the facilities, tools, materials, or supplies for the worker;
6. the length of time for which the worker is hired;

36. Id. Factors indicating whether a business has the right to control the business aspects of a worker’s job include the extent to which the worker has unreimbursed business expenses; the extent of the worker’s investment; the extent to which the worker makes his or her services available to the relevant market; how the business pays the worker; and the extent to which the worker can realize a profit or loss. Id. at 7–8.
37. Id. at 8. Factors that show the parties’ type of relationship include written contracts describing the relationship the parties intended to create; whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay; the permanency of the relationship; and the extent to which services performed by the worker are a key aspect of the regular business of the company. Id.
7. the method of payment;
8. whether the work is part of the employer's regular business;
9. whether the parties believe they are creating a master-servant relationship; and
10. whether the principal remains in business.  

In addition, the Board and the courts also have applied certain entrepreneurial factors based on the worker's ability to generate a profit or loss, such as whether the worker has the opportunity to take risks that may result in profit or loss, and whether the worker has a proprietary interest or investment in his or her work.

However, the right-to-control test has been criticized for yielding unpredictable results, as each factor in the test is entitled to different weight in different factual circumstances. It has also been criticized as being rigid and formulaic—"a one-size-fits all test used without due regard for the many

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40. See Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 755–56 (9th Cir. 1979) (holding that the opportunity for profit or loss of strawberry growers who were sublicensees under a subcontract for growing strawberries appeared to depend more on the managerial skills of the sublicensor and licensor—in developing fruitful varieties of strawberries, in analyzing soil and past conditions, and in marketing—than it did on the grower's own judgment and industry in weeding, dusting, pruning, and picking); Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1310, 1313–14 (5th Cir. 1976) (holding that operators of laundry pick-up stations were employees due in part to the operators' investment was modest and bore no direct relationship to the overall cost of operating the station); Mitchell v. John R. Cowley & Brother, Inc., 292 F.2d 105, 109–112 (5th Cir. 1961) (holding that a night watchman, whose work and time was substantially absorbed by jobs, is in fact engaging in the business as distinguished from performing personal labor, and thus, is an employee rather than an independent contractor). For further discussion of common law control tests, see Mitchell H. Rubenstein, Employees, Employers, and Quasi Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship, 14 U. Pa. J. Bus. L. 605, 625–26, 636 (2012); Deanne M. Mosley & William C. Walter, The Significance of the Classification of Employment Relationships in Determining Exposure to Liability, 67 Miss. L.J. 613, 632–33 (1998).
41. See NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120 (1943) (dismissing the common law test as uncertain in form, and inconsistent and unreliable in result).
42. See Roadway Package Sys., Inc., 326 N.L.R.B. 842, 850 (1998) ("[A]lthough the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.").
different contexts to which it is applied." Even the Supreme Court has acknowledged that the common law control test may be challenging at times because "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or independent contractor," also remarking that there is no "shorthand formula" or "magic phrase" associated with the right-to-control test. Instead the Court has instructed, without further guidance, that "all the incidents of the relationship must be assessed and weighed with no one factor being decisive."

The Restatement of Employment Law sets forth a slightly different variation of the right-to-control test. Under the Restatement, a worker is an employee if

1. the individual acts, at least in part, to serve the interests of the employer;

2. the employer consents to receive the individual's services; and

3. the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

The Restatement terms independent contractors as "independent businesspersons," finding an independent contractor status when the worker exercises

43. Jeffrey M. Hirsch et al., UNDERSTANDING EMPLOYMENT LAW 9 (2d ed. 2013) ("There might, for example, be good reasons to classify a given worker as an employee for purposes of obtaining employment law protections, but to classify that same worker as an independent contractor for purposes of taxes and employer vicarious liability.").
45. Id.
46. The Restatement of Employment Law is a relatively new restatement, recently published in 2015. Restatement of Employment Law (Am. Law Inst. 2015). Traditionally, employment law was only included under the umbrellas of agency, contracts, and tort law. See Samuel Estreicher et al., Forward: The Restatement of Employment Law Project, 100 Cornell L. Rev. 1245, 1249 (2015). Notably, this new Restatement—dedicated exclusively to employment law—was drafted by employment law scholars and practitioners. A key goal of the Restatement of Employment "was to help give the decisional employment law of fifty states a common terminology and framework and to offer a formulation of principles that made sense of the decisions and were also workable and accessible to judges and lawyers across the country." Id. at 1247 (also noting that "our principal audience is judges and practitioners").
47. Restatement of Employment Law § 1.01 (Am. Law Inst. 2015) (noting exceptions for volunteers and controlling owners).
entrepreneurial control over important business decisions, made in his or her own interests. 48

2. The Economic Realities Test

While the right-to-control test was originally devised to establish employer tort liability, the economic realities test was designed specifically for the employment law context—not for tort vicarious liability, tax, or ERISA issues. 49 According to the Department of Labor, a worker who is "economically dependent on an employer is suffered or permitted to work by the employer," and thus should be classified as an employee. 50 The "suffer or permit" standard was "specifically designed to ensure as broad of a scope of statutory protection as possible." 51 Thus, the economic realities test attempts to resolve the issue consistently with the purpose of the employment law statute in question. 52 Hence, if the purpose of the legislation is to protect or benefit the worker, "the court looks to all the circumstances involved to determine the economic reality of the workplace situation." 53

Although the factors that constitute the economic realities test vary slightly across jurisdictions, the Department of Labor interprets them as follows: (1) whether the work is an integral part of the employer's business; 54 (2) whether

48. Id. (citing the examples of "whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to customers.").

49. HIRSCH et al., supra note 43, at 10.


51. Id. at 2–5.

52. Barron, supra note 31, at 460.

53. Id. For application of the economic realities test as it pertains to the NLRA, see Brown University, 342 N.L.R.B. 483, 483, 487–89 (2004) (teaching and research assistants at private universities are students and therefore not statutory employees); Brevard Achievement Ctr., Inc., 342 N.L.R.B. 982, 982, 986 (2004) ("severely disabled" employees working as janitors are not statutory employees because their employment is primarily rehabilitative rather than economic).

54. Brown University, 342 N.L.R.B. at 490–91. "The case presents the issue of whether graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining . . ." Id. at 483. Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385 (3d Cir. 1985) ("workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer").
the worker’s managerial skill affects the worker’s opportunity for profit or loss;\(^5\)
(3) whether the worker’s relative investment compares to the employer’s investment;\(^6\)
(4) whether the work performed requires special skill or

“A true independent contractor’s work, on the other hand, is unlikely to be integral to the
employer’s business.” Weil, supra note 50, at 6.

55. Weil, supra note 50, at 7–9.

In considering whether a worker has an opportunity for profit or loss, the focus is
whether the worker’s managerial skill can affect his or her profit and loss. A worker
in business for him or herself faces the possibility to not only make a profit, but also
to experience a loss. The worker’s managerial skill will often affect opportunity for
profit or loss beyond the current job, such as by leading to additional business from
other parties or by reducing the opportunity for future work. For example, a worker’s
decisions to hire others, purchase materials and equipment, advertise, rent space,
and manage time tables may reflect managerial skills that will affect his or her
opportunity for profit or loss beyond a current job.

Id. at 7; see also Martin v. Selker Bros., Inc., 949 F.2d 1286, 1294 (3d Cir. 1991) (opportunity
for profit or loss must depend on managerial skills to indicate independent contractor status).
In order to determine whether a worker is in business for him or herself, this factor should not
focus on the worker’s ability to work more hours, but rather on whether the worker exercises
managerial skills and whether those skills affect the worker’s opportunity for both profit and
loss. For example, a worker’s decisions to hire others, purchase materials and equipment,
advertise, rent space, and manage time tables may reflect managerial skills that will affect his
or her opportunity for profit or loss beyond a current job. Id.; see Dole v. Snell, 875 F.2d 802,
810 (10th Cir. 1989) (cake decorators’ “earnings did not depend upon their judgment or
initiative, but on the [employer’s] need for their work”). Possibility of loss is a risk usually
associated with independent contractor status. See, e.g., Snell, 875 F.2d at 810 (there was no
way for cake decorators to experience a loss, and possible reduction in earnings was not the
same as a loss); Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1536–37 (7th Cir. 1987) (migrant
farm workers had no possibility for loss of investment, only loss of wages, indicating that they
were employees).


Courts also consider the nature and extent of the relative investments of the
employer and the worker in determining whether the worker is an independent
contractor in business for him or herself. The worker should make some investment
(and therefore undertake at least some risk for a loss) in order for there to be an
indication that he or she is an independent business. An independent contractor
typically makes investments that support a business as a business beyond any
particular job. The investment of a true independent contractor might, for example,
Furthermore the business’s capacity to expand, reduce its cost structure, or extend the
reach of the independent contractor’s market.

Even if the worker has made an investment, it should not be considered in isolation;
it is the relative investments that matter. Looking not just to the nature of the
investment, but also comparing the worker’s investment to the employer’s
investment helps determine whether the worker is an independent business. If so,
the worker’s investment should not be relatively minor compared with that of the
employer. If the worker’s investment is relatively minor, that suggests that the
initiative;\(^57\) (5) whether the relationship between the worker and the employer is permanent or indefinite;\(^58\) and (6) the nature and degree of the employer’s control.\(^59\)

worker and the employer are not on similar footings and that the worker may be economically dependent on the employer.

\(^{57}\) Id. at 9.

\(^{58}\) "A worker’s business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically dependent.” Id. at 10. “[T]he fact that workers are skilled is not itself indicative of independent contractor status.” Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988). Even specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical and used to perform the work. See id; Selker Bros., 949 F.2d at 1295 (“the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way”); Superior Care, 840 F.2d at 1060 (for skills to be indicative of independent contractor status, they should be used in some independent way, such as demonstrating business-like initiative); Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 305 (5th Cir. 1998) (efficiency in performing work is not initiative indicative of independent contractor status); Lauritzen, 835 F.2d at 1537 (“Skills are not the monopoly of independent contractors.”).

\(^{59}\) Weil, supra note 50, at 9–10. Permanency or indefiniteness in the worker’s relationship with the employer suggests that the worker is an employee. After all, a worker who is truly in business for him or herself will eschew a permanent or indefinite relationship with an employer and the dependence that comes with such permanence or indefiniteness. Most workers are engaged on a permanent or indefinite basis (for example, the typical at-will employee). Even if the working relationship lasts weeks or months instead of years, there is likely some permanence or indefiniteness to it as compared to an independent contractor, who typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer. See, e.g., Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1384–85 (3d Cir. 1985) (correcting district court for ignoring fact that workers worked continuously for the employer and that such evidence indicates that workers were employees). . . . .

However, a lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship, and [as such,] the reason for the lack of permanence or indefiniteness should be carefully reviewed to determine if the reason is indicative of the worker’s running an independent business. . . . The key is whether the lack of permanence or indefiniteness is due to “operational characteristics intrinsic to the industry” . . . or the worker’s “own business initiative.” [Superior Care, 840 F.2d] at 1060–61 (“the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently”). . . .

\(^{59}\) Weil, supra note 50, at 13–15. “[T]he employer’s control should be analyzed in light of the ultimate determination whether the worker is economically dependent on the employer or truly an independent businessperson. The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his
The economic realities test has been praised as a way to correct the formalism and indeterminacy represented by the right-to-control test\(^6\) by accounting for the fact that employer control is often absent from situations that otherwise should be defined as employment relationships and instead focuses on economic dependency.\(^6\)^1 "The rationale of [the economic realities] test is that it is important to compensate or provide protection to those who look to their employer for financial security and well-being."\(^6\)^2 Thus, it is also often applied in the context of "legislation requiring minimum wages and overtime pay (FLSA), protection from discrimination (Title VII), ... family medical leave (FMLA), unemployment insurance, and workers' compensation ... ."\(^6\)^3

3. The Hybrid Test

A hybrid of the common law right-to-control test and the economic realities test is often used by courts to determine how workers should be classified, or her own business." Id. at 13; see Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1313 (11th Cir. 2013) ("Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity." (quoting Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1312–13 (5th Cir. 1976))). And the worker’s control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it. See, e.g., Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1047 (5th Cir. 1987) ("[I]t is not what the operators could have done that counts, but as a matter of economic reality what they actually do that is dispositive."). It is important to note that the "control" factor should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor; all relevant factors should be considered, and cases must not be evaluated based on the control factor alone. See, e.g., Superior Care, Inc., 840 F.2d at 1059 ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances.").

60. See HIRSCH ET AL., supra note 43, at 10.


63. Id. For an in-depth discussion of statutory employee protections and the corresponding challenges in interpreting legislative intent, see generally Mark Linder, Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness, 21 COMP. LAB. L. & POL’Y J. 187 (1999) (second and third parenthetical abbreviations added). While the NLRB’s definition of “employee” under Section 2(3) does not tend to support the findings of economic realities, the Board did incorporate economic realities into the statutory definition of “employee.” Brown Univ., 342 N.L.R.B. 483, 489–90, 496–97 (2004). See generally Anne Marie Lofaso, The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work, 5 FLA. INT’L U. L. REV. 495, 500–07 (2010) (providing history and development of the NLRA’s definition of "employee").
incorporating factors from each.\textsuperscript{64} Specifically, this middle-of-the-road approach looks to the remedial purpose of the statute and all the circumstances involved to determine the economic reality of the relationship, while focusing on the employer’s right to control as the most important factor.\textsuperscript{65} While this test was first fashioned in \textit{Spirides v. Reinhardt}\textsuperscript{66} in 1979, the majority of circuits have since followed the D.C. Circuit in adopting the hybrid test.\textsuperscript{67} Moreover, in 1992, the U.S. Supreme Court applied a substantially similar test to determine worker classification, albeit in the context of ERISA.\textsuperscript{68} In \textit{Nationwide Mutual Insurance Co. v. Darden}, the Court set out the test as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the

\textsuperscript{64} Barron, supra note 31, at 460, 469–70; Mosley & Walter, supra note 40, at 636–41.

\textsuperscript{65} See Barnes v. Colonial Life & Accident Ins. Co., 818 F. Supp. 978, 980 (N.D. Tex. 1993) (citing Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979)). In applying the test, a court will analyze a number of factors to ascertain whether a worker is an employee or independent contractor, including the following:

(1) kind of occupation, with reference to whether the work is done under the direction of a supervisor or is done by a specialist without supervision; (2) skill required in the particular occupation; (3) source of payment for the office and equipment; (4) length of time the claimant has worked; (5) method of payment, whether by time or by the job; (6) manner in which the work relationship is terminated, whether by one or both parties, with or without notice and explanation; (7) availability of annual leave; (8) nature of the work, whether an integral part of the defendant’s business; (9) accumulation of retirement benefits; (10) payment of social security taxes; and (11) intention of the parties.

\textit{Id.}

\textsuperscript{66} 613 F.2d 826, 832 (D.C. Cir. 1979), aff’d, 656 F.2d 900 (1981).


hiring party is in business; the provision of employee benefits; and the
tax treatment of the hired party. 69

While the Darden Court ambivalently omitted “statutory purpose” as a factor—
neither accepting or rejecting it—the culmination of all the factors indirectly
accommodates the consideration of economic realities and statutory purpose.

B. Delivery Drivers and a Shifting Focus to Entrepreneurial Opportunity

When examining the topic of worker misclassification, it is inevitable that
the discussion will lead to the occupation of delivery drivers. Thanks to
companies such as Roadway, FedEx Ground, 70 and Corporate Express, through
litigation, the Board and the courts have set significant precedent by applying
various contract and corporate structures to the factors in the tests discussed
above. 71 While worker classification under the NLRA has lacked simplistic,
bright-line application from the passage of the Wagner Act in 1935, 72 through
the Taft-Hartley Act of 1947, 73 to the present day, 74 the recent line of case law
involving delivery drivers offers some prospect of pragmatic consistency in
application, notably, by shifting the emphasis from right-to-control to
entrepreneurial opportunity.

Under Taft-Hartley and traditional agency law, the extent of actual
supervision of the means and manner of the worker’s performance is the key

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69. Id. at 322–24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730,

70. Roadway Package System (RPS), a division of Roadway Services, was founded in
1985, and later became Caliber System Inc. in 1996. RPS was officially rebranded as FedEx
Ground in January 2000 following the acquisition of the Caliber companies by FDX Corp. in
timeline/history/opco-ground (last visited Mar. 29, 2017). Roadway and corporate successor
FedEx have been vigorous in its pursuit of defending independent contractor status for its long
and short haul driver. Robert W. Wood, FedEx Settles Independent Contractor Mislabling
Case for $228 Million, FORBES (June 16, 2015), http://www.forbes.com/sites/robertwood
/2015/06/16/fedex-settles-driver-mislabling-case-for-229million/#1fa9f32ec22e.

71. See infra discussion Part II(B).


include any individual . . . having the status of an independent contractor.”). However, “[t]he
obvious purpose of this amendment was to have the Board and the courts apply general agency
principles in distinguishing between employees and independent contractors . . . .” NLRB v.
consideration in determining worker classification. The Board has also considered other factors, including whether the workers had any real interest in the employment separate from the employer’s interest, whether the workers could be employed by other companies without the employer’s consent, whether the money received by workers was analogous to the wages of an employee, whether the workers were in the same economic position as the employees, and whether the workers would benefit from collective bargaining. However, above all, the purported employer’s right to control remained the decisive criterion in determining the employment relationship.

But recent cases, often involving delivery drivers, have shifted the focus from “right to control” to “entrepreneurial opportunity.” In Roadway Package System, Inc. (hereinafter Roadway III)—the last in the line of three cases involving the nationwide package delivery company over the course of ten

75. See Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270, 272 (5th Cir. 1988) (stating the hybrid test combines the economic realities test used in FLSA cases with common law agency principles, focusing on the employer’s right to control the manner and means of the worker’s performance); Wilde v. Cty. of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994) (noting the hybrid test consists of “common-law factors listed in the Restatement and some additional factors related to the worker’s economic situation”).

76. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter on Employment Relationship/Independent Contractors (June 25, 1968) (“[A]n employee, as distinguished from a person who is engaged in a business of his own, is one, who as a matter of economic reality ... follows the usual path of an employee and is dependent on the business which he serves.”); see also Seattle Post-Intelligencer Dep’t of Hearst Pubs., Inc., 9 N.L.R.B. 1262, 1275 (1938) (finding that motor route drivers had no real interest in the business apart from fulfilling their subscription lists, which were property of the company).

77. See Seattle Post-Intelligencer, 9 N.L.R.B. at 1275 (“The drivers cannot act as employees or representatives of any competing publisher without the Company’s assent.”).

78. Id. (“Inasmuch as the drivers deal only with newspapers delivered to subscribers[,] their return is analogous to earnings measured by the number of subscription deliveries rather than profit from an independent business.”).

79. See In re Hearst Pubs., Inc., 25 N.L.R.B. 621, 629 (1940) (finding that newspaper distribution agents “occupy positions comparable, in all substantial respects, to persons indisputably identified as employees.”).

80. See NLRB v. Hearst Pubs., Inc., 322 U.S. 111, 132–33 (1944) (holding the Board did not abuse its discretion in finding collective bargaining units could exclude “transient and casual workers” while including “men who were responsible workers, continuously and regularly employed as vendors and dependent upon their sales for their livelihood”).

81. See, e.g., Frankel v. Bally, Inc., 987 F.2d 86, 89–90 (2d Cir. 1993) (“[I]n practice there is little discernible difference between the hybrid test and the common law agency test. Both place their greatest emphasis on the hiring party’s right to control the manner and means by which the work is accomplished and consider a non-exhaustive list of factors as part of a flexible analysis of the ‘totality of the circumstances.’”). See generally MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 14–15 (1989).
years— the Board again reaffirmed its position that pickup and delivery drivers working for Roadway were employees, not independent contractors, as classified. The Board relied heavily on the Supreme Court’s analysis set forth in United Insurance, in which the Court held that an insurance company’s debit agents whose primary function was to collect premiums on existing policies for a commission from the company, which trained and supervised them and retained the right to discharge them, were “employees” within the NLRA. As in United Insurance, the Board found that the Roadway drivers did not operate independent businesses, but rather performed functions that were an essential part of Roadway’s normal operations. The Board found that (1) the drivers did not need to have any prior training or experience, but rather they received training from Roadway; (2) they did business in Roadway’s name with assistance and guidance from it; (3) they did not ordinarily engage in outside business; (4) they constituted an integral part of Roadway’s business under its substantial control; (5) they had no substantial proprietary interest beyond their investment in their delivery trucks; and (6) the drivers had no significant entrepreneurial opportunity for gain or loss. The Board rejected Roadway’s contention that the


86. Id.
right to control factor should predominate, and instead agreed with the union’s position that all factors should be weighted in the analysis.

As such, in determining the distinction between an employee and independent contractor under Section 2(3) of the NLRA, the Roadway III Board found that the business imposed substantial limitations on workers’ entrepreneurial rights, and as such, drivers were only performing functions essential to the business’s operations. In so holding, the Board, in essence, rejected the “right to control test which mistakenly emphasizes minor details of the day-to-day performance of the Company’s work,” to instead refocus on the workers’ opportunity to act as entrepreneurs. But rather than abolishing the right-to-control test, “[t]he Roadway Board, as had the Supreme Court, took care to strike a balance between the ‘right of control’ factor and the flexible, multifactor approach . . . .”

87. Id. at 850. Roadway contended it exercised limited control over the drivers and that the drivers were engaged in independent business ventures:

Roadway emphasizes, inter alia, that the drivers control their own work schedules and other details of job performance; they are not subject to a disciplinary policy; and their compensation package is based on performance-related components. Roadway further asserts that the drivers are independent entrepreneurs because they have a significant proprietary interest in their service areas and they have experienced gains and losses in their businesses. Roadway notes that the drivers, like independent businessmen, receive no fringe benefits from it, and they are responsible for their own tax withholdings.

Id.

88. Id. at 850 (quoting the Supreme Court’s language in NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968) that “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”). The Board also looked to the Restatement for guidance, noting that “Comment c to Section 220(1) of the Restatement states that ‘[t]he factors in Subsection (2) are all considered in determining the question [of employee status], and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the employee relationship.’” Id.; see also NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 61 (1st Cir. 1981) (“The determination of ‘independence’ . . . ultimately depends upon an assessment of ‘all of the incidents of the relationship . . . with no one factor being decisive.’” (quoting United Ins. Co., 390 U.S. at 258); Austin Tupler Trucking, Inc., 261 N.L.R.B. 183, 184 (1982) (“Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.”).

89. See Roadway III, 326 N.L.R.B. at 851.

90. See id. at 850–51.

A few years later, the D.C. Circuit declared in *Corporate Express Delivery Systems v. NLRB* that the Board, while retaining all of the common law factors, has shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy, “whether the putative independent contractors have a ‘significant entrepreneurial opportunity for gain or loss.’” But do not be mistaken that this new “subtle refinement” in the analysis somehow favors a finding of an employment relationship. In *FedEx Home Delivery v. NLRB*, the court found FedEx’s constraints on drivers to be compelled merely by “customer demands and government regulations,” and thus, the relationship was that of an independent contractor. In *FedEx Home Delivery*, the drivers owned their own vehicles and were permitted to use them for outside business, as long as they removed or masked all FedEx markings on the trucks. FedEx also permitted the drivers to take on multiple routes, to hire their own employees, and to sell or assign their routes without permission from FedEx. As such, the court found that the evidence of right-to-control was “clearly outweighed by evidence of

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92. *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780–81 (D.C. Cir. 2002) (finding that owner-operators who used their own vehicles for the defendant were employees rather than independent contractors because they were not permitted to employ others to do the company’s work or use their vehicles for other jobs; as such, the workers lacked “all entrepreneurial opportunity” and functioned as employees).

93. *Id.* at 780. The Board and the courts took into consideration a comment added to the Restatement’s definition of a “servant,” which sets forth that “[i]n some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.” *RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d* (AM. LAW INST. 1957); *Corp. Express Delivery Sys.*, 292 F.3d at 780.

94. *See* *FedEx Home Delivery, Inc. v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (In discussing the shift towards entrepreneurial opportunity, the court noted that “[t]his subtle refinement was done at the Board’s urging in light of [the] comment to the Restatement . . . .”).

95. 563 F.3d 492 (D.C. Cir. 2009).

96. *Id.* at 501 (“[W]here a company’s control over an aspect of the workers’ performance is motivated by a concern for customer service, that control does not suggest an employment relationship.” (quoting *C.C. Eastern Inc. v. NLRB*, 60 F.3d 855, 859 (1995)); *N. Am. Van Lines v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (“[E]mployer efforts to monitor, evaluate, and improve the results or ends of the worker’s performance do not make the worker an employee. . . . [R]estrictions upon a worker’s manner and means of performance that spring from government regulation . . . do not necessarily support a conclusion of employment status” because the company “is not controlling the driver[,]” the law is.).

97. *FedEx Home Delivery*, 563 F.3d at 504.

98. *Id.* at 498.

99. *Id.* at 499–500.
entrepreneurial opportunity," and found the drivers to be independent contractors.100

Regardless of outcome, this line of cases involving delivery drivers represents a refocus of emphasis from the employer’s right to control to whether the position presents opportunities and risks inherent in entrepreneurialism.101

C. A Return to Right-to-Control?

While *Roadway* and progeny set in motion a transition from right-to-control to entrepreneurial opportunity, it is important to remember that none of these decisions were handed down from the Supreme Court.102 Thus, while decisions from the Board and the D.C. Circuit are persuasive, other circuits are not bound to emphasize entrepreneurial opportunity. As such, the Eleventh Circuit declined to follow the Board’s logic, and instead reverted to pure application of the common law of agency and contract law.103

In *Crew One Productions, Inc. v. NLRB*, the Eleventh Circuit reversed the Board’s decision which found that stagehands were employees under the NLRA for purposes of certifying a union for collective bargaining with a referral service.104 As a basis for its decision, the court found that the referral service had no right to the work of stagehands for event producers to which they were referred; the stagehands had signed contracts which designated them as independent contractors; the stagehands wore their own clothing (with the exception of brightly colored vests bearing the referral service’s name) and supplied their own tools; the referral service did not withhold taxes; and any

100. *Id.* at 504.

101. *See* C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858–59 (D.C. Cir. 1995). For example, in that case, the D.C. Circuit held that drivers for a cartridge company who owned their own tractors, signed an independent contractor agreement, “retain[ed] the rights, as independent entrepreneurs, to hire their own employees . . .” and could “use their tractors during non-business hours . . .” and who were “paid by the job” and received no employee benefits, were independent contractors. *Id.* Conversely, in *Corp. Express Delivery Sys. v. NLRB*, the D.C. Circuit straightforwardly concluded that where the owner-operators “were not permitted to employ others to do the Company’s work . . . or to use their own vehicles for other jobs . . . [they] lacked all entrepreneurial opportunity and consequently functioned as employees rather than as independent contractors.” 292 F.3d 777, 780–81 (D.C. Cir. 2002).


103. *See Crew One Prods., Inc. v. NLRB*, 811 F.3d 1305, 1313 (11th Cir. 2016) ("[Roadway, Slay, and Time Auto] rely solely on the say-so of the Board, which does not convince—let alone bind—us as a court applying the common law of agency.").

104. *Id.* at 1311.
workers' compensation coverage provided to the stagehands was provided at the insistence of—and paid for by—the referral service’s clients. The only factor suggesting the stagehands were employees is that they were paid by the referral service on an hourly basis; however, the court found this one factor was outweighed by the totality of the other factors.

To arrive at its conclusion, the court relied heavily on factors evidencing right-to-control, finding that “Crew One did not have the right to control the stagehands.” Additionally, contrary to a long line of case law from the Board and the D.C. Circuit, the court paid particular attention to tax withholdings and the workers’ contractual agreements, finding that “the failure to withhold taxes weighs strongly in favor of a determination that the stagehands are independent contractors[,]” and “[t]he independent contractor agreements are evidence of intent to form an independent contractor relationship.”

While the Eleventh Circuit’s decision in Crew One outrightly rejects the Board’s urging to give more weight to entrepreneurial opportunity, only time will tell if other circuits will follow suit or acquiesce to the Board. So long as

105. Id. at 1312–14.
106. Id. at 1314.
107. Id. at 1311 (“[W]e give special attention to control. . . . Control is the most important factor in the common law.”) (citing NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912, 919 (11th Cir. 1983)).
108. Id. at 1311–12 (“[T]he fact that the Company deducts no Social Security or income taxes from the [worker’s] receipts . . . is a strong indication of the absence of employee status.” (quoting Associated Diamond Cabs, 702 F.2d at 925 n.3)). The Eleventh Circuit acknowledged that other circuits tend to give this factor less weight. Id. at 1312 (citing Seattle Opera v. NLRB, 292 F.3d 757, 764 n.8 (D.C. Cir. 2002) (“[T]he tax treatment of the [workers’] payments is of little analytical significance[.]”); Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 116 (2d Cir. 2000) (“Were . . . tax treatment factors accorded extra weight, . . . a firm and its workers could all but agree for themselves, simply by adjusting the structure of workers’ compensation packages, whether the workers will be regarded as independent contractors or employees.”); J. Huizinga Cartage Co. v. NLRB, 941 F.2d 616, 620 (7th Cir. 1991) (“[I]f an employer could confer independent contractor status through the absence of payroll deductions[,] there would be few employees falling under the protection of the Act.”)).

109. Crew One Prods., 811 F.3d at 1312–23 (distinguishing City Cab Co. of Orlando v. NLRB, 628 F.2d 261 (D.C. Cir. 1980), Time Auto Transp., Inc., 338 N.L.R.B. 626 (2002), and Corporate Express Delivery Sys., 332 N.L.R.B. 1522 (2000), which each imply that the totality of the circumstances outweighs the significance of the agreement; the Eleventh Circuit notes that the Board found in each case that the employer exercised control over the manner and means of performance, which was absent in the Board’s Crew One findings).

110. See NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968); see also St. Joseph News Press, 345 N.L.R.B. 474, 478 (2005) (“Supreme Court precedent ‘teach[es] us not only that the common law of agency is the standard to measure employee status but also that we have
Congress and the Supreme Court refuse to pass legislation or make a definitive ruling, respectively, the ability of the Board and the circuits to come to an agreement is doubtful.\(^{111}\)

### III. PREVAILING WORKER CLASSIFICATION LAW IN WASHINGTON STATE AND THE NINTH CIRCUIT

Because this article critically analyzes a City of Seattle ordinance, it is necessary to explore applicable Washington statues and case law, and mandatory precedent from the Ninth Circuit. It is also important to understand the interplay between laws governing collective bargaining (the NLRA) and wage and hour laws (the FLSA). As both laws were created to protect workers' rights, it seems as if the worker classification analyses should be the same. But as the following sections will show, wage and hour laws and labor laws cannot necessarily be applied interchangeably when determining worker classification.

#### A. Washington Statutes

The Washington Minimum Wage Act ("MWA"), codified in Chapter 49.46 of the Washington Revised Code, provides for payment of minimum wages and overtime.\(^{112}\) Similar to NLRA, the MWA circularly defines an "employee" as "any individual employed by an employer,"\(^{113}\) which does not apply to independent contractors.\(^{114}\) Washington's Standards of Labor regulations also specifically exempt independent contractors.\(^{115}\) It defines independent contractors as "individuals [who] control the manner of doing the work and the

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\(^{111}\) See Linder, supra note 63, at 201–03 (noting that courts applying the agency test to determine worker status are unable to confront the policy issues underlying the cases); cf. Alan Hyde, Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement, 13 Emp. Rts. & Emp. Pol'y J. 87, 87–88 (2009) (contending that any Restatement which "seeks to define relations of employment without any reference to any purpose of employment law" will be inherently arbitrary and unable to rationally restate the law).

\(^{112}\) WASH. REV. CODE § 49.46.005 (2015) ("[T]he establishment of a minimum wage for employees is a subject of vital and imminent concern to the people of this state and requires appropriate action by the legislature to establish minimum standards of employment within the state of Washington . . . .").

\(^{113}\) Compare id. § 49.46.010, with 29 U.S.C. § 152(3) (2015).

\(^{114}\) WASH. REV. CODE § 49.46.010 (2015); see also WASH. DEP'T OF LAB. & INDUS., ADMIN. POL'Y, ES.A.1, MINIMUM WAGE ACT APPLICABILITY 2 (2006) ("bona fide independent contractor[s] [are] exempt from the MWA").

\(^{115}\) WASH. ADMIN. CODE § 296-126-002(2)(c).
means by which the result is to be accomplished." As such, under the pure statutory language, Washington emphasizes the right-to-control test in determining employee-independent contractor classification.

B. Washington Case Law

FedEx is back again, and so is the economic realities test. In Anfinson v. FedEx Ground Package System, Inc., the Division 1 Court of Appeals of Washington analyzed whether delivery drivers should be classified as employees or independent contractors for purposes of the MWA. A class of 320 current and former FedEx Ground Package System workers filed suit seeking a right to overtime pay. The parties disagreed on the correct test to determine worker classification under the statute; FedEx argued that the common law right-to-control test governs (referenced in the Washington Administrative Code), while the plaintiff class contended that the FLSA economic realities test controls. So, naturally, the trial court, drawing on submissions from the parties and its own research, gave the jury a hybrid instruction focusing on FedEx’s right to control in light of the economic dependence factors. The jury

116. Id.
117. See id.
119. Id. at 35–36 (defining the class as “[A]ll persons who performed services as a pick up and delivery driver, or “contractor,” for defendant during the class period (December 21, 2001 through December 31, 2005) who signed (or did so through a personal corporate entity) a FedEx operating agreement and who handled a single route at some point during the class period; excluding persons who only performed or filled one or more of the following positions during the class period: multiple route contractors, temporary drivers, line-haul drivers, or who worked for another contractor.”).
120. WASH. ADMIN. CODE § 296-126-002(2)(c) (2016).
121. Anfinson, 244 P.3d at 45–46. Anfinson argued that the trial court’s Instruction 9, which focused on whether an employer has “the right to control the details of the class members’ performance of the work” was incorrect. Id. at 37.
122. Id. at 37–38. The trial court’s instruction 9 states:
You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members’ performance of the work. In deciding control or right to control, you should consider all the evidence bearing on the question, and you may consider the following factors . . . [listing 8 factors indicating control, including the right to control the manner in which the work is to be performed, opportunity for profit or loss, investment in materials or equipment, degree of permanence of the working relationship, method of payment, etc.].

Id.
found the delivery drivers were independent contractors. Anfinson appealed, contending, among other things, that the jury instructions misstated the law and misinformed the jury about the standards for determining worker status. Specifically, Anfinson argued that the jury instruction erroneously focused on “whether an employer has the ‘right to control the details of the . . . performance of the work.’”

The Washington appeals court held that the jury instruction defining the standard for determining worker status “incorrectly stated the law and was prejudicial to Anfinson.” The court relied on the fact that “the Supreme Court and all the federal circuits agree that ‘the economic realities’ test is the applicable test” to be used under the FLSA, on which Washington’s Minimum Wage Act is based. Accordingly, the court, following the majority of federal circuits, consolidated the economic realities test into only six factors: (1) the permanence of the working relationship between the parties; (2) the degree of skill the work entails; (3) the extent of the worker’s investment in equipment or materials; (4) the worker’s opportunity for profit or loss; (5) the degree of the alleged

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124. Anfinson, 244 P.3d at 37.

125. Id.

126. Id.

127. Id. (emphasis added) (citing authoritative case law from the Supreme Court and numbered circuits: Bartels v. Birmingham, 322 U.S. 126, 130 (1947); Donovan v. Agnew, 712 F.2d 1509, 1510 (1st Cir. 1983); Brock v. Superior Care, Inc., 840 F.2d 1054, 1058–59 (2d Cir. 1988); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1383 (3d Cir. 1985); Steelman v. Hirsch, 473 F.3d 124, 128 (4th Cir. 2007); Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 303 (5th Cir. 1998); Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984); Sec’y of Labor v. Lauritzen, 835 F.2d 1529, 1536 (7th Cir. 1988); Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989); Brouwer v. Metropolitan Dade County, 139 F.3d 817, 818–19 (11th Cir. 1998)).

128. Id. at 39. In analyzing the provisions of the MWA, the court was “guided by [the Washington Supreme Court’s] decision in Stahl v. Delicor of Puget Sound, Inc.” and characterized Stahl as a “case [that] involved a class claim that Delicor’s commission plan violated the MWA provisions regarding overtime wages.” Id. The court noted both “that the MWA is ‘based on the Fair Labor Standards Act of 1938 (FLSA),’ and that a review of the [A]ct supported the court’s conclusions regarding the MWA.” Anfinson, 244 P.3d at 39 (citing Stahl, 64 P.3d 15).

129. See Brock v. Superior Care, Inc., 840 F.2d 1054, 1058–59 (2d Cir. 1988); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1383 (3d Cir. 1985); Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984); U.S. Dept’g of Lab. v. Lauritzen, 835 F.2d 1529, 1534–35 (7th Cir. 1987); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989).
employer’s control over the worker;” and “(6) whether the service rendered by the worker is an integral part of the alleged employer’s business.\textsuperscript{130}

In line with these factors, the court refused to accept Anfinson’s proposed jury instructions, which included the “relative investments of the parties,” declaring that “the ‘relative’ investment of the parties is not articulated in [the six factor economic realities test used by the majority of federal circuits].”\textsuperscript{131} Additionally, under the MWA, the economic realities test does not include an analysis of the belief of the parties as to whether they were employees or independent contractors, and belief did not form any part of the economic realities test articulated by the majority of federal circuits.\textsuperscript{132} Accordingly, belief of the parties and relative investments of the parties were not considered in determining worker classification.\textsuperscript{133}

\textit{Anfinson} thus provides authority in Washington as to whether FedEx drivers are employees or independent contractors for purposes of Washington’s Minimum Wage Act or the FLSA. But the analysis of worker classification of Uber drivers requires a more similar comparator than delivery drivers, and \textit{Anfinson} does not necessarily govern collective bargaining rights under the NLRA.\textsuperscript{134}

**C. Ninth Circuit Case Law**

The Ninth Circuit has addressed worker classification of taxi drivers in the context of the NLRA, which is the most similar comparator as of the time of this writing. In the 2008 decision of \textit{NLRB v. Friendly Cab Company}, the Ninth Circuit Court of Appeals found that drivers who leased cabs from Friendly were employees rather than independent contractors, and were therefore entitled to collective bargaining representation.\textsuperscript{135} However, unlike the FLSA analysis, the court focused on Friendly’s right to control. Because \textit{Friendly} serves as binding precedent over the rideshare dispute in Seattle, this section will fully set forth the facts in this case with greater detail to facilitate a fact-specific comparative analysis.

\begin{small}
\textsuperscript{130} Anfinson, 244 P.3d at 40–41. The court also relied on the Washington Department of Labor and Industries’ interpretation of the MWA, substantially adopting the same six factor economic realities test. \textit{Id.}

\textsuperscript{131} \textit{Id.} at 44 (noting that “only the Fifth Circuit states relative investment of the parties as one of six factors to be used in determining the economic relationship between the parties.”).

\textsuperscript{132} \textit{See id.}

\textsuperscript{133} \textit{See supra} notes 125–126 and accompanying text.

\textsuperscript{134} This is because the NLRA occupies the field with respect to preemption of state law. \textit{See infra} Part V(A).

\textsuperscript{135} \textit{NLRB v. Friendly Cab Co.}, 512 F.3d 1090, 1093 (9th Cir. 2008).
\end{small}
Friendly Cab Company, operating out of a facility in Oakland, California, owned approximately eighty taxicabs and leased those cabs to drivers who operated them in the area.\footnote{136} The leases typically indicated a rental period of seven days, and they renewed automatically, calling for "six days of service and one day of mandatory maintenance per week."\footnote{137} The leases required in return for the driver to pay a fee ranging from $450 to $600 per week, taking into account "the cab model as well as the driver's driving record, driving ability, and prior accidents."\footnote{138} Friendly had "discretion to assign drivers to different... taxicab models, and the type of cab (airport or street cabs)."\footnote{139} The contracts also specified that the leases did not create an "employer-employee relationship between Friendly and its taxicab drivers, and that Friendly [was] not responsible for withholding any federal or state taxes or [for] providing worker's compensation insurance."\footnote{140}

The leases also required drivers to comply with Friendly's Taxicab Company Policy Manual and its Standard Operating Procedures, which cover a broad range of general topics such as safety and non-discrimination,\footnote{141} but also sets forth regulations that assert control over drivers.\footnote{142} Some of these regulations

\footnote{136} Id.
\footnote{137} Id.
\footnote{138} Id.
\footnote{139} Id.
\footnote{140} Id.
\footnote{141} Id. at 1093–95 ("Friendly requires that its drivers attend, at their expense, annual classes on company policies and laws dealing with discrimination.").
\footnote{142} Id. at 1094. "[I]f the drivers do not comply with Friendly's policies, Friendly can terminate their leases." Id. at 1095.
included driving instructions,\textsuperscript{143} dress code,\textsuperscript{144} outside business opportunities,\textsuperscript{145} dispatch response,\textsuperscript{146} and method of customer payment.\textsuperscript{147}

\textsuperscript{143} Id. at 1094. The Policy Manual "instructs drivers that: ‘[a]cceleration should be smooth,’ they should ‘[a]void abrupt stops,’ they should ‘not stop next to puddles or in front of obstacles such as signs, trees or hydrants,’ and that ‘[w]hen stopping at curbs, stop either right next to curb or out away from the curb.’" Id. (alteration in original).

\textsuperscript{144} Id. The Policy Manual also "impose[d] a dress code, which requires that all taxicab drivers ‘maintain good personal hygiene and dress appropriately and professionally: collared shirts with sleeves, slacks or knee-high skirts, closed shoes with socks or hose.’" Id. (alteration in original). "Friendly employ[ed] a ‘road manager’ who monitor[ed] the drivers’ appearance and compliance with company policies." Id. at 1095.

\textsuperscript{145} Id. at 1094. The Standard Operating Procedures restricted outside business opportunities for drivers, stating that

[The Standard Operating Procedures] restrict[ed] outside business opportunities for [] drivers by stating that: ‘[a]ll calls for service must be conducted over company provided communications system and telephone number. No private or individual business cards or phone numbers are allowed for distribution to customers as these constitute an interference in company business and a form of competition not permitted while working under the lease.’

Id. Further, Friendly’s drivers were not able to sublease their vehicles to other drivers, and required that taxicabs carry advertisements for outside vendors on the roofs of taxicabs, which were at selected and placed at Friendly’s discretion. Id. at 1094–95.

\textsuperscript{146} Id. at 1094. Friendly’s Standard Operating Procedures provide that “[d]rivers must service all reasonable customer calls from dispatches.” Id. (quoting the Standard Operating Procedure). Testimony showed that this regulation was enforced in practice: “Several drivers testified that the dispatcher will ignore or bypass them if they refuse or are late to a dispatch. One driver testified that if drivers do not respond in a certain amount of time, the dispatcher reminds drivers over the radio that ‘we run the show, you guys are just the driver. Just drive. That’s it.’” Id.

\textsuperscript{147} Id.

[There was conflicting testimony as to] whether Friendly’s divers had to accept credit cards, the [Standard Operating Procedures] require[d] that drivers accept scrip and vouchers from customers. Id. A ‘taxi scrip’ is a temporary substitute for currency provided by some local communities in the Bay Area, which provides discounted coupons or vouchers to registered blind, elderly, disabled customers, and passengers traveling with service animals who are unable to access regular transit. See id. at 1094 n.3. Taxicab drivers are required to respond at Friendly’s discretion to dispatches for voucher service from contract accounts that Friendly Transportation . . . maintains with companies such as United Parcel Service, Federal Express, Union Pacific, and the American Red Cross. It is not clear how often this occurs since the SOP indicates that Friendly Transportation’s vans and sedans have primary responsibility for these corporate accounts and taxicabs are used at Friendly’s discretion as a secondary option. On such occasions, Friendly reimburses drivers according to a rate list, minus a set percentage based upon the total amount of the voucher. For vouchers up to $50, Friendly keeps ten percent of the total amount; from $50 to $100, fifteen percent; from $100 to $125, twenty percent; from $125 to $200, twenty-five percent; and over $200, thirty percent. There is testimony
The East Bay Taxi Drivers Association ("Union") was appointed as the collective bargaining representative of Friendly's drivers, due to "tension between Friendly and its drivers," and thereafter filed an unfair labor practice petition with the Board.\textsuperscript{148} The Board found that "Friendly's drivers were employees within the meaning of Section 2(3) of the [NLRA,]" and subsequently certified the Union as the exclusive collective bargaining representative for Friendly's taxicab drivers.\textsuperscript{149} Friendly refused to bargain with the Union, and the Board found that Friendly violated Sections 8(a)(1) and (a)(5) of the NLRA "by refusing to participate in collective bargaining."\textsuperscript{150} Friendly appealed to the Ninth Circuit Court of Appeals.\textsuperscript{151}

Giving deference to the Board,\textsuperscript{152} the Ninth Circuit affirmed the Board's conclusion that Friendly's drivers were employees within the meaning of the NLRA.\textsuperscript{153} The Ninth Circuit followed the Board's analysis on right-to-control, but placed particular emphasis on entrepreneurial opportunity as being the "most from the drivers that these flat rates can be less than the meter rate for the same trip, but the drivers do not have the ability to refuse a voucher dispatch."

\textit{Id.}

\textsuperscript{148} Id. at 1095.

\textsuperscript{149} \textit{Id.}; see 29 U.S.C. § 158(a)(5) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . .").

\textsuperscript{150} \textit{Friendly}, 512 F.3d at 1095. The Board affirmed the decision of an administrative law judge ("ALJ") and adopted the ALJ's recommended order. \textit{Id.} (citing \textit{Friendly Cab. Co., Inc.}, 344 N.L.R.B. 528 (2005) (generally referred to as the "Unfair Labor Practice Proceeding").

\textsuperscript{151} \textit{Id.} The Ninth Circuit Court of Appeals has jurisdiction to review a final order of the Board upon petition to the court under 29 U.S.C. § 160(f). 29 U.S.C. § 160(f) (2016) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.").

\textsuperscript{152} \textit{Id.} at 1095–96. \textit{Friendly}, 512 F.3d at 1095–96. "In reviewing the NLRB's application of agency principles to the facts of the case, the 'court should not set aside the Board's determination of the issue merely because the court, as an original matter, would have decided the case the other way. If the Board's conclusion represents a choice between two fairly conflicting views, it may not be displaced.'" \textit{Id.} at 1095 (quoting \textit{Merchants Home Delivery Serv., Inc. v. NLRB}, 580 F.2d 966, 973 (9th Cir. 1978) (internal quotation marks and citations omitted). Accordingly, the reviewing court should uphold the NLRB's decision if it "correctly applied the law and if there is substantial evidence on the record as a whole to support its findings of fact." \textit{Id.} at 1096 (quoting \textit{Chipman Freight Servs., Inc. v. NLRB}, 843 F.2d 1224, 1225 (9th Cir. 1988)).

\textsuperscript{153} \textit{Friendly}, 512 F.3d at 1103.
significant" factor. The Court also found compelling the Board’s findings of control by Friendly over the means and manner of its drivers’ performance, including

1. regulating the details of how drivers must operate their taxicabs,

2. imposing discipline for refusing or delays in responding to dispatches,

3. requiring drivers to carry advertisements without receiving revenue,

4. requiring drivers to accept vouchers subject to graduated ‘processing fees,’

5. prohibiting subleases,

6. imposing a strict dress code, and

7. requiring training in excess of government regulations.

The Board and the Ninth Circuit’s inclination to follow the Board in Friendly Cab Co. signifies the view of entrepreneurialism as the primary indicator of right-to-control or lack thereof, in line with Roadway III and Corporate Express. As such, the Ninth Circuit recognizes that the crux in finding an independent contractor status is the worker’s opportunity to engage in entrepreneurial enterprise and to develop one’s own business interests.

154. Id. ("The NLRB relied on a number of factors that in their totality compel a finding of employee status, the most significant of these being Friendly’s prohibition on its drivers’ operating an independent business and developing entrepreneurial opportunities with customers.")

155. Id. But note, "[a]lthough some of these factors individually may not constitute substantial control, the NLRB reasonably concluded that these factors taken together overcame any evidence of independent contractor status." Id.

156. See supra Part II(B); cf. Clara Seymour, NLRB v. Friendly Cab Company: Entrepreneurialism and the Independent Contractor/Employee Distinction, 29 Berkeley J. Emp. & Lab. L. 503, 503, 505 (2008) ("[E]ntrepreneurial freedom may be construed as its own factor indicating control or lack thereof, or may be inherent in the ‘distinct occupation or business’ factor in the Restatement (Second) of Agency.").

157. Friendly, 512 F.3d at 1098 ("These limitations do not allow Friendly’s drivers the entrepreneurial freedom to develop their own business interests like true independent contractors.").
IV. THE SEATTLE RIDESHARE ORDINANCE

With the passage of Council Bill 118499 (hereinafter, “Seattle ordinance”), Seattle became the first city in the U.S. to establish a framework to enable contract drivers to organize and collectively bargain. On December 14, 2015, the Seattle City Council voted unanimously to give drivers classified as independent contractors—notably, those drivers working for taxi and app-dispatch companies like Uber and Lyft (hereafter, “for-hire drivers”)—the ability to unionize. Seattle mayor Ed Murray refused to sign the council bill but did not veto the legislation, thus allowing the bill to become law. While the Mayor expressed support for the rights of workers, he also revealed reservations concerning costs related to overseeing the collective bargaining process, costs of

158. As of the time of this writing, the Council Bill has not been codified into the Seattle Municipal Code. The ordinance will add relevant definitions (some discussed supra in this article) to Section 6.310.110, and it will add a new Section 6.310.735 to the Code to include substantive provisions. This section falls with Title 6 – Business Regulations, Chapter 6.310 – Taxicabs and For-Hire Vehicles. See Seattle, Wash., Ordinance 118,499 (Dec. 17, 2015).


regulation, and "significant costs associated with defending this Bill in the courts." Mike O'Brien, the Seattle City Councilmember who introduced the ordinance, was quoted defending the bill in The Seattle Times: "$[t]his bill was only introduced out of necessity after witnessing how little power drivers themselves had in working for a living wage." O'Brien received support and assistance from Teamsters Local 117 in introducing the bill.

The City Council stated the purpose of the ordinance was "to ensure safe and reliable for-hire and taxicab transportation service . . . and to exercise the City's authority to regulate for-hire transportation pursuant to [Washington law] . . . ." Under the specific language of the bill, the legislation allows for-hire drivers "to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work." The City derived its authority from the Washington Revised Code, which sets forth, in relevant part:

The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to

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162. Letter from Edward B. Murray, Mayor, City of Seattle, to Seattle City Council (Dec. 14, 2015), https://assets.documentcloud.org/documents/2646760/EBM-Letter-to-Council-Re-TNC-12-14-15.pdf ("I remain concerned that this ordinance, [as passed by the Council], includes several flaws. Most notably, City costs of administering the collective bargaining process remain unknown and the Council has placed the burden of significant rulemaking on City staff.").

163. Beekman, supra note 2. Note that Seattle's new minimum wage law, which went into effect on April 1, 2015, provides for a minimum wage increase within the City of Seattle to $15 an hour, phased in over time. See $15 Minimum Wage, SEATTLE.GOV: OFF. MAYOR, http://murray.seattle.gov/minimumwage/#sthash.6c811cEM.dpbs. Beginning April 2015, "[s]mall employers (businesses with fewer than 500 employees) [are required to] reach $15 per hour in seven years," and "[l]arge employers (businesses with 500 or more employees, either in Seattle or nationally) [are required to] reach $15 per hour in three years." Id. Accordingly, after the minimum wage ordinance is fully phased in, a living wage in Seattle will presumably be about $30,000 a year.


165. Seattle, Wash., Ordinance 124,968, at 2 (Dec. 23, 2015). The City cited RCW 46.72.001 and RCW 81.72.200 as giving them authority to regulate for-hire transportation. Id.

166. Id. at 1.
regulate for hire transportation services without liability under federal antitrust laws.\textsuperscript{167}

The bill asserts that establishing a process through which drivers and app-dispatch companies such as Uber and Lyft can collectively negotiate the terms of their contracts "will enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, cost-effective, and economically viable manner."\textsuperscript{168} The City Council believes collective bargaining benefits will be two-fold: (1) for-hire drivers working under a collective bargaining agreement are "more likely to remain in their positions over time and devote more [hours of service] because the terms [of the agreement] are more likely to be satisfactory . . . [:]" and (2) by ensuring compensation is sufficient, drivers will be under less "financial pressure to provide transportation in an unsafe manner (such as by working longer hours than is safe, skipping needed breaks, or operating vehicles at unsafe speeds in order to maximize the number of trips completed) or to ignore" necessary vehicle maintenance.\textsuperscript{169} Therefore, the City Council concluded that the ability of for-hire drivers to collectively bargain benefits both drivers and their passengers as well.\textsuperscript{170}

The Seattle ordinance sets out that a nonprofit organization, such as a union, may become a "qualified driver representative"\textsuperscript{171} in which it would provide representation to all "qualified drivers."\textsuperscript{172} Unions wishing to represent for-hire

\textsuperscript{167} Id. (also citing to RCW 81.72.200 for similar legislative intent governing taxicab transportation). As noted at the outset of this article, this piece does not address federal antitrust laws. But as one may logically conclude, the U.S. Chamber of Commerce believes federal antitrust law preempts these Washington state law provisions. \textit{See supra} note 5 (discussing ongoing litigation brought by the U.S. Chamber of Commerce against the City of Seattle alleging violations of federal antitrust laws).

\textsuperscript{168} Id. at 3–4.

\textsuperscript{169} Id. at 4.

\textsuperscript{170} Id. at 3–4. It is important to note that Uber's business model substantially differs from traditional taxi cab companies. In a nutshell, Uber is a smartphone app that provides on-demand service to registered users by connecting riders with drivers. Drivers use their own vehicles to provide a taxi service, and Uber gets roughly twenty percent of the fare. The service benefits both drivers and passengers. The Uber service provides drivers with income by using a vehicle they already own without the additional risk of investment in a specialized taxi vehicle. The Uber service is also beneficial for passengers, as the app provides them with relatively low-cost, fast and convenient service.

\textsuperscript{171} Id. at 6. The ordinance defines "Qualified driver representative" as "an entity that assists for-hire drivers operating within the City for a particular driver coordinator in reaching consensus on desired terms of work and negotiates those terms on their behalf with driver coordinators." Id.

\textsuperscript{172} Id. (defined as "a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director pursuant to Section 6.310.735. In establishing such conditions, the Director shall consider factors such as length, frequency, total
drivers are required to submit a request to the City of Seattle’s Director of Finance and Administrative Services within a certain time period. The Director will then notify the union applicant of the City’s determination on whether the union has been selected as the driver representative “to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator.” Once an exclusive driver representative union is selected, the majority of qualifying drivers of each separate app-dispatch company would have to vote for approval to be represented by the union.

The ordinance officially became part of the Seattle city code in January 2015, but the full force of the ordinance will not go into effect until May 2017, which would be the earliest point a union could apply to be the exclusive driver representative.

number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, and any other factors that indicate that a driver’s work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation. A for-hire driver may be a qualifying driver for more than one driver coordinator.”).

173. Id. at 5, 7, 9 (“An entity wishing to be considered as a QDR [qualified driver representative] for for-hire drivers operating within the City must submit a request to the Director within 30 days of the commencement date . . . . If no EDR [exclusive driver representative] is certified for a driver coordinator, the Director shall, upon written request from a designated QDR or from an entity that seeks to be designated as a QDR, promulgate a new commencement date applicable to that driver coordinator that is no later than 90 days after the request, provided that no driver coordinator shall be subject to the requirements of Section 6.310.735 more than once in any 12-month period.”).

174. Id. at 5, 7. The Director is required to notify the applicant in writing within 14 days of the receipt of the request. Id. at 7. An applicant who disputes the “Director’s determination may appeal to the Hearing Examiner within 10 days of receiving the determination.” Id.

175. Id. at 6. A “qualifying driver” is defined as “a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director . . . . In establishing such conditions, the Director shall consider factors such as the length, frequency, and total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, and any other factors that indicate that a driver’s work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation.” Id. The bill has been revised to this more discretionary language, after previously requiring qualified drivers to have completed at least 150 trips in the 30 days before the commencement date of the ordinance. Seattle, Wash., Council Bill 118,499 (Dec. 13, 2015).


V. ADMINISTRATIVE FINDINGS AND COURT RULINGS ON RIDESHARE WORKER CLASSIFICATION

A. Administrative Remedy and Preemption

With the passage of the Seattle ordinance, which authorizes for-hire drivers in Seattle to elect driver representative unions for purposes of collective bargaining, the focus then shifts to whether the city ordinance violates federal labor law.\textsuperscript{178} Congress created the Board to administer and implement the NLRA, in which Congress granted primary jurisdiction to the Board as the court of first resort, to adjudicate disputes arising under the statute.\textsuperscript{179} In other words, parties to labor disputes must first file a complaint with the Board before seeking redress from a court of law. This reliance on the Board as a primary administrative remedy is "premised on the [Board's] expertise and experience in resolving labor relations matters and on the importance of fashioning a coherent and uniform body of labor law by which parties can predicate their future conduct."\textsuperscript{180} The Supreme Court has expressed the need to protect the primary jurisdiction of the

\textsuperscript{178} The answer to whether the city ordinance is preempted by the National Labor Relations Act is unclear, and unfortunately quite complex. See generally ARCHIBALD COX ET AL., Labor Law: Cases & Materials 873–75 (15th ed. 2011). There are no express preemption provisions within the NLRA or even a legislative history to indicate to what extent the federal scheme is supposed to supplant state labor laws. See Garner v. Teamsters Local No. 776, 346 U.S. 485, 488 (1953) (The NLRA "leaves much to the states, though Congress has refrained from telling us how much."); Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 YALE J. ON REG. 355, 374 (1990) ("The Court has found nothing on the face of the statute, nor in the legislative history, that reflects an express decision by Congress one way or the other respecting the survival of state laws."). However, drawing upon Constitutional preemption doctrine, we may logically conclude that when federal and state labor laws conflict, the NLRA will trump the state law in question. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which made in Pursuance thereof . . . shall be the supreme Law of the Land.").


\textsuperscript{180} Paul M. Secunda, Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States, 29 COMP. LAB. L. & POL'Y J. 209, 232 (2008); see also Paula K. Knippa, Note, Primary Jurisdiction Doctrine and the Circumforaneous Litigant, 85 TEX. L. REV. 1289, 1315 (2007) ("[t]he inconsistent holdings emanating out of both federal and state courts would destroy the uniformity of the regulatory scheme that Congress hoped to achieve through the administrative and adjudicatory clearinghouse of the [NLRB]"); Jonathan D. Hacker, Note, Are Trojan Horse Union Organizers "Employers"?: A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3), 93 Mich. L. REV. 772, 776 (1995) (noting that courts have consistently recognized the Board's experience and expertise with the complexities of industrial relations).
Board, particularly “where state laws seek to regulate activity that Congress purposefully chose to leave unregulated.”

Once the Seattle ordinance goes into effect in summer of 2017, assuming a union applies to become the exclusive driver representative for Uber or Lyft (or both), the Director approves it, and the majority of qualifying drivers vote for representation by the union, then when does the Board step in? The ordinance, as currently worded, makes no mention of the Board. It essentially supplants the Board with the City’s Director of Finance and Administrative Services.

181. Secunda, supra note 180, at 231. Note that primary jurisdiction and field preemption are two distinct concepts. See Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (In the absence of an expressed intention to preempt state or local law, courts will “sustain [a] local regulation . . . unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.”). Similarly, “a state may not regulate conduct, even if it is neither protected nor prohibited by the NLRA, that is within the zone of activity that Congress meant to be left to the free play of economic forces.” Stephen F. Befort, Demystifying Federal Labor and Employment Law Preemption, 13 LAB. LAW. 429, 433 (1998) (citing Lodge 76, Int’l Assoc. of Machinists v. Wisc. Emp’t Relations Comm’n, 427 U.S. 132, 149–51 (1976)).

182. Usually, the Board—not a municipal entity—determines whether the labor organization is appropriate for the purposes of collective bargaining. In such determination, the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.


183. See generally Seattle, Wash., Ordinance 124,968, at 3–4 (Dec. 23, 2015). The Ordinance seems to look past the drivers’ status as independent contractors.

(H) Business models wherein companies control aspects of their drivers’ work, but rely on the drivers being classified as independent contractors, render for-hire drivers exempt from minimum labor requirements established by federal, state, and local law. (I) Establishing a process through which for-hire drivers and the entities that control many aspects of their working conditions collectively negotiate the terms of the drivers’ contractual relationships with those entities will enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner, and
Usually, there is a three-step procedure for certifying a union. First, interested employees or an employer may file a representation petition with the Board. Next, “the appropriate regional office investigates to determine if... a substantial number of employees wish to be represented by the union for purposes of collective bargaining.” This is referred to as “a question of representation.” Lastly, if the Board finds a “question of representation” to exist, it conducts an election.

Once the ordinance becomes incorporated into the Seattle Municipal Code, Uber, Lyft, and any other driver coordinator (collectively, “Uber” hereafter) will need to wait until a vote is conducted and an exclusive driver representative (labor organization) is elected by a majority of qualified drivers before taking action with the NLRB. Once a labor organization presents a claim to Uber to be recognized as a representative for purposes of collective bargaining, Uber may then file a petition with the Board for a hearing to contest the representation. Alternatively, Uber could do nothing and simply refuse to bargain with the labor organization. In that scenario, the Uber employees seeking representation or the elected labor organization would need to file a petition with the Board asserting that they wish to be represented by the labor organization.

thereby promote the welfare of the people who rely on safe and reliable for-hire transportation to meet their transportation needs.

Id.

185. Id.
186. Id. at 289–90.
187. Id.
188. Id. at 290.
189. See supra note 158.
190. See supra notes 175–176, 184–188 and accompanying text.
191. See 29 U.S.C. § 159(c)(1)(B) (2015) (“Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board ... an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative ['designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes']; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an elect by secret ballot and shall certify the results thereof.”).
192. See 29 U.S.C. § 159(c)(1)(A) (“Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board ... an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that
But until Uber or another driver coordinator is harmed by the ordinance, any challenge will likely be considered unripe for administrative review and, thus, Uber will lack standing.\textsuperscript{193} If there is no active controversy because the main provisions of the ordinance have not yet taken effect, then a complaint to the Board could only settle a hypothetical dispute, which would require speculation on the effects of the ordinance.\textsuperscript{194} Such an uncertainty would preclude a finding of ripeness.

Once a complaint is lodged, then a federal court could decide the issue of whether the NLRA preempts the Seattle rideshare ordinance. Because there are no statutory preemption provisions contained within the NLRA, local regulations are preempted only where they conflict with the federal law, where they would frustrate the scheme behind the enactment of the federal law, or where the totality of the circumstances indicates that Congress intended to occupy the relevant field and completely exclude state legislation.\textsuperscript{195}

Federal labor law preemption is a matter of federal common law, not a matter of statutory law.\textsuperscript{196} Two types of federal preemption are recognized under the NLRA.\textsuperscript{197} First, "Garmon preemption" is based on the premise that the Board possesses primary jurisdiction over the determination of whether a particular

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\textsuperscript{193} See Jacob Fischler, \textit{Seattle Calls Chamber Suit Over Driver Union Law Premature}, LAW360 (Mar. 29, 2016), http://www.law360.com/articles/777304/seattle-calls-chamber-suit-over-driver-union-law-premature (discussing the City of Seattle's Motion to Dismiss the U.S. Chamber of Commerce's antitrust lawsuit challenging Seattle's ordinance allowing for-hire drivers to organize). However, Uber, Lyft, and Sidecar have in the past have joined together in a coalition to repeal another Seattle rideshare ordinance they felt unfairly limited and regulated restrictions on mobile app ride service companies operating in the city. See Uber, Lyft, and Sidecar Support Coalition to Repeal Rideshare Ordinance, UBER NEWSROOM (Mar. 28, 2014), https://newsroom.uber.com/us-washington/uber-lyft-and-sidecar-support-coalition-to-repeal-rideshare-ordinance/.

\textsuperscript{194} It is important to take notice of Section 164 limitations set forth under the National Labor Relations Act. 29 U.S.C. § 164(c) empowers the Board to decline jurisdiction over labor disputes "involving any class or category of employers, where in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1) (2011). However, because rideshare companies such as Uber do indeed have a "sufficiently substantial" effect on commerce, it would be highly unlikely that the Board would decline jurisdiction in this scenario. As such, any ruling would preempt the city ordinance. Board would decline jurisdiction in this scenario.


\textsuperscript{196} \textit{See generally} id.

activity regulated by states is either an unfair labor practice or protected activity governed by the NLRA;\textsuperscript{198} when it is clear or may be assumed that an activity is within the NLRA, the local jurisdiction must yield.\textsuperscript{199} Second, "Machinists preemption" protects against state interference with policies implicated by the structure of the NLRA itself by preempting state law and state causes of action concerning conduct Congress intended to be unregulated.\textsuperscript{200}

The Seattle ordinance is tantamount to regulation, as it would specifically supplant the Board’s administrative structure with the City’s Director of Finance and Administrative Services (“Director”) to certify a union.\textsuperscript{201} Consequently, in enacting and enforcing the requirement of the Seattle ordinance, the City of Seattle would be acting as a market regulator, and thus, \textit{Garmon} preemption would apply. As such, the NLRA prevents localities from regulating within a protected zone, including a zone reserved for the Board’s jurisdiction.\textsuperscript{202}

\textsuperscript{198} San Diego Bldg. Trades Council v. \textit{Garmon}, 359 U.S. 236, 244–45 (1959) (determining "whether the particular activity regulated by the States was governed by § 7 or § 8 [of the NLRA] or was, perhaps, outside both those sections."); see also \textit{Metro. Life Ins. Co.}, 471 U.S. at 748.

\textsuperscript{199} \textit{Garmon}, 359 U.S. at 244–45. "The critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board, for it is only in the former situation that a state court’s exercise of jurisdiction necessarily involves a risk of interference with the NLRB’s unfair labor practice jurisdiction that the arguably prohibited branch of the \textit{Garmon} doctrine was designed to avoid." \textit{Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters}, 436 U.S. 180, 180 (1978). "\textit{Garmon} pre-emption prohibits regulation even of activities that the NLRA only arguably protects or prohibits." \textit{Bldg. & Constr. Trades Council of the Metro. Dist.}, 507 U.S. at 225 (emphasis added).

\textsuperscript{200} Lodge 76, \textit{Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp’t Relations Comm’n}, 427 U.S. 132, 140 (1976). \textit{Machinists} pre-emption arose because Congress intended certain conduct to be "controlled by the free play of economic forces." \textit{Id.} (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971). \textit{Machinists} pre-emption "protects against state interference with the policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." \textit{Metro. Life Ins. Co.}, 471 U.S. at 749. "The doctrine was [initially] designed . . . to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act." \textit{Id.}

\textsuperscript{201} \textit{See supra} notes 182–188 and accompanying text.


When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, \textit{see Machinists}, or for NLRB jurisdiction, \textit{see Garmon}. A State does not regulate, however, simply by acting within one of these protected areas. When a state owns and manages property, for example, it must interact with
Accordingly, Uber and similar companies could assert that the Seattle ordinance is subject to Garmon preemption because it regulates union ("qualified driver representative") elections and collective bargaining representation, or in the alternative, Machinists preemption because the Seattle ordinance regulates an activity that Congress intended to be unregulated.

For example, if a class of Uber drivers elects a union for representation under the provisions of the Seattle ordinance, Uber could simply refuse to bargain with that representative. The Seattle ordinance would then give the union two options: it could file a complaint with the Director, who is "authorized to enforce and administer" the Seattle ordinance; or the union could pursue its own private right of action in court.

Either way, Uber could assert an affirmative defense that the Seattle ordinance is preempted by the NLRA under the Garmon preemption doctrine, and accordingly, the Board has jurisdiction over a question of alleged unfair labor practices. Specifically, section 8(a)(5) of the NLRA states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." On the other hand, if Uber proactively contests the election of a qualified driver representative, then it could complain directly to the Board and argue that NLRA section 7 preempts the Seattle ordinance. Whatever strategy Uber decides to pursue, it could assert

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private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.

Id. (citing Machinist, 427 U.S. 132 (1976); Garmon, 359 U.S. 236 (1959)).

203. Seattle, Wash., Ordinance 124,968 (Dec. 23, 2015) ("The Director is authorized to enforce and administer section 6.310.735. . . . The Director shall investigate alleged violations of subsections 6.310.735.D and 6.310.735.H.1, and if the Director determines that a violation has occurred, the Director shall issue a written notice of violation. The Director may investigate alleged violations of other subsections of this section 6.310.735, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The notice shall: 1) Require the person or entity in violation to comply with the requirement; 2) Include notice that the person or entity in violation is entitled to a hearing before the Hearing Examiner to respond to the notice and introduce any evidence to refute or mitigate the violation, in accordance with Chapter 3.02; . . . ").

204. Id. at 18–19 (Section 6.310.735 "may be enforced through a private right of action. Any aggrieved party, including but not limited to an EDR, may bring an action in court, and shall be entitled to all remedies available at law or in equity appropriate to remedy any violation of this section 6.310.735. A plaintiff who prevails in any action against a private party to enforce this section 6.310.735 may be awarded reasonable attorney’s fees and costs.").


206. See 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring
that the Seattle ordinance is subject to Garmon preemption because the ordinance serves to regulate an area of law already governed by the NLRA. Alternatively, Uber could argue that the Seattle ordinance is subject to Machinists preemption, because for-hire driver terms and conditions of contracting have been left to the free play of economic forces in the private sector. For example, if the Board were to find that Uber drivers are independent contractors, Uber could defeat the Seattle ordinance under the Machinists theory, because independent contractors are not covered under the NLRA and, thus, must be left to free market forces by design of the statute.

In sum, the Seattle ordinance most surely seems subject to Garmon preemption, and in the alternative, Uber could also argue that the ordinance is subject to Machinists preemption. Either way, it becomes compelling to determine the worker classification status of the for-hire drivers. As such, any future dispute between Uber and the City of Seattle will most likely be subject to the jurisdiction of the Board, and subsequently, the federal courts. Because the implications of the Seattle ordinance will predictably be argued in the context of the NLRA, this section will continue with a selection of limited precedent, set forth through administrative rulings, an advisory opinion, and court orders from pending litigation, as of the time of this writing, in the Ninth Circuit.

B. Labor Commissioner of the State of California

While labor law is guided by the NLRA, the Board may look to findings of state labor commissions in the context of the FLRA decisions, for instance, when it would be helpful to review findings of fact on worker classification. The California Labor Commission has reached two different conclusions with respect to individual for-hire drivers—one was found to be an independent contractor, whereas the other was found to be an Uber employee. This section will set forth the framework and reasoning from these differing opinions below.

1. Alatraqchi v. Uber Technologies, Inc.

In August of 2012, the Labor Commissioner of the State of California set forth a decision that analyzed whether an individual plaintiff, former Uber driver,
was an employee of Uber or an independent contractor. In *Alatraqchi v. Uber Technologies, Inc.*, the plaintiff driver provided limousine services using the Uber app and subsequently filed suit complaining that Uber failed to pay certain commissions and invoice adjustments; Uber presented evidence of payment to the contrary. In deciding whether plaintiff was owed these monies, the Commissioner was left to decide whether Alatraqchi was an employee or independent contractor. The Commissioner relied on a hybrid test, set forth by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, albeit in the context of worker’s compensation.

While the Commissioner did note that contractual terms identifying a worker as an independent contractor are not determinative, the Commissioner still

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210. *Id.* at 1–2.

211. *See id.* at 2.

212. *See S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 407 (Cal. 1989). The factors as articulated by the Labor Commissioner are as follows:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. whether the principal or the worker supplies the instrumentalities, tools, and place for the person doing the work;
4. The alleged employee’s investment in the equipment or materials required by his or her task or his or her employment of helpers;
5. Whether the service rendered requires a special skill;
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee’s opportunity for profit or loss depending on his or her managerial skill;
8. The length of time for which the services are to be performed;
9. The method of payment, whether by time of by the job; and
10. Whether or not the parties believe they are creating an employer-employee relationship...

*Berwick v. Uber Techs., Inc.*, Case No. 11-46739 EK, 6–7 (Cal. Lab. Comm’n, Jun. 3, 2015) (using the factors established by the California Supreme Court in *Borello*. The Commissioner noted that the last factor may have some bearing on the question “but is not determinative since this is a question of law based on objective tests.” *Id.* at 7.

213. *Alatraqchi*, Case No. 11-42020 CT, at 3 (“Even if the parties expressly agree in writing that an independent contractor relationship exists, under the tests, the one performing services may still be considered an employee.”).
found that Alatraqchi was an independent contractor, and not an employee of Uber. In a concise analysis, the Commissioner found:

Defendant’s business was engaged in technology and not in the transportation industry. The services Plaintiff provided were not part of the business operated by Defendant, and the evidence did indicate that Plaintiff provided similar services for others during the time of his employment with Defendant. The work arrangement was paid at a per-job rate. Plaintiff provided the means to complete the job. Plaintiff set his own hours, and controlled the manner in which he completed the job. Defendant did not supervise or direct his work and only paid him when Plaintiff invoiced Defendant. Based on the testimonies and evidence presented, Plaintiff performed services as an independent contractor of Defendant, and not as a bona fide employee.

While it is unclear how much weight the Commissioner placed on the fact that Alatraqchi was a professional limousine driver with outside business, the Commissioner’s other findings all seem to also point in the direction of independent contractor status. However, because the Board relies heavily on entrepreneurial opportunity, this may show how the opposite conclusion resulted in the following case below.


Almost three years later in June of 2015, the California Labor Commissioner issued a second decision regarding the worker classification of an individual Uber driver—this time, with a different result. In the case of Berwick v. Uber Technologies, Inc., another former Uber driver claimed earned and unpaid wages owed and reimbursement for expenses and waiting time penalties incurred. While the Commissioner dismissed Berwick’s claim for minimum wages and

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214. Id. at 3.
215. Id. Subsequently, the case was “dismissed for lack of jurisdiction on the part of the Labor Commissioner” because the Commissioner does not have “jurisdiction over disputes arising from bona fide independent contractor, rather than employment, relationships.” Id. at 4.
216. See id. at 3.
217. See NLRB v. Friendly Cab. Co., 512 F.3d 1090, 1103 (9th Cir. 2008).
liquidated damages due to lack of evidence, the Commissioner did require Uber to indemnify Berwick for expenses incurred for the use of her car in the amount of $3,622.08 and for toll charges of $256.00, plus interest. This is significant in that a finding of employment status was required for Berwick to recover any reimbursement for her expenses, under the California Labor Code.

And even more interesting, the Commissioner came to this conclusion using the *Borello* factors—the very same case and analysis that yielded the opposite result three years prior.

Uber argued that it exercised very little control over the hours Berwick worked and her other activities because it required no minimum number of trips. Uber, again, held itself out as "nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation." However, this time, the Commissioner found otherwise.

Because Uber obtains "clients in need of the service and provid[es] the workers to conduct it," the Commissioner found that Uber "retained all necessary control over the operation as a whole." Likewise, "it [is] not necessary that a principal exercise complete control over a worker's activities in order for that worker to be an employee[,]" and the worker's ownership of the

219. *Id.* at 11. "Plaintiff [Berwick did] not dispute that [Uber] paid her. While [Uber] did not provide any payment information, [Berwick] refused to provide any record of payment, arguing that she did not have access to the information because her corporation, [Berwick Enterprises], retained it." *Id.* Thus, Berwick did not meet her burden of proof to support her claim for additional wages or minimum wage. *Id.*


221. See *Berwick*, Case No. 11-46739 EK, at 6, 10. "Labor Code § 95 authorizes the Labor Commissioner to enforce all labor laws of the state, the enforcement of which is not specifically vested in any other officer, board or commission." *Id.* at 6. "Labor Code § 2802 requires an employer to indemnify an employee for all that the employee necessarily expends in the discharge of the employee's duties." *Id.* at 10.

222. See *Berwick*, Case No. 11-46739 EK, at 6–7; see supra notes 212–215 and accompanying text.

223. *Berwick*, Case No. 11-46739 EK, at 5, 8.

224. *Id.* at 9.

225. *Id.*

226. *Id.* at 8.

227. *Id.* (citing *Borello*, 48 Cal. 3d at 355–60) ("The minimal degree of control that the employer exercised over the details of the work was not considered dispositive because the work did not require a high degree of skill and it was an integral part of the employer's business. The employer was thus determined to be exercising all necessary control over the operation as a whole.").
vehicle used to perform the work is not dispositive in creating an independent contractor status.\textsuperscript{228}

The Commissioner placed particular emphasis on the fact that Uber drivers’ work is an integral part of the business.\textsuperscript{229} Uber is in the business of “provid[ing] transportation . . . to passengers[,]” and drivers do the “actual transporting of those passengers.”\textsuperscript{230} As such, “[w]ithout drivers such as [Berwick], [Uber’s] business would not exist.”\textsuperscript{231} Also, the Commissioner contended that Uber vets prospective drivers in the same fashion as an employer would investigate a candidate for employment—drivers must provide personal banking, social security, and residential information, as well as pass a background and DMV check.\textsuperscript{232} Additionally, the Commissioner found that Uber controls the instrumentalities of the work, in that drivers must register their cars with Uber, and such cars must not be more than ten years old; Uber also provides the iPhone application, which is essential to performing the work.\textsuperscript{233} “Aside from her car, [Berwick] had no investment in the business.”\textsuperscript{234}

As for entrepreneurial opportunity, the Commissioner found that Berwick’s work did not possess any “‘managerial’ skills that could affect [her] profit or loss.”\textsuperscript{235} Uber sets a price for the trip, and Uber, in turn, pays the driver a “non-negotiable service fee.”\textsuperscript{236} Drivers cannot negotiate cancellation fees, and Uber “discourage[s] drivers from accepting tips because it would be counterproductive to [Uber’s] advertising and marketing strategy.”\textsuperscript{237} In light of all these findings,

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\item \textsuperscript{228} Id. (citing Toyota Motor Sales v. Superior Court, 220 Cal. App.3d 864, 876 (1990)) (worker making pizza deliveries held to be an employee of the pizzeria, notwithstanding the fact that the delivery person was required to provide his own car and pay for gasoline and insurance).
\item \textsuperscript{229} Id. (“The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish and independent business or professional service.”) (quoting S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations, 769 P.2d 399, 408–09 (Cal. 1989)).
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Id. at 9.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id. Uber was ordered to clarify its position regarding tipping in April 2016; essentially that while tips are not included in fares (except for UberTAXI), they are neither encouraged or discouraged. See Order Denying Plaintiff’s Motion for Preliminary Approval at 10, O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (No. C-13-3826). “Uber will make good-faith efforts to clarify its messaging to riders regarding tipping, i.e. that tips are not included in fares . . . but that they are neither expected nor required.” Id. “Drivers
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the California Labor Commissioner found that Berwick was in fact an employee of Uber. And while this administrative decision applied only to the individual at issue, its findings are persuasive for other jurisdictions and adds more credibility to rideshare drivers’ contentions that they should be classified as employees.

C. Commissioner of the Bureau of Labor and Industries of the State of Oregon

Following the pair of Labor Commissioner opinions out of California, the Bureau of Labor and Industries of the State of Oregon (BOLI) proactively released an advisory opinion in October 2015 regarding the employment status of Uber drivers. Although no relevant case has yet been filed in Oregon regarding the employment status of Uber drivers, the BOLI intended the Advisory Opinion “to be instructive to all interested parties—most notably Uber, its drivers and other transportation network companies—on what conclusions can be drawn from current, available information.” The BOLI relied on the economic realities test, as set forth by the U.S. Department of Labor, will be permitted to put up signs requesting tips,” although Uber disputes that this practice would constitute a change in policy. Id.

238. Id.


241. Or. Advisory Opinion, supra note 239.

242. Uber promptly responded to the Oregon BOLI, in a letter from William Barnes, Regional General Manager, West Uber to Commissioner Avakian, which was subsequently published at: William Barnes, Uber’s Response to BOLI’s Employee Dispute, OR. BUS. REP. (Oct. 22, 2015), http://oregonbusinessreport.com/2015/10/ubers-response-to-bolis-employee-dispute [hereinafter Barnes] (“This decision and subsequent push to media is surprising, since the Oregon Bureau of Labor and Industries did so apparently without talking to any drivers and after a brief five-minute phone call with Uber that came out of the blue and without context.”).

243. See Or. Advisory Opinion, supra note 241. The BOLI relied on recent administrative and court cases in California addressing the employment status of Uber drivers, in addition to Administrative Interpretation No. 2015-1, July 15, 2015, from the U.S. Department of Labor, which analyzes the misclassification of workers generally. See sources cited supra notes 49–54 and accompanying text. “The facts examined here are taken from the California administrative and court cases. Uber’s practices in Oregon are substantially the same as those in California.” Or. Advisory Opinion, supra note 241.
in determining Uber worker classification under the FLSA. Accordingly, the Oregon BOLI analyzed the facts under each factor as applied to Uber drivers (degree of control, relative investments, worker’s profit and loss, skill and initiative, permanency of the relationship, and extent to which work performed is an integral part of the alleged employer’s business).

First, with regard to the degree of control factor, it found that “Uber exercises a significant degree of control over the driver’s actual work.”

While Uber drivers use their own vehicle and may accept or reject ride requests, effectively setting their own work schedules, ... Uber [(1)] unilaterally dictates the fare to be charged, a percentage of which is paid to the driver; (2) monitors the performance of drivers and may discipline or terminate those who do not perform to Uber’s standards; (3) may restrict a driver’s access to its smartphone [app] if the driver fails to complete a requisite number of trips within a defined period; (4) instruct[] drivers as to their conduct, personal appearance, and methods for carrying out services; and (5) prescribes qualifications for its drivers, selects them through a screening process that includes a background, motor vehicle records check, and vehicle inspection.

The BOLI found that such a greater degree of control by Uber shows that the worker could not be considered a separate economic entity, thus creating an employment relationship.
Second, the BOLI found that an Uber driver's relative investment "is negligible compared to that of Uber's multi-billion dollar infrastructure," thus indicating an employment relationship.\textsuperscript{249} An Uber driver's investment is generally limited to expenses incurred through the use of a personal vehicle, "including fuel, maintenance, and insurance costs[,]" and in some cases, "a deposit for the iPhone Uber provides for access to its application."\textsuperscript{250} But Uber's investment includes "the software application itself, marketing, finance and accounting systems, [] management of operations[,]" and all other incidental costs of doing business.\textsuperscript{251}

Third, "[a]n Uber driver does not exercise managerial functions that affect the opportunity for profit or loss[,]" thus indicating an employment relationship.\textsuperscript{252} Uber unilaterally sets fares, and "[t]he driver's ability to earn additional income is related only to the number of rides [he or she] provide[s] through Uber."\textsuperscript{253} "In fact, Uber prohibits workers from answering rider employee works, restricting their ability to pursue additional opportunities to earn income during that time. . . . If drivers were employees, they would have to work fixed and pre-assigned shifts, and their ability to work across multiple platforms simultaneously would be restricted—mechanisms of control that traditional employers exert over employees."

Barnes, supra note 242.

\textsuperscript{249} Or. Advisory Opinion, supra note 241 ("The nature and extent of the relative investments from the employer and the worker help determine whether the worker has an independent business. An independent contractor usually makes investments that support the business beyond any one particular job. Investments may enable the business to expand, change its costs or otherwise change the manner and extent of how it provides goods or services. If the worker's investment is relatively minor compared to the employer's, then the worker may be economically dependent on the employer.").

\textsuperscript{250} Id. \textsuperscript{251} Id.

\textsuperscript{252} Id. ("A worker with their own business may experience either a profit or loss, often dependent upon their managerial skills to administer the business. An employee's ability to earn more is dependent upon their ability to work and the employer making work hours available, not the managerial skills of the worker.").

\textsuperscript{253} Id. Uber rebuts:

Uber has created a new way for people to work: on their own terms. People choose to drive with Uber because of the flexibility it provides, and the dignity that comes with being their own boss. Contrary to assertions made in BOLI's advisory opinion, Uber does not control the work drivers do. Drivers independently decide when and where to work, and their performance is rated not by Uber but by the individual riders they interact with in the course of their work.

This flexibility and freedom is prized by the workers who use Uber. In a survey of drivers 87 percent said they chose to drive with Uber to "be my own boss and set my own schedule." The value they place on flexibility shows up in our data, too:
questions about booking future rides outside the Uber application or in any other way soliciting future rides from Uber riders."

Next, the Oregon BOLI found that Uber drivers "do not exercise managerial and business like skills or initiative that would indicate they are operating independent businesses." Again, this indicates an employment relationship, as drivers are "dependent entirely upon Uber's application in order to perform any work." Additionally, with regard to permanency of the working relationship, "Uber does not engage drivers to perform services for a fixed period of time, [or on a] project or contract basis." "As long as the drivers satisfy Uber's standards they may work indefinitely." This, too, indicates an employment relationship.

over 65 percent of drivers in the United States vary the hours they work by over 25 percent week-to-week. So for most drivers, working for 12 hours one week, 17 the next, and 8 the one after that is a new work schedule that fits around their life, instead of demanding their life fit around a 9-to-5 job.

Barnes, supra note 242.


255. Id. ("A worker's business skills, judgment and initiative, rather than their technical skills, indicate whether they are economically independent from the business. If the work requires technical skills but is not reliant on such business skills to perform the work, then the worker is likely an employee.").

256. Id. Uber argues BOLI also asserts that drivers using Uber do not rely on skill to do their work. On behalf of all the drivers using Uber, we respectfully disagree. Enterprising and entrepreneurial drivers may choose to drive at times of day or in parts of a city where they can optimize their income. And because performance is monitored by individual riders (not Uber), drivers rely on customer service skills to ensure riders are satisfied. For instance, riders can nominate drivers who go above and beyond for a "Sixth Star Award," which rewards drivers for excellent customer service.

Barnes, supra note 242.

257. Or. Advisory Opinion, supra note 241 ("Employees are generally hired on a permanent or indefinite basis. Independent contractors generally work project to project.").

258. Id.

259. Uber highlighted the indefinite term of the relationship:

Uber is a platform for earning income that will be there when drivers most need it. In a survey of drivers, 32 percent of respondents indicated that they rely on Uber for income while also looking for full-time work. In other words, Uber serves as a bridge during periods of unemployment. So while BOLI is correct in asserting that drivers can expect a relationship with Uber over a long period of time, it's a relationship that ebbs and flows as a driver needs it to. This is quite the opposite of a permanent employment relationship, in which a driver is at the employer's service for a permanent or indefinite basis."

Barnes, supra note 242; Or. Advisory Opinion, supra note 239.
Finally, the work of Uber drivers is unquestionably an integral part of Uber’s business, once again indicating an employment relationship. Uber is in the business of providing “transportation services to its customers, services it cannot provide without its drivers.” As such, the driver’s work is not only integral but[] a necessary part of Uber’s business.

The BOLI concluded that the six factors of the economic realities test clearly illustrate how Uber drivers are not operating their own separate businesses with the degree of autonomy one expects from an independent contractor. To the contrary, the rigorous hiring process, the highly controlled directions as to how work is to be performed and at what price, the expectation of long term employment, the insignificant investment of the driver when compared to the massive infrastructure provided by Uber, and the integral nature of the driver’s work are all characteristic of an employment relationship.

Accordingly, pursuant to the economic realities test and through its Advisory Opinion, the Oregon BOLI declares that “[u]nder Oregon law, . . . Uber drivers are employees.”

D. O’Connor and Yucesoy Class Actions

The O’Connor and Yucesoy consolidated class action is also relevant to this article, although it is ongoing litigation with a pending proposed settlement.

260. Or. Advisory Opinion, supra note 241 (“If a worker performs services integral to the business, it is likely the worker is an employee. Courts have found this factor particularly compelling. Work can be integral even if it is just one component of the business. Work can also be integral if it involves the same tasks performed by thousands of other workers providing work for the business.”).

261. Id.

262. Id.

263. Id. (“It should be noted that Oregon’s minimum wage laws exempt ‘taxicab operators.’ The term ‘taxicab operator’ is based on a traditional and older model describing the delivery of transportation services and may not apply to Uber drivers. Even if the exemption did apply, however, Uber drivers would still be covered by other important workplace protections such as the right to be paid in full and on time and, the right to work free from discrimination and harassment.”).

264. Id. Obviously, Uber does not agree. William Barnes wrote in response, “The advisory determination is based on an erroneous and incomplete picture of how drivers use the Uber application in Oregon[,] and as such, is filled with factual errors and assertions that are simply wrong. . . . [Uber] look[s] forward to providing facts about the Uber platform to your office to clarify the misinformation represented in your initial advisory decision.” Barnes, supra note 242.
agreement as of the time of this writing.265 These related cases consist of all drivers in California and Massachusetts who have used the Uber App at any time since August 16, 2009.266 The plaintiffs contend that they are Uber employees, as opposed to independent contractors, and thus are eligible for various protections codified for employees under state law.267 Specifically, the plaintiffs allege that Uber had uniformly failed to reimburse its drivers “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties,”268 and uniformly failed to pass on the entire amount of any tip or gratuity “that is paid, given to, or left for an employee by a patron.”269

265. See generally O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015). The proposed settlement called for Uber to revise some practices and pay $84 million to drivers and another $16 million contingent on an initial public offering (IPO). Order Denying Plaintiff’s Motion for Preliminary Approval at 7, O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (No. C-13-3826). The author completed the substantive writing of this article in August 2016, at which time a proposed settlement agreement had been presented, with subsequent multiple objections. A hearing for preliminary approval came before the court on June 2, 2016, but the parties failed to provide sufficient information, and the court ordered the parties to file supplemental briefs. See Order Re Plaintiffs’ Motion for Preliminary Approval at 2, 16, O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015) (No. C-13-3826). Order Denying Plaintiffs’ Motion for Preliminary Approval at 2, 34, O’Connor v. Uber Techs., Inc., 311 F.R.D 547 (N.D. Cal. 2015) (No. 518).

266. The O’Connor putative class consisted of approximately 160,000 UberBlack, UberX, and UberSUV drivers “who had driven for Uber in the State of California at any time since August 16, 2009, and who (1) signed up to drive directly with Uber or an Uber subsidiary under their individual name, and (2) are/were paid by Uber or an Uber subsidiary directly and in their individual name, and (3) did not electronically accept any contract with Uber or one of Uber’s subsidiaries which contain the notice and opt-out provisions . . . unless the driver timely opted-out of that contract’s arbitration agreement.” Order Granting in Part and Denying in Part Plaintiffs’ Motion for Class Certification at 5, 67, O’Connor v. Uber Technologies, Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015) (No. C-13-3826). Uber joined a substantially similar class action, Yucesoy v. Uber Technologies, Inc., which had been brought in Massachusetts. Notice of Removal at 1, Yucesoy v. Uber Techn., Inc., (D. Mass. 2014) (No. 14-13938). Uber removed the case from the Superior Court of the Commonwealth of Massachusetts, Suffolk County to the U.S. District Court for the District of Massachusetts. See Notice of Removal at 1, Yucesoy v. Uber Technology, Inc., (D. Mass. 2014) (No. 14-13938). Thereafter, Uber filed and was granted a motion to transfer venue to the U.S. District Court for the Northern District of California to be a related case to O’Connor v. Uber. Joint Stipulation to Defendants’ Deadline to Respond to Plaintiff’s Complaint at 1, Yucesoy v. Uber Technologies, Inc., 109 F. Supp. 3d 1259 (N.D. Cal. 2015) (No. 15-00262).


As of the time of this writing, the proposed settlement agreement is pending before the U.S. District Court for the Northern District of California, and there has been no final judgment on the merits. But O'Connor does provide important takeaways in regard to the complaint of worker misclassification. The court previously filed several orders on the merits of this case, including an order denying Uber's Motion for Summary Judgment. In this order, the court found that Uber was not entitled to summary judgment because a reasonable inference of an employment relationship could have been drawn, and relying on the Borello factors, the court could not decisively determine whether Uber had the right to control the manner and means of the work. Specifically, the court found that "the strongest evidence of right to control"—"whether Uber can fire its transportation providers at will"—was in dispute.

270. See Civil Minutes at 1–2, O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (No. C-13-3826) for the proceedings held before U.S. District Judge Edward M. Chen. In the proposed settlement agreement, Uber agreed to pay $84 million, plus an additional $16 million contingent on an initial public offering (IPO) reaching one-and-a-half times Uber's most recent valuation. Declaration of Shannon Liss-Riordan In Support of Plaintiffs Motion for Preliminary Approval of Class Action Settlement, Exh. 6 at 13, 21, O'Connor v. Uber Technologies, Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (No. C-13-3826) [hereinafter Settlement Agreement]. Of the $84 million, $300,000 will be used for class administration, a maximum of $73,000 will be allocated for enhancement payments to the named Plaintiffs and other Settlement Class members who contributed to the litigation, and $8.7 million will be treated as wages reported on IRS form W-2. Settlement Agreement, supra note 275, at 32–33, 35. The remaining settlement fund is proposed to be separated into two funds: $5.5 to $6 million for Massachusetts complainant drivers, and $56 to $66.9 million for California complainant drivers. Settlement Agreement, supra note at 41. Following the June 2 hearing for preliminary approval, Plaintiff's counsel was permitted to seek attorney's fees in the amount of 25 percent of the settlement fund, but she informed the court she would reduce her fee by $10 million. On August 18, 2016, U.S. District Judge Chen in San Francisco ruled the settlement “is not fair, adequate, and reasonable” for drivers and denied the proposed settlement. Order Denying Plaintiffs' Motion for Preliminary Approval at 7, 34, O'Connor v. Uber Technologies, Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015) (C-13-3826). The parties were ordered to meet and work on amendments to the proposed settlement and appear in court on September 15, 2016. See Order Denying Plaintiffs' Motion for Preliminary Approval at 35, O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015) (C-13-3826).


272. Id. at 20.

273. See supra note 212.


275. Id. at 20. Uber claimed "that it [was] only permitted to terminate drivers 'with notice or upon the other party's material breach' of the governing contracts. Plaintiffs, however, point[ed] out that the actual contracts seem[ed] to allow Uber to fire its drivers for any reason and at any time." Id. (citing addendum at 4 ("Uber will have the right, at all times
Discussing right to control, the court set out a laundry list of material facts relevant to the Borello analysis that were in dispute, including the minimum trip requirement and instructional language regarding customer service which was included in the contract.276

The plaintiffs cite[d] numerous documents . . . instruct[ing] drivers to, among other things: “make sure you are dressed professionally;” send the client a text message when 1–2 minutes from the pickup location (“This is VERY IMPORTANT”); “make sure the radio is off or on soft jazz or NPR;” and “make sure to open the door for your client.” As Uber emphasizes, “it is the small details that make for an excellent trip,” and Plaintiffs have presented evidence (when viewed in the light most favorable to them) that Uber seeks to control these details right down to whether drivers “have an umbrella in [their] car for clients to be dry until they get in your car or after they get out.” Plaintiffs note that drivers are

and at Uber’s sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or Driver from accessing or using the Driver App, . . .

However, the court did note in a footnote that contract interpretation would serve an important part. Id. at 21 n.19 (“The issue of Uber’s right to terminate its drivers may not truly be in dispute. The contracts say what they say, and this Court may interpret unambiguous contractual terms as a matter of law. Assuming the Court reads the contracts to mean what they say—that Plaintiffs are terminable at will—then this factor would tip in favor of finding Plaintiffs are Uber’s employees.”) (internal citation omitted). Departing from these contractual provisions, Uber did propose, in the proposed Settlement Agreement, to implement a comprehensive written deactivation policy. Settlement Agreement, supra note 270, at 36. Under this proposal, deactivation will only be allowed for sufficient cause, and low acceptance rates will not be grounds for deactivation, although a driver may still be deactivated if they have a high cancellation rate. Driver Deactivation Policy – US ONLY, Uber, https://www.uber.com/legal/other/driver-deactivation-us-english (last visited Oct. 31, 2016). Uber proposes also to provide advance warning before a driver is deactivated for reasons other than safety issues, discrimination, fraud, or illegal conduct. Settlement Agreement, supra note 270, at 36. If a driver is deactivated, Uber proposes it “will provide the Driver with an explanation for its deactivation decision.” Id. at 36–37. Further, Uber proposes that a driver whose user account is deactivated may appeal the deactivation decision to a Driver Appeal Panel (which would include fellow drivers), except for certain circumstances, e.g., low star ratings, criminal activity, physical altercation, or sexual misconduct. Id. at 36–37; Declaration of Shannon Liss-Riordan In Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, Exh. G at 1, O’Connor v. Uber Technologies, Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2106) (No. 13-3826). Finally, except in the event of the excluded matters previously listed, Uber proposes that drivers whose user accounts are deactivated will have the opportunity to take a “quality improvement course” and may be reactivated upon completion of the course. Settlement Agreement, at 36–37.

even instructed on such simple tasks as how to pick up a customer with their car.\textsuperscript{277}

With regard to the trip requirement, Uber claims that drivers could “work as much or as little as they like, as long as they gave at least one ride every 180 days (if on the UberX platform) or every 30 days (if on the UberBlack platform).”\textsuperscript{278} “According to Uber, drivers never have to accept any ‘leads’ generated by Uber (i.e., they can turn down as many rides as they want without penalty), and they can completely control how to give rides they do accept.”\textsuperscript{279} And in response to the customer service instructions above, Uber maintains that “it merely provides its drivers with ‘suggestions,’ but does not actually require its drivers to dress professionally or listen to soft jazz or NPR.”\textsuperscript{280}

But the court proffered that “a reasonable jury could find that numerous secondary factors cut in favor of finding an employment relationship.”\textsuperscript{281} Without expanding on each \textit{Borello} factor, the court held that “numerous factors

\begin{itemize}
\item \textsuperscript{277} \textit{Id.} at 21–22 (internal citations to the record omitted).
\item \textsuperscript{278} \textit{Id.} at 21.
\item \textsuperscript{279} \textit{Id.} But,
\item \textsuperscript{280} \textit{Id.} at 22.
\item \textsuperscript{281} \textit{Id.} at 25.
\end{itemize}

For instance, a jury could conclude that driving a car (as opposed to, \textit{e.g.}, a truck or bus) does not require a special skill, particularly if no special driver’s license is required. \textit{Compare JKH Enterprises}, 142 Cal. App. 4th at 1064 (holding that ‘the functions performed by the drivers, pickup and delivery of packages and driving in between, did not require a high degree of skill’) with \textit{State Comp. Ins. Fund v. Brown}, 32 Cal. App. 4th 188, 202–203 (1995) (noting that ‘truck driving—while perhaps not a skilled craft—requires abilities beyond those possessed by a general laborer’). Moreover, such driving is typically done in the field without close supervision. A jury could also find, for the reasons previously discussed, that drivers perform a regular and integral part of Uber’s business. To be sure, a number of secondary factors (\textit{e.g.}, drivers use their own vehicle, may employ other drivers to drive on their behalf, and signed an agreement stating no employment relationship is created), do support an independent contractor classification. But even as to these factors, their significance is ambiguous.

\textit{Id.} at 26.
point in opposing directions," and that "there are disputed facts, including those pertaining to Uber's level of control over the 'manner and means' of [drivers'] performance." 282 In so holding, the court did acknowledge that the traditional tests of employment create "significant challenges" to Uber's business model, and thus, many factors "appear outdated in this context." 283 Accordingly, Judge Chen called upon Congress to "enact rules particular to the new so-called 'sharing economy.'" 284

VI. WORKER CLASSIFICATION ANALYSIS OF RIDESHARE DRIVERS UNDER THE NLRA

While the last two sections explored Washington law and administrative decisions from California and Oregon, it is important to come full circle and refocus on the NLRA. This article has included these materials because there is a dearth of perspectives on the employee-independent contractor dilemma that rideshare companies bring to light. But the issue at hand with the Seattle ordinance is not necessarily a matter of employment protections—at least not yet. The more immediate issue is whether rideshare workers in Seattle have the right to organize, join unions, and collectively bargain under the protections of the NLRA. This section will first provide a brief summary of the relevant parts of the agreement prospective drivers must agree to before being able to use the Uber service, and then will provide a critical analysis of the Uber driver employment relationship as it applies to the NLRA.

A. The Uber Technology Services Agreement

The Uber Technology Services Agreement ("Agreement"), last updated on December 11, 2015 as of the time of this writing, dictates the terms of agreement between drivers and Raiser, LLC, a subsidiary of Uber (hereinafter, collectively, "Uber"). 285 Once agreeing to the terms and conditions of the Agreement, Drivers

282. Id. at 26.
283. Id. at 26–27.
284. Id. at 27. But see Eisenbrey & Mishel, supra note 15; Sachs, supra note 15.
285. Technology Services Agreement, RASIER, LLC / RASIER-CA, LLC / RASIER-PA, LLC / RASIER-DC, LLC / RASIER-MT, LLC / HINTER-NM (Dec. 11, 2015), https://s3.amazonaws.com/uber-regulatory-documents/country/united_states/RASIER%20Technology%20Services%20Agreement%20December%202010%202015.pdf. Raiser, LLC is a subsidiary of Uber Technologies, Inc. The driver enters into the agreement "for the purpose of accessing and using the Uber Services," and in order to use the services, drivers and Raiser agree to be bound by the terms and conditions of the Agreement. Id.
are issued a “Driver ID” to enable them to access and use the driver app\textsuperscript{286} on their mobile device.\textsuperscript{287} Uber stipulates that it may deactivate a Driver ID if the driver does not provide services for Uber at least once a month.\textsuperscript{288}

Uber’s December 2015 version of the Agreement also contains some very strategic language to avoid lawsuits alleging worker misclassification.\textsuperscript{289} First and foremost, the Agreement—commonly referenced as the “Driver-Partner Agreement”—is conspicuously titled, “Technology Services Agreement,”\textsuperscript{290} reminiscent of an agreement for a cell phone plan or cable television service. Uber promotes its role as merely providing “lead generation to independent providers of rideshare ... passenger transportation services ...”\textsuperscript{291} Accordingly, the Uber app “enable[s] an authorized transportation provider to seek, receive and fulfill requests for transportation services ...”\textsuperscript{292} This language frames the working relationship in a way that portrays drivers as existing independent contractors, who already provide transportation services prior to signing up for Uber, similar to the facts of \textit{Alatraqchi}, in which an independent driver used the Uber app to compliment the business of his preexisting limousine service.\textsuperscript{293} To punctuate this point, the Agreement further sets forth in bold, “[y]ou acknowledge and agree that [Uber] is a technology services provider that does not provide transportation services.”\textsuperscript{294} Further down, the Agreement explicitly stipulates that it creates only an independent contractor working relationship: “the relationship between the parties under this Agreement

\textsuperscript{286}. \textit{Id.} at 2 (“Driver app” is defined as “the mobile application provided by [Uber] that enables transportation providers to access Uber Services for the purpose of seeking, receiving and fulfilling on-demand requests for transportation services by Users, as may be updated or modified from time to time.”).

\textsuperscript{287}. \textit{Id.} (“Device” refers to either the driver’s personal mobile device or a company-issued mobile device.).

\textsuperscript{288}. \textit{Id.}

\textsuperscript{289}. \textit{See} \textit{Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss} at 9, O’Connor v. Uber Technologies, Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. C-13-3826) (noting that Uber argues the terms of the Agreement between “Uber and drivers negate the allegation ... that there is day-to-day control because the agreement (1) identifies drivers as independent contractors and not employees, (2) disclaims the creation of an employment relationship, (3) specifically disclaims Uber’s control over drivers, and (4) affirms that the drivers’ transportation companies exercise control.”).

\textsuperscript{290}. \textit{Technology Services Agreement, supra} note 285, at 1.

\textsuperscript{291}. \textit{Id.}

\textsuperscript{292}. \textit{Id.} The Agreement continues: “You desire to enter into this Agreement for the purpose of accessing and using the Uber Services.” \textit{Id.}

\textsuperscript{293}. \textit{See supra} Part V(B)(1).

is solely that of independent contracting parties. The parties expressly agree that:
(a) this Agreement is not an employment agreement, nor does it create an employment relationship, between [Uber] and you; and (b) no joint venture, partnership, or agency relationship exists between [Uber] and you."295

But labels are not the sole determinative of the drivers' working relationship with Uber.296 At most, the contractual terms disclaiming an employment relationship go to but one of the factors to determine worker classification: "whether the parties believe they are creating an employer-employee relationship."297 Uber, in practice, walks a fine line between creating an independent contractor relationship and actual employment.

295. Technology Services Agreement, supra note 285, at § 13. Further, the Agreement stipulates that a Driver may not "hold yourself out as an employee, agent or authorized representative of [Uber]. . . ." Id.


297. See id. at 335 (applying an eight factor test that considers employer-employee belief of classification as a prong). In addition to the express acknowledgement of independent contractor status, the newly reworded Agreement includes a bold, all-caps paragraph on the first page, and a seven-page section on arbitration. Technology Services Agreement, supra note 285, at 14–21. While the contents of the arbitration provision are not relevant to the worker classification discussion itself, it should be noted that this arbitration language was added just two days after U.S. District Court Judge Edward Chen vastly expanded the O'Connor class action to include approximately 100,000 drivers. See Joel Rosenblatt, Judge Faults Uber for Confusing Drivers with New Contract, Bloomberg (Dec. 17, 2015), http://www.bloomberg.com/news/articles/2015-12-18/uber-faulted-by-judge-for-confusing-drivers-with-new-contract. The class in O'Connor consisted of approximately 160,000 "UberBlack, UberX, and UberSUV drivers who ha[d] driven for Uber in the State of California at any time since August 16, 2009, and who (1) signed up to drive directly with Uber or an Uber subsidiary under their individual name, and (2) are/were paid by Uber or an Uber subsidiary directly and in their individual name, and (3) did not electronically accept any contract with Uber or one of Uber's subsidiaries which contain the notice and opt-out provisions . . . unless the driver timely opted-out of that contract's arbitration agreement." Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification at 5, 7, O'Connor v. Uber Technologies, Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015) (No. C-13-3826). The arbitration provision requires drivers to resolve any conflicts with Uber in private arbitration instead of court. Technology Services Agreement, supra note 285, at § 15.3 ("This Arbitration Provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis . . . pursuant to the terms of the Agreement unless you choose to opt out of the Arbitration Provision."). While the Agreement states that drivers have 30 days to opt out of the provision, it also prohibits those who don't "from participating in or recovering relief under any current or future class [] action." Technology Services Agreement, supra note 285, at § 15.3. In response to the new Agreement, Judge Chen remarked that the new contract is "likely, frankly, to engender confusion," and, thus, "order[ed] Uber to stop communicating with drivers covered by the class action about matters affecting the lawsuit without consulting their lawyers or getting the court's consent. Uber had previously told the judge that it wouldn't enforce the
B.  A Critical Analysis of the Uber Model Under the NLRA

As discussed, it is doubtful that the Seattle rideshare ordinance will subsist without Uber or Lyft filing a complaint with the Board, at which time, a federal court will find that the conflict of law favors preemption by the NLRA.298 As such, this subsection will take the reader through a hypothetical analysis of whether Uber drivers are independent contractors or, rather, employees entitled to organize and collectively bargain under the protections of the NLRA. Accordingly, precedent would suggest that the Board would analyze the facts under the right to control test, placing particular emphasis on entrepreneurial opportunity.299 However, it is also plausible that the Board would consider economic realities, as it has in the past,300 an analysis that has also been used by the Supreme Court301 and the Department of Labor,302 and applied through Washington labor laws.303

As noted in the previous subsection, the Technology Services Agreement includes various provisions designed to pass Uber off as merely a technological intermediary between prospective passengers and potential drivers. But one may argue that Uber’s own past practices defy this framework. Uber’s central defense to the worker misclassification argument is that it is not a “transportation company,” but instead, a pure “technology company” which simply generates “leads” for transportation providers through its software.304 Judge Chen of the Northern District of California criticized this interpretation of Uber’s corporate model, remarking that it “focuses exclusively on the mechanics of its platform (i.e., the use of internet-enabled smartphones and software applications) rather

298. See supra Part V(A).

299. See supra Part III(C); NLRB v. Friendly Cab Co., 512 F.3d 1090, 1103 (9th Cir. 2008).

300. See Brown University, 342 N.L.R.B. 483, 496 (2004) (Liebman & Walsh, dissenting) (noting a “striking resemblance” between the test applied by the majority and the economic realities test); Brevard Achievement Ctr., Inc., 342 N.L.R.B. 982, 987 (2004) (“severely disabled” employees working as janitors are not statutory employees because their employment was primarily rehabilitative rather than economic).


302. See supra Part II(A)(2).

303. See supra Part III(B).

304. See Technology Services Agreement, supra note 285, at 1.
than on the substance of what Uber actually does (i.e., enable customers to book and receive rides)."\textsuperscript{305}

But if Uber has not already, it soon will distinguish the public perception of it being a transportation company to instead being just a mobile app. Accordingly, Uber drivers should be considered independent contractors.\textsuperscript{306} The lone factor that supports a finding of an employer-employee relationship is that drivers rely on the Uber Partner app to obtain customers and do business. As such, the contract controls the relationship’s means and manner of reaching the parties’ mutual business objectives. But that’s it. Uber does not prohibit drivers from obtaining customers through other methods—most drivers simply choose not to do so.\textsuperscript{307} According to Uber, the majority of drivers work part time.\textsuperscript{308} “Uber is still a side-gig for most drivers. Over 62% of Uber drivers are working full-time or part-time on another job,”\textsuperscript{310} and 68% of drivers “do not drive a set number of hours.”\textsuperscript{311} “More than half (56%) [of drivers] were logged

\begin{itemize}
  \item \textsuperscript{305} Order Granting in Part and Denying in Part Plaintiffs’ Motion for Class Certification at 10, O’Connor v. Uber Technologies, Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2015) (No. C-13-3826).
  \item \textsuperscript{306} The following analysis is based on information obtained from Uber’s official website, https://www.uber.com/driver-jobs, and a copy of the Uber driver agreement. See supra Technology Services Agreement, note 285 (applicable in Washington and other states, last updated Dec. 11, 2015).
  \item \textsuperscript{307} Technology Services Agreement, supra note 285, at § 2.4 (“You acknowledge and agree that you have complete discretion to provide services or otherwise engage in other business or employment activities. For the sake of clarity, you understand that you retain the complete right to; (i) use other software application services in addition to Uber Services; and (ii) engage in any other occupation or business.”).
  \item \textsuperscript{308} The economic realities analysis is similar—and provides the same outcome—as the new Restatement of Employment Law analysis for worker classification. See RESTATEMENT OF EMPLOYMENT LAW § 1.01 (AM. LAW INST. 2015). Under the Restatement analysis, an Uber driver (1) does, in part, serve the interests of the employer, (2) Uber consents to receive the driver’s services, but (3) Uber does not control the manner and means by which the individual renders services, nor does Uber effectively prevent the driver from rendering transportation services as an independent businessperson. See infra notes 318–334 and accompanying text.
  \item \textsuperscript{309} Why People Choose to Drive with Uber, UBERNEWSROOM (June 3, 2016), https://newsroom.uber.com/uk/why-people-choose-to-drive-with-uber. Eighty-six percent of drivers state that the reason they drive for Uber is that “Uber is a good option for you and fits your life well.” Id.
  \item \textsuperscript{311} Why People Choose to Drive with Uber, supra note 309.
\end{itemize}
in to [sic] the Uber app for less than 30 hours a week[,]" and only 28% of drivers were logged into the app for more than 40 hours a week.312 Uber asserts that most of their workers prefer the flexibility of being a freelancer, such as working only a few hours a week or at odd times.313 Accordingly, an economic realities argument fails.314 As noted in FedEx Home Delivery v. NLRB, the failure to take advantage of an entrepreneurial opportunity is largely irrelevant;315 "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor."316 Additionally, while drivers are not necessarily engaged in a distinct occupation or business, nor is there a certain level of skill required for the work (both factors which lend support to employment relationship), the fact that this part-time work for most drivers constitutes "secondary" income cuts against these right-to-control factors recognized by the Board.317

There are a multitude of other agency and FedEx factors falling under the right-to-control test that support finding an independent contractor

312. Id. According to Uber's own data, "[m]ore than one in five (21%) used it for less than ten hours a week and 17% for 10–20 hours a week. And the proportion logged in to the app for more than 40 hours a week has fallen from 34% to just 28% in the last two years."

313. See generally Why People Choose to Drive with Uber, supra note 309.

314. See Zatz, supra note 22, at 1093–99 ("Wage and hour regulations are built on a normative ideal of a worker who makes a living by achieving a certain balance between work time and personal time—eight hours for work, eight hours for sleep, eight hours for what we will—such that the hourly wage from that amount of work time provides enough total income to live a decent life.") (internal quotations omitted).

315. FedEx Home Delivery v. NLRB, 563 F.3d 492, 502 (D.C. Cir. 2009) (citing C.C. Eastern v. NLRB, 60 F.3d 855, 860 (D.C. Cir. 1995) ("opportunities cannot be ignored unless they are the sort workers 'cannot realistically take,' and even 'one instance' of a driver using such an opportunity can be sufficient to 'show [] there is no unwritten rule or invisible barrier preventing other drivers from likewise exercising their contractual right'")) (alteration in original); Arizona Republic, 349 N.L.R.B. 1040, 1045 (2007).

316. FedEx Home Delivery, 563 F.3d at 502 (quoting C.C. Eastern, 60 F.3d at 860).

317. See RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958); News Syndicate Co., Inc., 164 N.L.R.B. 422, 423–24 (1967) (noting the NLRB has "consistently" required application of the "right of control" test).
relationship.\textsuperscript{318} (1) drivers must purchase or lease their own cars;\textsuperscript{319} they can use any 4-door vehicle newer than a certain number of years old;\textsuperscript{320} (2) drivers are responsible for all costs associated with operating and maintaining their vehicles;\textsuperscript{321} (3) drivers do not wear uniforms, and vehicles need not display Uber logos;\textsuperscript{322} (4) Uber does not prescribe hours of work, break times, or what geographic areas drivers must service;\textsuperscript{323} (5) there is no minimum number of hours required to be worked nor is there any certain length of time for which the

\begin{thebibliography}{10}
\item 318. For a similar analysis, see St. Joseph News-Press, 345 N.L.R.B. 474, 483 (2005) ("Application of the Roadway and Dial-A-Mattress standards to the carriers in this case establish that they are independent contractors, not employees: the carriers provide their own 'tools' of work, their vehicles and supplies; they receive little training from the Respondent; they are not supervised by the Respondent while performing the work; they may hire their own employees; they may work for more than one party; they can solicit new business; and they can subcontract their routes to others.").

\item 319. Technology Services Agreement, supra note 285, at § 3.2 (Vehicles must be "(a) properly registered and licensed to operate as a passenger transportation vehicle in the Territory; (b) owned or leased by you, or otherwise in your lawful possession . . . [].")

\item 320. How Much do Uber Drivers Make in 2016?, supra note 310. Every year, Uber updates their list of vehicle standards and requirements. Note that each Uber service has different sets of requirements. "UberX, the basic most common Uber service accepts any 4-door car of a certain age." In several cities, UberX requires vehicles to be under 15 years old or, in other words as of 2016, "Year 2001 or newer" to help "avoid mechanical and safety issues." Uber Car Requirements, I DRIVE WITH UBEB (March 21, 2016), http://www.idrive withuber.com/uber-car-requirements/. Uber car year requirements do vary by city. For example, as of 2016, New York City requires 2011 or newer, and Seattle requires 2006 or newer. Id. Uber also annually revises its accepted vehicle models, which generally only requires the vehicle to be a 4-door sedan that "seat[s] 4 or more passengers excluding the driver", no taxis or other marked vehicles, and no salvaged or rebuilt vehicles. Id.; see also Technology Services Agreement, supra note 285, at § 3.2 ("You acknowledge and agree that your Vehicle shall at all times be . . . suitable for performing the passenger transportation services contemplated by this Agreement.").

\item 321. Technology Services Agreement, supra note 285, at § 3.2 ("You acknowledge and agree that you Vehicle shall at all times be . . . maintained in good operating condition, consistent with industry safety and maintenance standards for a Vehicle of its kind and any additional standards or requirements in the applicable Territory, and in a clean and sanitary condition."); see also id. at § 2.2 ("[Y]ou shall provide all necessary equipment, tools and other materials, at you own expense, necessary to perform Transportation Services.").

\item 322. Technology Services Agreement, supra note 285, at § 2.4 ("[Uber] shall have no right to require you to: (a) display [Uber's] or any of its Affiliates' names, logos or colors on your Vehicle(s); or (b) wear a uniform or any other clothing displaying [Uber's] or any of its Affiliates' names, logos or colors.").

\item 323. Id. ("You retain the sole right to determine when, where, and for how long you will utilize the Driver App or the Uber Services.").
\end{thebibliography}
worker is hired;\(^{324}\) (6) drivers can decline work;\(^{325}\) (7) drivers must remit their own taxes;\(^{326}\) (8) drivers are responsible for negotiating, setting, and collecting their own fare (the digitally-calculated fare is only a "recommended" amount),\(^{327}\) and perhaps most importantly, (9) drivers may use their vehicles for other entrepreneurial opportunities.\(^{328}\) Further, Uber drivers do not complete applications; they sign a Partner Agreement in which the Driver Partner acknowledges he or she is an independent contractor and that "the Company does not... direct or control you generally or in your performance..." (cutting against the factor of whether the parties believe they are creating a master-servant relationship).\(^{329}\)

While drivers might argue that they must comply with specific company guidelines (i.e., must maintain a clean driving record\(^{330}\)) and are subject to discipline (i.e., poor customer satisfaction ratings result in warnings and ultimately termination of Partner status\(^{331}\)), courts have found that efforts to

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324. See id.

325. Id. ("You retain the option, via the Driver App, to attempt to accept or to decline or ignore a User’s request for Transportation Services via the Uber Services, or to cancel an accepted request for Transportation Services via the Driver App, subject to Company’s then-current cancellation policies.").

326. Id. at § 4.8 ("You acknowledge and agree that you are required to: (a) complete all tax registration obligations and calculate and remit all tax liabilities related to your provision of Transportation Services as required by applicable law; and (b) provide Company with all relevant tax information. You further acknowledge and agree that you are responsible for taxes on your own income arising from the performance of Transportation Services.").

327. Id. 285, at § 4.1 ("You: (i) appoint [Uber] as your limited payment collection agent solely for the purpose of accepting the Fare, applicable Tolls and, depending on the region and/or if requested by you, applicable taxes and fees from the User on your behalf via the payment processing functionality facilitated by the Uber Services; and (ii) agree that payment made by User to [Uber]... shall be considered the same as payment made directly by User to you. In addition, the parties acknowledge and agree that as between you and [Uber], the Fare is a recommended amount, and the primary purpose of the pre-arranged Fare is to act as the default amount in the event you do not negotiate a different amount. You shall always have the right to: (i) charge a fare that is less than the pre-arranged Fare; or (ii) negotiate, at your request, a Fare that is lower than the prearranged Fare...").

328. See supra notes 307–316 and accompanying text.

329. Technology Services Agreement, supra note 285, at § 2.4 ("[Uber] does not, and shall not be deemed to, direct or control you generally or in your performance under this Agreement specifically..."). Further, "[y]ou acknowledge and agree that [Uber] is a technology services provider that does not provide transportation services." Id. at 1.

330. Id. at § 3.1 ("You acknowledge and agree that you may be subject to certain background and driving record checks from time to time in order to qualify to provide, and remain eligible to provide, Transportation Services.").

331. Id. at § 2.5.2 ("In the event your average rating falls below the Minimum Average Rating, [Uber] will notify you and may provide you... a limited period of time to raise you..."
promote customer safety\textsuperscript{332} and "monitor, evaluate, and improve a worker's performance" are compatible with independent contractor status.\textsuperscript{333} As the Board explained in FedEx, Uber's constraints on drivers are compelled merely "by customer demands and government regulations."\textsuperscript{334}

Furthermore, the argument for employment cannot rely on the fact that drivers receive their payments through Uber.\textsuperscript{335} Just like any other app or internet seller platform, Uber is merely acting as an intermediary to expedite the payment process. Specifically, Uber denotes that it is a "limited payment collection agent" which securely processes payment for the fare, in which the driver acknowledges that the payment made by the customer to Uber "shall be considered the same as payment made directly by the [rider] to [the driver]."\textsuperscript{336} This is not by any means a novel concept; think of sellers on Amazon for example.\textsuperscript{337} An individual signs up to be a third party seller on the Amazon.com platform. He lists a product, and a buyer makes a purchase, remitting payment to Amazon. The seller is notified of the purchase, and he later receives payment from Amazon, less Amazon fees.

Moreover, the argument that the driver's work is an integral part of the employer's regular business is unsupported by contemporary business models in the digital age. The Uber app is merely a device used to facilitate individual average rating above the Minimum Average Rating. If you do not increase your average rating above the Minimum Average Rating within the time period allowed (if any), [Uber] reserves the right to deactivate your access to the Driver App and the Uber Services.")

\textsuperscript{332.} FedEx Home Delivery v. NLRB, 563 F.3d 492, 501 (D.C. Cir. 2009) ("[A] uniform requirement often at least in part 'is intended to ensure customer security rather than to control the [driver].'" (quoting Internal Revenue Service, Employment Tax Guidelines: Classifying Certain Van Operators in the Moving Industry 23 (2009)) (noting that being a safe and insured driver is required by DOT regulations, and thus, requirements resulting from government regulations do not show control); N. Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989) ("Restrictions upon a worker’s manner and means of performance that spring from government regulation . . . do not necessarily support a conclusion of employment status" because the company "is not controlling the driver," the law is).

\textsuperscript{333.} FedEx Home Delivery, 563 F.3d at 496–97, 501 (“We have held that constraints imposed by customer demands and government regulations do not determine the employment relationship.” (citing C.C. Eastern, 60 F.3d at 859 (“[W]here a company’s control over an aspect of the workers’ performance is motivated by a concern for customer service, that control does not suggest an employment relationship.”)); N. Am. Van Lines, 869 F.2d at 599 (“[E]mployer efforts to monitor, evaluate, and improve the results of ends of the worker’s performance do not make the worker an employee.”)).

\textsuperscript{334.} See FedEx Home Delivery, Inc., 563 F.3d at 501; see also supra Part II(B).

\textsuperscript{335.} See Technology Services Agreement, supra note 285, at § 4.1.

\textsuperscript{336.} Id.; see also supra note 327.

\textsuperscript{337.} See Participation Agreement, AMAZON, at https://www.amazon.com/gp/help/customer/display.html?nodeId=1161302 ("Amazon provides a platform for third-party Sellers and Buyers to negotiate and complete transactions. Amazon is not involved in the actual transaction between Sellers and Buyers . . . ") (internal quotations omitted).
entrepreneurial pursuits, in which the business profits from facilitating the third party transaction. Someone wants to drive to make some extra cash; someone else needs transportation. Uber connects the two and facilitates the transaction—that’s all. Where has this been seen before? Craigslist is a good example. An individual posts on Craigslist that he is offering roofing services; another has a need for roofing repair. Craigslist connects the parties to facilitate a private transaction. What about newspaper classified ads? It’s the same concept. But would Craigslist and newspapers be considered employers because they facilitate service transactions? Surely not.

Accordingly, the great weight of factors support that Uber drivers should be classified as independent contractors, not employees. No matter whether the Board relies on right-to-control factors, entrepreneurial opportunities, or a hybrid test, the result is the same.

VII. THE FUTURE OF UBER AND THE RIDE SHARE INDEPENDENT CONTRACTOR

Notwithstanding the foregoing, Uber does have a problem with its worker classification model. This is not to say that Uber drivers should be classified as employees—as articulated above, various factors suggest otherwise. As the services agreement lays out, Uber should be considered no more than a technological platform that creates lead generation to connect independent contracting parties. The problem does not lie in what Uber is—the problem arises from what Uber used to be in the public eye: a transportation services company. Put simply, Uber has an identity crisis, and it needs an extreme makeover, quick.338

In order to stay out of the hot water of litigation and class actions,339 Uber needs to practice what it preaches. Easier said than done, Uber should boost its

338. Even as recent as August 2016, an Uber company representative, Rachel Holt, Uber’s regional general manager in North America, has represented drivers using the Uber app to the media as “people who work for Uber.” Long, supra note 19 (emphasis added) (quoting Holt as saying “A big part of my job is finding ways to make the experience more rewarding and stress free for the hundreds of thousands of people who work for Uber.”).

marketing and advertising campaigns to reflect its new, refined image: just an app—no more than Airbnb is to lodging, or Craigslist is to just about everything else. Uber should regulate no more than what is necessary under preexisting government safety and security regulations. As such, if a driver with a 1985 Yugo wants to use the Uber app to make some extra cash providing transportation services with his car, then so be it—as long as the vehicle meets government-imposed safety regulations, then Uber should not intervene. If a driver wants to listen to death metal instead of classical music or NPR, then the more power to him. If the driver listening to death metal giving a ride to a passenger in his 1985 Yugo wants to solicit future business from that passenger by giving her his scribbled phone number on a sticky note, then best of luck to him. 

Obviously, this example is a bit of a stretch, and Uber has other mechanisms in place to ensure safe and consistent service to riders who use their app. However, in essence, Uber needs to rebrand itself. Uber surely has high caliber lawyers drafting and redrafting its driver agreement to conform to that of an independent contractor agreement. But Uber needs more than ink in the abstract—it needs a collaboration of public relations, marketing, operations, and

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340. Of course, no offense to Yugo, current or former owners of Yugos, death metal bands and their management, or listeners of death metal. I am just attempting to paint a picture of the antithesis of Uber’s recommendations to drivers. In fact, I’m sure many Uber riders would prefer death metal to NPR. But see Dan Neil, The 50 Worst Cars of All Time, TIME, http://content.time.com/time/specials/2007/article/0,28804,1658545_1658533_1658529,00.html (last visited Oct. 28, 2016) (honoring the 1985 Yugo GV as “the Mona Lisa of bad cars”). “Built in Soviet-bloc Yugoslavia, the Yugo had the distinct feeling of something assembled at gunpoint. Interestingly, in a car where ‘carpet’ was listed as a standard feature, the Yugo had a rear-window defroster—reportedly to keep your hands warm while you pushed it. The engines went ka-blooey, the electrical system—such as it was—would sizzle, and things would just fall off. Yugo. Or not.” Id.

341. See Technology Services Agreement, supra note 285, at § 2.5. “[A]fter receiving Transportation Services, a User will be prompted by Uber’s mobile application to provide a rating of you and such Transportation Services and, optionally, to provide comments or feedback about you and such Transportation Services.” Id. at § 2.5.1. “You acknowledge that [Uber] desires that Ubers have access to high-quality services via Uber’s mobile application. In order to continue to receive access to the Driver App and the Uber Services, you must maintain an average rating by Users that exceeds the minimum average acceptable rating established by [Uber] for your Territory... In the event your average rating falls below the Minimum Average Rating, [Uber] will notify you and may provide you... a limited period of time to raise your average rating... If you do not increase your average rating... within the time period allowed (if any), [Uber] reserves the right to deactivate your access to the Driver App and the Uber Services.” Id. at § 2.5.2.
legal counsel to turn out a product that is indisputably, unmistakably a rideshare app—only.

VIII. CONCLUSION

Seattle has unwittingly become the battleground between on-demand startups and labor activists with the city’s new legislation enabling Uber drivers to organize. As discussed, it is likely that this attempt will fail, if not by the will of the drivers, by a decision handed down from the Board. Whether relying on right-to-control, entrepreneurial opportunity, or a hybrid test, Uber drivers should be classified as independent contractors. Uber does not have sufficient control over the details of the work, and Uber drivers are not prohibited from pursuing other entrepreneurial opportunities.

But all is not lost. The pending O’Connor and Yucesoy consolidated class action discussed earlier in this article may shed some light on to how Uber may approach this conflict.342 In a proposed settlement agreement, Uber agreed to collaborate with plaintiff drivers regarding the creation and funding of a “driver association” as a means of “opening a dialogue between Uber and Drivers.”343 The association’s leaders are to be elected by drivers, and the leaders will have the opportunity to meet quarterly with Uber management to discuss driver concerns.344 Notably, this proposed driver association will not be a union, and it will have no right to bargain collectively with Uber.345 Unfortunately, the proposed settlement provides “little detail [as to] how the driver association will work in practice . . . including what obligations Uber will have to fund [in] the driver association.”346 While nothing yet has been set in stone, Uber’s sheer willingness to negotiate the creation of a homogenous pseudo-union is a starting point towards facilitating open dialogue and potentially expanding drivers’ rights.

However, regardless of whether for-hire drivers are found to be employees or independent contractors, the Seattle ordinance fails on the ground that it is preempted by the NLRA. If Uber drivers elect a union for representation under the Seattle ordinance, Uber could simply refuse to bargain. But if Uber chose to pursue its own private right of action in court, it could assert an affirmative

343. Settlement Agreement, supra note 275, at 38.
344. Id. at 38–39.
345. Id. at 38.
defense that the Seattle ordinance is preempted by the NLRA under the Garmon preemption doctrine,347 and as such, the Board would have jurisdiction over a question of unfair labor practices. In the alternative, Uber could defeat the Seattle ordinance under the Machinists doctrine, because independent contractors are not covered under the NLRA and, thus, must be left to free market forces by design of the statute.348

Nevertheless, Uber cannot continue to stand behind a veil of ignorance relying solely on the small print in its cleverly-titled “Technology Services Agreement.” It must take additional steps that are critical to ensuring that drivers are informed of the working relationship and, accordingly, that drivers are treated as independent contractors. The Board’s probable treatment of the Seattle rideshare ordinance will not only affect other app-based ride dispatch companies like Lyft and Sidecar, but it will become the backdrop to a much broader conversation about on-demand service companies altogether. The rise of Millennials participating in the marketplace has created a demand for convenient, affordable services offered by individuals in the community. To name a few, Airbnb for lodging alternatives, TaskRabbit for odd jobs, and GrubHub for food delivery.349 These companies are attractive to workers because they offer more flexibility than a conventional job.

The age-old assumption that services are provided by businesses with employees is fading. Consumers and workers are basically cutting out the middleman: the business. In theory, both benefit—consumers pay less and workers retain more of the profit. But these startups that facilitate transactions, with business models similar to Uber’s, now occupy a peculiar niche in the labor market—and present a new challenge to labor activists. On one hand, they support a growing number of workers who value independence and flexibility above all, while on the other hand, there is concern that they create a new way to circumvent paying minimum wages, providing benefits, and dealing with unions.

Startups such as Uber were built upon the notion that those who provide the services would be independent contractors. Without this classification, the concept fails. To classify Uber drivers as employees might create a slippery slope of misclassifying a nation of freelancers who fully intend to be independent contractors. Likewise, Uber must be proactive to properly structure, document, and implement its independent contractor relationships in a manner that enhances compliance with labor laws instead of retaining needless direction and control over drivers using the app, most of which is non-essential to its business model.

347. See supra Part V(A).
348. See supra Part V(A).
As for other on-demand companies that classify their workers as independent contractors, Uber’s myriad of litigation will provide a much-needed analysis for the evolving workplace.