

# RIDE-SHARING-COMPANY DRIVERS: EMPLOYEES OR INDEPENDENT CONTRACTORS?

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## I. INTRODUCTION

This article considers whether companies such as Uber and Lyft wrong their drivers—or third parties who bring suits against the companies—by classifying their drivers as independent contractors. The relationship between companies and persons the companies classify as independent contractors has often been determined by the courts. Case law involving similar facts with newspaper companies,<sup>1</sup> pizza companies,<sup>2</sup> and taxicab companies<sup>3</sup> date back to the 1930s. Technological advancements in the twenty-first century have sparked the resurrection of the issue in a new context by ride sharing companies.

Uber and Lyft, formally known as Transportation Networking Companies (TNC), the world's leading ride-sharing companies,<sup>4</sup> classify their drivers as independent contractors. A classification which may lead to many problems, including:

1. An accident wherein a third party, not a passenger,<sup>5</sup> suffers loss or injury at the hands of a TNC driver, and the driver does not have adequate insurance coverage to cover the loss;

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<sup>1</sup> *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 583 (Tex. 1964).

<sup>2</sup> *Toyota Motor Sales, U.S.A., Inc. v. Superior Court*, 269 Cal. Rptr. 647, 649 (Cal. Ct. App. 2008).

<sup>3</sup> R.L. Martyn, *Owning, Leasing, or Otherwise Engaging in Business of Furnishing Services for Taxicabs as Basis of Tort Liability for Acts of Taxi Driver Under Respondeat Superior Doctrine*, 8 A.L.R.3d 818, § 1(a) (1966).

<sup>4</sup> See Harry Campbell, *Will Uber Ever Dominate the International Rideshare Market?* FORBES: TECH (May 13, 2015, 09:25 AM), <http://www.forbes.com/sites/harrycampbell/2015/05/13/will-uber-ever-dominate-the-international-rideshare-market>. Uber was “last valued at about \$50 billion [and] has more than 1 million drivers” across “311 cities and 58 countries.” Alyson Shontell, *California Labor Commission Rules an Uber Driver Is an Employee, Which Could Clobber the \$50 Billion Company*, BUSINESS INSIDER: TECH (Jun. 17, 2015, 10:22 AM), <http://www.businessinsider.com/california-labor-commission-rules-uber-drivers-are-employees-2015-6>.

<sup>5</sup> It is important to make this distinction because users are covered under a TNC's insurance policy. Cf. *Driving Jobs vs. Driving with Uber*, <https://www.uber.com/driver-jobs> (last visited Sept. 17,

2. Unequal treatment under federal and state laws (e.g., by not reimbursing expenses drivers incur in furtherance of the business of an employer<sup>6</sup> or by refusing to provide health insurance or unemployment benefits to their drivers<sup>7</sup>);
3. Refusal to provide worker's compensation benefits when drivers are injured or killed when performing their contracted duties; and
4. Unpaid employer taxes (e.g., Social Security and Medicare), giving TNCs economic advantages over similar businesses.

These issues have spawned numerous legal actions, most of which are filed in state or federal courts in California, and most remain unresolved as of this writing. However, challenges are also sprouting in other jurisdictions across the country.<sup>8</sup>

Despite TNCs' claims to the contrary, an examination of one TNC's (i.e., Uber's) business structure, driver contract, and relationship with its drivers demonstrates that TNCs clearly reserve the right to, and in most instances actually do, control many aspects of a driver's job<sup>9</sup> the idea here is that if another TNC's business model and contract provisions are identical to or mirror Uber's then the same applies. At common law, this right to control effectively creates an employer-employee relationship,<sup>10</sup> as the right to control is paramount in determining whether such relationship exists.<sup>11</sup> Based on the business structure and a TNC's right to control the means by which its drivers accomplish their jobs, a TNC's drivers should be considered employees, not independent contractors.

Few articles have been written regarding TNCs.<sup>12</sup> Even fewer judicial decisions have been reported because the advent of TNCs is relatively recent. However, the issues at question in these cases are not. Indeed, most cases address the question of whether drivers are employees or independent contractors of TNCs. Case law on the topic goes back nearly eighty-five years, and it establishes tests for courts to apply when determining the

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2016) (demonstrating Uber's policy requiring drivers to have person auto insurance, which covers passengers).

<sup>6</sup> *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015).

<sup>7</sup> *Cf. O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015) (making it clear that the benefit Uber provides to driver is limited to fees).

<sup>8</sup> *See, e.g., Cotter*, 60 F. Supp. at 1073 (suggesting that drivers in other states would have joined a class action lawsuit if allowed by the court); *O'Connor*, 82 F. Supp. 3d at 1140 (mentioning TNC cases in Massachusetts and Illinois). *See also*, Deborah F. Buckman, *Liability and Regulation of Ride-Sharing Services Using Social Media (Liability & Regulation)*, 6 A.L.R. 7th Art. 1, § 5 (2015).

<sup>9</sup> *See, e.g., O'Connor*, 82 F. Supp. 3d at 1149–53.

<sup>10</sup> *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 406–07 (1989).

<sup>11</sup> *Id.*; C.B.L., *Circumstances Under Which the Existence of the Relationship of Employer and Independent Contractor Is Predicable*, 19 A.L.R. 1168, § 29 (1922).

<sup>12</sup> *E.g.*, Buckman, *supra* note 8, at § 8 (2015) (discussing active cases before Jun. 11, 2015, including *Cotter v. Lyft* and *O'Connor v. Uber*, which are cited in notes 6 and 7; however, most cases surround whether Uber or Lyft have created unfair competition for Taxi services by misclassifying themselves as taxi companies without subjecting themselves to the same regulations); Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1099–1100 (2015) (discussing the effect of Uber's insurance coverages as it relates to Uber's liability for drivers' torts under California's unfair competition law); Alexi Pfeffer-Gillett, *When "Disruption" Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers*, 104 CAL. L. REV. 233, 234, 238–39 (2016) (discussing a legal theory, i.e., nondelegable duty rule, that has not yet been argued in existing cases).

employment relationship. However, the tests are outdated, as TNCs present contemporary questions that are not adequately addressed by the established tests:

1. Are the mobile applications by which TNCs and drivers connect with users comparable to picking up a phone and dialing the company??
2. Do TNCs fall into the same categories as other employers, or should they be considered a new type of employer?
3. Is waiting for a fare while active on the driver app considered to be “on call” or is it similar to a cab driver sitting at a cab stand instead?

Moreover, most litigated cases are filed in California state or federal courts. And while choice-of-law clauses often provide that California law will govern issues arising from interpretation of the contract, it is only a matter of time before a question not pertaining to the interpretation of the contract will arise in other states.

The purpose of this article is to provide a comparative analysis of California and Texas laws and how they could be applied to determine the employment relationship between TNCs and their drivers. The author has chosen these questions to examine the laws of these two states because 1) state legislatures differ in how they regulate TNCs,<sup>13</sup> 2) TNCs are becoming increasingly popular in many large Texas cities and are encroaching upon the heavily regulated taxi industry, 3) TNCs are becoming increasingly popular nationwide, and 4) this question has attracted much media attention. A comparative analysis is necessary because a California Labor Commission decision<sup>14</sup> was appealed and will soon be decided, or settled, and one has been filed (but was later dismissed) in Texas.<sup>15</sup> It will not be long before another is filed in Texas or elsewhere. When such a case arises, attorneys will scramble to find primary and secondary source material on the issue in any state. So, it is the author’s hope that this analysis will be of interest to lawyers in practice and academia across the country.

This first section introduced the topic and presented potential problems created when TNC drivers are not recognized as employees. Section II introduces TNCs and describes the general structure of a TNC, with Uber as the illustrative business model.<sup>16</sup> Section III discusses recent

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<sup>13</sup> While the state legislature regulates TNCs in California, the Texas legislature has deferred to city councils to approve operating permits and determine regulations. Jitneys (a similar form of ride for hire in the 1910s) were first regulated by city councils; later, Jitneys became the heavily regulated transportation providing industry we now know as taxis. Ravi Mahesh, *From Jitneys to App-Based Ridesharing: California’s “Third Way” Approach to Ride-for-Hire Regulation*, 88 S. CAL. L. REV. 965, 982, 985 (2015).

<sup>14</sup> Order, Decision, or Award of the Labor Commissioner at 1, *Berwick v. Uber Techs*, No. 11-46739 EK (Cal. Labor Comm’n filed Jun. 3, 2015) <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical>.

<sup>15</sup> Order Granting Plaintiff’s Motion to Dismiss at 1, *Jane Doe v. Uber Techs, Inc.*, (162nd Dist. Ct., Dallas County Tex. filed Aug. 12, 2015).

<sup>16</sup> The Uber and Lyft business models are nearly identical; however, the two are delineated where differences occur.

administrative agency decisions and resolved and pending cases. Section IV defines an employee and an independent contractor under California statutes and summarizes California case law. Section V applies analogous California case law, including a comparison to case law regarding delivery drivers. Section VI defines an employee and independent contractor under Texas statutes and case law. Section VII applies analogous Texas case law, including a comparison to case law regarding cab drivers. Section VIII summarizes and explains why TNCs' drivers should be considered employees, not independent contractors, and how a jury may decide. Section IX discusses the implications of a court's decision to classify a TNC's drivers as employees.

## II. A BRIEF HISTORY OF TRANSPORTATION NETWORK COMPANIES

A TNC is an organization that provides "prearranged transportation services for compensation using an online-enabled application (app) or platform to connect users with drivers using their personal vehicles."<sup>17</sup> Uber and Lyft differ in how they identify their drivers to the public. For example, Uber does not require an emblem or other distinct insignia,<sup>18</sup> but Lyft requires all drivers to display a pink mustache in some conspicuous area viewable to the public (usually on the dash or grille).<sup>19</sup> Houston, Texas, requires all TNCs to display emblems, insignia, or logos to identify their association.<sup>20</sup> This uneven regulation is seen not only in the display, but also in how the TNCs are required to be insured.<sup>21</sup>

The drivers do not have to be professionals or commercially licensed drivers, but rather must only have a licensure of the same class required to drive the vehicles registered with the TNC.<sup>22</sup> Drivers simply download a smartphone app, register with the TNC, and provide information regarding their licensure, vehicle's registration and insurance, and the financial-institution information where the TNC will deposit their earnings.<sup>23</sup> Prior to activating the driver app, applicants conduct a series of phone interviews with the TNC, and the TNC runs a simple background check to weed out potential drivers who have committed felonies within the last seven years.<sup>24</sup>

<sup>17</sup> Mahesh, *supra* note 13, at 1009.

<sup>18</sup> In most of the country, Uber drivers require no designating emblem. However, while Uber requires no distinct insignia, the California Public Utilities Commission recently began requiring approved trade dress insignia for all TNCs, including Uber, be displayed on the front and back of all TNC vehicles. *CPUC Rules and Regulations*, UBER, <http://ubermovement.com/cpuc-video/> (last visited Sept. 17, 2016).

<sup>19</sup> See Sara Thornton, Comment, *The Transportation Monopoly Game: Why Taxicabs Are Losing and Why Texas Should Let Transportation Network Company Tokens Play*, 47 *TEX. TECH. L. REV.* 893, 922 n.254 (2015).

<sup>20</sup> *Id.* at 921–22.

<sup>21</sup> Compare Mahesh, *supra* note 13, at 1015, with Thornton, *supra* note 19, at 917, 930.

<sup>22</sup> See Thornton, *supra* note 19, at 895.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *Id.* at 920–21; see also Mahesh, *supra* note 13, at 966. However, some stories have indicated that Uber does not perform sufficient background checks because felons have been allowed to drive for Uber. See Pfeffer-Gillett, *supra* note 12, at 235.

TNCs offer the same services as taxi drivers, but with many upsides: newer vehicles,<sup>25</sup> more comfortable rides,<sup>26</sup> cheaper fares,<sup>27</sup> and markedly shorter wait times.<sup>28</sup> Potential passengers (users) download the same smartphone app, upload their personal information, including payment information, which is usually linked to a credit card<sup>29</sup> or some third-party payment source (e.g., PayPal). Instead of using the traditional hand-wave method of hailing a cab, users open the app, upload their location using their phones' GPS systems, and the information is sent to the closest driver.<sup>30</sup> A driver is given the opportunity to accept the fare and must do so within ten to thirty seconds before the request passes to the next nearest driver. Once a driver accepts a fare, the app sends the driver's information to the user, including a description of the driver and vehicle and a picture of the driver, so the user knows whom to expect.<sup>31</sup> Finally, instead of a metered ride, users agree upon a fixed fare prior to commencing a pickup, and the fare is paid directly to the TNC via the user's payment information linked to their account.<sup>32</sup>

All drivers must agree to the terms and conditions as outlined in the Software and Online Services Agreement ("Agreement") during the registration process. Otherwise, they are not permitted to perform the service.<sup>33</sup> Once drivers are ready to provide rides, they simply open the app and log in to let potential users know they are available.<sup>34</sup> These rides are often referred to as ride sourcing instead of ridesharing because the driver and user do not share a common destination.<sup>35</sup> Once a user requests a ride using the app, the app sends a notification to a driver within the vicinity.<sup>36</sup> The driver will locate the user with the provided information and then transport the user to his or her destination.<sup>37</sup> Once a driver picks up the user, the driver is obligated to perform the request according to a number of controls explicitly outlined in the Agreement by the TNC.<sup>38</sup> Unless indicated otherwise, the following examples are Uber-specific contract stipulations:

25 See, e.g., Mahesh, *supra* note 13, at 1008 n.255.

26 *Id.* at 1002.

27 *Id.*

28 Lisa Rayle, Susan Saheen & Nelson Chan, *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco* 2 (Nov. 1, 2014) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the University of California Transportation Center), [http://www.its.dot.gov/itspac/dec2014/ridesourcingwhitepaper\\_nov2014.pdf](http://www.its.dot.gov/itspac/dec2014/ridesourcingwhitepaper_nov2014.pdf).

29 See Thornton, *supra* note 19, at 895–97.

30 *Id.* at 895–896.

31 *Id.* at 895–97.

32 *Id.* at 897.

33 See Mahesh, *supra* note 13, at 1011.

34 See *How Does Uber Work?*, UBER: HELP, <https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e> (last visited Sept. 17, 2016).

35 See Rayle et al., *supra* note 28, at 2.

36 *Uber Driver Training Video: Complete Partner Information Driver Videos*, YOUTUBE (Mar. 17, 2015) <https://www.youtube.com/watch?v=GWX9UoJbbJw>.

37 Uber, *Software License and Online Services Agreement*, § 2.3, [https://uber-regulatory-documents.s3.amazonaws.com/country/united\\_states/p2p/Partner%20Agreement%20November%2010%202014.pdf](https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%2010%202014.pdf) (last visited Sept. 17, 2016) [hereinafter *Uber Agreement*].

38 *Id.*

1. Drivers may decline any request; however, once a request is accepted, the driver must perform the request according to the user's directions and a failure to provide services as requested may cause a driver to become liable for damages;<sup>39</sup>
2. The TNC restricts the number of users a driver may carry at a time (e.g., the driver may not carry anyone in the vehicle other than the user and user's authorized guests);<sup>40</sup>
3. Drivers must maintain their vehicles in "good operating condition," they must be kept clean and sanitized,<sup>41</sup> and drivers must notify the TNC if their vehicles change, so the TNC may ensure the vehicles meet industry standards;<sup>42</sup>
4. Drivers must maintain current vehicle registration and insurance and are subject to periodic background checks to remain eligible to provide services;<sup>43</sup>
5. The TNC prohibits drivers from accepting tips or payments in cash;<sup>44</sup>
6. Drivers should wait at least ten minutes at a user's pickup site before they cancel a request;<sup>45</sup>
7. Drivers must transport users directly to their destinations without interruption or unauthorized stops;<sup>46</sup>
8. Users rate their drivers after using a TNC's services; drivers must maintain a "Minimum Average Rating," which is established by the company for a specific locale;<sup>47</sup>
9. TNCs may suspend or terminate drivers if their rating is too low;<sup>48</sup>
10. Drivers may negotiate the price of a fare; however, TNCs "reserve the right to change the fare calculation at any time in the [TNC's] discretion based upon local market factors";<sup>49</sup>
11. TNCs reserve the right to refuse a driver's payment for any adverse occurrences (e.g., if a driver does not satisfy a user's request);<sup>50</sup>
12. Drivers must provide the services in a "professional manner with due skill, care and diligence, and . . . maintain high standards of professionalism, service and courtesy";<sup>51</sup>
13. Drivers are allowed to pick their own hours, but must provide services for a user at least once a month;<sup>52</sup>

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39 *See Id.* at § 2.3–2.4.

40 *Id.*

41 *Id.* at § 3.2.

42 *See Id.* at § 3.3.

43 *Id.* at § 3.1.

44 *Cf. Id.* at § 4.1.

45 *Id.* at § 2.2.

46 *Id.* at § 2.3.

47 *Id.* at § 2.5.

48 *Id.*

49 *Id.* at § 4.

50 *Id.*

51 *Id.* at § 3.1.

52 *Id.* at § 2.1.

14. Drivers are allowed to perform services on an indefinite term, unless either party terminates the agreement;<sup>53</sup>
15. TNCs reserve the right to terminate the driver at any time, with or without notice, for violating any material provision of the Agreement.<sup>54</sup>

Although the preceding contract provisions were Uber-specific, Lyft has similar provisions. The following are Lyft-specific contract provisions:

1. Lyft “may suspend or deactivate the user account . . . or revoke . . . permission to access the Lyft Platform, at any time, for any reason” not prohibited by law, upon notice to the driver;<sup>55</sup>
2. Drivers “will only provide Services using the vehicle that has been reported to and for which a photograph has been provided to Lyft,” and drivers “will not transport more passengers than can securely be seated in such vehicle (and no more than seven (7) passengers in any instance)”;<sup>56</sup>
3. Drivers may not sublicense the platform to other drivers or employees;<sup>57</sup>
4. Drivers cannot operate as a public carrier or taxi service, accept cash, offer rides to street hails, or engage in any activity inconsistent with the agreement;<sup>58</sup>
5. Drivers are prohibited from cancelling rides, or they may be subject to a cancellation fee;<sup>59</sup>
6. Lyft sets the prices for fares, implements minimum ride fees, and assesses other fees;<sup>60</sup>
7. Drivers must maintain their vehicles in “good operating condition”;<sup>61</sup> and
8. Drivers must display the pink mustache indicating their Lyft affiliation.<sup>62</sup>

TNCs claim they do not actually employ drivers, but rather link supply (TNC drivers) with demand (those who require transportation).<sup>63</sup> All drivers, by executing the agreement and providing services for the TNC, stipulate that the relationship established between the parties is that of an employer and independent contractor.<sup>64</sup>

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53 *Id.* at § 12.2.

54 *Id.*

55 Lyft, *Lyft Terms of Service*, §7, 16, <https://www.lyft.com/terms> (last visited, Sept. 17, 2016) [hereinafter *Lyft Agreement*].

56 *Id.* at § 8.

57 *Id.* at § 7.

58 *Id.* at § 8.

59 *Id.* at § 3.

60 *Id.*

61 *Id.* at § 8.

62 *Id.* at § 9.

63 *E.g.*, O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135, 1142 (N.D. Cal. 2015); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1068 (N.D. Cal. 2015). *See also* Shontell, *supra* note 4.

64 *See Uber Agreement, supra* note 37, at § 13.

TNCs assert the following reasons why their drivers should be considered independent contractors:

1. TNC drivers need not be classified one way or the other because they only perform services for the users;<sup>65</sup>
2. TNC drivers are independent contractors as a matter of law because they are free to work whenever they please, and the contracts establish the relationship as such;<sup>66</sup>
3. TNCs are technology companies and do not provide transportation services because they do not own any vehicles or employ drivers;<sup>67</sup>
4. TNCs claim the standards of performance, or guidelines, are suggestions and not orders;<sup>68</sup>
5. TNCs exercise minimum control over how the drivers perform their tasks;<sup>69</sup> and
6. Drivers agree that they are independent contractors.<sup>70</sup>

### III. RECENT ADMINISTRATIVE DECISIONS, SETTLEMENTS, AND PENDING CASES CONCERNING EMPLOYMENT STATUS OF TNC'S DRIVERS

#### A. ADMINISTRATIVE PROCEEDINGS

##### 1. *U.S. Department of Labor Interpretation*

On July 15, 2015, the United States Department of Labor, Wage and Hour Division released an interpretation of the Fair Labor Standards Act (FLSA), reviewing substantial federal case law that casts a wide net on who is considered an employee.<sup>71</sup> In essence, anyone who is “suffered or permitted to work” is an employee of that business if the worker is economically dependent upon the business.<sup>72</sup> The interpretation opines that the factors of an “economic realities” test should be applied in view of the FLSA’s broad scope of employment and its “suffer or permit to work” standard.<sup>73</sup> Further, the factors guide the determination for whether the worker is truly independent of the employer or is economically dependent on the employer.<sup>74</sup> Courts are advised to ask:

1. Is the work an integral part of the employer’s business?<sup>75</sup>
2. Does the worker’s managerial skill affect the worker’s opportunity for profit or loss?<sup>76</sup>

<sup>65</sup> See *Cotter*, 60 F. Supp. 3d at 1081–82.

<sup>66</sup> *Id.*

<sup>67</sup> See *O’Connor*, 82 F. Supp. 3d at 1137–38.

<sup>68</sup> *Cotter*, 60 F. Supp. 3d at 1079. See also *O’Connor*, 82 F. Supp. 3d at 1150.

<sup>69</sup> See *Cotter*, 60 F. Supp. 3d at 1078–79.

<sup>70</sup> *Id.* at 1079–80.

<sup>71</sup> U.S. DEP’T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2015-1 (July 15, 2015), [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf).

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2, 5.

<sup>75</sup> *Id.* at 6.



3. How does the worker's relative investment compare to the employer's investment?<sup>77</sup>
4. Does the work performed require special skill and initiative?<sup>78</sup>
5. Is the relationship between the worker and the employer permanent or indefinite?<sup>79</sup>
6. What is the nature and degree of the employer's control?<sup>80</sup>

The opinion determined that most workers are employees under the FLSA's broad definition, but stated each case should be considered individually and no one factor should be emphasized over another; instead, they all should be used as guides.<sup>81</sup>

## 2. *California Proceedings*

On June 3, 2015, the California Division of Labor Standards Enforcement (DLSE) issued an order awarding more than \$4000 to Barbara Berwick for back wages and expenses incurred in furtherance of Uber's business.<sup>82</sup> Berwick had worked as a driver for Uber for nearly four months when she quit in September 2013 without advance notice.<sup>83</sup> Shortly thereafter, she filed a complaint with the DLSE alleging she had been misclassified as an independent contractor, and Uber owed her back-wages for over 400 hours and expenses incurred in furtherance of the business.<sup>84</sup> The agency held a hearing in March 2013, during which both parties presented evidence.<sup>85</sup> Upon consideration, the agency later determined that Berwick was in fact an employee of Uber because 1) the drivers are an integral part of Uber's business, 2) Uber is intricately involved in every aspect of the operation, and 3) Uber provided an essential, required piece of equipment: the app.<sup>86</sup> Thus, Berwick was entitled to recoup the amounts she alleged in her complaint.<sup>87</sup>

## 3. *Oregon*

On October 14, 2015, in response to requests for guidance on the employment status of Uber drivers, the Oregon Bureau of Labor and Industries issued an advisory opinion declaring Uber drivers to be employees, not independent contractors.<sup>88</sup> The Bureau stated that workers

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<sup>76</sup> *Id.* at 7.

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Id.* at 13.

<sup>81</sup> *Id.* at 15.

<sup>82</sup> Order, Decision, or Award of the Labor Commissioner at 11, *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK (Cal. Labor Comm'n filed Jun. 3, 2015), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical>.

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.* at 1.

<sup>85</sup> *See generally id.*

<sup>86</sup> *Id.* at 8–10.

<sup>87</sup> *Id.* at 10–11.

<sup>88</sup> OR. BUREAU OF LABOR AND INDUS., ADVISORY OPINION OF THE COMMISSIONER OF THE BUREAU AND INDUSTRIES OF THE STATE OF OREGON 4 (Oct. 14, 2015), <http://uberlawsuit.com/Oregon.pdf>.

are increasingly performing work in circumstances that appear to be outside of traditional employment arrangements.”<sup>89</sup> The State advised courts to use a six-part economic-realities test to determine whether drivers truly exercise economic independence over their own business.<sup>90</sup> The test includes the degree of control exercised by the alleged employer; the extent of the relative investments of the worker and the alleged employer; the degree to which the worker’s opportunity for profit and loss is determined by the alleged employee; the skill and initiative required in performing the job; the permanency of the relationship; and the extent to which the work performed by the worker is an integral part of the alleged employer’s business.<sup>91</sup>

#### 4. Florida

In May 2015, the Florida Department of Economic Opportunity (FDEO) issued separate determinations that two Uber drivers were, in fact, employees of Uber.<sup>92</sup> Previously, Uber revoked access to the driver app for each driver at different times and for different reasons.<sup>93</sup> Both drivers later filed claims for reemployment assistance (i.e., unemployment insurance).<sup>94</sup> After an investigation, the former drivers were granted assistance.<sup>95</sup> Uber promptly appealed the FDEO’s decision.<sup>96</sup> Upon reconsideration, the FDEO reversed its decision in December 2015, ultimately finding that the drivers were independent contractors, not employees.<sup>97</sup> Interestingly, the FDEO’s reasoning controverts the Oregon opinion, reasoning that the “real shift in [the American economy] is that technology is allowing hundreds of thousands of people to go into business for themselves” and the many advantages available to independent businesses are key motivators for drivers being their own bosses.<sup>98</sup> The FDEO further opined that “such status has long been part of the American dream . . . [and t]echnological advances are opening up that dream to many more people.”<sup>99</sup> The agency likened the relationship to the economic dependence of an artist on an art gallery, indicating the former does not necessarily need the latter to subsist.<sup>100</sup>

<sup>89</sup> *Id.* at 1.

<sup>90</sup> *Id.* at 2; *See, e.g., Cejas v. Commercial Interiors, Inc. v. Torres-Lizama*, 260 Or App 87 (2013).

<sup>91</sup> *Id.*

<sup>92</sup> *Rasier, LLC [Uber]*, No. 0026 2834 68-02 & No. 0026 2825 90-02 at 2, 26 (Florida Dep’t of Econ. Opportunity Dec. 3, 2015) (final order finding for petitioner on admin. appeal), [http://www.capitalnewyork.com/sites/default/files/0026%202825%2090-02,%200026%202834%2068-02%20FINAL%20ORDER%20\(1\).PDF](http://www.capitalnewyork.com/sites/default/files/0026%202825%2090-02,%200026%202834%2068-02%20FINAL%20ORDER%20(1).PDF).

<sup>93</sup> *Id.* at 3.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 4, 21.

<sup>98</sup> *Id.* at 20.

<sup>99</sup> *Id.*

<sup>100</sup> *Compare id.* at 14 (describing the work of brokers), *with id.* at 19 (noting art galleries as broker services).

## B. PENDING LITIGATION

## 1. California

In January 2014, an Uber driver was using his driver app while driving to locate a user in San Francisco, California.<sup>101</sup> The driver failed to yield at an intersection and struck a woman and her two children who were crossing the street in the pedestrian crosswalk.<sup>102</sup> All three were transported to a local hospital.<sup>103</sup> One child, a six-year-old girl, did not survive.<sup>104</sup> The girl's family sued the driver and Uber, alleging numerous torts, including wrongful death.<sup>105</sup> Uber claimed its \$1 million insurance policy did not cover the driver's negligence because the driver was driving between fares.<sup>106</sup> However, the case reached an undisclosed, tentative settlement agreement in July 2015.<sup>107</sup>

On August 16, 2013, multiple plaintiffs filed a putative class-action suit in the United States District Court for the Northern District of California on behalf of themselves and other similarly situated individuals.<sup>108</sup> The plaintiffs alleged that they are employees of Uber, rather than independent contractors as indicated in their contracts, and thus are eligible for and entitled to California Labor Code employee protections (e.g., a requirement that an employer pass on the entire amount of any gratuity that is paid, given to, or left for an employee by a patron).<sup>109</sup> On December 4, 2014, Uber filed a motion for summary judgment alleging entitlement to such relief as a matter of law because the drivers are independent contractors, in accordance with their drivers' contracts.<sup>110</sup> On March 3, 2015, the court entered an order denying Uber's motion for summary judgment, ruling the issue cannot be decided as a matter of law.<sup>111</sup> The case has multiple interlocutory appeals to the Ninth Circuit Court of Appeals, and is currently engaged in settlement negotiations.<sup>112</sup>

On September 3, 2013, multiple plaintiffs filed a putative class-action suit against Lyft, alleging Lyft violated various sections of the California Labor Code by failing to furnish wage statements, unlawfully taking portions of gratuities, and misclassifying the drivers as independent

<sup>101</sup> See Thornton, *supra* note 19, at 899.

<sup>102</sup> Andrew Dalton, *Driver Identified in Death of 6-Year-Old TL Pedestrian*, SFIST (Jan. 2, 2014, 12:10 PM), [http://sfist.com/2014/01/02/driver\\_identified\\_in\\_death\\_of\\_6-yea.php](http://sfist.com/2014/01/02/driver_identified_in_death_of_6-yea.php).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Complaint, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. filed Jan. 27, 2014).

<sup>106</sup> See Thornton, *supra* note 19, at 899.

<sup>107</sup> Dan Levine, *Uber Settles Wrongful Death Lawsuit in San Francisco*, REUTERS: TECHNOLOGY NEWS (Jul. 15, 2015, 1:42 AM) <http://www.reuters.com/article/2015/07/15/us-uber-tech-crash-settlement-idUSKCN0PO2OW20150715#f0RkTo3jJ7H1MjMK.97>.

<sup>108</sup> See O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

<sup>109</sup> *Id.*

<sup>110</sup> Compare Docket and Filings, *Ninth Circuit California, North District of California Court*, O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC (N.D. Cal. filed Aug. 16, 2013), docket entry 211, <https://dockets.justia.com/docket/california/candce/4:2013cv03826/269290> (last visited Sept. 18, 2016) [hereinafter *O'Connor Docket*], with O'Connor, 82 F. Supp. 3d at 1136.

<sup>111</sup> See *id.* at 1152–53.

<sup>112</sup> See *O'Connor Docket*, *supra* note 118, at entry 725 et seq.

contractors.<sup>113</sup> In December 2014, both parties filed cross-motions for summary judgment, each alleging entitlement to such relief as a matter of law; but the court entered an order denying the parties' cross motions on March 11, 2015.<sup>114</sup> An amended case management order entered on April 9, 2015, ordered the parties to plan for a March or April 2016 trial.<sup>115</sup> On April 7, 2016, the court denied a motion for preliminary approval of class action settlement, ruling the agreement did not fall within the range of reasonableness, asserting 1) the drivers would be shortchanged for their mileage and expense reimbursement; 2) the settlement contained no provision addressing the drivers' classification; 3) the settlement failed to certify the class-action status and purported to leave the arbitration clause intact and enforceable, thus precluding drivers claims to the class-action; and 4) it was unclear whether the arbitration clause was enforceable because it was in violation of portions of the National Labor Relations Act.<sup>116</sup> The parties had until May 2016 to file an appeal, but the court reserved the right to consider another motion for settlement, were it to rectify the instant settlement's shortcoming even if it omitted a worker classification.<sup>117</sup>

On July 28, 2015, the United States District Court, Northern District of California, ruled that drivers may not file claims for reimbursement under the Fair Labor Standards Act outside of their home state.<sup>118</sup> For example, drivers in Massachusetts who have not driven in California may not join the California class-action suit for purposes of collecting expenses; they must file such claims in their own states.<sup>119</sup>

## 2. *One Texas Case - Dismissed*

On August 12, 2015, a Texas woman filed a suit for personal injury damages alleging defendant Talal Ali Chammout, a driver for Uber Black, an upscale limo service operated by a limousine company on Uber's platform, assaulted her one evening after a ride.<sup>120</sup> The original petition demanded a jury and damages in excess of \$1 million to be decided by the jury.<sup>121</sup> A jury trial was set for January 9, 2017;<sup>122</sup> however, without citing a

<sup>113</sup> See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069–70 (N.D. Cal. 2015).

<sup>114</sup> See *Cotter*, 60 F. Supp. 3d at 1081–82.

<sup>115</sup> Amended Case Management Order at 1, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

<sup>116</sup> Order Denying Motion for Preliminary Approval of Class Action Settlement at 1, 18–20, *Cotter v. Lyft*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

<sup>117</sup> *Id.* at 21.

<sup>118</sup> See *Yucesoy v. Uber*, No. C-15-0262 EMC, 2015 WL 4571547, at \*4 (N.D. Cal. Jul. 28, 2015).

<sup>119</sup> *Id.* at \*3.

<sup>120</sup> Plaintiff's Original Petition at 2, *Jane Doe v. Uber Techs., Inc.* (162nd Dist. Ct., Dallas County, Tex. filed Aug. 12, 2015).

<sup>121</sup> *Id.* at 2–3.

<sup>122</sup> Scheduling Order at 2, *Jane Doe v. Uber Techs., Inc.* (162nd Dist. Ct., Dallas County, Tex. filed Aug. 12, 2015).

reason, the plaintiff filed a motion to dismiss on December 2, 2015.<sup>123</sup> The court dismissed the case on December 8, 2015.<sup>124</sup>

### 3. Recent Criminal Actions

On February 21, 2016, an Uber driver, Jason B. Dalton, killed six people and injured two others on a six-hour shooting spree in Kalamazoo, Michigan, during which he continued to perform services for Uber.<sup>125</sup> One passenger reported the driver to Uber as visibly upset and driving erratically (e.g., ignoring a stop sign and swerving through traffic).<sup>126</sup> He claimed that he jumped from the moving vehicle at an intersection and reported the driver to the police.<sup>127</sup> Still, the driver continued to perform services for Uber between shootings.<sup>128</sup> Dalton was apprehended without incident six hours after the shooting spree began.<sup>129</sup> He was charged with six counts of murder and two counts of attempted murder.<sup>130</sup> At the time of this writing, a civil case has not been filed with regard to Dalton.

## IV. DEFINITIONS UNDER CALIFORNIA LAW

The California Labor Code defines an employee as someone who is under contract to perform services for the benefit of another.<sup>131</sup> There is a rebuttable presumption that any person who performs services for the benefit of another is an employee of that person.<sup>132</sup> Once that person provides prima facie evidence of an employer-employee relationship, the burden shifts to the employer to prove that the person is an independent contractor.<sup>133</sup> The employer must prove independent-contractor status<sup>134</sup> by satisfying these factors:

1. That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.
2. That the individual is customarily engaged in an independently established business.

<sup>123</sup> Plaintiff's Motion to Dismiss at 1, *Jane Doe v. Uber Techs., Inc.* (162nd Dist. Ct., Dallas County, Tex. filed Aug. 12, 2015).

<sup>124</sup> Order Granting Plaintiff's Motion to Dismiss at 1, *Jane Doe v. Uber Techs., Inc.* (162nd Dist. Ct., Dallas County, Tex. filed Aug. 12, 2015).

<sup>125</sup> Mitch Smith, Monica Davey & Alan Blinder, *Kalamazoo Searches for Motive in Spree that Killed 6*, N.Y. TIMES (Feb. 21, 2016, 9:25 AM), <http://nyti.ms/1QtF0U1>.

<sup>126</sup> Sophia Rosenbaum & Bruce Golding, *Uber Got Complaints About Michigan Shooter*, N.Y. POST (Feb. 22, 2016, 5:38 PM), <http://nypost.com/2016/02/22/uber-got-complaints-about-michigan-shooter>.

<sup>127</sup> *Id.*

<sup>128</sup> Nick Valencia & Mariano Castillo, *Police: Kalamazoo Rampage Suspect Had No Mental Health History*, CNN NEWS (Feb. 24, 2016, 11:17 AM), <http://www.cnn.com/2016/02/23/us/kalamazoo-michigan-shootings/>.

<sup>129</sup> See Smith et al., *supra* note 133.

<sup>130</sup> See Rosenbaum & Golding, *supra* note 134.

<sup>131</sup> CAL. LAB. CODE § 2750 (West, Westlaw through Ch. 248 of 2016 Reg. Sess., Ch. 8 of 2015-2016 2nd Ex. Sess.).

<sup>132</sup> *Id.* at § 2750.5.

<sup>133</sup> *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).

<sup>134</sup> *Id.*; *Bemis v. People*, 240 P.2d 638, 644 (Cal. Dist. Ct. App. 1952).

3. That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the [California] Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.<sup>135</sup>

California's test for proving that a person is an employee is "whether the person [or company] to whom service is rendered has the right to control the manner and means of accomplishing the result desired."<sup>136</sup> "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established."<sup>137</sup> Further, the company need not exercise the right, or even retain the right to control all details,<sup>138</sup> as the employee status may exist when there are still certain freedoms to perform the work,<sup>139</sup> because what matters is that control be retained over the relevant "portions of its operations."<sup>140</sup> Furthermore, the right to terminate at will, without cause, is "strong evidence in support of an employment relationship,"<sup>141</sup> because it "gives [the principal] the means of controlling the agent's activities."<sup>142</sup>

In addition to the control test, there are sub-factors to be considered:

1. Whether the one performing services is engaged in a distinct occupation or business;<sup>143</sup>
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;<sup>144</sup>
3. The skill required in the particular occupation;<sup>145</sup>

<sup>135</sup> CAL. LAB. CODE § 2750.5(a-c) (West, Westlaw through Ch. 248 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2nd Ex. Sess.).

<sup>136</sup> *S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel.*, 769 P.2d 399, 404 (Cal. 1989).

<sup>137</sup> *Millsap v. Fed. Express Corp.*, 277 Cal. Rptr. 807, 811 (Cal. Ct. App. 1991).

<sup>138</sup> *See Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 170-71 (Cal. 2014).

<sup>139</sup> *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 44 (Cal. Ct. App. 2007).

<sup>140</sup> *Borello*, 769 P.2d at 408.

<sup>141</sup> *Id.* at 404.

<sup>142</sup> *Ayala*, 327 P.3d at 171.

<sup>143</sup> *Borello*, 769 P.2d at 408.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

4. Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;<sup>146</sup>
5. The length of time for which the services are to be performed;<sup>147</sup>
6. The method of payment, whether by the time or by the job;<sup>148</sup>
7. Whether or not the work is a part of the regular business of the principal;<sup>149</sup>
8. Whether or not the parties believe they are creating the relationship of employer-employee;<sup>150</sup>
9. The alleged employee's opportunity for profit or loss depending on his managerial skill;<sup>151</sup>
10. The alleged employee's investment in equipment or materials required for his task, or his employment of helpers;<sup>152</sup>
11. Whether the service rendered requires a special skill;<sup>153</sup>
12. The degree of permanence of the working relationship;<sup>154</sup> and
13. Whether the service rendered is an integral part of the alleged employer's business.<sup>155</sup>

California courts have held that any one of the thirteen parts in the test cannot be "applied rigidly and in isolation."<sup>156</sup> Further, the "factors cannot be applied mechanically as separate tests; they are intertwined, and their weight depends on particular combinations."<sup>157</sup> A worker's employment status is important because California law gives many benefits and protections to employees, while independent contractors receive virtually none.<sup>158</sup> Employees are generally entitled to minimum wage and overtime pay,<sup>159</sup> meal and rest breaks,<sup>160</sup> reimbursement for work-related expenses,<sup>161</sup> workers' compensation,<sup>162</sup> and employer contributions to unemployment insurance.<sup>163</sup> California courts have held that the labor code statutes are constructed to protect employees because employees are presumed to be comparatively weak and deserve to receive "a wage that insures

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146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at 407.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 408.

157 *Id.*

158 *See id.* at 1074.

159 CAL. LAB. CODE § 1194 (West, Westlaw through Ch. 248 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2nd Ex. Sess.).

160 *Id.* § 226.7 (West, Westlaw through Ch. 248 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2nd Ex. Sess.).

161 *Id.* § 2802 (West, Westlaw through Ch. 248 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2nd Ex. Sess.).

162 *Id.* § 3700 (West, Westlaw through Ch. 248 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2nd Ex. Sess.).

163 CAL. UNEMP. INS. CODE § 976. (West, Westlaw through Ch. 248 of 2016 Reg. Sess. and Ch. 8 of 2015-2016 2nd Ex. Sess.).

[sic] . . . them the necessary shelter, wholesome food and sufficient clothing.”<sup>164</sup>

Furthermore, the “rule that employees be reimbursed for costs ensures that employers don’t undercut wages by passing the cost of doing business on to their employees.”<sup>165</sup> Moreover, “[t]he purpose of the unemployment insurance program is to provide benefits for ‘persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.’”<sup>166</sup> In California, it is apparent that the importance behind correctly identifying the employment relationship relates to the social legislation designed to protect employees.<sup>167</sup>

## V. CALIFORNIA CASE LAW ANALOGOUS TO TNC BUSINESS STRUCTURE

### A. RIGHT TO CONTROL AND DECEPTIVE RELATIONSHIPS

In *JKH Enters. v. Dep’t of Indus. Rels.*, JKH Enterprises (JKH) appealed a trial court’s affirmation of a Department of Industrial Relations fine and conclusion that “special” package delivery drivers were employees of JKH and, as a result, JKH would be required to obtain and provide worker’s compensation insurance to protect the drivers.<sup>168</sup> JKH’s drivers were required to fill out a form entitled “independent contractor profile.”<sup>169</sup> The “drivers [were] not required to contact JKH’s dispatcher on a regular basis because in the course of servicing the regular routes, they pick[ed] up the packages from JKH’s route customers and [were] directed by the customer where and when to deliver the packages.”<sup>170</sup> The drivers: were not required to work either at all or on any particular schedule; chose their own driving routes; used their own vehicles; paid for their own gas, maintenance, and insurance; were allowed to perform delivery services for other companies; were not supervised by JKH; and earned their money by splitting the fee that JKH charged its customers for each delivery.<sup>171</sup>

JKH was required to show that the drivers were not employees.<sup>172</sup> The court applied the right-to-control test with “deference to the purposes of the protective legislation”<sup>173</sup> and evaluated the substantial evidence in support of JKH’s claim that the drivers were independent contractors.<sup>174</sup> The court

<sup>164</sup> *Martinez v. Combs*, 231 P.3d 259, 271 (Cal. 2010).

<sup>165</sup> *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015).

<sup>166</sup> *W. Hollywood Cmty. Health & Fitness Ctr. v. Cal. Unemployment Ins. Appeals Bd.*, 181 Cal. Rptr. 3d 196, 198 (Cal. Ct. App. 2014).

<sup>167</sup> Interestingly, another statute provides for penalties up to and including joint and several liability for damages assessed to an employer when a person advises an employer to misclassify an employee in an attempt to deprive the employee of his rightful benefits. CAL. LAB. CODE § 2753 (West 2011).

<sup>168</sup> *JKH Enters. v. Dep’t of Indus. Rels.*, 48 Cal. Rptr. 3d. 563, 566 (Cal. Ct. App. 2006).

<sup>169</sup> *Id.* at 568.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 569.

<sup>172</sup> *Cf. id.* at 570 (requiring JKH to provide documentation of drivers’ personal information, payment information, contracts, etc.).

<sup>173</sup> *Id.* at 578.

<sup>174</sup> *Id.* at 579–80.



held the drivers were, in fact, employees, because the company exercised all necessary control over its operation as a whole, the drivers did not require a particular skill, and the contract was an attempt to subvert the relationship.<sup>175</sup>

As with JHK's drivers, TNC's drivers do not require any special skill beyond the ability to operate a smartphone and possess a license to drive a passenger car that they own. Further, TNCs undeniably control aspects of the drivers' jobs that are crucial to their business. Finally, the strict construction of the contract is an effort to treat employees as independent contractors and can be seen as an attempt to deceive the drivers and the public by refusing to afford employees the rights to which they are entitled or refusing to accept responsibility for a driver's negligence.

#### B. DRIVERS AS THE CORE OF THE TNC SERVICE

In *Air Couriers Int'l v. Emp't Dev. Dep't*, Air Couriers International (Couriers) filed a complaint for a refund against the California Director of the Employment Development Department to recover employment taxes it paid for its delivery drivers, arguing that the drivers operated as independent contractors.<sup>176</sup> The superior court rejected the claim, and Couriers appealed. Couriers employed drivers to pick up and deliver packages in a timely manner.<sup>177</sup> Couriers's drivers worked flexible schedules, determined their own schedules, and decided when and how long to work; worked other jobs while driving for Couriers; were not required to accept each and every job; did not receive formal training; supplied their own vehicles, equipment, and supplies; used their own cell phones to track and accept deliveries; executed independent contractor agreements; and were penalized when they did not accept some jobs.<sup>178</sup>

The court held that the drivers were not independent contractors because Couriers did not produce adequate evidence to rebut the employment presumption.<sup>179</sup> Also, the drivers performed an integral and entirely essential aspect of Couriers's business; the drivers had not made any significant purchases required to perform the job, as they were all supplied by Couriers; and Couriers retained all necessary control over drivers to perform the functions of the business.<sup>180</sup> The court, upholding the determination that drivers were employees of Couriers, noted that the "[d]rivers delivered packages to [Couriers'] customers, not to their own customers. [Couriers] set the rates charged to customers, billed the customers, and collected payment. All of these facts, established at trial, reveal the drivers' deliveries were part of [Couriers'] regular business" and "the simplicity of the work (take this package from point A to point B)

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175 *Id.* at 580–81.

176 *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 39 (Cal. Ct. App. 2007).

177 *Id.* at 38.

178 *Id.* at 39–41.

179 *Id.* at 48.

180 *Id.* at 46–47.

made detailed supervision, or control, unnecessary. Instead, [Couriers] retained all necessary control over the overall delivery operation.”<sup>181</sup>

As with Couriers, TNC drivers perform a service for their company. This service is an integral part of the TNC’s business; in fact, without the drivers, the TNC business model would fail. Additionally, the drivers could not operate an independent business without the TNC and the users are not the drivers’ customers, but rather the TNCs’ customers. Moreover, TNCs set the rate for fares and bills users directly. Finally, TNCs retain control over the relevant aspects necessary to complete the job (as did Couriers), more than just the necessary instruction to pick up the user from point A and take the user to point B.

## V. DEFINITIONS UNDER TEXAS LAW

The Texas Labor Code defines an employee as any “person in the service of another under a contract of hire, whether express or implied, or oral or written” and includes: 1) “an employee employed in the usual course and scope of the employer’s business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer’s business,” 2) persons “other than an independent contractor[s] or the employee[s],” and 3) “trainee[s].”<sup>182</sup> Under Texas common law, an independent contractor is any person

who, in the pursuit of an independent business or occupation, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in all its details, and representing the will of employer only as to the result of work and not as to the means by which it is accomplished.<sup>183</sup>

Further, under Texas common law, an employer is someone who controls not only the “end sought to be accomplished, but also means and details of its accomplishment.”<sup>184</sup> It is well established that if an independent contractor and his assistants are “subject to the control of [an employer] with respect to details and method of doing the work then he is an employee [not an independent contractor].”<sup>185</sup> However, the burden of proof is upon the claimant to prove that a worker is an employee.<sup>186</sup> “The supreme test in determining whether a worker is an employee or an independent contractor . . . is the test with respect to the right of control.”<sup>187</sup>

<sup>181</sup> *Id.*

<sup>182</sup> TEX. LAB. CODE ANN. § 401.012(a)–(b) (West, Westlaw through 2015 Reg. Sess.).

<sup>183</sup> C.B.L., *supra* note 11, at 1305; *see also* Hart v. Traders & Gen. Ins. Co., 185 S.W.2d 605, 607 (Tex. Civ. App. 1945), *aff’d*, 144 Tex. 146 (1945).

<sup>184</sup> Alvarado v. Old Republic Ins. Co., 951 S.W.2d 254, 259 (Tex. App. 1997).

<sup>185</sup> Halliburton v. Texas Indem. Ins. Co., 213 S.W.2d 677, 680 (Tex. 1948).

<sup>186</sup> Anchor Cas. Co. v. Hartsfield, 390 S.W.2d 469, 471 (Tex. 1965).

<sup>187</sup> *Halliburton*, 213 S.W.2d at 680. *Accord* Morgan v. Freeman, 715 F.2d 185, 188 (5th Cir. 1983) (applying the right-to-control test in establishing the master-servant relationship in a vicarious liability case); *and* S. G. Borello & Sons, Inc. v. Dept. of Indus. Rel., 769 P.2d 399, 409 (Cal. 1989). (demonstrating the right-to-control test as determinative in establishing an employer-employee relationship in a workmen’s compensation case and citing numerous other California jurisdictions

When there is a contract, Texas courts have looked for evidence to show that the employer explicitly retains control over not only the work sought to be accomplished but also the means by which it is accomplished.<sup>188</sup> Whether actual control is exercised is an evidentiary factor and moot, as the decisive factor is simply whether the employer has the right to control the means by which work is to be performed under the contract.<sup>189</sup> Further, whether a claim arises under a common-law doctrine or a worker's compensation claim, the same definition of employee is used, and the same control test applies for determining the relationship.<sup>190</sup>

Alternatively, when no contract exists, several Texas courts have used a five-part test to determine whether a worker is an independent contractor:<sup>191</sup>

- 1) [T]he independent nature of the worker's business; 2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; 3) the worker's right to control the progress of the work except as to the final results; 4) the time for which the worker is employed; and 5) the method of payment, whether by the hour, or by the job.<sup>192</sup>

Texas courts have held that the right to discharge an employee for unskillfulness, neglect of duty, or other (or even without) cause is a paramount right of an employer.<sup>193</sup> The fact that numerous Texas courts have held this right to discharge a worker without regard to final completion of a service strongly evidences the right to control.<sup>194</sup> Finally, if a contract should show that a worker is an independent contractor, it should also show that the employer relinquished its right to control.<sup>195</sup> Where it has not, then the relationship is that of an employer and employee.<sup>196</sup>

## VI. TEXAS CASE LAW ANALOGOUS TO TNC BUSINESS STRUCTURE

### A. RIGHT TO CONTROL IS THE SUPREME TEST

In *Halliburton v. Texas Indem. Ins. Co.*, the Texas Supreme Court reviewed a court of appeals decision that reversed an accident review board finding that Halliburton, an individual, was an employee of Kirby Lumber

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applying the same test in similar situations, such as worker's compensation and unemployment insurance law).

<sup>188</sup> See *Halliburton*, 213 S.W.2d at 680.

<sup>189</sup> *Farrell v. Greater Houston Transp. Co.*, 908 S.W.2d 1, 3 (Tex. App. 1991).

<sup>190</sup> *Alvarado v. Old Republic Ins. Co.*, 951 S.W.2d 254, 259 (Tex. App. 1997).

<sup>191</sup> See, e.g., *id.*; *INA of Texas v. Torres*, 808 S.W.2d 291, 293 (Tex. App. 1991).

<sup>192</sup> See *INA of Tex.*, 808 S.W.2d at 292.

<sup>193</sup> See, e.g., *Dempster Mill. Mfg. v. Lester*, 131 S.W.2d 254, 256 (Tex. Civ. App. 1939); *Gulf Ref. Co. v. Rogers*, 57 S.W.2d 183, 185 (Tex. Civ. App. 1933).

<sup>194</sup> *Liberty Mut. Ins., Inc. v. Boggs*, 66 S.W.2d 787, 792 (Tex. Civ. App. 1933) (citing ten Texas jurisdictions in accord). Moreover, jurisdictions across the country agree. See, e.g., *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014); *S. G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 769 P.2d 399, 404 (Cal. 1989).

<sup>195</sup> *Liberty Mut.*, 66 S.W.2d. at 793.

<sup>196</sup> *Id.*

Company (Kirby).<sup>197</sup> Texas Indemnity Company (Texas Indemnity), an insurance provider for Kirby, claimed that Halliburton was an independent contractor.<sup>198</sup> Kirby's supervisors directed Halliburton to gather a crew and load lumber onto a railcar. Halliburton provided a small crew of his own workers to help load the lumber. The record showed that during the task, Halliburton was subject to the order of the supervisors; the supervisors actually supervised the work, stopped the work when some task was not completed to Kirby's specifications, and reserved the right to fire Halliburton and any of his crew members if they did not comply with their, as Kirby called them, "suggestions."<sup>199</sup> Texas Indemnity contended that the suggestions regarding specifications were not orders; however, witnesses and workers on the site said that all suggestions were treated as orders and were rarely disobeyed.<sup>200</sup> Texas Indemnity further asserted that the relationship was that of an independent contractor because the workers were allowed to pick their own hours and provided their own materials to perform specific tasks.<sup>201</sup>

The Texas Supreme Court stated in *Halliburton* that the supreme test in determining whether a worker is an employee is the right to control.<sup>202</sup> The court further stated that if a worker performs a task according to his own methods and is not subject to another's orders regarding the details of the work to be performed, then he is an independent contractor.<sup>203</sup> The court must review the contract and all evidence presented to determine what the contract really intended.<sup>204</sup> The court noted that Kirby reserved the right to control the methods by which Halliburton performed his job.<sup>205</sup> Therefore, the court found that Halliburton was an employee of Kirby.<sup>206</sup>

As with Halliburton, a TNCs' drivers are subject to a number of controls, including, but not limited to, the following: 1) drivers must perform the request according to the user's direction, and a failure to provide services as requested may cause a driver to become liable for damages; 2) drivers must transport all users directly to their destinations without interruption or unauthorized stops; 3) drivers must provide the services in a "professional manner with due skill, care and diligence; and . . . maintain high standards of professionalism, service and courtesy;<sup>207</sup> and 4) TNCs reserve the right to hire, suspend, and terminate drivers for substandard performance.<sup>208</sup> However, TNCs claim the standards of performance, or guidelines, are suggestions and not orders.<sup>209</sup> If, however, a

197 *Halliburton v. Texas Indem. Ins. Co.*, 213 S.W.2d 677, 678 (Tex. 1948).

198 *Id.*

199 *Id.* at 679–80.

200 *Id.*

201 *Id.*

202 *Id.* at 680.

203 *Id.*

204 *Id.*

205 *Id.* at 680–81.

206 *Id.* at 681.

207 *See Uber Agreement*, *supra* note 37, at § 3.1.

208 *Id.* at §§ 3, 12.

209 *See, e.g., O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1150 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1079 (N.D. Cal. 2015).

user gives a driver a low rating then the driver's app will be turned off, effectively terminating, or suspending, the driver. So, it should be assumed (with reason) that the standards are much more than mere suggestions.

#### B. DECEPTIVE RELATIONSHIPS

In *Gulf Ref. Co. v. Rogers*, Gulf Refining Company (Gulf Refining) appealed a trial court's jury finding that a worker, Russell, was an employee of Gulf Refining.<sup>210</sup> Russell had signed a written contract wherein he was designated as an independent contractor of Gulf Refining.<sup>211</sup> Russell contracted to run a gasoline dispensary station on behalf of Gulf.<sup>212</sup> Russell was not allowed to sell other petroleum products on the site, but he was allowed to sell non-petroleum products, as long as he displayed a sign stating that said products were not associated with Gulf Refining's name.<sup>213</sup> However, Gulf Refining reserved the right to fix prices of the other goods.<sup>214</sup> The contract required Russell to assume responsibility for all damages assessed to the public.<sup>215</sup> The contract indicated that it could be terminated at any time by either party.<sup>216</sup> Furthermore, Gulf Refining required Russell to prepare operating reports, present bookkeeping records for inspection or audit at any time, and evaluate, discipline, and otherwise discharge employees who did not perform tasks to Gulf's standards.<sup>217</sup> On one occasion, Gulf Refining ordered Russell to discharge an employee who negligently sparked a fire while filling a vehicle with gasoline.<sup>218</sup>

The trial court's jury found that Russell was an employee of Gulf.<sup>219</sup> Moreover, the court found:

Even though the contract as originally entered into nominally created the relationship of employer and independent contractor, yet if such contract was a subterfuge, or if the employer thereafter assumed and actually exercised control over the means and methods by which the work was to be performed, the relation of master and servant existed . . . [and] [t]he written contract was apparently so drawn for the purpose of creating the apparent relationship of employer and independent contractor, and of avoiding liability for the negligence of the employees about the station; but the company was not satisfied to allow such relationship to exist. The evidence shows that it immediately assumed control, and proceeded to direct the method by which the work contracted for should be performed. By

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210 See *Gulf Ref. Co. v. Rogers*, 57 S.W.2d 183, 184 (Tex. Civ. App. 1933).

211 *Id.*

212 *Id.*

213 *Id.* at 184–85.

214 *Id.*

215 *Id.* at 185.

216 *Id.*

217 *Id.*

218 *Id.* at 184.

219 *Id.*

reserving the right to terminate the contract at will, it retained the means of compelling submission to its orders.<sup>220</sup>

Like the *Halliburton* court, the *Gulf Refining* court ruled that the most important aspect in determining whether a worker is an employee is whether the employer has the right to control the methods by which a task is accomplished.<sup>221</sup> The *Gulf Refining* court ruled that if a contract establishes an independent contractor relationship, yet the employer thereafter assumes “control over the means and methods by which the work [is] to be performed” then the relationship established is one of master-servant.<sup>222</sup> The court also found that by “reserving the right to terminate the contract at will, [Gulf Refining] retained the means of compelling submission to its orders.”<sup>223</sup> Finally, the court determined that the contract was an attempt to protect Gulf Refining from claims.<sup>224</sup>

As in the Gulf Refining case, TNCs 1) establish an owner-independent contractor relationship in the driver agreement; 2) retain the right to discharge workers who perform poorly, or fall below the average minimum rating in their area; 3) may terminate a driver with or without notice or reason; 4) require drivers to maintain a certain standard; and 5) reserve the right to fix or adjust the price of the transportation service.<sup>225</sup> Finally, it can be presumed that TNCs are also unwilling to maintain an employer-independent contractor relationship, as indicated by their immediate assumption and exercise of retained control.

### C. RELINQUISHMENT OF RIGHT TO CONTROL IS A REQUIRED CONTRACT PROVISION

In *Liberty Mut. Ins. Co. v. Boggs*, a Texas court of appeals reviewed a workman’s compensation board’s determination that Boggs, a pilot for and independent contractor of Curtis Wright Flying Service (Curtis), was an employee of Curtis.<sup>226</sup> Boggs was ordered by Bond, a manager of Curtis, to fly an airplane to a nearby city to attempt a sale to an interested buyer.<sup>227</sup> Prior to takeoff, Bond entered into an independent contractor agreement with Boggs.<sup>228</sup> Later, Bond ordered Boggs to return without executing the sale.<sup>229</sup> Boggs’s plane crashed on his return trip.<sup>230</sup> Upon his death, his estate was awarded workman’s compensation; Liberty Mutual appealed the decision.<sup>231</sup> The only contract with the pilot was an oral one.<sup>232</sup> In testimony, Bond stipulated that he rarely exercised control over the aspects

220 *Id.* at 185-86.

221 *Id.* at 185.

222 *Id.*

223 *Id.* at 186.

224 *Id.*

225 *See Uber Agreement*, supra note 37, at §§ 3, 4, 12, 13.

226 *See, Liberty Mut. Ins. Co. v. Boggs*, 66 S.W.2d 787, 788 (Tex. Civ. App. 1933).

227 *Id.* at 789.

228 *Id.*

229 *Id.* at 790.

230 *Id.* at 788.

231 *Id.* at 788.

232 *Id.*

of the pilot's job.<sup>233</sup> However, Bond admitted he "had the right to do anything" he wanted with the contractors and his airplanes, including hiring and firing the pilots.<sup>234</sup>

The *Liberty Mutual* court cited several rules of law and made several keen observations. First, the court ruled that if a worker provides services for another, he is presumed to be an employee, as a matter of law;<sup>235</sup> however, the presumption may be rebutted with evidence to the contrary.<sup>236</sup> Further, this presumption is strong, as it requires "the existence of every evidential fact tending to show the relationship to be that of an employee and the [absence] of evidence of any fact tending" to rebut it.<sup>237</sup> Generally, a contract may be used to rebut this presumption, but the terms of the contract must not reserve the right to control the means by which an independent contractor accomplishes any task and *must* explicitly relinquish an employer's right to control to the driver.<sup>238</sup> But if relinquishment is not a provision of the contract, then the "relation is that of employer and employee."<sup>239</sup> Second, if the provisions of the contract are controverted, or conflicting so that the relationship be misconstrued, then the issue becomes a mixed-question of law and fact, wherein evidential facts become crucial and will depend "upon the nature and number of the evidential facts, and whether they themselves are established conclusively by the evidence, or are in dispute."<sup>240</sup> Third, one evidential fact, if admitted or conclusively established by the evidence, is key to determining the relationship: the right to control.<sup>241</sup>

The court noted that no single fact could be more conclusive of the right to control than the right to discharge an employee because the "power to control would be the equivalent of the right to control, [and if true, then] the unrestricted power to stop the work or end the service short of the completion" implies full right to control a worker.<sup>242</sup> Further, the court noted that an independent contractor undertakes "to do a specific piece or quantity of work" and generally refers to a product not a service, lest it be an indefinite service.<sup>243</sup> Considering the facts, the court affirmed the board's finding that Boggs was an employee of Curtis.<sup>244</sup>

Similarly, Uber and Lyft drivers execute an independent contractor agreement with their drivers. Lyft's agreement does not relinquish control.<sup>245</sup> While Uber's agreement relinquishes control to the drivers, it contains a number of conflicting provisions.<sup>246</sup> In fact, Uber's contract

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233 *Id.* at 789.

234 *Id.*

235 *Id.* at 790–91.

236 *Id.*

237 *Id.* at 791.

238 *Id.*

239 *Id.*

240 *Id.* at 791–92.

241 *Id.* at 792.

242 *Id.*

243 *Id.*

244 *Id.* at 793.

245 See generally *Lyft Agreement*, *supra* note 55.

246 See *Uber Agreement*, *supra* note 37, at § 2.4.

contains some variation of the phrase “the [TNC] reserves [or retains] the right” to do something, in nine other provisions.<sup>247</sup> Further, TNCs do not “hire” their drivers to complete a specific work product, but rather to provide an indefinite service. Most telling, Uber’s contract reserves the right to discharge the drivers with or without cause.<sup>248</sup>

#### D. TAXI CAB LAW COMPARISON

In *Rodriquez v. Zavala*, the owner of Blue Top Taxi Company (Blue Top), Rodriguez, appealed a jury’s finding that Blue Top’s driver was negligent in a vehicle collision with a train causing personal injury to its two passengers.<sup>249</sup> Further, the trial court ruled as a matter of law that the driver was an employee of Blue Top rather than an independent contractor.<sup>250</sup> The driver was carrying two passengers as he approached a train crossing; failing to keep a proper lookout, he collided with the train which caused personal injury to two passengers.<sup>251</sup> The cab bore an emblem denoting association with Blue Top.<sup>252</sup> The driver owned the cab, “furnished his own insurance, and bore the automobile expenses.”<sup>253</sup> The driver paid Blue Top “thirty per cent of the fares, operated out of the company office, was dispatched by the company, was subject to control by the company with reference to the transportation of passengers, was on duty and on call for the taxi company when the accident occurred” and was transporting passengers who had placed a call to Blue Top for transportation.<sup>254</sup> Moreover, Blue Top’s owner testified that the driver worked out of his office and “works under my telephone.”<sup>255</sup> Finally, the driver did not pick his own hours, but rather was required to work a set number of hours at Blue Top’s direction.<sup>256</sup>

Blue Top’s owner alleged that the driver was an independent contractor because he owned his own car and bore all insurance and automobile expenses.<sup>257</sup> However, the court, noting that all facts were undisputed, ruled that “where the facts are undisputed and the evidence is reasonably susceptible of but a single inference, the question” of the employment relationship is one for the court.<sup>258</sup> Moreover, the court ruled that the “law of most jurisdictions with reference to taxicabs which dispatch a cab in response to a call by a member of the public, is that the owner of the company may not escape liability by a plea that the cab owner or driver was an independent contractor.”<sup>259</sup> Furthermore, the

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247 See *Uber Agreement*, *supra* note 37.

248 *Id.* at §12.2

249 *Rodriquez v. Zavala*, 279 S.W.2d 604, 605 (Tex. Civ. App. 1955).

250 *Id.* at 606.

251 *Id.* at 605–06.

252 *Id.* at 605.

253 *Id.*

254 *Id.* at 605–06.

255 *Id.* at 606.

256 *Id.*

257 *Id.*

258 *Id.* at 606–07.

259 *Id.* at 607.



[R]ule applies to and governs all persons to whom defendant furnished transportation, including the [passengers] and those who deal with [the cab company] as a corporation. Third parties who happen to own a cab and use it in the name of the company at the call of the company and under the colors of the company will be treated as the company.<sup>260</sup>

Likewise, a TNC's relationship with the driver is similar to that in *Rodriguez*. Drivers furnish their own car and insurance, and they bear their own automobile expenses. Drivers pay a percentage of the fares to the TNC, use the driver app instead of operating out of the company office, are dispatched by the TNC when a member of the public requests transportation, and are subject to control by the TNC with reference to the transportation of passengers. However, the drivers do not work a set schedule, save for the minimum one ride per month.<sup>261</sup> Nevertheless, as the court suggests, one small fact should not harm the inference.

## VII. DISCUSSION AND ATTENUATION OF A TNC'S ARGUMENT

The foregoing examination of a TNC's business structure, driver contract, and the relationship with its drivers shows that, despite a TNC's claims, it clearly reserves the right to control many aspects of a driver's job.<sup>262</sup> California and Texas courts would agree that the employment relationship should be established.

In California, the burden of proof is on the party attacking the employment relationship, the right to terminate may determine the right to control, and the question of employment status is a mixed question of law and fact. Further, California courts have held that statutory law regarding employment status is designed to protect the innocent party (i.e., the employee) with regard to social legislation (e.g., social welfare benefits such as unemployment insurance). Texas case law protects a different party (i.e., the innocent bystander (a tortfeasor's victim)). At any rate, California is said to provide more protections for its employees than Texas.<sup>263</sup>

In Texas, the right to control is the supreme factor that establishes an employer-employee relationship. If an employer reserves the right to control the methods by which an alleged independent contractor performs the job functions, the driver is not an independent contractor, but rather an employee. Furthermore, an employer who compels an independent contractor's obedience by threat of termination demonstrates the ultimate right to control. Because a TNC reserves the right to terminate drivers with substandard performance, it demonstrates the ultimate right to control, thus establishing the employer-employee relationship. However, since the contract's provisions conflict, and TNCs continue to hold their drivers as independent contractors, the decision will ultimately be handed to a jury. Where the facts surrounding the status of an employee are controverted, it

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<sup>260</sup> *Id.*

<sup>261</sup> *See Uber Agreement, supra* note 37, at § 2.1.

<sup>262</sup> *Id.* at §§ 3, 4, 12, 13.

<sup>263</sup> *See Narayan v. EGL, Inc.*, 616 F.3d 895, 899–900 (9th Cir. 2010).

is ultimately up to the fact-finder to determine the relationship.<sup>264</sup> In effect, the judge hands the jury “a square peg and [asks them] to choose between two round holes.”<sup>265</sup>

It is nearly impossible to predict a jury’s decision. When considering the likelihood of a fact-finder’s decision, one should consider numerous factors. First, and perhaps most important, courts have established the employer-employee relationship when it is evident that the contract was intended as a subterfuge.<sup>266</sup> Texas case law has held that a taxicab company “which dispatch[es] a cab in response to a call by a member of the public” cannot escape liability by simply stating that the cab owner, or driver, is an independent contractor.<sup>267</sup> Texas courts have called this a *mere sham or a cloak designed to conceal the true legal relationship between the parties*.<sup>268</sup> California courts agree that the “label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.”<sup>269</sup> Further, the Fifth<sup>270</sup> and Ninth<sup>271</sup> Circuits agree. Companies must be satisfied with their election of an independent-contractor relationship and must not assume control.

Finally, no one fact is decisive in determining the right to control.<sup>272</sup> Because, no one fact is decisive, juries have a tremendous amount of leeway; it would not be surprising for one jury to reach a determination contrary to another jury’s determination. Nevertheless, when the dispute as to whether drivers are employees cannot be determined as a matter of law, a case must be submitted to a fact-finder.<sup>273</sup> With the current facts, it cannot be foretold whether a reasonable jury would determine that drivers are employees of TNCs in all cases. However, it can be predicted that a reasonable jury would find that TNCs reserve the right to control the methods by which drivers perform their jobs.

At any rate, Uber’s driver agreement is effectively an attempt to subvert common-law theories surrounding the master-servant relationship. In its agreement, Uber relinquishes control, but later retains control over important aspects of the drivers’ jobs; in fact, the agreement continually contradicts itself. For example, in the preamble, the driver acknowledges that the “[TNC] does not provide transportation services,” yet in section 5.1, Uber requires the driver to acknowledge that the purpose of the app is

264 See, e.g., *Liberty Mut. Ins. Co. v. Boggs*, 66 S.W.2d 787, 788 (Tex. Civ. App. 1933); *Halliburton v. Texas Indem. Ins. Co.*, 213 S.W.2d 677, 681 (Tex. 1948).

265 *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

266 See, e.g., *JKH Enters, Inc., v. Dep’t of Indus. Rel.*, 48 Cal. Rptr. 3d 563, 580–81 (Cal. Ct. App. 2006); *Gulf Ref. Co. v. Rogers*, 57 S.W.2d 183, 185–86; see also *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 592 (Tex. 1964).

267 See *Rodriguez v. Zavala*, 279 S.W.2d 604, 606 (Tex. Civ. App. 1955) (citing *Economy Cabs, Inc. v. Kirkland*, 174 So. 222 (Fla. 1937); *accord Callas v. Indep. Taxi Owners’ Ass’n*, 66 F.2d 192 (D.C. Cir. 1933).

268 *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 591 (Tex. 1964) [emphasis added].

269 See *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Rel.*, 769 P.2d 399, 403 (Cal. 1989).

270 See *Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 258 F.3d 345, 350 (5th. Cir. 2001).

271 See *Narayan v. EGL, Inc.*, 616 F.3d 895, 904 (9th Cir. 2010).

272 See *Liberty Mut. Ins. Co. v. Boggs*, 66 S.W.2d 787, 791 (Tex. Civ. App. 1933).

273 See *Halliburton v. Texas Indem. Ins. Co.*, 213 S.W.2d 677, 681 (Tex. 1948).

to provide transportation services.<sup>274</sup> Perhaps another issue here is that independent contractors are usually hired to perform specific tasks on a short-term basis and are usually released following the completion of the task, but here, drivers are “hired” for an indefinite period of time. Certainly, this purports to be an employer-employee relationship.

One of the first principles law students are taught in law school is that for every wrong, the law provides a remedy.<sup>275</sup> “If the law is to be circumvented by litigants . . . then [students] were taught a futile lesson. [Businesses] should not be permitted to parade under a flag of truce . . . and then raise the black flag when called on to make restitution for damage perpetrated.”<sup>276</sup>

In summation, in California, if the employer 1) retains the right to control the worker, 2) attempts to deceive about the actual employment relationship, or 3) uses a worker as an integral part of the business, then the employer-employee relationship can be created. As in California, in Texas, if the employer 1) retains the right to control the worker or 2) attempts to deceive about the actual employment relationship then the relationship is that of an employer and employee. In the second place, in Texas, employers must relinquish control in the employment contract; where they do not, the relationship is that of an employer and employee. However, Texas does not maintain this worker as the central, integral, or core part of the business doctrine. This doctrine distinguishes Texas decisions from California decisions.

#### VIII. THE IMPLICATIONS OF ESTABLISHING THE EMPLOYER-EMPLOYEE RELATIONSHIP

It has been mentioned that a few state’s labor agencies have made TNC driver employment status determinations. The California Department of Labor determined that an Uber driver was, in fact, an employee and entitled to back wages and expenses.<sup>277</sup> The Oregon Department of Labor released an opinion stating that ride-sharing drivers were employees, not independent contractors.<sup>278</sup> The Florida Department of Economic Opportunity determined a Lyft driver was an employee, not an independent contractor; however, the panel later reversed its decision upon reconsideration.<sup>279</sup> A court ruling in support of TNC drivers will have far-reaching implications, with potential to 1) correct a social injustice by providing federal and state benefits to the drivers that are available to other employees, 2) pave the way to allow reparations when a TNCs drivers commit tortious acts, and 3) destroy the app-based service business model.

Following the California agency’s decision, a class-action suit was filed in California federal court. Other state agencies, following the first few

274 See *Uber Agreement*, *supra* note 37, at preamble, § 5.1.

275 *Rodriquez v. Zavala*, 279 S.W.2d 604, 607 (Tex. Civ. App. 1955).

276 *Id.*

277 See *supra* text accompanying notes 84-89.

278 See *supra* text accompanying notes 90-93.

279 See *supra* text accompanying notes 94-101.

examples, may issue official opinions regarding TNCs' driver employment status, opening the flood gates for drivers nationwide to make their own claims with their labor departments. Potentially, the flood of claims could inundate state agencies, creating a backlog of claims that may take many years to resolve. Further, if courts rule in favor of drivers, effectively restoring the employer-employee relationship, then TNC drivers will gain access to federal and state employee protections allowing other drivers to stake similar claims, whether it is a court's decision (as a matter of law), or a jury's verdict (as a matter of fact) declaring TNC drivers to be employees. Nevertheless, juries are imperfect. As such, they may render inconsistent decisions, undeniably creating the likelihood that these cases will crowd court dockets for years to come.

If a court restores the employer-employee relationships between TNCs and their drivers, and if a driver injures a third party,<sup>280</sup> such as a pedestrian, or another driver (and his passengers) in a vehicle, on the public roadway, then a court may allow these parties to recover damages from TNCs under the master-servant or *respondeat superior* common law theories.

Additional problems these decisions create include, but are not limited to: 1) depressive effect on app developers, 2) increased costs of doing business, 3) exposure to employment-discrimination law, and 4) preemptive effects on app-based-services, specifically, app-based-services with similar business models. A few examples of these apps include 1) Instacart,<sup>281</sup> a company that operates a network of shoppers and drivers who deliver grocery items;<sup>282</sup> 2) bitesquad, a California based company that operates a nationwide network of couriers who deliver food;<sup>283</sup> and 3) Postmates, a company that operates a nationwide network of couriers who deliver various goods.<sup>284</sup> Finally, Uber recently tested a goods-delivery service in a few U.S. markets and plans to expand to ten large U.S. cities, including Austin, Texas, and Los Angeles, California.<sup>285</sup> If Uber's drivers stake successful labor-department claims against Uber under this new business structure, then one may predict that drivers for similar courier services will likely do the same.

The employee claims, and any torts claims by third parties, may cost TNCs hundreds of millions of dollars to litigate or settle. Additionally, a large TNC, such as Uber, which has more than 160,000 drivers in the U.S.

<sup>280</sup> See, *supra* note 5 and accompanying text.

<sup>281</sup> But, similar cases should not rise to class-action status if courts adopt a recent New York federal court's decision to enforce Instacart's arbitration clause. See, e.g., *Moton v. Maplebear Inc., d/b/a Instacart*, No. 15 Civ. 8879 (CM), 2016 WL 616343, at \*9 (S.D.N.Y. Feb. 9, 2016); see also *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 944-47 (N.D. Cal. 2015).

<sup>282</sup> *What is Instacart?*, INSTACART, <https://www.instacart.com/help/section/200758544#204426950> (last visited Sept. 19, 2016).

<sup>283</sup> *Frequently Asked Questions*, BITESQUAD, <http://www.bitesquad.com/faq> (last visited Sept. 19, 2016).

<sup>284</sup> *About Postmates*, POSTMATES, <https://postmates.com/about> (last visited Sept. 19, 2016).

<sup>285</sup> Seth Fiegerman, *Uber Launches New App to Bring Food to Your Door*, MASHABLE (Jan. 21, 2016, 6:18:21 PM), <http://mashable.com/2016/01/21/uber-eats-expansion/#xbtM1kdVP8qJ>.

alone,<sup>286</sup> may survive the economic impact of such a decision,<sup>287</sup> but such decisions may cause insuperable economic problems for smaller TNCs, such as Lyft<sup>288</sup> or Sidecar,<sup>289</sup> that control a tiny corner of the ride-sourcing market. What is more, it could even cripple the ride-sourcing industry. In conclusion, these worker misclassification suits have the potential to destroy the app-based-services business model, pave the way to allow reparations when a TNCs drivers commit tortious acts, and correct a social injustice by providing employment protections for TNC drivers.

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286 Emily Badger, *Now We Know How Many Drivers Uber Has—And Have a Better Idea of What They're Making*, WASH. POST (Jan. 22, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/01/22/now-we-know-many-drivers-uber-has-and-how-much-money-theyre-making%E2%80%8B/>.

287 At last valuation, Uber had an estimated worth of \$50 billion. *Shontell*, *supra* note 4.

288 At last valuation, Lyft had an estimated worth of \$2 billion. Beth Jinks, *Icahn Says Lyft Worth More Than \$2 Billion Based on Uber Value*, BLOOMBERG (May 19, 2015, 1:12 AM), <http://www.bloomberg.com/news/articles/2015-05-19/icahn-says-lyft-worth-more-than-2-billion-based-on-uber-value>.

289 Although, this is moot, Sidecar shut down on December 31, 2015. Ken Yeung, *Sidecar, once an Uber and Lyft Competitor, Is Shutting Down on December 31*, VENTURE BEAT (Dec. 29, 2015, 11:36 AM), <http://venturebeat.com/2015/12/29/sidecar-once-an-uber-and-lyft-competitor-is-shutting-down-on-december-31/>.

