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Is Your Uber Driver or Lyfter an Employee or Independent Contractor and Why Does it Matter?

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Major sharing economy players Uber and Lyft have been in a series of legal battles regarding whether their drivers are employees or independent contractors. This article discusses the legal significance of employee and independent contractor designations, applies these employment categories to recent employment cases involving Uber and Lyft, and discusses possible legislative solutions that have been presented to address issues that have arisen based on the "gig" economy and widespread use of independent contractors to provide rides and other jobs.

I. WHAT IS THE ON-DEMAND WORKFORCE AND HOW IS AN EMPLOYMENT CLASSIFICATION DETERMINED?

There has been continued disagreement among legal scholars, economists, courts, and agencies regarding whether on-demand workers should be classified as employees or contractors. While sharing economy companies began as an attempt to disrupt the traditional taxi business model, they have also inadvertently created discrepancies within transportation regulation.

Uber, regarded as a sharing economy marketplace giant, and its closest counterpart, Lyft, became popular due to their simplified approach to ride hailing. These ridesharing companies use smartphone applications ("apps") that streamlined traditional taxi calling and payment methods with an easy user interface. Their novel business models attracted many customers and between 13 to 15 million Americans used a ride sharing service by the end of 2016. 7Park Data report on ride sharing. http://www.marketwatch.com/story/7park-data-releases-definitive-ridesharing-intelligence-report-2016-10-12-816020.

Uber and Lyft's success is also due to the labor practices they use for managing their drivers. Both companies classify and contract with drivers as independent contractors. In Uber's employment contract with drivers, called a "software license and online services agreement," drivers are never referred to as employees. Petition of Uber Technologies, Inc. for Permission to Appeal Pursuant to Rule 23(F), *O'Connor v. Uber Technologies, Inc.,* No. 3:13-cv-03826-EMC (9th Cir. Dec. 23, 2015) (No. 15-80220). Instead of "firing" drivers, Uber uses the term "deactivation." The contract also carefully removes any responsibility the company has for driver's interactions with customers. Categorizing drivers as independent contractors means that Uber and Lyft have been able to cut costs since independent contractors do not have the same regulatory requirements as employees such as employee benefits or guaranteed hourly wages.

Drivers have argued against ridesharing companies, stating that they are employees, not independent contractors. The different perspectives between drivers and companies has resulted in a steady stream of lawsuits against Uber and Lyft. According to some commentators, proper regulatory controls of sharing platforms are becoming increasingly more important as the market expands exponentially.

II. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

There has been difficulty categorizing ridesharing drivers as employees or independent contractors in part because of the different statutes and tests that can be applied.

The National Labor Relations Act (NLRA) gives employees statutory protections such as collective bargaining rights. The National Labor Relations Board uses the common law test for determining who is an employee under federal labor law. The eleven non-exclusive factors considered are stated in Section 220 of the Restatement (Second) of Agency. Recently, courts have also focused on the entrepreneurial opportunity factor in determining that an individual is an independent contractor. See *FedEx Home Delivery v. NLRB,* 563 F.3d 492 (D.C. Cir. 2009).

The Fair Labor Standards Act (FLSA) defines "employee" as "any individual employed by an employer." 29 USC § 203(c)(1). The test accompanying this statute is the "economic realities" test, which determines the level of economic dependence the worker has in a relationship with the employer. The test consists of six factors to consider in determining whether an individual is an employee:

> (1) The degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in business; (4) the permanence of working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which work is integral part of the alleged employer's business.

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Under the FLSA, employees are guaranteed a minimum wage, overtime pay, and a means of recovery if the employer violates the FLSA.

Less often used by courts in determining whether an individual is an employee is the Internal Revenue Code. The Internal Revenue Code requires employers to withhold taxes and pay employment taxes on behalf of employees. The Internal Revenue Service uses the common law rules for determining employee status. The IRS also issued Revenue Ruling 87-41, which lists twenty factors to be considered when classifying a worker as an employee. Rev. Rul. 87-41, 1987-1 C.B. 296.

Other statutes provide further protection for employees. Employees are protected from racial discrimination under Title VII of the Civil Rights Act. They are protected from age discrimination and disability discrimination under the ADEA. Employees are also entitled to paid leave and payments under the Social Security Act. Nicholas L. Debruyne, *Uber Drivers: A Disputed Employment Relationship In Light Of The Sharing Economy*, 92 Chi.-Kent L. Rev. 289, 290 (2017).

In contrast, these statutes do not extend protections to independent contractors. Instead, independent contractors have bargaining power to negotiate a rate for the use of a special skill. An independent contractor also serves multiple clients, performs discrete tasks for limited time periods, and exercises great discretion over the way the work is actually done. *Cotter v. Lyft, Inc.,* 60 F. Supp. 3d 1067, 1069 (N.D. Cal., Mar. 11, 2015).

Determining the employment status of rideshare drivers is important since employees are entitled to more statutory rights and protections than independent contractors. However, due to the numerous tests and statutes, courts have returned different decisions.

III. LITIGATION RELATED TO EMPLOYMENT CLASSIFICATION AS AN EMPLOYEE OR INDEPENDENT CONTRACTOR

Lyft and Uber (more so) have faced extensive litigation regarding the employment status of their drivers. The following cases illustrate the challenging issues courts have wrestled with in categorizing drivers as employees or independent contractors.

In *Berwick v. Uber Technologies, Inc.*, the California Labor Commissioner ruled that the Uber drivers bringing the class action were employees and not independent contractors. Berwick v Uber Technologies, no. 11-46739 EK, 2015 WL 4153765 (Cal. Dept. Lab. June 3, 2015). The Commissioner relied on California precedent by applying the *Borello* test. Similar to the FLSA, the *Borello* test applies a number of factors to determine the employment relationship, focusing on the "right to control" factor. S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello), 48 Cal. 3d 341, 350 (1989). Uber argued it was a neutral technological platform and retained little to no control.

The *Berwick* Court did not agree, finding Uber was involved in virtually every aspect of the operation. Uber conducted driver background checks, set the rate of driver compensation, controlled the tools the drivers used, and monitored drivers' performance through customer reviews. *Berwick* held the work being done by the drivers was integral to the regular business of Uber. *Berwick* was the first California decision to hold Uber misclassified drivers as independent contractors.

The question of whether Uber drivers were independent contractors appeared again in O'Connor v. Uber Technologies, Inc., 82 F.Supp.3d 1133 (N.D.Cal. 2015). Plaintiffs filed a class action lawsuit on behalf of a nationwide class of Uber drivers. They claimed they were employees and Uber had improperly categorized them as independent contractors to lower labor costs. By calling them independent contractors, Uber allegedly denied drivers tips and expense reimbursement. The United States District Court for the Northern District of California applied the *Borello* test, which had been used in *Berwick*.

O'Connor denied Uber's motion for summary judgment, finding disputed facts regarding how much control Uber had over its drivers. The strongest evidence of a "right to control" is the ability to fire employees. It was unclear whether Uber had the ability to fire drivers. Whether Uber controlled the "manner and means" (e.g., the cars) of the transportation services was also disputed. The parties disagreed on whether Uber enforced the Uber Driver Handbook "suggestions." It was also unclear whether the star rating system was considered "monitoring."

In *O'Connor,* while the lawsuit has been certified as a class action and the Ninth Circuit (on appeal from the district court's denial of summary judgment) held the case would go to jury trial, Uber attempted to reach settlement. In the $100 million proposed settlement, Uber would keep its business model such that drivers are "partners" with the flexibility to make their own schedules, but lacking access to traditional benefits like health care. The district judge rejected Uber's settlement agreement, ruling that it was not fair, adequate or reasonable. The court stated that the deal clearly favored Uber and it also failed to properly classify the drivers.

Both Uber and lead plaintiff Douglas O'Connor have filed six appeals (pending) of the lower court rulings.

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In contrast, the Florida Department of Economic Opportunity (DEO) found that two ex-Uber drivers were independent contractors and not eligible for Reemployment Assistance benefits. In *Rasier, LLC v. Florida Department of Economic Opportunity*, the Department of Revenue had originally found that that the drivers were employees. *Rasier, LLC v. Fla. Dep't of Econ. Opportunity,* No 0026282490-02. Rasier, LLC, Uber's Florida wholly owned subsidiary, appealed the decision. The DEO, in deciding that drivers were independent contractors, considered the driver's agency. The DEO found that drivers have substantial control over how long they use the app, when they use it, and whether they use it at all. The order categorizes Uber as a middleman or broker for technological services, not an employer.

While Uber has faced the brunt of the litigation against ridesharing companies, Lyft was also involved in a lawsuit brought by former drivers. In *Cotter v. Lyft, Inc.*, Lyft drivers in California argued they were employees and entitled to reimbursement for expenses such as gasoline and vehicle maintenance. The district court judge denied summary judgement to both Lyft and the drivers, holding determination of the employment class cation status was more appropriate for a jury. The court rejected Lyft's argument it is merely a technology company. *Cotter* found Lyft's active marketing as an on-demand ride service gives drivers detailed instructions, and actively seeks out customers.

The district court in *Cotter* approved a $27 million settlement between Lyft and the drivers in March 2017. Originally, Lyft had proposed a settlement offer of $12.25 million, but this was rejected by the court as unreasonable. The court took into account Lyft's rapid growth and the more than doubling of miles driven by Lyft operators since the claim was brought. The settlement agreement keeps Lyft drivers as independent contractors, but does provide some additional protection to its drivers. Under the agreement, drivers can earn bonuses and can only be dropped for a predetermined reason.

IV. POSSIBLE LEGISLATIVE SOLUTIONS

Some economic experts attribute the disagreement between courts regarding ridesharing employee status to the fact that classification tests are outdated and do not properly evaluate these companies. To fix this, one proposal is for courts to implement a simpler two-prong test. Grant E. Brown, Commentary, An Uberdilemma: Employees And Independent Contractors In The Sharing Economy, 75 MD. L. REV. Endnotes 15, 35 (2016). The first prong would be whether the worker can improve his or her economic opportunity through managerial skills. The second addresses whether the worker's services are integral to the employer's business.

Another solution is to create a third, hybrid employment category. Some argue that courts have disjointed decisions about ridesharing drivers because drivers are neither independent contractors nor employees. One proposed third category calls workers "dependent contractors." Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 11, 37-40 (2016), http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1431&context=jolt. Borrowing heavily from the FLSA factors, a "dependent contractor" is someone who brings services integral to the employer's business, works subject to both their own criteria and the employer's criteria, and performs activities autonomously. A "dependent contractor" is also paid based on the quality and quantity of work performed.

Other economists suggest creating a third employment category called the "independent worker." SETH D. HARRIS AND ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 13 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf. Independent workers would have few benefits, like independent contractors, but would have some ability to organize and bargain collectively. The economists argue that a third category is necessary because ridesharing work is incompatible with pay laws that measure work with a clock. Even though the app is running, drivers may not be engaged with customers all the time.

Detractors of creating a third employment category fear that additional categories would create further confusion in exchange for meager labor protections. At the 2015 White House's Summit on Worker Voice, President Obama cautioned against creating a third category. He stated that the resulting class of workers would receive a "a watered-down version of the protections and rights that a union provides."

V. ACTUAL IMPLEMENTATION

Some states have begun to address this issue through legislation. North Carolina, Arkansas, and Indiana passed laws requiring ridesharing drivers to be classified as independent contractors.

Other states and cities have shied away from picking a side between the drivers and transportation network companies ("TNC"), such as Uber and Lyft, instead proposing legislation offering drivers limited benefits.

In December 2015, Seattle passed an ordinance allowing Uber drivers to unionize. Under the ordinance, TNCs must provide the city with a list of drivers. The city then gave Teamsters Local 117 permission to begin organizing the

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drivers. According to some drivers, a union would allow them to collectively bargain over issues such as better pay. The ordinance also states eligibility requirements for drivers who get to vote on issues. The U.S. Chamber of Commerce and some Lyft and Uber drivers have already filed lawsuits challenging the ordinance. They allege the ordinance violates numerous federal laws, including the fact that independent contractors do not have the right to unionize.

Lawmakers in New York have also partnered with startups to draft a bill that gives independent contractors some employee benefits. Backed by Handy, an on-demand app that provides home services such as clean up and repairs, the bill would allow sharing economy employers to continue to treat workers as independent contractors. The bill attempts to create a compromise with workers by also allowing companies to contribute a portion of their revenue to "portable benefits." "Portable benefits" are funds such as paid sick leave that would follow workers even if they switched jobs. Many sharing economy companies support the bill, which will be introduced by New York State Senator Diane Savino.

The TNC's independent contractor policy illustrates a growing trend of companies using independent contractors, which avoid workplace regulations and reduce payroll based operations cost. Uber and Lyft, companies at the forefront of innovation, have generally focused on expanding first and forcing the government to catch up with new regulations. Even now that sharing economy business models have become prevalent, the classification of workers is still unclear and will remain an important issue for the foreseeable future.

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