

May 2017

Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the "On-Demand Economy"

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Recommended Citation

Andre Andoyan, *Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the "On-Demand Economy"*, 47 Golden Gate U. L. Rev. 153 (2017).
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COMMENT

INDEPENDENT CONTRACTOR OR EMPLOYEE: I’M UBER CONFUSED! WHY CALIFORNIA SHOULD CREATE AN EXCEPTION FOR UBER DRIVERS AND THE “ON-DEMAND ECONOMY”

ANDRE ANDOYAN*

“Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening.”¹

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¹ Tom Goodwin, The Battle for the Customer Interface, TECHCRUNCH (Mar. 3, 2015), http://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/#.1jwqqx:0sCd.

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INTRODUCTION

Unicorns, mythical creatures typically found in fairytales, fantasy novels, and now, San Francisco. “Unicorn” is a term used to refer to private companies valued at \$1 billion or more.² Uber is currently at the top of this list, meaning it is the highest valued unicorn company.³ Uber was created on a snowy night in Paris when two technology entrepreneurs, out in the cold, could not get a taxicab.⁴ Having recently sold their latest entrepreneurial ventures, both vowed to solve their problem with a simple idea: push a button to get a car.⁵ One entrepreneur was Garret Camp, the creator of StumbleUpon, a website discovery engine.⁶ The other was Travis Kalanick, the current CEO of Uber.⁷

Uber, the application that delivers a driver to you in minutes to take you to your destination, has taken society by storm.⁸ But Uber has also caused an uproar over issues involving whether it can operate in an area, and if so, how it should be regulated and behave.⁹ One issue that stands

² *The Unicorn List*, FORTUNE, <http://fortune.com/unicorns> (last visited Mar. 8, 2017).

³ *Id.*

⁴ Kara Swisher, *Man and Uber Man*, VANITY FAIR (Nov. 5, 2014, 12:00 AM), <http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy>.

⁵ *Id.*

⁶ *Id.*

⁷ *The Unicorn List*, *supra* note 2.

⁸ *How Uber Works*, UBER, <https://www.uber.com/ride/how-uber-works> (last visited Mar. 8, 2017).

⁹ *Uber Regulation: US Cities that Have Successfully Stood Up to Uber*, WHO’S DRIVING YOU? (July 19, 2015), <http://www.whosdrivingyou.org/blog/us-cities-stood-up-regulate-uber>.

out in particular is the debate over its drivers' employment classification.¹⁰

Uber provides services in a new economy that has been called many different names: "Collaborative Consumption," the "Sharing Economy," the "On-Demand Economy," the "Gig Economy," and "Gig Work."¹¹ It is important to take a moment to explain the differences in these terms. "Sharing Economy" and "Collaborative Consumption" both refer to the same thing: a peer-to-peer network that facilitates the sharing of resources that would not otherwise be consumed alone.¹² A good example of this is carpooling; two or more people decide to share a ride to the same location in order to save resources.¹³ Uber does not fall into this category because it does not help users share rides with people who want to go to the same place together. Rather, Uber provides rides to those who are seeking them and connects them with a driver. This characteristic places it into the "On-Demand Economy."

"On-Demand Economy" is an umbrella term used to cover many different types of services.¹⁴ "Gig Work" falls under this greater "On-Demand Economy."¹⁵ Uber is part of the "Gig Work" subsection of the "On-Demand Economy."¹⁶ This is because Uber connects the consumer (people seeking rides) with drivers who are willing to provide these rides.¹⁷ While Uber does not promise that there will be a driver, it provides the option to consumers in the area where it is operating.¹⁸

Commonly, "Gig Work" companies like Uber, Lyft, and Handy, classify their workers as independent contractors rather than employees.¹⁹ An independent contractor has the freedom to decide how and

¹⁰ James Surowiecki, *Gigs with Benefits*, THE NEW YORKER (July 6, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>.

¹¹ Jessica L. Hubley, *Online Consent and the On-Demand Economy: An Approach for the Millennial Circumstance*, 8 HASTINGS SCI. & TECH. L.J. 1, 4-6 (2016) (showing the classifications of different types of web-based business models); Caleb Holloway, Comment, *Keeping Freedom in Freelance: It's Time for Gig Firms & Gig Workers to Update Their Relationship Status*, 16 WAKE FOREST J. OF BUS. & INTELL. PROP. L. 299, 303 (2016) (explaining the difference between "Gig Work" and "Sharing Economy").

¹² *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>; Holloway, *supra* note 11.

¹³ Holloway, *supra* note 11.

¹⁴ Hubley, *supra* note 11, at 5-6 (describing four separate categories of the On-Demand Economy: "Marketplace," "Contract Marketplace," "Gig Platform," and "Service Platform;" classifying Uber as part of the "Gig Platform").

¹⁵ *Id.*

¹⁶ See e.g. Holloway, *supra* note 11 (classifying Uber as a "Gig Work" company).

¹⁷ *How Uber Works*, *supra* note 8.

¹⁸ Hubley, *supra* note 11, at 6.

¹⁹ UBER TECHNOLOGIES, INC., U.S. TERMS OF USE ¶ 6, <https://www.uber.com/legal/terms/us> (last updated Nov. 21, 2016); LYFT, INC., LYFT TERMS OF SERVICE ¶ 19, <https://www.lyft.com/terms>

when to do the work they provide to the employer.²⁰ In comparison, an employee is under the control of the employer, and the employer controls when and how something will be done.²¹ For companies like Uber, Lyft, and Handy, the initial choice is an economic one because independent contractors pay for most of their own expenses.²² Each of these companies promotes itself as a technological bridge between providers and consumers. It is the workers' employment classification, however, that has shed new light on an issue that has been debated in the law for years: *are these workers independent contractors or employees?*

Classifying drivers as employees would economically pressure Uber to eliminate much of the current flexibility that many drivers appreciate. Uber drivers, like other independent contractors, often enjoy the freedom that comes with being their own boss. However, current law may not support being one's own boss within the confines of being classified as employees. Consequently, if Uber drivers were found to be employees, the cost to Uber would increase and pressure Uber to limit the drivers' ability to set their own schedules. It is a poor outcome for both parties. While others have stated that Uber's business model does not fit the traditional classifications of employee or independent contractor, this comment proposes that in order to solve this dilemma, the California legislature should create an exception for Uber and other "On-Demand Economy" companies. This exception should reflect the reality of this new worker relationship, where new needs and demands come from both parties.

Part I of this comment details California employment law, how it has been applied to Uber, and how Uber, along with other "On-Demand Economy" companies, are different than other companies. Part II presents the current legal issues in worker classification. Part II also proposes the exception that should apply to Uber drivers and discusses why Uber, and other "On-Demand Economy" companies, should be entitled to this exception, including the practical problems with an employment classification for Uber. Part III concludes that changing our worker-clas-

(last updated Sep. 30, 2016); HANDY TECHNOLOGIES, INC., SERVICE PROFESSIONAL AGREEMENT ¶ 1.1, https://www.handy.com/pro_terms (last updated Feb. 10, 2017).

²⁰ Cal. Lab. Code § 3353; *see also Independent Contractor Defined*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> (last updated July 7, 2016).

²¹ *Employee (Common-Law Employee)*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee> (last updated Oct. 4, 2016).

²² Jennn Fusion, *Cost of an Employee Vs. Independent Contractor*, HOUS. CHRON., <http://smallbusiness.chron.com/costs-employee-vs-independent-contractor-1077.html> (last visited Mar. 8, 2017).

sification laws is a compromise that will benefit drivers, Uber, and reflect the changes in our society.

I. BACKGROUND

A. CALIFORNIA EMPLOYMENT COMMON LAW: THE “RIGHT-TO-CONTROL” TEST AND *BORELLO* FACTORS

Historically, employment law originated from tort law when consumers sought liability for injuries caused by employees.²³ Liability fell on the employer when there was control over the act that caused the injury or when there was a failure to supervise the employee.²⁴ The law has since evolved to protect employees and ensure that they are earning a livable wage.²⁵ However, the control factor that was used to determine liability is currently still a major factor in determining whether someone is an employee. This has become the focal point of litigation in California: is there enough control exerted over a worker that he or she should be considered an employee?²⁶

California courts determine whether a worker is an employee or independent contractor through applying the Right-to-Control Test.²⁷ The Right-to-Control Test determines whether the person carrying out the services has “the right to control the manner and means of accomplishing the result desired.”²⁸ However, control can be difficult to apply both strictly and in isolation because there can be an endless variety of work arrangements.²⁹ Thus, the court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* laid out secondary factors that include: (a) the level of distinction of the work; (b) whether the worker completes the work individually or under supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time they have to complete the work; (f) the method of payment, whether by time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-em-

²³ *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations (Borello)*, 769 P.2d 399, 403 (Cal. 1989); Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs Into Round Holes*, 31 ABA J. LAB. & EMP. L.J. 53, 53 (2015).

²⁴ Sprague, *supra* note 23, at 59.

²⁵ *Id.* at 53.

²⁶ *Id.*

²⁷ *Alexander v. FedEx Ground Package Sys., Inc. (Alexander)*, 765 F.3d 981, 988 (9th Cir. 2014); *Borello*, 769 P.2d at 404.

²⁸ *Borello*, 769 P.2d at 404.

²⁹ *Id.*

ployee.³⁰ A court will use these factors to determine whether a worker is an independent contractor or employee.³¹ There is also a presumption against employers to show that a worker is an independent contractor and not an employee.³² California law is silent on how to classify gig workers. This may be because the law never considered that this type of working arrangement would arise, which may explain why the current laws are inadequate to deal with this type of working arrangement.

B. CASE EXAMPLE OF THE “RIGHT-TO-CONTROL” TEST: *ALEXANDER V. FEDEX GROUND PACKAGE SYSTEM, INC.*

The court applied the “Right-to-Control” Test and *Borello* factors in a case similar to Uber, *Alexander v. FedEx Ground Package System, Inc.* In that case, a class of about 2,300 full-time delivery drivers for FedEx in California sued FedEx for misclassification as independent contractors, instead of employees.³³ The Ninth Circuit found that FedEx drivers were employees under California’s Right-to-Control Test.³⁴

The court looked at the extent of control FedEx had over drivers’ appearances.³⁵ First, the court found that FedEx, “can and does control the appearance of its drivers and vehicles.”³⁶ FedEx “control[ed] its drivers’ clothing from their hats down to their shoes and socks,” and “require[d] drivers to be ‘clean shaven, hair neat and trimmed, [and] free of body odor.’”³⁷ FedEx also required the driver’s vehicle to be marked with the FedEx logo and be “clean and presentable.”³⁸ Managers could then prevent drivers from working if a driver did not meet the specifications.³⁹ Through these requirements the Ninth Circuit found that FedEx had exerted control over the drivers’ appearances.⁴⁰

Next, the court found FedEx controlled the times the driver could work.⁴¹ The structuring of the workloads made it clear that even though FedEx did not specifically control the minutes that each driver worked, it had a “great deal of control over the driver’s hours.”⁴² Additional re-

³⁰ *Borello*, 769 P.2d at 404; *Alexander*, 765 F.3d at 994 (referring to the secondary factors used after completing a Right-to-Control Test).

³¹ *Borello*, 769 P.2d at 404.

³² *Borello*, 769 P.2d at 404; see CAL. LAB. CODE § 3357 (West 2016).

³³ *Alexander*, 765 F.3d at 984.

³⁴ *Id.* at 988.

³⁵ *Id.* at 989.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 989-90.

⁴² *Id.*

quirements for drivers included that they could not begin their deliveries until all packages arrived.⁴³ Then, drivers had to return to the loading dock by a specific time.⁴⁴ And, if they wanted their vehicle loaded for the next day, they had to leave it overnight.⁴⁵ The court also found FedEx controlled how and when drivers delivered their packages because they determined what packages would be delivered and when they must be delivered by.⁴⁶ All of these requirements demonstrated how FedEx exerted control over the drivers.⁴⁷

FedEx argued that drivers had their own freedom and were not under the complete control of the company.⁴⁸ For example, FedEx did not require that drivers take certain routes to accomplish their tasks.⁴⁹ It also did not require that drivers follow the recommendations given from managers.⁵⁰ FedEx further argued that it only controlled the drivers as to the results it sought, not the means by which they got there.⁵¹ This gave the drivers the autonomy to do their work in whatever way they best saw fit and forfeited control from FedEx.⁵² However, complete control by the employer is not necessary because there is some freedom “ ‘inherent in the work.’ ”⁵³ In this case, FedEx’s control outweighed the drivers’ freedom.⁵⁴

Based on the control FedEx exerted over the appearance of the driver, standards of the vehicle, the manner of deliveries, and the drivers’ working hours, there was enough control exerted to find that the drivers were employees of FedEx.⁵⁵ The result of this classification means that FedEx now has to comply with California employment laws when it comes to their drivers.⁵⁶ Additionally, as shown in the California Division of Labor Standards Enforcement’s decision described below, this also means that FedEx must pay for business expenses for drivers.⁵⁷

⁴³ *Id.* at 990.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 997.

⁵⁶ *See id.*

⁵⁷ Berwick, No. 11-46739 EK, 2015 WL 4153765 (Cal. Dep’t of Labor June 3, 2015).

C. THE CALIFORNIA DIVISION OF LABOR STANDARD ENFORCEMENT
APPLICATION OF THE “RIGHT-TO-CONTROL” TEST

The California Division of Labor Standards Enforcement (“DLSE”)⁵⁸ has issued a ruling on the classification of employment for drivers working for Uber in *Berwick v. Uber Tech., Inc.*⁵⁹ There, the DLSE relied on the *Borello* factors and determined that Barbara Berwick, an Uber driver, was in fact an employee and ordered that Uber pay for her expenses.⁶⁰ Ms. Berwick filed a claim against Uber seeking unpaid wages, reimbursement of expenses, liquidated damages, and waiting time penalties.⁶¹

When looking at the amount of control Uber exerted over Ms. Berwick, the DLSE found that Uber is “involved in every aspect of the operation.”⁶² First, the DLSE looked at the fact that Uber “vetted” all of its drivers and requires them to provide personal information like bank accounts, residential location, and even social security information.⁶³ Uber then controlled the driver through the rating system.⁶⁴ Uber monitored its drivers’ ratings and could terminate a driver whose ratings fell below the required 4.6 out of 5 stars.⁶⁵ Next, the DLSE found that Uber controlled the “tools” the driver used.⁶⁶ This included the application used to get rides and fares, and the car Ms. Berwick drove when driving for Uber, mandating that it must be less than ten years old.⁶⁷ Finally, Uber controlled how customers pay drivers by setting the rates and discouraging tips.⁶⁸

Uber contended that the application is merely a platform for drivers to connect with people who are in need of rides.⁶⁹ In addition, Uber argued that it does not exert any control over the number of hours that Ms. Berwick worked and that this flexibility is more akin to the role of an independent contractor, however, the DLSE was unconvinced.⁷⁰

⁵⁸ *Labor Commissioner’s Office*, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, <http://www.dir.ca.gov/dlse> (last visited Jan. 20, 2017) (stating the Department of Labor Standards Enforcement (DLSE) is also known as the California Labor Commissioner’s Office).

⁵⁹ *Berwick*, 2015 WL 4153765.

⁶⁰ *Id.* at *4-6.

⁶¹ *Id.* at *1.

⁶² *Id.* at *6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at *4, 6.

⁶⁶ *Id.* at *6.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at *3, 6.

⁷⁰ *Id.* at *6-8.

Based on the control exerted through vetting the drivers, the rating system, and the “tools” used, the DLSE found that the level of control Uber has over the driver meant that Ms. Berwick was, in fact, an employee.⁷¹ While the DLSE found that Ms. Berwick was an employee,⁷² as an administrative ruling, this decision only applies to her individually and is non-binding for other drivers.

This may have only been an administrative ruling, but it could have larger impacts for Uber. Uber does not neatly fit into one of the two classifications, and this ruling could signify a trend showing that the government is willing to classify drivers as employees. This issue is now finding its way through the court system and litigation has begun in *O'Connor v. Uber Technologies, Inc.*⁷³

D. UBER’S LEGAL BATTLE IN CALIFORNIA: *O’CONNOR V. UBER TECHNOLOGIES, INC.*⁷⁴

In the federal district court case, *O'Connor v. Uber Technologies, Inc.*, Uber sought summary judgment against drivers that were alleging they were Uber employees, not independent contractors.⁷⁵ A summary judgment motion is granted when there are no disputed facts of a particular case and the moving party is entitled to a favorable judgment as a matter of law.⁷⁶ Here, the motion was denied on the basis that drivers were presumptively employees.⁷⁷ The case was then prepared to go to trial, but some of the plaintiffs in the case attempted to create a class action lawsuit.⁷⁸ The trial was then stayed due to multiple appeals to the Ninth Circuit regarding arbitration clause issues that would not permit the plaintiffs to bring a class action suit.⁷⁹ While the arbitration issues

⁷¹ *Id.* at *5-8.

⁷² *Id.* at *6.

⁷³ *O'Connor v. Uber Techs., Inc. (O'Connor)*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁷⁴ Given the ongoing nature of the suit, the status of *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2014) has been updated as of March 8, 2017.

⁷⁵ *O'Connor*, 82 F. Supp. 3d at 1135.

⁷⁶ *Id.* at 1138.

⁷⁷ *Id.* at 1135.

⁷⁸ Order Granting in Part and Denying in Part Plaintiff’s Motion for Class Certification at 5-6, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-3826-EMC) (analyzing whether the working relationships between the drivers and Uber are similar enough so that a jury could determine all of the plaintiffs’ claims at once).

⁷⁹ Order Conditionally Granting in Part and Denying in Part Defendant’s Motion to Stay at 1, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-cv-03826-EMC); see *O'Connor v. Uber Appeal of Denial of Arbitration 15-17420*, U.S. COURTS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000823 (last visited Mar. 8, 2017) (website regarding the appeal of the arbitration clause issues in the case, the orders can be found here but the arbitration issues surrounding the class action claim are not explored in this comment).

surrounding the class action claim were being appealed, Uber and the drivers proposed a \$100 million settlement, but Judge Chen of the district court rejected this settlement.⁸⁰ The case is currently stayed pending the arbitration clause appeals.⁸¹

In determining whether to grant summary judgment, Judge Chen applied a two-step analysis.⁸² The first step requires the worker to establish a *prima facie* case demonstrating that there was an employer-employee relationship.⁸³ If this evidence is shown, then the court proceeds to the second step where the burden shifts to the employer to show that the “presumed employee was an independent contractor.”⁸⁴ Applying the Right-to-Control Test, Judge Chen found that there was a genuine issue of material fact as to the amount of control that was exerted by Uber, and that drivers were presumptively employees.⁸⁵

The district court relied on several facts in making its decision. The court pointed out that, “fundamentally,” without its drivers, Uber would not be a viable business.⁸⁶ Uber generates revenue from the rides its drivers perform. As in *Berwick*, the court looked at how Uber sets ride fare and exerts control over the hiring process.⁸⁷ Uber is dependent on having quality drivers because the drivers represent Uber on the road and are the main contact between the company and the rider.⁸⁸ This makes Uber dependent upon the drivers.⁸⁹

However, one critical factor in support of the independent contractor relationship was that Uber drivers could decide when and how much they drive.⁹⁰ Uber argued that drivers exert a tremendous amount of control in the relationship and should be found to be independent contractors.⁹¹ While the court considered this factor, it “does not in itself preclude a finding of an employment relationship.”⁹² The court found that the ques-

⁸⁰ Order Denying Plaintiffs’ Motion for Preliminary Approval at 2, *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-cv-03826-EMC), available at <https://assets.documentcloud.org/documents/3031645/Uber-Settlement-Denied.pdf>.

⁸¹ Stipulation and Order to Stay Pending Briefing at 1, *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-cv-03826-EMC), available at <https://docs.justia.com/cases/federal/district-courts/california/candce/3:2013cv03826/269290/761>.

⁸² *O’Connor*, 82 F. Supp. 3d at 1138.

⁸³ *Id.*

⁸⁴ *Id.* (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1142.

⁸⁷ *Id.* at 1142-43.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1143.

⁹⁰ *Id.* at 1152.

⁹¹ *Id.* at 1151.

⁹² *Id.* at 1152.

tion of control could not be determined on summary judgment and denied the motion.⁹³

The court concluded by admitting that the current laws were not adequately equipped to deal with the new “sharing economy.”⁹⁴ Judge Chen expressed how,

many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the *Borello* test It is conceivable that the legislature would enact rules particular to the new so-called “sharing economy.”⁹⁵

Therefore, the *O’Connor* case illustrates how “Gig Work” complicates the way Uber drivers should be classified. In addition, the current laws are not adequately equipped to handle this emerging economy. Uber, as a corporation, is also subject to additional business practices that impact the classification of its workers.

E. THE BUSINESS OF UBER

Uber lowers its liability by relying on low labor costs.⁹⁶ By classifying workers as independent contractors rather than full-time employees, Uber avoids paying certain taxes, offering benefits, and covering expenses.⁹⁷ Another added benefit is that through an independent contractor classification, Uber avoids paying for healthcare, which is a cost that companies with over 50 full-time employees must pay.⁹⁸ Stephen Gandel, an editor for *Fortune*, estimated that it would cost Uber about \$4 billion to pay its drivers as employees.⁹⁹ If Uber classified its workers as employees, the increased expenses would lower Uber’s equity and devalue the company.

⁹³ *Id.* at 1152-53.

⁹⁴ *Id.* at 1153.

⁹⁵ *Id.*

⁹⁶ Armin Laidre, *The Business Model of Uber*, IPLANNER.NET, (Apr. 15, 2015), http://www.iplanner.net/business-financial/online/how-to-articles.aspx?article_id=business-model-uber.

⁹⁷ Carmel Deamicis, *Despite Uber’s Arguments, Flexibility for Employees is a Company’s Choice*, RECODE (Aug. 11, 2015, 11:13 AM), <http://www.recode.net/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice>.

⁹⁸ *Id.*

⁹⁹ Stephen Gandel, *Uber-nomics: Here’s What It Would Cost Uber to Pay Its Drivers as Employees*, FORTUNE (Sept. 17, 2015), <http://fortune.com/2015/09/17/ubernomics>.

Businesses use a standard accounting formula to calculate their worth: assets equal liabilities plus equity.¹⁰⁰ Assets are determined through what a company owns, this includes: cash, inventory, investments, land, buildings, equipment, and goodwill.¹⁰¹ Liabilities are what the company owes to others.¹⁰² These include such things as: loans, salaries and wages, interest payable, and income taxes payable.¹⁰³ Equity is what is leftover; another way to think of the equation could be that equity equals assets minus liabilities.¹⁰⁴ Ideally businesses want to limit liabilities and increase assets, which in turn maximizes the equity and value of the business.

Currently, Uber's independent contractor classification benefits Uber through increased profits. Likewise, Uber's model benefits drivers by providing drivers autonomy and offering highly flexible work schedules. According to Uber, 73% of drivers enjoy the ability to be their own boss and prefer that option to a traditional full-time position.¹⁰⁵ For example, setting their own hours allows drivers to work another job, raise a family, attend school, and feel unencumbered by a rigid schedule. Uber's drivers control when and how often they work, and adjust their schedules' accordingly. A Bureau of Labor Statistics poll supports Uber's percentage finding that about 82% of independent contractors preferred flexible working arrangements to those of a more structured working regimen.¹⁰⁶

These new working arrangements are now possible through our advancements in technology. Technology is now providing an increase in freedom that was previously unavailable and has created a complicated dilemma for traditional employment contexts.

¹⁰⁰ *Accounting Equation (Explanation)*, ACCT. COACH, <http://www.accountingcoach.com/accounting-equation/explanation> (last visited Mar. 8, 2017).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (explaining how assets subtracted from liabilities equal owner's equity).

¹⁰⁵ Jonathan Hall, *In the Driver's Seat: A Closer Look at the Uber Partner Experience*, UBER: NEWSROOM (Jan. 22, 2015), <http://newsroom.uber.com/2015/01/in-the-drivers-seat-understanding-the-uber-partner-experience>.

¹⁰⁶ Susan J. Ashford, Elizabeth George, & Ruth Blatt, *Old Assumptions, New Work: The Opportunities and Challenges of Research on Nonstandard Employment*, in 1 ACADEMY OF MANAGEMENT ANNALS 65, 78 (James Walsh & Arthur P. Brief eds., 2008).

F. TECHNOLOGY MAKES UBER DIFFERENT

Uber is on the cutting edge with its use of “disruptive technology,” meaning technology that replaces or transforms our society.¹⁰⁷ The location-based application has utilized mobile internet to create rapid change to which the legislature, and other business forms, have yet to adapt.

Now, as Clayton Christensen, the man who coined the term “disruptive technology” admits, Uber itself is not a disruptive technology.¹⁰⁸ However, Uber is utilizing disruptive technologies to influence how the world views and utilizes personal transportation. Because of its size and success, Uber will influence other similar businesses. This is not to say that all companies emulating Uber’s model will be successful,¹⁰⁹ but it is creating new issues in the law that our current system is not equipped to handle.

As Uber tried to argue in the *O’Connor* case, it defines itself primarily as a technology company.¹¹⁰ As described by Judge Chen, this argument is “fatally flawed.”¹¹¹ He explains, “Uber does not simply sell software; it sells rides In fact, as noted above, Uber’s own marketing bears this out, referring to Uber as ‘Everyone’s Private Driver,’ and describing Uber as a ‘transportation system’ and the ‘best transportation service in San Francisco.’”¹¹² While Uber is not a disruptive technology, they are using technology as a powerful tool to change transportation.

New use of technology is changing the employment law arena. People are no longer required to work set hours, can operate on their own terms, and “be their own boss.” This is integral to Uber, and new to our society. Because drivers use this technology, they are in a new landscape with no current laws that directly apply. There must be a way to regulate Uber’s working arrangement to protect workers and to reflect this new business model where the needs and demands for both parties are met.

¹⁰⁷ See JAMES MANYIKA ET AL., THE MCKINSEY GLOB. INST., *Disruptive Technologies: ADVANCES THAT WILL TRANSFORM LIFE, BUSINESS, & THE GLOBAL ECONOMY 2* (2013), <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/disruptive-technologies>.

¹⁰⁸ Claire Groden, *Why Uber Isn’t Disruptive but Netflix Is*, FORTUNE (Nov. 17, 2015), <http://fortune.com/2015/11/17/uber-disruption-christensen>.

¹⁰⁹ Hannah Kaufman Joseph, *JOSEPH: The Uber-ization of Small Business*, Indianapolis Business Journal (Jan. 16, 2016), <http://www.ibj.com/articles/56640-joseph-the-uber-ization-of-small-business>.

¹¹⁰ *O’Connor*, 82 F. Supp. 3d at 1141 (“The central premise of this argument is Uber’s contention that it is not a ‘transportation company,’ but instead is a pure ‘technology company’ . . .”).

¹¹¹ *Id.*

¹¹² *Id.* at 1141-42.

II. ARGUMENT

A. UBER DOES NOT FIT INTO THE CURRENT LEGAL LANDSCAPE OF CALIFORNIA

California's current employment laws are not adequate for determining the employment status of Uber drivers.¹¹³ The most similar case to Uber's situation, *FedEx*, provides little guidance in this area because it can be distinguished.¹¹⁴ There, the court relied on FedEx's requirement of a strict uniform and dress codes, vehicle requirements, and the drivers showing up at certain times and delivering a certain number of packages every day.¹¹⁵

First, Uber differs in that there is a rating system, but no uniform or dress code. Drivers for Uber may wear whatever they like. This amount of freedom is a stark difference from the strict dress code that was imposed in *FedEx*.¹¹⁶ However, there is still some control exerted by Uber through the rating system. Through the rating system, riders rate their drivers. If a rider is unsatisfied by a driver's clothing, it will result in a low rating. The courts have viewed the rating system as a type of control that Uber exerts over its drivers.¹¹⁷ While there is no dress code, the rating system is crucial in how Uber exerts control over the drivers. Uber is controlling the drivers to some extent, but not as much as the employer in *FedEx*.¹¹⁸

Next, while Uber drivers have minimum requirements for the vehicles they can drive, it is not as rigid as the requirements in *FedEx*.¹¹⁹ An Uber driver's vehicle only has to be a 2002 model or newer, in good condition, and contain no other commercial branding.¹²⁰ Compare that standard to the maintenance of a logo, paint job, and truck regulation standards enforced in *FedEx*.¹²¹ In *FedEx*, the drivers were representing the company with specific logos that must be boldly presented on the

¹¹³ See e.g., Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. LAW & POL'Y REV. 479, 481 (2016), http://harvardlpr.com/wp-content/uploads/2016/06/10.2_7_Rogers.pdf (arguing that Uber drivers, and similar working relationship, should be considered employees).

¹¹⁴ *Alexander*, 765 F.3d 981.

¹¹⁵ *Id.* at 988-89.

¹¹⁶ *Id.* at 989 (describing in detail how much control FedEx had over the drivers' appearance).

¹¹⁷ *O'Connor*, 82 F. Supp. 3d at 1151; see also Sprague, *supra* note 23, at 71-72.

¹¹⁸ See *O'Connor*, 82 F. Supp. 3d at 1151.

¹¹⁹ *Alexander*, 765 F.3d at 989.

¹²⁰ *Vehicle Requirements San Francisco Bay Area*, UBER, <https://www.uber.com/drive/san-francisco/vehicle-requirements> (last visited Mar. 8, 2017).

¹²¹ *Alexander*, 765 F.3d at 989.

vehicle. Uber's requirements are significantly less stringent. Uber has much less control over the vehicles than what was required in *FedEx*.¹²²

Lastly, the Ninth Circuit found that FedEx, through the company's structure, essentially controlled the amount and time the drivers worked.¹²³ While the worker agreement in *FedEx* stated that FedEx cannot set specific work times down to the minute, FedEx had a "great deal of control over drivers' hours."¹²⁴ FedEx structured the workload so that drivers had to complete nine-and-a-half to eleven hours of work a day.¹²⁵ The fact that drivers could hire helpers to lower their workload and complete it in less time did not persuade the court.¹²⁶ FedEx managers could still adjust the drivers' hours so that they were still working between nine-and-a-half to eleven hours a day.¹²⁷ And, drivers could not leave the terminal until all of their packages had arrived and then they had to return by a specific time.¹²⁸ Additionally, if they wanted their truck loaded overnight, it had to stay in the FedEx terminal.¹²⁹ The combination of these requirements constrained the hours that FedEx drivers could work and increased the level of control.¹³⁰ Uber's core argument is that their structure is nothing like FedEx.¹³¹ All of their drivers have the ability to choose his or her hours and times to work.¹³² This is a significant difference in the amount of control a company has over the worker.

To put these two sets of workers in perspective, the typical FedEx driver has a FedEx delivery truck with the logo prominently displayed, is wearing a FedEx uniform, has his or her hair and physical appearance well-kept, and is driving on a tight schedule. The typical Uber driver is driving a vehicle that is a 2002 model or newer, with an Uber sticker in the windshield, is wearing clothes of his or her choosing, and drives on a schedule that he or she sets. Both are working for a company, but the manner in which they complete the work is greatly different and their classifications should be as well.

¹²² *See id.*

¹²³ *Id.* at 989-90.

¹²⁴ *Id.*

¹²⁵ *Id.* at 990.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *O'Connor*, 82 F. Supp. 3d at 1152.

¹³² *Id.*

B. EXCEPTION FOR THE “ON-DEMAND ECONOMY” COMPANIES IN CALIFORNIA

California should adopt an exception for workers in this new worker economy that would be a hybrid classification between the employee and independent contractor laws. This strikes a compromise between both entities by maintaining protection over the employee while representing the current business model.

Drivers under the hybrid classification would enjoy a base level of protection. The exception would include: a base level of pay with an hour cap; employers paying for expenses, not including healthcare or taxes; and freedom of employment. Freedom of employment includes that workers cannot be restricted to only one “On-Demand Economy” company.

Applying this exception to Uber means they would provide a base level of pay where workers could not earn less than a certain amount per hour, such as ten percent above the current state minimum wage rate. For example, if drivers earn \$25 an hour when rides are plentiful, at a slower period, where drivers may only earn eight to ten dollars an hour, Uber would provide supplemental compensation to ensure drivers are paid no less than ten percent above California minimum wage.¹³³ In addition to protecting workers, this accounts for how Uber is still collecting data even while drivers are not making money off of fares through data collection.¹³⁴ But, to discourage drivers from simply having their phones on at all times and “driving” for Uber at all hours of the day, drivers’ hours would be capped at 60 hours a week, without any overtime pay for time over 40 hours. This allows for drivers to control their own schedules and does not limit when they can drive, while also giving them wage protection. For Uber, the hour cap prevents drivers from abusing the exception.

In addition, Uber would be responsible for reimbursing drivers for expenses. Expenses in this context would mean: gas, bridge tolls, and car insurance. However, drivers would not be entitled to any healthcare or workers’ compensation benefits. Also, the company would not be responsible for withholding taxes from the drivers meaning that drivers would pay tax on the income they earn themselves. This lowers the cost to Uber and allows a powerful incentive to continue doing business in the state.

¹³³ See *Minimum Wage*, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, http://www.dir.ca.gov/dlse/faq_minimumwage.htm (last visited Mar. 8, 2017) (showing the current California minimum wage rates and proposed changes).

¹³⁴ Jay Cassano, *How Uber Profits Even While Its Drivers Aren’t Earning Money*, VICE: MOTHERBOARD (Feb. 2, 2016, 7:15 AM), <http://motherboard.vice.com/read/how-uber-profits-even-while-its-drivers-arent-earning-money>.

Lastly, drivers would be allowed to work for competing “Gig Work” companies. Market competition fosters innovation and stimulates job growth. Furthermore, permitting drivers to work for multiple companies would allow them to make working for “Gig Work” companies a feasible full-time position.

The California legislature should create this exception because the current laws do not adequately represent the new working structure for Uber and similar “On-Demand Economy” companies. This new exception to the current laws is what is needed in order to protect drivers and allow Uber, and similar businesses in the “On-Demand Economy,” to accurately reflect their working arrangements.

C. JUSTIFICATION FOR THE UBER EXCEPTION IN CALIFORNIA

The Uber classification dilemma is a problem that must be viewed not only as a legal or economic issue, but also as a problem that affects society as a whole. Uber is not a technology company, but a company that utilizes technology. In 2015, there was an estimated 1.86 billion people around the world with a smartphone.¹³⁵ This makes app-based companies even more prevalent in our society because they are not creating technology for others to use, but instead they are demonstrating the power and far-reaching impact that technology has upon our society. Similar companies are also emerging, leading society to the need for an exception to the current traditional worker classifications in California.

Uber, and other “Gig Work” companies, are reimagining the way transportation and service industries operate. For example, TaskRabbit is a company that allows someone to hire an experienced “tasker,” someone with skills in that area, to complete a task.¹³⁶ These tasks include: cleaning, moving furniture, repairing things, hosting parties and events, and even shopping and delivery.¹³⁷ Likewise, Airbnb is a web-based room-letting service.¹³⁸ Airbnb pairs people seeking lodging with ordinary people willing to rent out spare rooms or even homes.¹³⁹ Similar to Uber’s low-cost model, Airbnb does not own lodging property; it simply connects lodgers with lodging.¹⁴⁰ Like Uber, these nontraditional compa-

¹³⁵ *Number of Smartphone Users Worldwide 2014-2020*, STATISTA, <https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide> (last visited Feb. 17, 2017).

¹³⁶ TaskRabbit, <https://www.taskrabbit.com> (last visited Mar. 8, 2017).

¹³⁷ TaskRabbit, *4 Ways TaskRabbit Gives People More Time*, TASKRABBIT (Feb. 13, 2017), <https://blog.taskrabbit.com/2017/02/13/4-ways-taskrabbit-gives-people-more-free-time>.

¹³⁸ AIRBNB, <https://www.airbnb.com> (last visited Mar. 8, 2017).

¹³⁹ AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Mar. 8, 2017).

¹⁴⁰ *Id.*

nies are wildly successful and appear to be the way of the future. However, our society is ever changing: so what makes Uber special?

The difference between companies like Uber and their previous counterparts is that hotels, home services, and of course taxis, empower the lessor, worker, or driver to have more control over their work. They rent, work, or drive on their own time. Every stay at an Airbnb is different, and every Uber ride is unique. It empowers workers with a software application and a device to connect people anywhere around the world.

These companies are using technology in a way that has never been done before. They are able to get a consumer what they want, when they want, and how they want it, while at the same time allowing the workers flexibility in scheduling work. This is the epitome of the millennial generation (“give me what I want now”), and represents a new era of work (“whenever I want to do it”).

While technology is changing our global landscape, restructuring our entire labor system may seem to be a daunting and intimidating task. This is why states must take the lead in this legal revolution. Harkening back to the traditional notion of federalism, our democracy allows states to implement change on a state level. As Justice Brandeis once stated, “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁴¹ California should take the lead in this area and adopt an exception for “Gig Workers.”

One criticism of an exception to the current employment law is that it would be confusing to incorporate an exception to the law.¹⁴² Implementation of an exception should be done in the best way possible, but there will be confusion with implementation, as with any new law. Implementing an exception starting only at the state level will help to resolve some of these issues on a smaller scale, before looking at whether to adopt the model on a national level.

This also benefits the state because by taking this risk there is the potential for new business to come into California. “On-Demand Economy” companies will know exactly how much it will cost them to pay their workers in the state of California. This would be a benefit for the businesses in the state since they will be able to anticipate the cost, without having to go through costly litigation. It would also benefit the people of California since there is obviously a need for these types of companies. The people of the state will now be able to take advantage of

¹⁴¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁴² See e.g. Valerio Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdfund, and Labor Protection in the “Gig Economy,”* 37 COMP. LAB. L. & POL’Y J. 471, 495 (2016).

the services offered by these companies. It would also benefit the “On-Demand Economy” workers in the state. They too will not have to go through litigation to fight for their rights, but instead will be assured protection under the law.

Uber is changing the way businesses operate by allowing workers more autonomy, freedom, and the ability to work anytime, anywhere. This resembles an independent contractor model, but does not require the requisite skill that an independent contractor would traditionally have. Aside from these reasons for California’s adoption of the exception, the practical implications to the company should also be considered.

D. PRACTICAL IMPLICATIONS OF MISCLASSIFICATION

One of Uber’s legal arguments is that because it does not control its drivers’ working hours, classifying its workers as employees versus independent contractors is not the proper legal analysis.¹⁴³ This argument does not hold much merit for Uber. Determining whether someone is an employee or independent contractor is based on a causal relationship.¹⁴⁴ This means that the employment status of the worker is based on how the worker is currently treated.¹⁴⁵ As is, that means that Uber would not have to take away a driver’s flexibility if they are deemed employees.¹⁴⁶ Uber could retain their same business model, and even with flexible hours, drivers could still be classified as employees by the courts since this issue is not dispositive.¹⁴⁷ So while it is possible to classify Uber drivers as employees, the practical implications of an employment classification for gig workers would stifle the company’s growth, and make it more difficult for other “Gig Work” start-up companies.¹⁴⁸

There are high costs associated with employees. It can be argued that Uber is a multi-billion-dollar company and should pay drivers a higher wage, but forcing Uber to classify workers as employees may also discourage expansion and innovation. Uber is more than just getting someone from point A to point B. Because of its great success, Uber has

¹⁴³ *O’Connor*, 82 F. Supp. 3d at 1149, 1152.

¹⁴⁴ See Benjamin Sachs, *Uber: Employee Status and “Flexibility,”* ONLABOR (Sept. 25, 2015), <http://onlabor.org/2015/09/25/uber-employee-status-and-flexibility>.

¹⁴⁵ *Id.*

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* (stating Uber’s “argument depends on a very particular idea of flexibility: the flexibility to work without breaks. As long as Uber ensured that drivers took their breaks, they could allow drivers to work whenever and for however long the drivers wished.”).

¹⁴⁸ See Deamicis, *supra* note 97.

experimented in transporting everything from kittens to flu shots.¹⁴⁹ An employment misclassification would stifle creative innovation for Uber.

In addition, while most people would enjoy a flexible work schedule, the economic costs make it unfeasible to maintain this sort of a structure as an employer.¹⁵⁰ As Don Polden, a law professor at Santa Clara University School of Law states, “If you have employees as opposed to independent contractors, you have to have [a Human Resources] office and payroll services, someone there to calculate the hours, ensure there’s compliance with wage and hours laws.”¹⁵¹ For Uber, it does not make economic sense to allow the drivers to continue to work flexible schedules and classify them as employees.

There have been several alternatives suggested for the current system besides a hybrid classification. One such proposal advocated looking at the amount of dependency that businesses have in their workers.¹⁵² Instead of looking at how much the workers depend on the business, the test should be reversed and based on the amount of the dependence of the business on its workers.¹⁵³ However, under that system it is unclear why the drivers’ degree of investment is important.¹⁵⁴ Uber has, “enormous investments in technology, licensing, and other intangible assets, which dwarf drivers’ investment in cars.”¹⁵⁵ Also, the amount of time that drivers drive for Uber can vary greatly but that does not seem to be a good indicator because one can be a seasonal employee or a long-term independent contractor.¹⁵⁶ This proposal to our legal system would not solve the Uber worker classification dilemma.¹⁵⁷

Uber and its drivers present a legal, economical, and ethical dilemma. Both parties like the benefits they currently have, but the law will only support two worker classifications – employee or independent contractor. The parties are not free to negotiate which classification suits them; the law determines the classification. Therefore, an exception to the law is paramount and would benefit both parties because drivers

¹⁴⁹ See e.g., Felice J. Freyer, *Uber Delivers Flu Shots in 36 Cities, in One-Day Experiment*, BOSTON GLOBE (Nov. 20, 2015), <https://www.bostonglobe.com/metro/2015/11/19/uber-delivers-flu-shots-cities-one-day-experiment/ic2VzxYyS8ufsn6sbHEGuM/story.html>; see also Sarah Haydu, *Clear Your Calendars—#UberKITTENS Are Back*, UBER: NEWSROOM (Oct. 28, 2015), <https://newsroom.uber.com/2015/10/uberkittens-are-back>.

¹⁵⁰ See Deamicis, *supra* note 97.

¹⁵¹ *Id.*

¹⁵² Sprague, *supra* note 23, at 75-76.

¹⁵³ *Id.* (stating that the reversal would result in workers being classified as employees).

¹⁵⁴ Rogers, *supra* note 113, at 494 (2016) (arguing against the dependent contractor model).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 495-96.

¹⁵⁷ *Id.* at 496.

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could maintain their autonomy, yet still be afforded some employee protections.

III. CONCLUSION

The current employment classifications do not account for an Uber driver's overlap both as an independent contractor and employee. Drivers enjoy the ability to set their own schedules, but must not have to relinquish their protections in order to do so. Currently, California employment laws do not accurately represent an Uber driver's working arrangement. In order for drivers to maintain their flexibility and protections, while simultaneously reflecting the actual working relationships, there should be an exception created for this emerging sector of business in California.

Recognizing coming changes in society allows us to be proactive. That is why we as a society must adapt and our laws should do the same. After looking at Uber's legal, business, and societal impact, it is clear that there must be an exception, and California should be the first to implement it. Creating an exception in California will be the first step towards allowing workers to retain their flexibility, reflect our new society, and ensure that individuals earn a livable wage.