

RIDESHARING'S HOUSE OF CARDS: O'CONNOR V. UBER TECHNOLOGIES, INC. AND THE VIABILITY OF UBER'S LABOR MODEL IN WASHINGTON

Henry Ross

Abstract: Ridesharing companies, namely Uber and Lyft, have taken the transportation market by storm. These companies offer a competitive alternative to taxis through using smartphone apps and more efficient service offerings. As part of their business model, ridesharing companies treat their drivers as independent contractors rather than employees to minimize labor costs. However, drivers do not benefit from remedial labor statutes and thus (1) must pay for operating costs, (2) are not guaranteed a minimum wage, and (3) do not receive overtime pay. In *O'Connor v. Uber Technologies, Inc.*, a class of California Uber drivers are challenging their independent contractor status under California law. The test used by California courts to determine whether a worker is an independent contractor or an employee differs slightly from the test that Washington courts apply. In 2012, the Washington State Supreme Court adopted a worker-friendly "economic realities" test for determining whether workers are in fact independent contractors. Applying the lessons from *O'Connor* to Washington independent contractor law, this Comment calls into question the viability of Uber's labor model in Washington.

INTRODUCTION

Uber, the ridesharing behemoth, has upended the transportation network in cities across the globe. As an alternative to the inefficiencies of traditional taxis, the company uses a smartphone app to connect customers with its drivers, which has proved to be a hit with customers.¹ This immense popularity has driven Uber to expand into over 270 cities and counting worldwide within a five-year period, and has led many to anoint Uber as the most successful Silicon Valley startup ever after just six years.²

With a network of over 160,000 drivers in the United States alone, Uber has amassed an army of alleged independent contractors to drive

1. In response to Uber's growth, some taxi companies have developed their own apps. Alexa Vaughn, *Seattle Yellow Cab on the Comeback Path*, SEATTLE TIMES (Dec. 25, 2014, 8:24 PM), <http://www.seattletimes.com/seattle-news/seattle-yellow-cab-on-the-comeback-path/>.

2. See Scott Austin, Chris Canipe & Sarah Slobin, *The Billion Dollar Startup Club*, WALL ST. J. (Feb. 18, 2015), <http://graphics.wsj.com/billion-dollar-club/>; Jay Yarow, *At \$12 Billion, Uber Would Become the Most Valuable Startup in the World*, BUS. INSIDER (May 23, 2014, 3:29 PM), <http://www.businessinsider.com/at-12-billion-uber-would-become-the-most-valuable-startup-in-the-world-2014-5>.

its success.³ Uber's independent contractor policy tracks a growing trend among American companies of using independent contractors to avoid workplace regulations.⁴ By virtue of their independent contractor classification, Uber drivers and other independent contractors do not have employee benefits, pay expenses out of pocket, and are not entitled to guaranteed hourly wages or a salary.⁵

In *O'Connor v. Uber Technologies, Inc.*,⁶ Californian Uber drivers are challenging their independent contractor status.⁷ The plaintiffs allege that Uber has improperly used the independent contractor designation to save costs; in other words, Uber has made its rapid growth possible by sacrificing full-employee benefits for its drivers to capitalize on lower labor costs.⁸ Thus far, the drivers have been remarkably successful in the suit. The trial court refused to grant Uber's motion for summary judgment after applying California's relatively employer-friendly independent contractor test.⁹ Indeed, based on the drivers' apparent momentum in the case, many have speculated as to whether this lawsuit could lead to the end of Uber drivers' independent contractor status in California.¹⁰ The "right of control" test applied by the Northern District of California trial judge is based on California's independent contractor law.¹¹ The "right of control" test is the descendent of the traditional test still used to determine whether the law may hold an employer liable for the tortious conduct of an employee.¹²

3. Jonathan V. Hall & Alan B. Kreuger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Jan. 22, 2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf.

4. Joshua Wright, *Data Spotlight: Independent Contractors on the Rise*, ECON. MODELING SPECIALISTS INT'L (Apr. 29, 2011), <http://www.economicmodeling.com/2011/04/29/independent-contractors-other-noncovered-workers-on-the-rise/>.

5. Maya Kosoff, *2 Lawsuits Could Dramatically Alter the Business Model for Uber and Lyft*, BUS. INSIDER (Jan. 30, 2015, 11:10 AM), <http://www.businessinsider.com/uber-lyft-business-models-threatened-by-lawsuits-2015-1>.

6. No. C-13-3826 EMC, 2015 WL 1069092 (N.D. Cal. Mar. 11, 2015).

7. *Id.* at *1 (order denying defendants' motion for summary judgment).

8. *See id.*

9. *Id.* at *15.

10. *See, e.g.*, Alison Griswold, *Are Uber Drivers Employees? The Trial That Could Devastate the "Sharing Economy,"* SLATE (Mar. 12, 2015, 12:54 PM), http://www.slate.com/blogs/moneybox/2015/03/12/uber_lyft_employment_cases_juries_would_decide_the_legal_fate_of_the_sharing.html.

11. *See O'Connor*, 2015 WL 1069092, at *4-5.

12. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 351 (2001) ("The [right to control] rule that prevailed was based on an original facet of Blackstone's master-servant model: a master was liable for an act of the servant commanded by the master or committed in the course of the servant's service controlled by his master.").

In contrast to California's test, in 2012 the Washington State Supreme Court adopted an "economic realities" test for determining whether a worker is an independent contractor for the purposes of the Washington Minimum Wage Act.¹³ The "economic realities" test, while similar to the "right of control" test, is a more progressive, worker-friendly test that can often lead to a different result.¹⁴

The purpose of this Comment is to evaluate the legal reverberations that *O'Connor* could have in Washington. If the drivers ultimately succeed in their case using the more company-friendly California test in *O'Connor*, the Uber labor model could face a serious and credible challenge in any jurisdiction where drivers choose to bring such a suit. Part I examines the regulatory backdrop of ridesharing companies, and how the ascendancy of Uber and other ridesharing companies has challenged traditional transportation regulatory schemes. Part II explores the factual and legal underpinnings of *O'Connor*. Part III discusses Washington's independent contractor law, particularly in light of the Washington State Supreme Court's *Anfinson v. FedEx Ground Package System, Inc.*¹⁵ decision, which signaled a new, worker-friendly approach to independent contractor law in Washington. Finally, Part IV analyzes Uber drivers' likelihood of success in a misclassification claim, and ultimately concludes that Uber's labor model may not be viable under Washington law.

I. RIDESHARING COMPANY LABOR PRACTICES HAVE DISRUPTED TRANSPORTATION REGULATORY FRAMEWORKS

Uber has disrupted nearly a century of taxi regulations in America.¹⁶ Most notable to consumers, Uber has brought new technology, new price structures, and consistently reliable service into the market.¹⁷ Less visible to consumers are the labor practices these companies use in hiring and managing drivers. Uber officially treats its drivers as

13. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 871, 281 P.3d 289, 299 (2012); WASH. REV. CODE §§ 49.46.005–.920 (2014).

14. Kevin J. Miller, *Welfare and the Minimum Wage: Are Workfare Participants "Employees" Under the Fair Labor Standards Act?*, 66 U. CHI. L. REV. 183, 184 (1999).

15. 174 Wash. 2d 851, 281 P.3d 289 (2012).

16. See, e.g., David Greene, *Upstart Car Service Butts Heads with D.C.'s Taxis*, NPR NEWS (Jan. 31, 2012, 2:10 AM), <http://www.npr.org/2012/01/31/146123433/upstart-car-service-butts-heads-with-d-c-s-taxis>.

17. *Id.*

“independent contractors.”¹⁸ The independent contractor designation carries numerous advantages for Uber’s bottom line: it does not have to guarantee its drivers minimum wage and does not reimburse drivers for on-the-job expenses incurred (e.g., gas and vehicle maintenance).¹⁹ To understand how the independent contractor designation plays into the Uber model, it is critical to understand the nature of the company, its service offering, and the market in which it operates.

A. Uber and the Onslaught of Competition in the Taxi Industry

Startup competitors of traditional taxi services have wedged their way into a once airtight taxi market. The most notable competitors, Uber and Lyft, use a simplified model that incorporates smartphone technology to address two operational challenges faced by traditional taxi companies—dispatch and payment.²⁰ Instead of the traditional taxi-hailing process, customers can order a ride on their phone through a simple smartphone app.²¹ Drivers do not accept cash, and a customer’s credit card information is already stored—and automatically charged following a ride—on his or her phone by the smartphone app.²² Uber and Lyft use a “surge pricing” model that raises prices when demand outpaces the rate at which the services can respond to requests for rides.²³ These new companies also use customer reviews to reflect a driver’s quality, which the company monitors as a form of remote driver supervision.²⁴ The rapid growth of these new services reflects their popularity.²⁵ Indeed,

18. Griswold, *supra* note 10.

19. Kosoff, *supra* note 5.

20. Alexa Vaughn, *Ride-Share Cars: Illegal, and All Over Seattle*, SEATTLE TIMES (June 16, 2013, 9:09 AM), http://seattletimes.com/html/localnews/2021206141_ridesharingappsxml.html.

21. *Id.*

22. *Id.*

23. Dan Kedmey, *This Is How Uber’s ‘Surge Pricing’ Works*, TIME (Dec. 15, 2014), <http://time.com/3633469/uber-surge-pricing/>; Connor Adams Sheets, *Uber, Lyft New Year’s Eve Surge Pricing to Cost Riders*, INT’L BUS. TIMES (Dec. 31, 2014, 7:35 PM), <http://www.ibtimes.com/uber-lyft-new-years-eve-2015-surge-pricing-cost-riders-1771582>.

24. Sam Roudman, *Uber Drivers Organize Themselves in Seattle, Other Drivers Look to Do Same*, TECHPRESIDENT (May 27, 2014), <http://techpresident.com/news/25078/uber-drivers-organize-seattle-look-elsewhere>.

25. Although the merits of less restrictive taxi policies are beyond the scope of this Comment, at least one survey of economists suggests that ridesharing services disrupting the traditional regulatory scheme is economically desirable. *Taxi Competition*, CHI. BOOTH IGM FORUM (Sept. 29, 2014, 9:10 AM), http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_eyDrhnya7vAPrX7. A panel of over forty economists was asked whether they agree or disagree with the proposition that “[l]etting car services such as Uber or Lyft compete with taxi firms on equal footing regarding genuine safety and insurance requirements, but without restrictions on

many economists believe that customers are ultimately benefitting from the introduction of ridesharing companies into the transportation web.²⁶ Uber now operates in more than 200 cities in more than fifty countries,²⁷ and was valued at forty billion dollars during a recent financing round to raise additional capital.²⁸

Public opinion surveys show why ridesharing services have experienced such rapid growth. In a study commissioned by the City of Seattle in September 2013, a time when Uber and Lyft were growing in the area, over ninety percent of ridesharing customers rated the response time of their ridesharing vehicle as "Good" or "Very Good."²⁹ In contrast, only fifty percent of taxi customers rated the response time of their vehicle as "Good" or "Very Good."³⁰ The study also found that "[o]f 105 negative comments [received during the survey], 102 were related to taxis. Of 16 positive comments, only 1 was related to taxis."³¹ Additionally, on six specific metrics polled—(1) willingness to accept credit cards, (2) courtesy of driver, (3) route knowledge of driver, (4) appearance of vehicle, (5) promptness of arrival, and (6) ease of booking/hailing a ride—ridesharing services received higher customer ratings than taxis in every category.³²

Despite a sleeker service, Uber's business is in a legal grey area at best, and is patently illegal at worst.³³ Uber generally uses a "wait and see" attitude when entering new markets—the service expands until local governments actively enforce regulations or bring legal action.³⁴ Inevitably, the markets that Uber enters must respond in some fashion,

prices or routes, raises consumer welfare." *Id.* Every single economist either agreed or strongly agreed. *Id.*

26. *Id.*

27. *53 Countries: Available Locally, Expanding Globally*, UBER, <https://www.uber.com/cities> (last visited May 22, 2015).

28. John Shinal, *Uber's Valuation Tops Public Twitter, LinkedIn*, USA TODAY (Dec. 8, 2014, 7:32 PM), <http://www.usatoday.com/story/tech/columnist/shinal/2014/12/08/uber-valuation-compared-with-twitter-linkedin-amazon-ebay-airbnb/20113797/> (examining current valuations and speculating that Uber could give an IPO exceeding \$100 billion dollars within a few years).

29. James M. Cooper & Ray Mundy, *City of Seattle and King County Taxi, for Hire Vehicle and Limousine Services Demand Study, Service Quality—Response Time Experiences*, CITY SEATTLE (Sept. 2013), http://clerk.seattle.gov/public/meetingrecords/2013/taxi20130903_1a.pdf.

30. *Id.*

31. *Id.* at *Service Quality—Key Observations*.

32. *Id.* at *Secret Shopper Surveys*.

33. Greene, *supra* note 16.

34. See Michael B. Farrell, *State Reverses Ban on Uber Car Service Ordering App*, BOS. GLOBE (Aug. 17, 2012, 1:55 AM), <https://www.bostonglobe.com/business/2012/08/15/state-reverses-ban-uber-car-service-ordering-app/yQTQNP9c1BQiEM3Mrri2oO/story.html>; Greene, *supra* note 16.

and many jurisdictions have elected to ban the service outright to maintain the status quo for taxis.³⁵

Though Uber largely encounters resistance because its services do not conform to local taxi regulations, its aggressive business practices and a series of public gaffes are responsible for at least a portion of that resistance from customers, policymakers, and regulators alike.³⁶ For example, news leaked in November 2014 that Uber executive Emil Michael once publicly suggested that Uber might use personal data acquired in the course of business to humiliate journalists that are unfriendly to Uber.³⁷

The “surge-pricing” method has also cast Uber in a bad light.³⁸ During a recent shooting and hostage situation in Sydney, Australia, Uber applied surge pricing to the neighborhoods near the crisis because of sudden demand for transportation in the area.³⁹ This led to public outcry.⁴⁰ Despite its efforts to brand itself as a customer-friendly alternative to taxis, these public gaffes serve to reinforce Uber’s image as a cutthroat company when it comes to costs and revenues.

B. The City of Seattle’s Response to Uber’s Emergence

After a lengthy period of non-enforcement, the City of Seattle became America’s first major city to comprehensively address the influx of ridesharing services.⁴¹ The ordinance resulting from these deliberations created a permitting scheme that brought ridesharing companies, who had been operating in Seattle without regulations for nearly three years,⁴²

35. See Sara Roth, *Portland Sues Uber Alleging Illegal Operations*, USA TODAY (Dec. 10, 2014, 12:01 PM), <http://www.usatoday.com/story/tech/2014/12/08/portland-sues-uber-for-illegal-operations/20117155/> (quoting Portland Mayor Charlie Hales: “Taxi cab companies follow rules on public health and safety. So do hotels and restaurants and construction companies and scores of other service providers. Because everyone agrees: good regulations make for a safer community. Uber disagrees, so we’re seeking a court injunction”).

36. Frank Pallotta, *Uber Exec Suggests Digging up Dirt on Journalists*, CNN MONEY (Nov. 18, 2014, 10:25 AM), <http://money.cnn.com/2014/11/18/media/buzzfeed-uber-dinner-journalists/index.html>; *Uber ‘Truly Sorry’ for Price Rise During Sydney Siege*, BBC NEWS (Dec. 24, 2014), <http://www.bbc.com/news/technology-30595406>.

37. Pallotta, *supra* note 36.

38. See Nicky Wolf, *Uber Ride for Sleepy New Year’s Eve Partygoer Ends in \$900 Bill*, THE GUARDIAN (Jan. 6, 2015), <http://www.theguardian.com/technology/2015/jan/06/uber-900-bill-atlanta-new-years-eve-partygoer>.

39. *Uber ‘Truly Sorry’ for Price Rise During Sydney Siege*, *supra* note 36.

40. *Id.*

41. See Vaughn, *supra* note 20.

42. Alexia Tsotsis, *Spotted! Secret Uber Drivers on the Streets of Seattle*, TECHCRUNCH (July 25, 2011), <http://techcrunch.com/2011/07/25/uber-seattle/>.

into the regulatory environment.⁴³ Perhaps the most controversial aspect of the legislation was that it placed a cap of 150 drivers on each ridesharing company operating in Seattle.⁴⁴ The Seattle City Council expressed serious concern about the effect of ridesharing on the taxi market, which serves a public purpose by transporting the disabled and meeting transportation demands for public events.⁴⁵ The Council chose the 150-driver cap despite the fact that there were, according to ridesharing companies, more than 2000 rideshare drivers in Seattle at that time.⁴⁶ According to rideshare companies, this limitation would have destroyed their business model in the area and forced ridesharing companies to leave the market due to decreased revenue.⁴⁷ In effect, these regulations would have compromised ridesharing companies' supply and demand approach, as they would have been forced into the rigid constructs of traditional taxi regulation.

Seattle's ordinance lasted just a few months before the Council repealed and replaced it.⁴⁸ The Council based its decision to rewrite the regulations in large part on the specter of a ballot initiative designed to gut the first ridesharing ordinance.⁴⁹ The most controversial portion of the first ordinance—the cap on rideshare drivers—was removed from the second ordinance.⁵⁰ This cap ultimately gave ridesharing companies a final victory; although the regulations retained some critical provisions,⁵¹ removing caps on drivers allowed for unfettered growth.

Following Seattle's lead, many prominent American cities have passed ordinances bringing ridesharing services into the fold, or are in the process of doing so.⁵² Thus, the significance of the legal issues

43. Seattle, Wash., Ordinance 124441 (Mar. 17, 2014).

44. *Id.* § 11(B).

45. Because ridesharing drivers generally use their own vehicles, imposing such a requirement on ridesharing drivers would be impractical. Taylor Soper, *Seattle City Leaders Sound off on Ride-Sharing Dilemma – Who Do You Agree with?*, GEEKWIRE (Feb. 28, 2014, 2:37 PM), <http://www.geekwire.com/2014/recap-city-council-meeting/>.

46. Vaughn, *supra* note 20.

47. *Id.*

48. See Seattle, Wash., Ordinance 124526 (July 7, 2014).

49. Bill Lucia, *City Council Passes Ride-Sharing Regulations. Again.*, CROSSCUT (July 14, 2014), <http://crosscut.com/2014/07/14/politics-government/121009/seattle-city-council-ridesharing-regulations-legal/>.

50. *Id.*

51. *Id.*

52. See, e.g., Ed Arnold, *Uber Ready to Be Street Legal in Memphis*, MEMPHIS BUS. J. (Jan. 23, 2015), <http://www.bizjournals.com/memphis/news/2015/01/23/uber-ready-to-be-street-legal-in-memphis.html> (Memphis); Jeff Balke, *Uber, Lyft Now Legal in Houston After Council Vote*, HOUS. PRESS (Aug. 7, 2014, 6:00 AM), http://blogs.houstonpress.com/news/2014/08/uber_lyft_now_

surrounding Uber's service will only expand. One of these issues sure to become more prominent relates to the company's labor practices.

C. *Uber Drivers' Labor Practices and Workplace Environment*

Independent contractor status is founded upon the scope, duties, and nature of an individual's work.⁵³ While employees have recourse and guarantees for certain workplace standards, independent contractors are essentially on their own.⁵⁴ Some estimate that companies can save up to forty percent in administrative costs by designating employees as independent contractors.⁵⁵ Understanding the facts related to an individual's employment is therefore critical to determining whether status as an independent contractor is proper.⁵⁶

Uber is resolute about its drivers' independent contractor status.⁵⁷ The company's employment contract with drivers, which it terms a "software license and online services agreement," reflects this.⁵⁸ Throughout the contract, the language evidences a concerted effort by Uber to disclaim all responsibility for the drivers' contact with potential customers.⁵⁹ For example, when explaining a driver's relationship with Uber, the contract states that:

You [driver] acknowledge and agree that Company's provision

legal_in_houston_after_council_vote.php (Houston); Tom Benning, *Dallas Council Approves New Car-for-Hire Rules; Uber and Lyft to Be Able to Operate Legally*, DALL. MORNING NEWS (Dec. 10, 2014, 2:02 PM), <http://cityhallblog.dallasnews.com/2014/12/dallas-council-approves-new-car-for-hire-rules-uber-and-lyft-to-be-able-to-operate-legally.html/> (Dallas); Hal Dardick & Jon Hilkevitch, *Chicago Rideshare Regulations Approved*, CHI. TRIB. (May 28, 2014, 1:30 PM), <http://www.chicagotribune.com/news/local/politics/chi-chicago-rideshare-regulations-approved-20140528-story.html> (Chicago); Paul Nussbaum, *Ride Service Uber Gets OK in Pittsburgh Area*, PHILLY.COM (Aug. 21, 2014, 11:40 AM), http://www.philly.com/philly/business/transportation/20140822_Ride_service_Uber_gets_OK_in_Pittsburgh_area.html (Pittsburgh).

53. Carlson, *supra* note 12, at 297–99.

54. *Id.* at 301. Therein lies the attraction of independent contractors to companies.

55. Adam H. Miller, *Curbing Worker Misclassification in Vermont: Proposed State Actions to Improve a National Problem*, 39 VT. L. REV. 207, 210 (2014).

56. *See, e.g., id.*

57. Uber, Software License and Online Services Agreement § 13.1 (Nov. 10, 2014) (on file with author).

58. *Id.*

59. *See, e.g., id.* § 2.4 ("Company does not and shall not be deemed to direct or control you generally or in your performance under this Agreement specifically."); *id.* § 13.1 ("Except as otherwise expressly provided herein with respect to Company acting as the *limited payment collection agent* solely for the purpose of collecting payment from Users on your behalf, the relationship between the parties under this agreement is solely that of independent contractors." (emphasis added)).

to you of the Driver App and the Uber Services creates a direct business relationship between Company and you. Company does not, and shall not be deemed to, direct or control you generally or in your performance under this Agreement specifically, including in connection with your provision of Transportation Services, your acts or omissions, or your operation and maintenance of your Vehicle. You retain the sole right to determine when and for how long you will utilize the Driver App or the Uber Services.⁶⁰

This language reflects Uber's awareness of the fine line between independent contractor and employee.⁶¹ Of course, a company's representation that an individual is an independent contractor and not an employee is not the determinative factor in the independent contractor analysis.⁶² Rather, the facts surrounding the individual's labor (e.g., hours, permanency of the relationship, skill) are determinative.⁶³

With respect to on-the-job requirements, Uber drivers are required to maintain their cars' cleanliness while soliciting and giving rides.⁶⁴ Second, Uber requires its drivers to "maintain high standards of professionalism, service and courtesy."⁶⁵ Finally, Uber requires its drivers to pay operational expenses out of their own pocket.⁶⁶ These include "the cost of a car rental, insurance, gas, and normal wear-and-tear."⁶⁷

The benefit for Uber drivers, however, is that they are free to choose their own hours.⁶⁸ While some drivers might choose to work fulltime or

60. *Id.* § 13.1.

61. *See Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Cal. Ct. App. 2007) ("[T]here are a number of additional factors in the modern equation [for determining whether an employee is an independent contractor], including . . . the length of time for which the services are to be performed . . . and . . . whether the parties believe they are creating an employer-employee relationship.").

62. *See, e.g., Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1043-44 (5th Cir. 1987) ("[F]acile labels and subjective factors are only relevant to the extent that they mirror 'economic reality.'" (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961))).

63. *Id.*

64. Uber, Software License and Online Services Agreement § 3.2 (Nov. 10, 2014) (on file with author).

65. *Id.* § 3.1.

66. Maya Kosoff, *Here's How Much Uber Drivers Are Really Earning*, BUS. INSIDER (Nov. 19, 2014, 5:29 PM), <http://www.businessinsider.com/how-much-money-uber-drivers-really-make-2014-11>.

67. *Id.*

68. *Id.*

more, others may choose to work only a few hours per week.⁶⁹ Although Uber touts its drivers' independence as a benefit of working for the company, failure to meet the conditions noted above to Uber's satisfaction can result in a firing.⁷⁰ Of course, because Uber considers its drivers independent contractors rather than employees, referring to driver termination as "firing" would be problematic. Thus, Uber uses a more palatable term: "deactivation."⁷¹ Its employment agreement states the "[c]ompany reserves the right, at any time in the company's sole discretion, to deactivate or otherwise restrict you from accessing or using the driver app or the Uber services if you fail to meet [company] requirements."⁷²

Uber's rating system, which is the basis for many "deactivations," gives riders the opportunity to grade their trip on a scale of one to five stars.⁷³ Because there is no bright line driver rating requirement to avoid "deactivation," Uber's "deactivation" policy has left many drivers worried about their job security:

Sudden firings—or in industry-speak, "deactivations"—can leave drivers stranded without a source of income and no legal recourse to fight the termination. Uber doesn't tell drivers upfront what will get them canned, just [sic] sends them warnings once they're already in hot water. Without a clear policy of what makes a fireable offense, drivers are left to piece it together by sharing their warnings and deactivation stories on forums.⁷⁴

Stories on these online forums are telling.⁷⁵ Uber acknowledges that it "deactivates" drivers for consistently poor reviews.⁷⁶ The fact that Uber

69. Hall & Kreuger, *supra* note 3.

70. Abraham Riesman, *We Asked 10 Black-Car Drivers If They Prefer Working for Lyft or Uber—Here's Why Lyft Won by a Landslide*, N.Y. MAG. (Dec. 7, 2014, 8:00 PM), <http://nymag.com/daily/intelligencer/2014/12/lyft-uber-drivers.html>.

71. *Id.*

72. Uber, Software License and Online Services Agreement § 3.1 (Nov. 10, 2014) (on file with author) ("Company reserves the right, at any time in Company's sole discretion, to deactivate or otherwise restrict you from accessing or using the Driver App or the Uber Services if you fail to meet the [company] requirements.").

73. Riesman, *supra* note 70.

74. Ellen Huet, *How Uber's Shady Firing Policy Could Backfire on the Company*, FORBES (Oct. 30, 2014), <http://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/>.

75. See *What Is the Uber Process for Deactivation?*, UBERPEOPLE.NET (Sept. 7, 2014), <http://uberpeople.net/threads/what-is-the-uber-process-for-deactivation.3185/>.

76. Nairi, *Feedback Is a Two-Way Street*, UBER NEWSROOM (Apr. 23, 2014), <http://newsroom.uber.com/2014/04/feedback-is-a-2-way-street/> ("Have partner drivers been deactivated for consistently poor ratings? You bet.").

dismisses drivers for poor job performance is neither surprising nor objectionable. Rather, the disturbing trend for drivers is that they are sometimes terminated without even being aware that their job performance is sub-standard; and thus, their job is potentially in jeopardy.⁷⁷ Uber drivers have attempted to pin down exactly what the minimum standards for “deactivation” are, but even Uber company sources do not give a consistent answer.⁷⁸ The only consensus on this issue is that Uber does not tolerate subpar ratings: “Many drivers [have] railed against Uber’s notoriously strict rating system, going so far as to say it makes them fear their own passengers.”⁷⁹

In summary, Uber drivers work in an environment with little certainty. Uber’s employment agreement and publicly available company policies on performance are vague at best. Drivers’ lack of consistent contact with supervisors who ultimately decide whether a third party’s opinion on the driver’s performance warrants firing compounds this vagueness. Furthermore, by virtue of not being designated employees, Uber drivers do not benefit from remedial labor statutes, and thus theoretically have no claim against Uber when drivers have a complaint about the nature of their workplace.⁸⁰

D. *Many Uber Drivers Earn Below Minimum-Wage Incomes*

Uber drivers’ exact earnings are as unclear as the circumstances of their workplace supervision. In Uber’s view, because of their alleged independent contractor status, drivers are not subject to state and federal wage laws, and must pay out-of-pocket for job-related expenses.⁸¹

77. See Kara Kostanich, *Uber Driver Claims Working Conditions Are Unjust*, KOMO NEWS (Apr. 12, 2014, 8:33 AM), <http://www.komonews.com/news/local/Uber-driver-claims-working-conditions-are-unjust-255021211.html?tab=video&c=y> (referencing an interview with an Uber driver, Danny, the blog post states, “Danny says if you get a couple bad ratings, your job is in jeopardy”).

78. Jeff Bercovici, *Uber’s Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014, 8:14 PM), <http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/> (asserting the lack of clarity regarding minimum requirements for drivers’ average ratings by comparing different minimums cited on Uber websites for two different cities, London and San Diego); see also *How the Rating System Works*, UBER S. FLA. (last visited Sep. 21, 2015) <http://ubersouthflorida.com/how-does-the-rating-system-work/> (stating that a driver’s account is at risk of being deactivated when his or her average rating is below 4.6).

79. Reisman, *supra* note 70.

80. Dan Levine & Sara McBride, *Uber, Lyft, Face Critical Courtroom Test over Driver Benefits*, REUTERS (Jan. 28, 2015, 7:15 AM), <http://www.reuters.com/article/2015/01/28/us-uber-lyft-workers-idUSKBN0L11BN20150128>.

81. See Ben Walsh, *How Uber Fails to Prove Its Drivers Make More than Taxi Drivers*,

Indeed, because Uber does not track the expenses that drivers are responsible for, even Uber itself cannot know exactly what drivers earn after expenses.⁸² Nonetheless, a handful of available data points give some indication of what Uber drivers actually make.⁸³

In January 2015, Uber released a study commissioned for the company and conducted by Uber's Head of Policy Research Jonathan Hall and former Obama administration advisor Alan Krueger.⁸⁴ Although any self-commissioned corporate study will elicit some skepticism, the study nonetheless offers a rare window into Uber drivers' earnings.⁸⁵ The highlight of the study is that Uber claims drivers in its six largest cities of operation earn roughly nineteen dollars per hour.⁸⁶ The study finds that this is roughly fifty percent more than traditional taxi drivers.⁸⁷ The study acknowledges, however, that it does not account for driver expenses:

Of course, Uber's driver-partners are not reimbursed for driving expenses, such as gasoline, depreciation, or insurance, while employed [taxi] drivers . . . may not have to cover those costs. These costs vary for each driver-partner, and drivers may be able to partially offset their costs by deducting work-related expenses from their income for tax purposes, including depreciation and/or leasing fees, gasoline, maintenance, insurance, mobile device and data fees, and license and registration fees depending on their particular tax situation. A detailed quantification of driver-partner costs and net after-tax earnings is a topic of future research. Nonetheless, the figures suggest that unless their after-tax costs are more than \$6 per hour, the net hourly earnings of Uber's driver-partners typically exceed the average hourly wage of employed taxi drivers and chauffeurs.⁸⁸

HUFFINGTON POST (Jan. 24, 2015, 3:59 PM), http://www.huffingtonpost.com/2015/01/22/uber-drivers-pay-study_n_6527470.html (discussing flaws in Uber's internal report regarding drivers' pay).

82. *Id.* (discussing the key differences between gross and net pay).

83. *See generally* Hall & Krueger, *supra* note 3 (using limited pieces of data available to Uber itself, such as gross receipts, to calculate drivers' pay).

84. *Id.*

85. *See id.* at 18 (giving a rough estimation of drivers' gross pay, and the factors that Uber considers to determine same).

86. *Id.* at 23.

87. *Id.* ("Finding Uber-driver partners considered in survey made an average wage of \$19.19 per hour, compared to the average taxi driver wage of \$12.90 per hour.").

88. *Id.*

The study also contains data on drivers' lifestyles and employment patterns. Over half of all drivers remain active Uber drivers after one year of driving.⁸⁹ Moreover, thirty-eight percent of Uber drivers drive for Uber as their only job, compared to thirty-one percent that have a separate full-time job, and thirty percent that have a separate part-time job.⁹⁰ Ninety-one percent of Uber drivers drive for Uber to earn additional income to support themselves or their family financially.⁹¹

These calculations, and specifically the wage numbers, suggest that Uber drivers make well above minimum wage. However, many commentators have highlighted a number of flaws with the study.⁹² Much of this criticism centers on the study's variation from previous Uber reports on driver earnings.⁹³ Specifically, three issues related to driver compensation continue to be problematic for the Uber labor model: (1) driver out-of-pocket expenses, (2) minimum-wage concerns, and (3) driver inability to collect tips.⁹⁴

First, in many places, the costs of purchasing and maintaining a vehicle, including gas, may exceed six dollars per hour.⁹⁵ Reuters News Service has discussed one driver who claims he "spent about \$150 to \$200 per week . . . on gas, \$45 per week on car washes, \$100 per month for synthetic oil changes, plus insurance and other expenses while driving his 2013 Dodge Dart at least 60 hours a week in San Diego."⁹⁶ These costs break down to roughly seven dollars per hour.⁹⁷ While not empirically representative of average Uber drivers' costs, these figures illustrate that the Uber study's assumption that work-related driver costs do not exceed six dollars may not be a safe assumption.⁹⁸

Second, this report does not mention the considerable number of

89. *Id.* at 16.

90. *Id.* at 10.

91. *Id.* at 11.

92. *See, e.g.,* Griswold, *supra* note 10 (highlighting flaws in assumptions that the study makes); Walsh, *supra* note 81 (highlighting flaws in values that study gives for standard driver expenses).

93. *See* Griswold, *supra* note 10.

94. *See* Walsh, *supra* note 81.

95. Levine & McBride, *supra* note 80.

96. *Id.*

97. *Id.*

98. As one commentator has noted: "The problem is that . . . [the Uber numbers] are all gross pay numbers, but the two sets of drivers pay out costs in different ways. Taxi drivers tend to pay leasing companies to use cabs maintained by medallion companies, and also pay for gas, while Uber drivers are responsible directly for paying and maintaining everything they need to keep their car on the road . . . [W]ithout net earnings, the paper has no support for its most important claim—that Uber drivers earn more money than taxi drivers." Walsh, *supra* note 81.

drivers who earn less than minimum wage according to prior data releases from Uber. In 2014, the company released weekly earnings data for its New York City drivers.⁹⁹ According to this data, while many drivers make competitive hourly earnings, a considerable portion of its drivers make below ten dollars per hour.¹⁰⁰ Other reports have corroborated claims that some drivers earn less than minimum wage.¹⁰¹ While such a problem has always been a concern in the taxi industry, Uber's independent contractor arrangement subjects drivers to the same inconsistent wages without the job security of a taxi license or medallion:

For thirty minutes of work [as a taxi driver], including loading and unloading a passenger, a driver might earn \$5—well below the minimum wage. But the trade-off for the relatively low pay was job security: stringent limits on who could pick up passengers and restrictions on the total number of cabs in a particular jurisdiction ensured drivers had enough work to make a living.¹⁰²

Thus, even if Uber's data is genuine, it illustrates that while compensation for taxi-like services may be similar, job security for Uber drivers is significantly lower because of Uber's ratings-based "deactivations."¹⁰³

This minimum wage issue is even more glaring in cities subject to higher local minimum wage requirements, which in at least one Uber market is as high as fifteen dollars per hour.¹⁰⁴ If Uber drivers make

99. Andrew, *What Does a Typical New York UberX Partner Earn in a Week?*, UBER NEWSROOM (Dec. 1, 2014), <http://newsroom.uber.com/nyc/2014/12/what-does-a-typical-new-york-uberx-partner-earn-in-a-week/>.

100. *Id.* Ten dollars per hour is above the federal minimum wage, which provides for \$7.25 per hour, 29 U.S.C. § 206 (2012), but well below other minimum wages. *See* SEATTLE, WASH., MUNICIPAL CODE ch. 14.19, §§ 14.19.010–.080 (2014) (mandating a fifteen-dollar per-hour minimum wage).

101. Maya Kosoff, *Uber Drivers Speak Out: We're Making a Lot Less Money than Uber Is Telling People*, BUS. INSIDER (Oct. 29, 2014, 8:54 AM), <http://www.businessinsider.com/uber-drivers-say-theyre-making-less-than-minimum-wage-2014-10> ("We spoke with more than a dozen Uber drivers to see how much money they were making, and none of the numbers they gave were even close to \$90,000. In fact, a few drivers said they were struggling to even earn the minimum wage. The drivers we spoke with say they're making anywhere from \$5 an hour to \$20 an hour, meaning that in a year's time, if they're working 40-hour weeks, they could be making anywhere between \$10,000 to \$41,000.").

102. John Liss, *Uber and the Taxi Industry's Last Stand*, THE NATION (Jan. 27, 2015), <http://www.thenation.com/article/uber-and-taxi-industrys-last-stand/>.

103. *See supra* Part I.C.

104. *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE ch. 14.19, §§ 14.19.010–.080 (setting minimum wage to fifteen dollars per hour).

nineteen dollars per hour on average in Uber's six largest markets,¹⁰⁵ factoring in expenses would presumably bring many drivers below a fifteen-dollar threshold. If so, Uber drivers' potential lost wages due to misclassification would be considerably larger in a city such as Seattle.

Third, Uber drivers generally do not receive tips from passengers, who must pay through the app.¹⁰⁶ In contrast to the traditional tipping process for taxis, the company instructs passengers not to tip drivers.¹⁰⁷ This policy is difficult to reconcile with the company's belief that its drivers are independent contractors, free to engage in business relationships with customers, with Uber simply providing the app that facilitates the relationship.¹⁰⁸ If the drivers were indeed independent contractors, it seems that drivers would have the independence to accept tips.¹⁰⁹

In summary, Uber drivers' purported independent contractor status combined with Uber's restrictive rating policies diminishes their compensation. As a function of this status, Washington statutes and regulations designed to guard against detrimental wage conditions do not apply.¹¹⁰ Broken down, data related to Uber drivers' compensation suggests that many drivers have similar problems to full-fledged employees (e.g., less than livable wages), despite the fact that the drivers do not benefit from workplace protections.¹¹¹ Moreover, other workplace commonalities, such as reimbursement for expenses, are not available for Uber drivers.¹¹²

105. Hall & Krueger, *supra* note 3, at 23.

106. Maya Kosoff, *Here's How Uber's Tipping Policy Puts Drivers at a Disadvantage*, BUS. INSIDER (Oct. 29, 2014, 2:26 PM), <http://www.businessinsider.com/uber-tipping-policy-2014-10> ("[I]f you're riding in an UberX, UberBlack, or UberSUV vehicle, there's no way to include a tip for your driver.").

107. *Do I Need to Tip My Driver?*, UBER, <https://help.uber.com/h/1be144ab-609a-43c5-82b5-b9c7de5ec073> (last visited Jan. 29, 2015).

108. See First Amended Class Action Complaint and Jury Demand at 5, *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 1069092 (N.D. Cal. May 30, 2014), ECF No. 107, 2014 WL 7794845.

109. See *id.*

110. See *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wash. App. 35, 42–43, 244 P.3d 32, 41 (2010) ("[I]f the jury determined that the class members were employees and not independent contractors, FedEx would be liable for overtime wages under the [Minimum Wage Act]."), *aff'd*, 174 Wash.2d 851, 281 P.3d 289 (2012).

111. See Hall & Krueger, *supra* note 3, at 26 (finding that Uber drivers *average* approximately twenty dollars per hour in Uber's most lucrative markets before expenses). As discussed above, when expenses are added to these calculations, many Uber drivers' wages are closer to minimum wage levels.

112. Walsh, *supra* note 81.

II. *O'CONNOR V. UBER TECHNOLOGIES*: UBER DRIVERS CHALLENGE THEIR INDEPENDENT CONTRACTOR STATUS

Due to Uber drivers' potential grievances, including low wages and no compensation for on-the-job expenses, a class of California drivers has sought legal recourse. In August 2013, Uber drivers filed a claim for violation of California wage law.¹¹³ Uber has thus far been unable to defeat the claim—Uber failed to win summary judgment and the issue will go to a jury.¹¹⁴

A. *The Parties' Arguments*

Many of the foregoing facts discussed in Part I about the work of Uber drivers¹¹⁵ have taken center stage in *O'Connor*. The drivers' arguments separate into two categories: (1) Uber's outward representations about the role of drivers, and (2) Uber's internal treatment of drivers.¹¹⁶ Each of these are relevant to the independent contractor analysis in this case.

First, with respect to outward representations, the drivers have cited Uber's marketing materials as evidence of their employee status.¹¹⁷ The first sentence of the plaintiffs' statement of facts in their brief opposing summary judgment stated, "[i]n its own words, Uber is an 'on-demand car service,' that has described itself to the public as 'your on-demand private driver.'"¹¹⁸ In addition, the plaintiffs cited Uber promotional videos that present Uber as a *transportation* company, compared to Uber's claim that it is a software company.¹¹⁹ For example, in one promotional video, Uber founder Travis Kalanick states that "the drivers are the lifeblood of Uber."¹²⁰ Accordingly, the plaintiffs claimed that this contradicts Uber's contentions that it is merely a "technology" or

113. First Amended Class Action Complaint and Jury Demand, *supra* note 108, at 5.

114. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 1069092, at *15 (N.D. Cal. Mar. 11, 2015).

115. *See supra* Part II.D.

116. *See* Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion for Summary Judgment at 2–8, *O'Connor*, 2015 WL 1069092, ECF No. 222, 2015 WL 2456295.

117. *Id.* at 6–7.

118. *Id.* at 2.

119. *Id.* at 6.

120. *Uber: Everyone's Private Driver*, VIMEO, <https://vimeo.com/58800109> (last visited May 21, 2015) (promotional video posted to Uber's vimeo company page); *see also* Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion for Summary Judgment, *supra* note 116, at 6.

“software” company, as alluded to in the driver operating agreements. The drivers assert that they could not be the “lifeblood of Uber” if Uber is in fact a software company.¹²¹

Second, with access to voluminous company records in the discovery stage, the plaintiffs presented evidence of Uber personnel exerting direct control and supervision over drivers’ activities.¹²² For example, the drivers cited emails in which Uber operations and management employees comment, “Terrible Reviews, No second chance needed” and “BANNING YOUR ASS AGAIN.”¹²³ Additionally, the plaintiffs noted that much of the training Uber drivers receive instructs drivers to ask passengers about their temperature and radio preferences, and in some cases requires that the radio be tuned to “soft jazz or NPR.”¹²⁴

In its motion for summary judgment, Uber’s description of the drivers’ work took a decidedly different tone. The motion described Uber’s role in the driver’s work as simply forwarding requests for pickups to the nearest drivers.¹²⁵ Moreover, Uber asserted that what the plaintiffs refer to as direct control over the drivers’ work is instead merely “common-sense suggestions about how to achieve 5-star ratings.”¹²⁶ Additionally, among other things, Uber cited the fact that the relationship is terminable at will at any time by any party, and that each trip Uber drivers accept is voluntary, with no penalty or repercussion if drivers choose simply to not perform the service.¹²⁷

B. California’s Unique *Borello* Test

In *O’Connor*, the court applied California’s unique *Borello* test to the foregoing parties’ factual arguments to determine independent contractor status.¹²⁸ The test, as announced in the California State Supreme Court’s landmark decision *S.G. Borello & Sons, Inc. v. Department of Industrial*

121. Plaintiffs’ Opposition to Defendant Uber Technologies, Inc.’s Motion for Summary Judgment, *supra* note 116, at 6.

122. *Id.* at 7.

123. *Id.* at 6 n.9 (emphasis in original).

124. *Id.* at 5.

125. Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 4, *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 1069092 (N.D. Cal. Mar. 11, 2015), ECF No. 211.

126. *Id.*

127. *Id.* at 9 (discussing the terms of the Software License and Online Services Agreement).

128. *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 1069092, at *4 (N.D. Cal. Mar. 11, 2015).

*Relations*¹²⁹ uses a two-tiered structure.¹³⁰ It looks first to traditional common-law control, then to other considerations.¹³¹

In *Borello*, the California State Supreme Court addressed whether migrant farmworkers were employees for California workers' compensation purposes.¹³² After evaluating case law from other states and federal courts, the Court announced the following test.¹³³ First, the Court reiterated the importance of the alleged employer's right to control the worker's activities on-the-job (e.g., supervision, managerial structure, or right to fire).¹³⁴ Second, the Court gave some credence to factors beyond the right of control:

However, the courts have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right of control work details is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.¹³⁵

Looking primarily to the control that the employer exercised, the *Borello* Court found that the migrant farmworkers were in fact full-fledged employees.¹³⁶

This "tiered" test, where the "right of control" is "most important,"¹³⁷ is different from other jurisdictions' independent contractor tests.¹³⁸ Many jurisdictions simply group the right of control factor in with *Borello*'s secondary indicia to create a test where no factor takes precedence over others.¹³⁹ California, on the other hand, uses this two-tiered test, with the first tier addressing the right of control, and the

129. 769 P.2d 399 (Cal. 1989).

130. *Id.* at 404.

131. *Id.*

132. *Id.* at 401.

133. *Id.* at 404. Note the distinction between a two-tiered and a two-step test. The *Borello* test will always address both tiers, and the first factor is never dispositive. However, the "control" factor is the most important part of the analysis.

134. *Id.*

135. *Id.*

136. *Id.* at 409.

137. *Id.* at 404.

138. Compare *id.* (using the right to control test), with Michelle M. Lasswell, *Worker's Compensation: Determining the Status of a Worker as an Employee or an Independent Contractor*, 43 *DRAKE L. REV.* 419, 422-24 (1994) (discussing the various other tests to determine whether an independent contractor is an employee).

139. *Id.*

second tier encompassing additional factors.¹⁴⁰ Although the nuance of each *Borello* factor is beyond the scope of this Comment, it bears mentioning that the *O'Connor* court identified *thirteen* secondary factors.¹⁴¹

C. *The O'Connor Analysis: A Victory for Drivers*

Based on this two-tiered analysis, the trial court ultimately concluded that Uber had not met its burden for summary judgment.¹⁴² The decision rested on two related reasons. First, the trial judge found that Uber drivers were “presumptively employees” under California law.¹⁴³ The significance of whether an independent contractor is a “presumptive employee” under California law is primarily procedural, as opposed to substantive.¹⁴⁴ In general, once a worker shows that a service has been provided to the alleged employer, the presumption applies and the burden then shifts to defendants to show that the workers are indeed independent contractors.¹⁴⁵

Second, moving to the merits, the trial court began by addressing

140. See, e.g., *Borello*, 769 P.2d at 404.

141. *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 1069092, at *5 (N.D. Cal. Mar. 11, 2015). Drawing on *Borello*, the *O'Connor* court listed the following as the thirteen factors:

- (1) whether the one performing services is engaged in a distinct occupation or business;
- (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;
- (3) the skill required in the particular occupation;
- (4) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (5) the length of time for which the services are to be performed;
- (6) the method of payment, whether by the time or by the job;
- (7) whether or not the work is a part of the regular business of the principal;
- (8) whether or not the parties believe they are creating the relationship of employer-employee;
- (9) the alleged employee's opportunity for profit or loss depending on his managerial skill;
- (10) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- (11) whether the service rendered requires a special skill;
- (12) the degree of permanence of the working relationship;
- (13) whether the service rendered is an integral part of the alleged employer's business.

Id. For a detailed explanation of how independent contractor tests became so large and unruly, see Carlson, *supra* note 12, at 351.

142. *O'Connor*, 2015 WL 1069092, at *6.

143. *Id.*

144. See *id.*

145. *Id.*; see also *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (explaining that once a worker shows he provided a service “the burden shifts to the employer, which may prove, if it can, that the presumed employee was an independent contractor”).

Uber's assertion that it does not directly supervise its drivers, which goes to the alleged employer's level of control.¹⁴⁶ Although acknowledging that Uber does not *directly* supervise its drivers, Uber's propensity to "deactivate" drivers that do not comply with specific standards appears to be a form of indirect but significant supervision over employee conduct.¹⁴⁷ The court went on to acknowledge that Uber drivers' personal control over their own hours could evince independent contractor status.¹⁴⁸ However, the court was more concerned about the level of control Uber exercised while drivers were on the job:

The more relevant inquiry is how much control Uber has over its drivers *while they are on duty* for Uber. The fact that some drivers are only on-duty irregularly says little about the level of control Uber can exercise over them when they *do* report to work. Indeed, and as noted above, [courts interpreting California law have] recognized this precise distinction in earlier cases where hirees who were "not required to work either at all or on any particular schedule" were nonetheless held to be employees as a matter of law based on the amount of control the employer could exercise when those employees decided to turn up for work.¹⁴⁹

Summarizing these two justifications, the court found that the right of control factor, or "primary" *Borello* factor, did not warrant summary judgment.¹⁵⁰ With respect to the secondary *Borello* factors, the court noted that some factors, such as drivers providing their own vehicles, indicated an independent contractor relationship, while others, such as the drivers forming "an integral part of Uber's business" favored an employment relationship.¹⁵¹ By analogy, the *O'Connor* trial court's analysis gives some insight into whether Uber drivers may be classified as independent contractors under Washington law, which uses a slightly different analysis.

146. *O'Connor*, 2015 WL 1069092, at *13.

147. *Id.*

148. *Id.* at *14.

149. *Id.* (emphasis in original) (quoting *JKH Enters., Inc. v. Dep't of Indus. Relations*, 142 Cal. App. 4th 1046, 1051 (2006)).

150. *Id.* at *15.

151. *Id.*

III. WASHINGTON DOCTRINES: "RIGHT OF CONTROL" VERSUS "ECONOMIC REALITIES"

Courts have developed a litany of tests to delineate the bounds between independent contractors and employees. For example, a claim involving vicarious liability for tort purposes would implicate a different test than an employee asserting employee status for wage purposes.¹⁵² In contrast, a claim involving wage or workers' compensation, such as those at issue in *O'Connor* and *Borello*, respectively, would implicate a different test.¹⁵³

A. *Washington's Iteration of the Traditional "Right of Control" Test*

Traditionally, Washington courts have used a "right of control" test to evaluate whether a business relationship is in fact an employee-employer relationship.¹⁵⁴ This test evaluates the extent to which an employer controlled the actions of persons performing work for the business.¹⁵⁵ Though similar to the *Borello* test, it does not "tier" any factors, and instead uses the following equally weighted factors:

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

152. See *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 871, 281 P.3d 289, 297 (2012) (explaining the various applications of independent contractor tests).

153. See *id.* (holding that the "economic realities" test applies to wage disputes).

154. See, e.g., *Kamla v. Space Needle Corp.*, 147 Wash. 2d 114, 119–21, 52 P.3d 472, 474–76 (2002) (using the right to control test to evaluate a misclassification claim).

155. *Id.*

relation of master and servant; and

(j) whether the principal is or is not in business.¹⁵⁶

In theory, if these factors tilt in favor of an employer-employee relationship, it follows that the employer should be liable for the tortious conduct of an employee.¹⁵⁷

The origins of this test go back centuries.¹⁵⁸ With the advent of the industrial economy, employers were able to exercise increased control over the conduct of their employees: "[I]ntegrated enterprise demanded a large number of employees and the larger enterprise needed a high degree of control and predictability which they could get with employees but which was not possible in commercial relationships with individual entrepreneurs."¹⁵⁹ Thus, placing liability on the employer became common practice.¹⁶⁰

The Washington State Supreme Court's seminal case on the "right of control" test, *Hollingberry v. Dunn*,¹⁶¹ gives a guiding example of how a court might apply this test.¹⁶² In *Hollingberry*, an automobile collided with three horses that escaped from a nearby farm, which resulted in the death of a passenger.¹⁶³ The farm owner had contracted with a worker to seed an area surrounding a fence for a horse enclosure.¹⁶⁴ The critical facts were that (1) the farm worker used his own equipment, (2) used his own methods of planting seeds, (3) both parties acknowledged that the worker had superior seeding knowledge, and (4) the parties did not agree to any fixed level of compensation.¹⁶⁵ Despite the farm owner's instructions, the worker forgot to completely enclose the fence after a day's work, and the horses escaped.¹⁶⁶ The farm owner voluntarily settled with the decedent's estate, and brought a claim seeking

156. *Hollingberry v. Dunn*, 68 Wash. 2d 75, 80-81, 411 P.2d 431, 435 (1966) (quoting RESTATEMENT (SECOND) OF AGENCY § 220 (1958)) (holding that, based on these factors, a sodding contractor was not an employee).

157. *See id.*

158. *See generally* 1 W. BLACKSTONE, COMMENTARIES 14 (1765) (explaining that those who hire workers as "servants" should be held liable for those "servants'" actions).

159. John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, 340 (1991).

160. *Id.*

161. 68 Wash. 2d 75, 411 P.2d 431 (1966).

162. *Id.* at 81, 411 P.2d at 435.

163. *Id.* at 76, 411 P.2d at 431.

164. *Id.* at 78, 411 P.2d at 432-34.

165. *Id.*

166. *Id.*

indemnification from the farm worker for negligence.¹⁶⁷ The Court held that the worker was an independent contractor, rather than an employee, and thus the worker could not indemnify the farm owner.¹⁶⁸ In its reasoning, the Court affirmed the appellate court's decision, noting that substantial evidence supported a finding that the "right of control" factors supported the independent contractor designation.¹⁶⁹

The "right of control" test in American jurisprudence can be traced back nearly 200 years.¹⁷⁰ Antiquated nomenclature such as "master" and "servant" often accompany the test.¹⁷¹ The test is particularly unsuitable for the modern employment law environment, which is governed primarily by statute, and where the primary concerns are workplace protections, such as a guaranteed minimum wage.¹⁷²

Courts and commentators alike have criticized this test as unwieldy and unpredictable.¹⁷³ Because it uses ten different factors, the test can lead to wildly different results.¹⁷⁴ Moreover, as one commentator aptly notes, America's transition from industrial to a service-based economy presents serious, potentially insurmountable, challenges to the traditional test.¹⁷⁵ Industrial jobs raise more concerns about employee welfare in the workplace, and tests for independent contractors should reflect that.¹⁷⁶

B. *The FedEx Saga and Modern Considerations*

The need for a test that fits with modern realities of the workplace,

167. *Id.* at 76, 411 P.2d at 431.

168. *Id.* at 82, 411 P.2d at 435.

169. *Id.*

170. *See, e.g.,* *Inhabitants of Lowell v. Boston & L.R. Corp.*, 40 Mass. 24, 33 (1839) (giving a "right to control" independent contractor analysis).

171. *See, e.g., id.* ("If a servant, in obedience to the command of his master, commits a trespass upon the property of another, not knowing that he is doing any injury, he is nevertheless answerable for the tort as well as his master, to the party injured; yet he is entitled to an action against his master for the damages he may suffer, although the master also was ignorant, that the act commanded was unlawful; because he is deemed the principal offender.").

172. *See* *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 869–70, 281 P.3d 289, 297 (2012) (explaining the different purposes of the right to control and economic realities tests).

173. *See, e.g.,* Susan Schwochau, *Identifying an Independent Contractor for Tax Purposes: Can Clarity and Fairness Be Achieved?*, 84 IOWA L. REV. 163, 180–81 (1998) ("Courts' determinations have been criticized for being based on only one or two factors The result is a 'test' in which neither the factors nor their weights can be predicted." (internal citations omitted)).

174. *Id.*

175. *See* *Bruntz*, *supra* note 159, at 340–41 (explaining the evolution of independent contractor law in the context of economic and industrial transitions).

176. *See id.*

such as wage and occupational health issues, is only growing; independent contractors are becoming a larger portion of the American labor force.¹⁷⁷ This deficiency has resulted in extensive litigation. One notable example involves dozens of lawsuits brought by FedEx Ground delivery drivers alleging that the company misclassified them as independent contractors and therefore owed back pay and reimbursement for various job-related expenses.¹⁷⁸ FedEx Ground uses approximately 4000 drivers nationwide, all of whom it classifies as independent contractors.¹⁷⁹ The drivers have sued in a variety of contexts and jurisdictions; thus, the tests and their application are varied.¹⁸⁰ The *FedEx* saga is representative of the impact litigation has in shaping independent contractor law across the country

For example, in *FedEx Home Delivery v. National Labor Relations Board*,¹⁸¹ FedEx refused to negotiate with duly elected union representatives because the workers were independent contractors and thus could not organize.¹⁸² In short, FedEx claimed that it used independent contractors to drive its delivery trucks.¹⁸³ FedEx assigned the drivers a route, and the drivers had to complete the route on their own time before a specified deadline.¹⁸⁴ The National Labor Relations Board (NLRB) ruled against FedEx in an administrative adjudication, and FedEx appealed to the D.C. Circuit.¹⁸⁵ Applying the “right of control” test,¹⁸⁶ the D.C. Circuit judges overruled the NLRB, holding that the delivery drivers were independent contractors.¹⁸⁷ The facts

177. Joshua Wright, *Data Spotlight: Independent Contractors on the Rise*, EMSI (Apr. 29, 2011), <http://www.economicmodeling.com/2011/04/29/independent-contractors-other-noncovered-workers-on-the-rise/>.

178. See, e.g., *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014); *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423 (7th Cir. 2012); *Huggins v. FedEx Ground Package Sys., Inc.*, 592 F.3d 853 (8th Cir. 2010); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557 (N.D. Ind. 2010).

179. See *FedEx Home Delivery*, 563 F.3d at 495 (discussing FedEx’s delivery workforce).

180. Compare *id.* (collective bargaining), with *Craig*, 686 F.3d 423 (wages).

181. 563 F.3d 492 (D.C. Cir. 2009).

182. *Id.* at 495.

183. *Id.*

184. *Id.*

185. *Id.*

186. The majority gave an interesting take on the modern application of the “right of control” test, noting that “[f]or a time, when applying this common law test, we spoke in terms of an employer’s right to exercise control, making the extent of *actual* supervision of the means and manner of the worker’s performance a key consideration,” but over time the court recognized that “some controls were more equal than others.” *Id.* at 496–97 (emphasis added).

187. *Id.* at 504.

showed that FedEx did not control the amount that drivers worked, did not prescribe the specific hours during which they would work, and the workers could even sell their own assigned routes to other drivers.¹⁸⁸

The majority reasoned that the drivers therefore retained “entrepreneurial opportunity.”¹⁸⁹ This, according to the majority, conformed to “right of control” precedent that emphasized “entrepreneurial opportunity” as evidence that workers were independent contractors.¹⁹⁰ In reaching a different conclusion, an impassioned dissent rejected this “entrepreneurial opportunity” take on the “right of control” test, and called for adherence to the traditional “right of control” factors.¹⁹¹

Other courts ruling on this *FedEx* saga have echoed the dissent’s view. In *Alexander v. FedEx Ground Package System, Inc.*,¹⁹² the Ninth Circuit found that drivers who worked in a capacity similar to the workers in *FedEx Home Delivery* qualified as employees under the “right of control” test.¹⁹³ The factual circumstances in *Alexander* deviated in three critical areas: (1) drivers were generally assigned workloads that led to, at a minimum, nine-hour workdays; (2) drivers were required to wear company uniforms; and (3) FedEx instructed the drivers to act cordially toward customers.¹⁹⁴ In light of these factual differences, the court stressed that FedEx controlled the “manner and means” of employment, which it held to be the most important factor in the “right of control” analysis.

These two cases, and the litany of other FedEx independent contractor disputes, give a representative example of the issues that are most relevant to the “right of control” test.¹⁹⁵ While *Hollingberry* sets out the relevant factors, the *FedEx* cases give a glimpse of the factual considerations at play in misclassification cases. A successful outcome for Uber drivers in *O’Connor* could spark litigation in other states, similar to that of the *FedEx* saga. Any such outbreak of Uber

188. *Id.* at 499–500.

189. *Id.* at 500.

190. *Id.*

191. *Id.* at 517 (Garland, J., dissenting).

192. 765 F.3d 981 (9th Cir. 2014).

193. *Id.* at 997.

194. *Id.* at 985.

195. See, e.g., *id.*; *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423 (7th Cir. 2012); *Huggins v. FedEx Ground Package Sys., Inc.*, 592 F.3d 853 (8th Cir. 2010); *FedEx Home Delivery*, 563 F.3d 492; *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557 (N.D. Ind. 2010). These cases all addressed nearly identical misclassification claims by FedEx delivery drivers.

independent contractor cases would presumably result in a variety of analyses similar to that of the *FedEx* cases, with potentially different outcomes due to subtle differences in jurisdictions' tests.¹⁹⁶ A line of Uber cases could lead to a similar result.

C. Anfinson: *The Washington State Supreme Court Forges a New Path*

The "right of control" and the California *Borello* test are not the only tests courts use for determining independent contractor relationships;¹⁹⁷ some courts have elected to use an "economic realities" test.¹⁹⁸ While related, this test departs from the "right of control" test in critical areas. Most notably, it focuses on the wage and dependency of the worker on the alleged employer instead of looking primarily at control.¹⁹⁹ These differences make the "economic realities" test better suited for determining independent contractor status when wage and workplace protection statutes are at issue, rather than liability concerns.²⁰⁰

The United States Supreme Court first established the "economic realities" test in *Bartels v. Birmingham*.²⁰¹ In that case, the Court analyzed whether members of bands recruited by headlining singers were employees, for purposes of social security, of the concert venues in which they played.²⁰² In determining the band members were not employees, the Court cited the worker-protection purposes underlying the applicable statute as its reason for departing from the "right of control" test: "Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who *as a matter of economic reality* are dependent upon the business to which they render service."²⁰³ The Court

196. *Id.*

197. See Deanne M. Mosley & William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 MISS. L.J. 613, 631-32 (1998) (discussing the three independent contractor tests federal courts use in civil rights contexts: (1) the "right of control" test, (2) the "economic realities" test, and (3) a "hybrid" test).

198. Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 671 (1996).

199. See *id.* at 667.

200. See *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 870, 281 P.3d 289, 297 (2012) (highlighting the economic realities test's more effective application when addressing wage concerns).

201. 332 U.S. 126, 130 (1947).

202. *Id.* at 127-28.

203. *Id.* at 130 (emphasis added).

listed the following factors that guide this analysis in addition to whether the employer exercises control over the worker: (1) the permanency of the arrangement, (2) the level of skill required, (3) the investment in the facilities and materials for work, and (4) opportunities for profit or loss.²⁰⁴ Taking a holistic approach to this test, the Court noted that “[i]t is the total situation that controls.”²⁰⁵

The Washington State Supreme Court has recently adopted an iteration of this test for determining whether an employee is an independent contractor under wage statutes.²⁰⁶ In *Anfinson v. FedEx Ground Package System, Inc.*, Washington FedEx drivers brought a claim in state court alleging violations of the Washington Minimum Wage Act (MWA) and, as a corollary, the Federal Labor Standards Act (FLSA).²⁰⁷ The MWA guarantees a minimum wage tied to inflation for all *employees*, and not independent contractors, in Washington.²⁰⁸ Moreover, the statute states that employees are entitled to 150 percent pay for overtime work,²⁰⁹ requires employers to maintain certain wage records,²¹⁰ and creates a statutory cause of action for workers paid less than the MWA's requirements.²¹¹ Although beyond the scope of this Comment, the FLSA is the federal analogue for the MWA.²¹²

In *Anfinson*, a class of FedEx drivers argued that FedEx misclassified them as independent contractors.²¹³ They sought back pay for overtime hours worked under the MWA and compensation for required uniforms under the Washington Industrial Welfare Act.²¹⁴ Determining which test for independent contractors applied in Washington for the purposes of

204. *Id.*

205. *Id.*

206. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 871, 281 P.3d 289, 297–98 (2012).

207. 159 Wash. App. 35, 42–43, 244 P.3d 32, 35–36 (2010), *aff'd*, 174 Wash. 2d 851, 281 P.3d 189.

208. *See* WASH. REV. CODE § 49.46.020 (2014) (guaranteeing a minimum wage for employees, but not contractors).

209. *Id.* § 49.46.130(1).

210. *Id.* § 49.46.070.

211. *Id.* § 49.46.090. In addition to the MWA, Washington law includes a number of other remedial labor statutes intended to protect the rights of workers, including the Industrial Welfare Act (IWA), *id.* §§ 49.12.005–903, and the Washington Industrial Safety and Health Act of 1973 (WISHA), *id.* §§ 49.17.010–910.

212. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 868, 281 P.3d 289, 295–97 (2012).

213. *Anfinson*, 159 Wash. App. 35, 42–43, 244 P.3d 32, 35–36 (2010), *aff'd*, 174 Wash. 2d 851, 281 P.3d 189.

214. *Id.* at 42–43, 244 P.3d at 35–36.

wage statutes was a matter of first impression for the Court.²¹⁵ At trial, the judge instructed the jury that the FedEx drivers were employees if FedEx had the “right of control” over the drivers.²¹⁶ Citing the federal trend of using the “economic realities” test for FLSA purposes, the court of appeals overturned this instruction, adopting the “economic realities” test.²¹⁷ This set the stage for the Washington State Supreme Court to guide this matter of first impression.

The majority of the Court agreed with the court of appeals that the “economic realities” test was the proper analysis.²¹⁸ Writing for the majority, Justice Owens gave a thorough analysis of the independent contractor law landscape.²¹⁹ First, as the court of appeals noted, the MWA and FLSA both are intended to protect workers.²²⁰ Moreover, Congress enacted the MWA at a time when federal courts, as evidenced by *Bartels*, already used the “economic realities” inquiry for determining independent contractor status under the FLSA.²²¹

Second, the majority invoked the Washington remedial statute canon of interpretation.²²² Washington courts interpret remedial statutes liberally and construe any exemptions from such statutes narrowly.²²³ This canon has been invoked in previous wage cases; in doing so, the Court has noted that “Washington [has a] long and proud history of being a pioneer in the protection of employee rights.”²²⁴ The *Anfinson* majority’s application of the remedial statute canon fits with this line of reasoning. Because it focuses on the economic well-being of the worker rather than the employer’s control, many consider the “economic realities” test to be a more progressive framework.²²⁵

Finally, the Court distinguished between the “right of control” and “economic realities” tests. Specifically, the MWA and common law vicarious liability are means to two very different ends²²⁶:

215. *Id.* at 41, 244 P.3d at 34–35.

216. *Id.* at 47, 244 P.3d at 38.

217. *Id.* at 53–54, 244 P.3d at 41–42; *Anfinson* 174 Wash. 2d 851, 281 P.3d 289.

218. *Anfinson*, 174 Wash. 2d at 871, 281 P.3d at 297–98.

219. *See id.* at 868–71, 281 P.3d at 297–98.

220. *Id.* at 869–70, 281 P.3d at 297–98.

221. *Id.*

222. *See id.* at 870, 281 P.3d at 298.

223. *Id.*

224. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash. 2d 291, 300, 996 P.2d 582, 586–87 (2000).

225. *See, e.g.*, Carlson, *supra* note 12, at 323 (discussing the potential for the economic realities test to be slightly more worker-friendly than other tests).

226. *Anfinson*, 174 Wash. 2d at 870, 281 P.3d at 297–98.

[C]onsideration of the contrasting purposes of vicarious liability—to which the right-to-control test set forth in the *Restatement (Second) of Agency* § 220 applies—and the MWA bolsters our rejection of the right-to-control test. The right-to-control test serves to limit an employer's liability for the torts of another. By contrast, minimum wage laws have a remedial purpose of protecting against “the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.”²²⁷

This reasoning is where Washington's independent contractor law regarding vicarious liability, such as that applied in *Hollingberry*, diverges from wage-related independent contractor claims. On the vicarious liability prong, the “right of control” test controls.²²⁸ On the wage-disputes prong, the “economic realities” test controls.²²⁹

While making clear that the “economic realities” test is the proper test for wage-based independent contractor suits in Washington, the *Anfinson* opinion does not explicitly establish what factors comprise the test.²³⁰ The majority cites two different tests as examples of the “economic realities” test, but does not state which of these tests it wishes to adopt.²³¹ Some federal courts use a five-factor “economic realities” test:

To aid us in this task, we consider five factors: the degree of control exercised by the alleged employer; the extent of the relative investments of the worker and alleged employer; the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; the skill and initiative required in performing the job; and the permanency of the relationship.²³²

Other federal circuits have tacked on a sixth factor that asks “whether the service rendered is an integral part of the alleged employer's business.”²³³ By explicitly citing two slightly different iterations of the “economic realities” test, the Court did not settle what precise factors apply to the test under Washington law.

227. *Id.* (emphasis in original) (quoting *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945)).

228. *Hollingberry v. Dunn*, 68 Wash. 2d 75, 82, 411 P.2d 431, 436 (1966).

229. *Anfinson*, 174 Wash. 2d at 871, 281 P.3d at 297–98.

230. *Id.* at 869, 281 P.3d at 296.

231. *Id.*

232. *See, e.g.*, *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (citing *Reich v. Circle C Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993)).

233. *See, e.g.*, *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

Two justices disagreed with this analysis in *Anfinson*.²³⁴ In his dissent, Justice Charles Johnson rejected the majority's adoption of the "economic realities" test as "unworkable."²³⁵ He reasoned that by evaluating the worker's financial dependency on the employer, the test could cover virtually all independent contractors: "the plaintiff drivers are dependent on FedEx for their livelihood. But so too is the painting subcontractor dependent on the builder, the tire manufacturer on General Motors, the aviation electronics firm on Boeing, and so on."²³⁶

Though Justice Johnson's prediction could be accurate in theory, his analysis ignores that the "economic realities" test adopted by the majority is more nuanced than mere financial dependence. Indeed, financial dependence is central to the inquiry, but the test implicates at least five factors separate from simple financial dependence.²³⁷ It seems doubtful *Anfinson* will spell the end of independent contractors in Washington as the dissent seems to suggest that it will,²³⁸ particularly in light of the aforementioned growth of independent contractors.²³⁹

IV. APPLYING THE LESSONS OF *O'CONNOR*: QUESTIONING THE VIABILITY OF THE UBER LABOR MODEL IN WASHINGTON

Uber drivers have already brought class action suits in courts outside of Washington.²⁴⁰ For example, in *O'Connor*, drivers are currently pursuing wage and gratuities claims under California state labor statutes.²⁴¹ The outcome of the case will turn on whether they can qualify as employees under California law.²⁴² In contrast to the *Anfinson* test used in Washington, California courts use the two-tiered *Borello* test for wage independent contractor analyses.²⁴³ Although similar, the

234. *Anfinson*, 174 Wash. 2d at 878, 281 P.3d at 303 (Johnson, J., dissenting).

235. *Id.*

236. *Id.* at 882, 281 P.3d at 304.

237. *Id.* at 869, 281 P.3d at 296-97 (majority opinion).

238. *Id.* at 882, 281 P.3d at 304 (Johnson, J., dissenting).

239. See Wright, *supra* note 4.

240. See generally Class Action Complaint and Jury Demand, *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 4742878 (N.D. Cal. Aug. 13, 2013), ECF No. 58.

241. See *id.* at *5.

242. See *id.*

243. See, e.g., *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007) ("The essence of the test is the 'control of details'—that is, whether the principal has the right of control the manner and means by which the worker accomplishes the work—but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a

Anfinson test has a decidedly different character: It does not give extra weight to a single factor in the way the *Borello* test favors the “right of control” factor over others.²⁴⁴

Thus, while a legal analysis of Uber drivers’ independent contractor status in Washington would be different from the *O’Connor* analysis, the lessons from *O’Connor* could be predictive of the facts and interpretations that would be relevant to a similar analysis under Washington law. Because the *Anfinson* Court gave a decidedly worker-friendly commentary on the test for independent contractors, *O’Connor* suggests that Uber’s independent contractor labor model may not be viable in Washington.

A. *Courts Using the “Economic Realities” Test Apply It as a Worker-Friendly Analysis*

Courts’ progressive tone when discussing the “economic realities” test is instructive for how Uber drivers’ potential claims may be resolved.²⁴⁵ Because Washington’s adoption of the “economic realities” test is rather recent, it is instructive that federal courts have consistently found the “economic realities” test to be a particularly liberal analysis.²⁴⁶

For example, in *Doty v. Elias*,²⁴⁷ the Tenth Circuit Court of Appeals heard a case brought by restaurant employees alleging misclassification as independent contractors for wage purposes.²⁴⁸ In that case, the defendant stressed the fact that the plaintiffs could pick the hours they worked (during the restaurant’s open hours).²⁴⁹ Despite this near

distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal’s direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal’s regular business, and (8) whether the parties believe they are creating an employer-employee relationship.”). Notably, California’s minimum wage statute was passed *prior* to the FLSA, and thus state courts have not given weight to the federal courts’ use of the “economic realities” test for wage-based independent contractor disputes. *See* *Martinez v. Combs*, 231 P.3d 259, 270 (Cal. 2010) (refusing to apply the economic realities test given that the relevant California statute preceded the FLSA).

244. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 869, 281 P.3d 289, 296 (2012).

245. *See, e.g., Doty v. Elias*, 733 F.2d 720, 722 (10th Cir. 1984) (discussing the “economic reality” test’s friendliness for workers).

246. *See, e.g., EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983); *Hickey v. Arkla Indus.*, 699 F.2d 748, 751 (5th Cir. 1983).

247. 733 F.2d 720 (10th Cir. 1984).

248. *Id.* at 722.

249. *Id.* at 723.

complete autonomy over hours, the court cited the fact that the majority of plaintiffs were wholly dependent on working at the restaurant to make a living wage.²⁵⁰ Since *Doty*, some have characterized this decision as evidence of the “economic realities” test’s worker-friendliness.²⁵¹ At bottom, the critical threshold for plaintiffs is whether they can show that they depend on the work for their livelihood, which encompasses a vast number of independent contractors.²⁵²

In light of the test’s worker-friendly tilt, independent contractors who claim they are misclassified will always have a head-start in their efforts to persuade a court that they are in fact employees.²⁵³ This is in line with the Washington State Supreme Court’s remedial statute interpretation canon discussed above.²⁵⁴ Thus, Uber drivers will generally have a greater chance at success under the “economic realities” test.

B. The “Economic Realities” Factors Suggest Uber Drivers Qualify as Employees Rather Than Independent Contractors

The primary requirement in Washington for gaining employee status for MWA purposes is demonstrating that the six “economic realities” factors favor employee designation.²⁵⁵ This inquiry is fact intensive.²⁵⁶ At each stage of the analysis, the economic dependence of the Uber drivers will be “the lens through which [a court will] evaluate each of the several factors.”²⁵⁷

1. Uber’s Right of Control

The first factor in the economic realities test judges the “degree of control” that the employer can exercise over the worker.²⁵⁸ As discussed

250. *Id.*

251. See *Wheeler v. Hurdman*, 825 F.2d 257, 270–71 (10th Cir. 1987) (reasoning that the economic realities test is inherently geared toward protecting workers).

252. See *Doty*, 733 F.2d at 723.

253. See *Wheeler*, 825 F.2d at 270–71 (discussing one interpretation of the FLSA-independent contractor definition as a “liberal definition”).

254. See generally *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 281 P.3d 289 (2012).

255. *Id.* at 869, 281 P.3d at 298.

256. *Id.*

257. *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1318 (11th Cir. 2013) (explaining that economic dependence of drivers is the foundation for the entire “economic realities” analysis).

258. See *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (citing *Reich v. Circle C Invs., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993) (listing “control” as the first factor within the economic realities test)).

above, this is the carryover factor from the earlier common law test.²⁵⁹ Since *Anfinson*, only one court has conducted a thorough analysis of the economic realities factors. In *Moba v. Total Transportation Services Inc.*,²⁶⁰ a federal district court applying Washington law ruled that based on language in a contract guaranteeing that freight drivers were not obliged to work at any certain time and authorizing drivers to work for other freight companies, the right of control factor indicated the drivers were independent contractors.²⁶¹

Moba's analysis overemphasizes the significance of formalities at the expense of realities. When evaluating this factor, courts should not look to the contract's language as definitive evidence of control.²⁶² If contract language were dispositive, any company that seeks to treat workers as independent contractors could simply write contract terms that seem to bar the company from controlling the workers, and then exert control in practice despite those terms. Instead, courts should look to how the labor scheme works in practice to determine whether the company does in fact exert control over the workers; as the Fifth Circuit has noted, "[i]t is not significant how one 'could have' acted under the contract terms. The controlling realities are reflected by the way one actually acts."²⁶³

Looking at Uber drivers' practical circumstances, Uber does exert some pressure in dictating how drivers do their job. First, as discussed above, Uber uses a surge pricing model that creates zones where drivers have a temporary financial incentive to serve because of high demand in that area.²⁶⁴ Second, the company effectively requires a significant level of courtesy on the job because of its strict "deactivation" policy.²⁶⁵ Third, the discussion in *O'Connor* about the subtle instructions that Uber gives its drivers, such as suggesting the radio be tuned a certain way or the air conditioning properly monitored, cuts in favor of the drivers on this factor.²⁶⁶ Of course, there are periods when Uber drivers are alone in their vehicle on the job, without direct supervision. Thus, the outcome

259. See *supra* Part III.

260. 16 F. Supp. 3d 1257 (W.D. Wash. 2014).

261. *Id.* at 1264.

262. See *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1047 (5th Cir. 1987) (explaining that the primary focus of the control factor is the interaction and relationship between the parties, not nomenclature).

263. *Id.* (quoting *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974)).

264. Kedmey, *supra* note 23.

265. Riesman, *supra* note 70.

266. See Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion for Summary Judgment, *supra* note 116, at 5.

on this factor is by no means absolute. In summary, Uber rarely, if at all, exercises direct control (e.g., face to face) over its drivers. However, it does use secondary methods of control, such as supervising ratings and encouraging consistent habits, to exert some control over drivers' on-the-job conduct.

2. *Drivers' Opportunity for Profit or Loss*

The "opportunity for profit or loss" factor turns on the extent to which an individual's level of performance on the job can increase or decrease one's financial success.²⁶⁷ For example, if highly skilled individuals can make comparatively large amounts of money based on those skills, the arrangement would tilt toward an independent contractor relationship.²⁶⁸ By contrast, if all alleged employees' compensation is similarly proportional to the amount of labor performed, the circumstances suggest that the worker is an employee rather than an independent contractor.²⁶⁹

Uber drivers seemingly have little opportunity for exceptional profit or loss. According to one court evaluating this factor in the context of delivery drivers, when "experienced drivers knew which jobs were most profitable," the "profit or loss" factor tilted in favor of independent contractor status.²⁷⁰ Such is not the case with Uber: Uber's own data suggests that the drivers who work the most hours per week—presumably the most experienced—do not, on an hourly basis, earn much more than infrequent drivers.²⁷¹ Uber drivers' opportunity for profit based on superior skill is negligible at best, which favors employee designation.

3. *Drivers' Investment in Required Equipment or Materials*

The "investment" factor relates to the "profit or loss" factor.²⁷² The touchstone of this factor is as follows:

If the worker supplies more of the tools and materials for the

267. See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1536 (7th Cir. 1987) (analyzing farmworkers' opportunity for profit or loss under the economic realities test).

268. See *id.*

269. See *id.*

270. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998).

271. See *Hall & Kreuger*, *supra* note 3, at 18 (showing that Uber drivers' compensation does not increase as they work more hours).

272. See *Lauritzen*, 835 F.2d at 1537 (discussing farmworkers' investment in their gear and tools).

work, for instance, the worker's investment increases, she is exposed to greater risk of loss or opportunity for profit, and it becomes more likely that she is an independent contractor. An employee, by contrast, brings only his personal services to the relationship, and the employer provides all the supplies and equipment.²⁷³

Of course, independent contractors often bring their own materials to jobs. Courts have not established a clear threshold that alleged employees must meet to tip this factor in their favor.²⁷⁴ Courts have, however, reasoned that “[w]hen an employer furnishes valuable equipment, an employment relationship almost invariably exists.”²⁷⁵ This expansive reading fits with the economic dependence “lens” that courts often use when evaluating these factors.²⁷⁶

Driving for Uber requires two essential tools: an app and a car. Uber provides drivers with the tool most important to their job: the Uber app.²⁷⁷ Although Uber's business model depends principally on the app, Uber drivers have the option of supplying their own vehicles and smartphones or their own vehicle and smartphone.²⁷⁸ These considerations make the “investment” factor with respect to Uber drivers rather even.

4. *Whether the Service Requires a “Special Skill”*

Uber drivers follow their phones' directions, pick customers up, and drop them off.²⁷⁹ One could perhaps make extra money by having knowledge of popular areas to request rides. However, the occupation does not *require* a special skill.²⁸⁰ In *O'Connor*, Uber attempted to make the argument that drivers can significantly affect their earnings by using expertise or skillful techniques.²⁸¹ Even so, if giving rides to customers

273. Carlson, *supra* note 12, at 351.

274. *Id.*

275. See, e.g., Potter v. Mont. Dep't of Labor & Indus., 853 P.2d 1207, 1212 (Mont. 1993) (citing Solheim v. Tom Davis Ranch, 677 P.2d 1034, 1038 (Mont. 1993)).

276. See *supra* Part IV.B.

277. See Uber, Software License and Online Services Agreement (Nov. 10, 2014) (on file with author).

278. *Id.*

279. See Vaughn, *supra* note 20.

280. Compare FedEx Home Delivery v. NLRB, 563 F.3d 492, 500–01 (D.C. Cir. 2009) (delivery driving), with Hollingberry v. Dunn, 68 Wash. 2d 75, 78, 411 P.2d 431, 432 (1966) (seeding).

281. Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment; Memorandum of Points and Authorities in Support Thereof, *supra* note 125, at 4.

for money requires a special skill for the purposes of this test, it is hard to imagine what forms of labor would not require a special skill.²⁸² Indeed, part of the appeal of becoming an Uber driver is that anyone who knows how to drive can make money by working as a driver.

Dissimilarly, at least one federal court has found that delivery drivers can qualify as independent contractors.²⁸³ In *FedEx Home Delivery*, the D.C. Circuit ruled that FedEx drivers who had to take a short course in delivery driving could qualify as specially skilled employees.²⁸⁴ Thus, while Uber driving may not seem like an especially “skilled” profession, facts may support both sides of this factor. Contrast Uber drivers with the relationship in *Hollingberry*, which the parties entered into because the worker was particularly knowledgeable in “seeding,” a bona-fide specialty.²⁸⁵ In addition, the Fifth Circuit has held that welding, which is a decidedly skilled profession, is the type of “special skill” that this factor contemplates.²⁸⁶ If an activity as common as driving a car qualifies as a special skill, it is difficult to imagine what would not qualify as a special skill. Accordingly, driving for Uber should not require a particularly special skill.

5. *Permanence of the Relationship*

Although Uber’s driving contracts specify that the relationship is terminable at will,²⁸⁷ the relationship is nevertheless more permanent than the traditional conception of independent contractor relationships.²⁸⁸ Consider, for example, the *Hollingberry* arrangement in which the seeder contracted to complete a discrete job: seeding an enclosed area.²⁸⁹ In contrast, Uber drivers work with no defined end. Of course, Uber drivers are free to stop driving whenever they choose.²⁹⁰

282. See Plaintiffs’ Opposition to Defendant Uber Technologies Inc.’s Motion for Summary Judgment, *supra* note 116, at 25 (highlighting the very few opportunities that drivers have to make profits above the average driver).

283. *FedEx Home Delivery*, 563 F.3d at 500–01 (D.C. Cir. 2009).

284. *Id.*

285. *Hollingberry*, 68 Wash. 2d at 78, 411 P.2d at 432.

286. *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 333 (5th Cir. 1993).

287. Uber, Software License and Online Services Agreement § 2.4 (Nov. 10, 2014) (on file with author).

288. See, e.g., *Hollingberry*, 68 Wash. 2d at 78, 411 P.2d at 432 (holding that a sodding employee tasked with a single job did not have a particularly permanent relationship with the other party).

289. *Id.*, 411 P.2d at 433.

290. Uber, Software License and Online Services Agreement § 2.5 (Nov. 10, 2014) (on file with author).

Under the language of the contract, there is no guaranteed employment period.²⁹¹ Thus, although Uber drivers have an immediately severable relationship with Uber, the fact that the arrangement is for an indefinite period makes the resolution of this factor non-absolute.

6. *Whether the Service Rendered Is an Integral Part of the Business*

The final factor evaluates the importance of workers to the alleged employer's business. In some instances, courts have found employees who, at first glance, are not crucial to a business's livelihood are nevertheless an integral part of the business. In *Dole v. Snell*,²⁹² a cake business's decorators challenged their designation as independent contractors.²⁹³ The court, citing the very name of the business, "Cakes by Karen," reasoned that the employees were "obviously" integral to the business.²⁹⁴

Uber would not exist without drivers. Although the company touts itself as a "technology company," it earns revenue from its drivers giving a portion of their fares to Uber.²⁹⁵ Consider the company's own slogan. When users open the Uber app, they see the words "[e]veryone's private driver."²⁹⁶ If cake decorators qualify as an integral part of a business named "Cakes by Karen," drivers would logically qualify as an integral part of a business that represents itself as "everyone's private driver." Uber drivers are integral to the company's business, and this factor, therefore, favors employee status.

C. *Contrasting the Economic Realities Analysis with the O'Connor Analysis*

In summary, the factors favor full-employee classification for Uber drivers. The drivers have little opportunity for profit or loss, their job does not require a special skill, and Uber drivers are essential to the company's business model. The only clearly countervailing factors are

291. *Id.*

292. 875 F.2d 802 (10th Cir. 1989).

293. *Id.* at 802-04.

294. *Id.* at 811.

295. Marlize van Romburgh, *Uber in S.F. Is Now Three Times Bigger than City's Entire Taxi Industry*, S.F. BUS. TIMES (Jan. 20, 2015 10:04 AM), <http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/01/uber-valuation-revenue-sf-taxi-industry-kalanick.html>.

296. Alyson Shontell, *Uber CEO Explains His Company's Highly Ambitious Goal to End Car Ownership in the World*, BUS. INSIDER (Feb. 7, 2015 12:07 PM), <http://www.businessinsider.com/ubers-plans-to-be-cheaper-than-owning-a-car-2015-2>.

that the relationship is not permanent and Uber does not exercise significant control over its drivers' daily activities. In light of these factors, Uber drivers have a viable claim under the "economic realities" test, as adopted by the Washington State Supreme Court in *Anfinson*, for employee designation under Washington wage statutes.

The "economic realities" test is similar to the *Borello* test used in California, but lacks a predominant control factor.²⁹⁷ As discussed above, Uber drivers have thus far been successful in California, a jurisdiction where control is the predominant factor, despite the fact that the control factor is not as favorable to the drivers' case as other factors within the analysis.²⁹⁸ In other words, if drivers can have success in *O'Connor*, it follows that drivers could be even more successful in Washington, a jurisdiction where control is not predominant.

The implication of possible claims on the part of drivers should not be understated. If the drivers are indeed employees, Uber would be required to guarantee minimum wage, reimburse for expenses, and comply with worker protection regimes such as workers' compensation schemes.²⁹⁹ In any case, the success of the *O'Connor* plaintiffs calls into question whether Uber would be able to survive a similar challenge in a jurisdiction, such as Washington, with an arguably more worker-friendly independent contractor test.

CONCLUSION

The ascendance of Uber in the ridesharing industry has been a boon to consumers.³⁰⁰ Much of this benefit has come at the expense of drivers, who are not guaranteed many of the labor protections that most employees enjoy.³⁰¹ *O'Connor v. Uber Technologies* represents what could be the first of many lawsuits against Uber for misclassification of employees. When analyzing the distinctions between the California and

297. Compare *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wash. 2d 851, 869, 281 P.3d 289, 296 (2012), with *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 403 (Cal. 1989).

298. See *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 1069092, at *6 (N.D. Cal. Mar. 11, 2015).

299. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 144-51 (2015).

300. See *Taxi Competition*, CHI. BOOTH IGM FORUM (Sept. 29, 2014, 9:10 AM), http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_eyDrhny7vAPrX7 (showing that a vast majority of economists surveyed believe that ridesharing has increased taxi competition and thus benefitted consumers).

301. Kosoff, *supra* note 5.

Washington independent contractor tests, serious questions about the viability of Uber's labor model emerge. After the Washington State Supreme Court's opinion in *Anfinson v. FedEx*, Uber drivers potentially hold the power to upend the rapidly-growing ridesharing industry in Washington. Although Uber designates its drivers as independent contractors, this designation may be erroneous. Courts are sure to address this question in the near future, with the result in *O'Connor* instructive as to how such a lawsuit would play out in Washington. As the number of independent contractors in America continues to grow, the issue could drive independent contractor litigation in other industries.

Copyright of Washington Law Review is the property of Washington Law Review Association and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.