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The Gig Economy: Don't Call It A Comeback

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I. INTRODUCTION

A. A Lumpy Start

In 1978, Marcus Felson and Joe L. Spaeth publish the paper, "Community Structure and Collaborative Consumption: A Routine Activity Approach," in which they examined acts of collaborative consumption, *i.e.*, "events in which one or more persons consume economic goods or services in the process of engaging in joint activities with one or more others."[1] Among other things, Felson and Spaeth discussed the dependence of collaborative consumption on the "spatiotemporal concurrence of collaborators" (*i.e.*, people being in the same place at the same time).[2] As they explained,

> Because acts of collaborative consumption require the use of resources produced by other activities, as well as the cooperation among persons, these activities cannot exist autonomously but rather must feed upon other activities. Thus their analysis must consider the spatiotemporal structure of community activities which concentrate or disperse people in space and time or otherwise structure and coordinate their activities. … Insofar as joint activities involve consumption of goods and services, the spatiotemporal structure of community activities will have an important impact upon the extent of collaborative consumption. More precisely, by affecting the timing of collaborative activities, community structure tends to generate circumstances under which particular types of collaborative consumption occur.

This was, of course, before 68.4% of U.S. adults owned a smartphone[3] and had regular access to a dispersed communication network that enabled them to coordinate their activities with known and unknown others instantaneously at virtually no cost. Indeed, there seems little doubt that the modern sharing economy owes much of its existence to Apple's 2008 introduction of the iPhone and the app store.[4] The rapid adoption of mobile computing devices equipped with an ever-growing list of "social" apps has made it possible it to coordinate the actions—and thus consumption—of otherwise disparate and dispersed individuals.

Against this backdrop, enter the concept of the "lumpy" good (or service):

> The basic intuition is simple. There are goods that are "lumpy," by which I mean that given a state of technology, they can only be provisioned in certain discrete bundles that offer discontinuous amounts of functionality or capacity. In order to have any computation, for example, a consumer must buy a computer processor, which in turn only comes in certain speeds or capacities. Lumpy goods can, in turn,

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[1] Felson, Marcus and Joe L. Spaeth, "Community Structure and Collaborative Consumption: A routine activity approach," American Behavioral Scientist, 21:614–24, Mar-April 1978.
[2] *Id*. at 616.
[3] Statista, "Smartphones in the U.S. – Statistics & Facts," https://www.statista.com/topics/2711/us-smartphone-market/ (up from 40% in 2012).
[4] Eric Newcomer, "The Sharing Economy: Friend or Foe," Bloomberg News, June 15, 2015, https://newsletters.briefs.bloomberg.com/document/4vz1acbgfrxz8uwan9/what-it-is.

> be fine, mid-, or large grained. A large-grained good is one that is so expensive that it can only be used by aggregating demand for it. Industrial capital equipment, like steam engines, is of this type. Fine-grained goods are of a granularity that allows consumers to buy precisely as much of the goods as has the amount of capacity they require, such as a donut or a cup of coffee. Mid-grained goods are small enough for an individual to justify buying for her own use, given their price and her willingness and ability to pay for the functionality she plans to use. If enough individuals in society buy and use such mid-grained lumpy goods, that society will have a large amount of excess capacity "out there," in the hands of individuals.[5]

As Professor Yochai Benkler suggested in 2004 (before smartphones), a "shareable" good is one that is technically lumpy (*i.e.*, sold in a discrete unit rather than a smooth flow) and of mid-grained granularity (*i.e.*, reasonably attainable but in a unit that provides more capacity than the owner needs).[6] Although technology does not dictate the level of sharing of such goods, it does set a ceiling on the level of sharing possible.[7]

In 2004, Professor Benkler identified both cars and computers as "shareable" goods and noted the sharing of these resources via carpooling and distributed computing, respectively, had four characteristics in common: (1) they involved large-scale sharing practices among people who were either weakly related socially or complete strangers; (2) they involve sharing private economic goods otherwise owned for personal use; (3) market models exist for clearing their excess capacity; and (4) the output of the sharing practice is a "rival" good in that the shared use of the item precludes other uses of the item.[8] Professor Benkler then explored at length the social and technological limitations imposed on these sharing arrangements and the effects those limitations had on the economics of the sharing.

With respect to carpooling, Professor Benkler noted the vast majority of carpooling involved (at the time) no exchange of money but instead a bartered distribution of obligation (each person takes a turn driving) or cost-sharing (*e.g.*, sharing the out-of-pocket costs associated with fuel and tolls).[9] Similarly, with respect to distributed computing, Professor Benkler noted the most visible distributed computing projects tended to center around "other-focused" or "altruistic" goals, *e.g.*, SETI@home (search for extraterrestrial life), Folding@home (simulating protein folding), Fightaids@home (computational biology to screen drugs for treating HIV), and Genome@home (modeling artificial genes to create artificial proteins).[10] Even looking beyond these high-profile distributed computational projects, Professor Benkler found the absence of money was typical, with fewer than one fifth of distributed computing projects making any mention of money at all.[11] Moreover, of those that did mention money, most referred to a share of a generally available prize for solving a scientific or mathematical challenge and mix an appeal to hobby and altruism with

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[5] Benkler, Yochai, "Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production," The Yale Law Journal, Vol. 114:217, 297, Oct. 22, 2004, https://www.dropbox.com/s/ig8955sggxjd1h0/Sharing%20Nicely%20Benkler_FINAL_YLJ114-2.pdf.
[6] *Id*. at 276-77.
[7] *Id*. at 278-79.
[8] *Id*. at 277, 281.
[9] *Id*. at 283.
[10] *Id*. at 293.
[11] *Id*.

the promise of money; only two of almost sixty active distributed computing projects reviewed by Professor Benkler in November 2003 were built on a pay-per-contribution basis.[12]

B. The Rise of the Gig Worker

Of course, a lot has changed since 2004. New technologies have enabled companies like Car2Go, Uber, and Lyft to create new models for sharing excess vehicle capacity that are highly profitable and involve the direct exchange of money. Likewise, technological advancements and the emergence of new applications have created new markets for distributed computing.[13] Indeed, distributed computing is at the heart of the emerging Internet of Things, where otherwise "ordinary" devices and appliances, whether personal or industrial, are equipped with computational capabilities sufficient to analyze data captured by the device and report their findings back to a centralized computer responsible for analyzing same at a system-level to look for trends, enable more efficient operation, or any one of a thousand other purposes, without the centralized computer having to run each of the computations being performed by the dispersed "smart" devices. Likewise, the Thin Client movement shows companies using technology to further reduce the granularity of computing devices down to the bare essentials of little more than a display, a keyboard, and a connection to another device doing all the actual computing.

In hindsight, the rise of companies like Uber, Lyft, AirBnB, Handy, TaskRabbit, and Favor seems almost obvious, as does the emergence of a new model of "gig" engagement where (mostly part-time) workers earn money in variable ways at variable times and at variable rates of pay. To be clear, the sharing economy and its gig workers are a far way away from displacing the traditional employment model, but the role of the gig economy is undoubtedly growing.

Indeed, Lawrence Katz and Alan Krueger recently revised downward the estimates contained in their influential 2016 paper on the spread of the gig economy.[14] As Mr. Krueger explained, "Larry Katz and I now conclude that there was a modest rise in the share of the workforce in nontraditional jobs over the last decade—probably on the order of one to two percentage points, instead of the five percentage point rise we originally reported."[15]

Of course, part of the challenge is a lack of consensus on how exactly to define the gig economy and a complete dearth of government data on the subject. In the last three years, various sources have estimated that anywhere from 27% to 36% of the U.S. workforce participates in the gig economy.[16] These numbers are in rough agreement with a January 2015 study produced by Uber,

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[12] *Id*.

[13] Jon Russell, "Improbable Lands $20M from Andreessen Horowitz for Distributed Simulation Tech," TechCrunch, Mar. 24, 2015, http://techcrunch.com/2015/03/24/improbable-andreessen-horowitz/.

[14] Erik Sherman, The Gig Economy Never Really Happened, Say the Scientists Who Predicted It, Fortune, January 7, 2019, http://fortune.com/2019/01/07/gig-economy-uber-taskrabbit/.

[15] *Id*.

[16] Edelman Intelligence, "Freelancing in America: 2018," New York: Upwork and Freelancers Union, 2017, https://www.upwork.com/i/freelancing-in-america/2018/ (35%) (last visited April 22, 2019); Shane McFeely and Ryan Pendell, "What Workplace Leaders Can Learn From The Real Gig Economy," Gallup Workplace, Aug 16, 2018, https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx (36%) (last visited April 5, 2019); Gallup, MBO Partners, "The State of Independence in America," Herndon, VA: 2018, www.mbopartners.com/state-of-independence (26.9%) (last visited April 22, 2019); Manyika, James, Susan Lund, Jacques Bughin, Kelsey Robinson, Jan Mischke, and Deepa Mahajan, "Independent Work: Choice, Necessity, and the

a name virtually synonymous with the sharing economy.[17] According to Uber, a survey of 601 responding Uber drivers revealed that 80% were working full-time or part-time immediately prior to driving on the Uber platform and two-thirds reported having a full-time job while driving on the Uber platform.[18] Another eight percent of drivers reported being unemployed just prior to partnering with Uber, while seven percent identified as students, three percent identified as retired, and two percent identified as stay-at-home parents.[19] Among those working prior to driving on the Uber platform, 81 percent reported they had a permanent job they believed would be there until they left, were laid off, or were fired.[20]

Moreover, the Great Recession almost certainly gave the sharing economy a permanent home in the U.S. economy and psyche. A study conducted by the Federal Reserve Bank of Boston surveyed 778 individuals age 21 years or older who were not retired and provided complete information regarding the following: informal work participation status, informal hours worked, informal earnings, formal employment status, formal earnings, formal hours, age, race, gender, educational attainment, homeownership status, and required responses to three questions about economic expectations.[21] The study found the following:

1. Roughly 44 percent of respondents reported participating in some informal paid work activity during the past two years, not including paid survey work. Earning money was by far the most widely cited reason for participation in informal work, as opposed to other motivations such as having fun, meeting people, or developing or maintaining job-related skills.

2. Among employment-status groups, the part-time employed are most likely to participate in informal work (59 percent). Among jobless individuals, those who report that they want a job are more likely to engage in informal work arrangements (40 percent) than those who reported not wanting a job (27 percent). Imputing employment status as defined by the Bureau of Labor Statistics (BLS), 26 percent of the respondents who get classified as not in the labor force are nevertheless working informally.

Gig Economy," Washington, DC: McKinsey Global Institute, 2016, http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy (27%) (last visited April 22, 2019); *see also* TJ McCue, "57 Million Workers Are Part Of the Gig Economy," Forbes, Aug 31, 2018, https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy/ (last visited April 5, 2019).

[17] Jonathan Hall and Alan Krueger, "An Analysis of the Labor Market for Uber's Driver-Partners in the United States," Uber Technologies, Jan. 22, 2015, https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf.

[18] *Id*. at p. 10.

[19] *Id*.

[20] *Id*.

[21] Bracha, Anat and Burke, Mary A., "Informal Work Activity in the United States: Evidence from Survey Responses," Federal Reserve Bank of Boston, No. 14-13, Dec. 2014, http://www.bostonfed.org/economic/current-policy-perspectives/2014/cpp1413.pdf.

3. Among informal work participants, eight percent reported that informal work helped "very much" to offset the negative effects of the recent recession and 27 percent said it had helped "somewhat."

4. Among employment-status groups, part-time employees appeared to have benefitted the most from informal work in terms of offsetting negative effects of the recession: 19 percent of informal work participants in this group said informal work had helped "very much" in this regard. In addition, considering all informal participants, there was a positive correlation between monthly earnings from informal work activities and the self-reported extent to which informal work helped offset negative shocks.

5. The high prevalence of informal work participation among part-time employees and the importance of such work to this group in offsetting negative economic shocks suggests that there may be a significant willingness among members of this group to supply additional hours to formal jobs as labor demand strengthens.

6. More than half of those who report engaging in informal work are performing Internet-based tasks such as selling goods online, and many others performing informal tasks are likely to make use of the Internet in doing such work. (These statements do not include online survey-taking activity.) Recent trends such as rising Internet access, declining prices for mobile devices, and an increasing supply of web-based applications that facilitate finding or generating informal work are likely to persist, and therefore we expect participation in the peer-to-peer economy to continue to grow over time even in the face of an improving labor market.[22]

Indeed, a recent Gallup poll found roughly 36% of U.S. workers are engaged in some amount of gig work.[23] That same poll found 64% of gig workers are "doing their preferred type of work," compared to roughly 71% of traditional workers.[24] In other words, while traditional work still holds an edge, a majority of gig workers report doing gig work *out of preference*. A deeper analysis of the Gallup poll further suggests truly independent gig workers with gigs that permit flexibility, autonomy, and creative freedom are far more satisfied than arguably misidentified "gig" workers who are engaged more as temporary workers or on-call workers.[25]

While noting again that any estimate hinges in part on the specific definition of "gig worker" or "sharing economy" being used, the Brookings Institute reported in December 2016 that the sharing economy could grow to be a $335 billion industry by 2025.[26] The Brookings Institute report was

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[22] *Id.*

[23] Shane McFeely and Ryan Pendell, "What Workplace Leaders Can Learn From The Real Gig Economy," Gallup Workplace, Aug 16, 2018, https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx (last visited April 5, 2019); *see also* TJ McCue, "57 Million Workers Are Part Of the Gig Economy," Forbes, Aug 31, 2018, https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy/ (last visited April 5, 2019).

[24] *Id.*

[25] *Id.*

[26] Niam Yaraghi and Shamika Ravi, "The Current and Future State of the Gig Economy," The Brookings Institute (Dec. 29, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/sharingeconomy_032017final.pdf (last visited April 5, 2019).

based on a 2014 study by December 2014 study from PricewaterhouseCoopers ("PwC"), which included the automotive, hospitality, finance, staffing, and media streaming industries in their definition of "sharing economy" but excluded crowdfunding, expedited delivery, and the buying of used goods.[27] Using this definition, PwC found the sharing economy generated $14 billion in 2014 and was projected to grow to $335 billion by 2025.

Given the flexibility of "gig"-related terminology, it is important to note this paper and discussion focuses on the true gig worker—one who determines whether to work, what to work, when to work, where to work, and how to work—regardless of industry and specifically does *not* address other workers engaged on a temporary or on-call basis who may otherwise share many characteristics of a more traditional employment relationship but without the benefits, security, and longevity normally associated with traditional employment.

With that in mind, and borrowing from Professor Benkler's helpful concepts, true gig workers have shown that employment and labor can be thought of as having a "mid-grain lumpiness." While most workers want (and need) full-time employment, they also want (and need) time off, whether for vacation, common illness, the birth of a child, or some other life event not compatible with a typical full-time work schedule.[28] Likewise, while employers need employees when they need them, variations in demand, capacity, and a host of other factors invariably result in periods of both over and under-staffing. In short, it seems likely that continued advancements in technology will lead to ever-evolving models for marrying labor supply with labor demand, which may look nothing like the traditional model of employment, much less the enshrined vision of long-term employment commonly associated with the 1950s and hard-earned retirement pocket watches.

C. The Fight Over Employment

If the sharing economy and the gig model of engagement do in fact continue to gain ground, it is unlikely the traditional employment model will vanish, if for no other reason than the number of social programs and initiatives we have (wisely or unwisely) tied to employment. Consider, for example, the following small selection of social goals accomplished via the regulation of employers and the employment relationship:

1. **Revenue** – In 2013, the Treasury Tax Inspector General for Tax Administration noted that the last comprehensive worker misclassification audit, conducted for tax year 1984, found that 15 percent of employers misclassified 3.4 million workers as independent contractors, resulting in an estimated total tax loss of $1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes in that single tax year.[29] Moreover, many of the companies involved in the gig economy are structured as technology platforms that merely facilitate transactions between two interested parties (*e.g.*, a buyer and seller on eBay, a rider and driver on Uber, *etc.*), such that payments across that platform may be subject

[27] *Id*. at 5.
[28] *See, e.g.*, 29 U.S.C. § 2601, et seq. (the FMLA); *see also* the time off section of any employee handbook.
[29] Treasury Tax Inspector General for Tax Administration, "Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings," June 14, 2013, https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf.

to Form 1099-K rather than 1099-MISC.[30] This distinction is important, given the reporting threshold for 1099-K requires $20,000 in payments plus 200 transactions, whereas the 1099-Misc requires a mere $600 in payments.[31]

2. **Wages** – When Congress wanted to ensure a certain minimum wage was earned by workers in the United States and that a premium was paid for work in excess of a certain number of working hours in any given workweek, it passed the Fair Labor Standards Act.[32] It is hardly surprising then that the DOL now describes "[t]he misclassification of employees as independent contractors [as] one of the most serious problems facing affected workers, employers and the entire economy."[33]

3. **Health Care** – In a guided or misguided (depending on your view) attempt to address health care in the United States, the Affordable Care Act doubled-down on employer-provided healthcare by mandating, among a great many other things, that all employers provide certain minimum levels of health care to its full-time "employees" or pay a penalty.[34] Further emphasizing the legal significance of "employment" under the law, the application schedule for the Affordable Care Act and the penalties it imposes were likewise set to vary based on the number of "employees" an employer has.[35]

4. **Time Off** – In 1993, Congress passed the Family Medical Leave Act to ensure working parents had (some) time for their children and (some) job security in the

[30] *Compare* https://www.irs.gov/businesses/understanding-your-1099-k *with* https://www.irs.gov/forms-pubs/about-form-1099-misc, noting I am not a tax lawyer and will never give anyone tax advice.
[31] *See id*. Again, not a tax lawyer, not giving tax advice. Hire a tax lawyer.
[32] 29 U.S.C. § 202(1) ("The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce."
[33] http://www.dol.gov/whd/workers/misclassification/
[34] 26 U.S.C. § 4980H.
[35] 26 U.S.C. §§ 4980H(a), (b) (calculating penalties based on the number of full-time employees), 4980H(c)(2) (defining large employer status based on the number of full-time employees).

event of serious illness.[36] Likewise, Congress has long ensured that military service members are entitled to job protections in the event of military service.[37]

5. **Equal Opportunity** – Beginning with Title VII of the Civil Rights Act of 1964 and continuing through with the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and a host of other lesser known "anti-discrimination" statutes, Congress and the states have effectively transformed employers into stewards and enforcers of equal employment opportunity principles with respect to their employees.

6. **Workers Compensation** – Virtually every state in the nation has passed a law either requiring or strongly encouraging employers to secure workers compensation insurance for its employees to ensure they receive medical treatment and some degree of income replacement in the event of an on-the-job injury.

7. **Unemployment** – Likewise, virtually every state has adopted a tax-based unemployment system by which employees are provided a reduced degree of income replacement in the event of most forms of terminations not directly related to employee misconduct.

8. **Immigration** – In 1986, Congress passed the Immigration Reform and Control Act for the first time which made employers directly responsible for the enforcement of federal immigration policy with respect to unauthorized employment in the United States by requiring them to inspect employee work authorization and identity documents, complete Form I-9, and retain copies of same for review by federal enforcement agencies.[38]

9. **Labor Relations** – Significant in its time, when Congress was faced with far-reaching concerns related to unequal bargaining power between the owners of industry and the providers of their labor, it passed the National Labor Relations Act and vested "employees" with the right to form unions and engage in other concerted activity for mutual aid and protection.[39]

All these social safety nets and levers turn on one thing: employment. So what happens if employment simply goes away? This question has earned serious attention, with a number of

[36] 29 U.S.C. § 2601(a) ("Congress finds that—(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly, (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions, (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting, (4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods, (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men, and (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."
[37] 38 U.S.C. § 4301 *et seq*.
[38] 8 U.S.C. § 3124a.
[39] 29 U.S.C. §§ 151-169.

states, politicians, and industry leaders calling for a rethinking of the current binary approach to service providers (you are either an employee or a contractor) and the potential creation of a third category of gig worker that can be taxed (or not), afforded certain social safety nets (but not others), and afforded certain basic legal protections (but not all of those applied to employees).[40] A full throated discussion of that issue is well beyond the scope of this paper. Rather, the remainder of this paper reviews the various tests used under various laws to sort out the current binary distinction between employees and independent contractors, although it does not conduct that review in exhaustive, grinding detail, principally because exhaustive, grinding papers are not especially fun to write or read.

II. EMPLOYEE V. INDEPENDENT CONTRACTOR

At present, whether a worker is an employee or an independent contractor determines the rights and obligations of entities and service providers in a wide variety of areas, including tax, wage and hour compliance, health insurance, mandatory leaves of absence, unemployment insurance, workers' compensation, intellectual property, vicarious liability, and even coverage under other laws (where coverage depends on how many employees an entity has). Although certain themes emerge (namely control and reality) among these various tests, it is important to understand there is no one unifying test for deciding whether a service provider is an employee or a contractor at the federal level, much less at the state level. Instead, each of the various agencies, laws (including the common law), and sovereigns affected by the determination has its own take on the issue. A number of these tests are explored below.

A. Common Law Test (Texas)

The common law test is the starting point for many of the other tests. In Texas, the common law test for determining whether someone is an employee or an independent contractor "is whether the employer has the right to control the progress, details, and methods of operations of the employee's work."[41] Notably, under Texas law, the employer must control "not merely the end sought to be accomplished, but also the means and details of its accomplishment."[42] The right to control is measured by a five factor test: "(1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except about final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job."[43]

There are certain advantages to having a service provider classified as a common-law employee. For example, Texas law recognizes that employees owe a fiduciary duty to their employers, both by virtue of their agency relationship and through the existence of a relationship of trust and confidence.[44] By contrast, an independent contractor may or may not owe a fiduciary duty to the

[40] *See, e.g.*, Diane Mulchay, "How U.S. Law Needs To Change To Support The Self-Employed And Gig Economy," (Jul. 23, 2018) https://hbr.org/2018/07/how-u-s-law-needs-to-change-to-support-the-self-employed-and-gig-economy (last visited April 5, 2019); Bloomberg Law, "INSIGHT: The Labor Flexibility and Legal Flux of the Gig Economy," (Oct. 5, 2018) https://www.bna.com/insight-labor-flexibility-n73014483023/ (last visited April 5, 2019).
[41] *Thompson v. Travelers Indem. Co. of Rhode Island,* 789 S.W.2d 277, 278 (Tex. 1990).
[42] *Limestone Products Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002).
[43] *Id.*
[44] *Johnson v. Pritchard,* 73 S.W.3d 193 (Tex. 2002) ("Under the common law of most jurisdictions, including Texas, agency is also a special relationship that gives rise to a fiduciary duty. . . . 'unless otherwise agreed, an agent is subject

recipient of his or her services.[45] Indeed, while the existence of a fiduciary duty based on a formal relationship is a question of law, the existence of a fiduciary duty based on an informal fiduciary relationship is typically a question of fact.[46] Generally speaking, an informal fiduciary relationship arises where one person trusts in and relies upon another. As the Texas Supreme Court has explained, "[W]e have also recognized that certain informal relationships may give rise to a fiduciary duty. Such informal fiduciary relationships have also been termed 'confidential relationships' and may arise 'where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.'"[47] For example, sales employees have been held to have fiduciary duties to their employers arising out of the trust and reliance inherent in their roles.[48]

Having a fiduciary duty imposes several significant obligations, including: (1) the duty to account for profits arising out of the relationship; (2) the duty not to act as, or on account of, an adverse party without the principal's consent; (3) the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency; and (4) the duty to deal fairly with the principal in all transactions between them.[49] In the specific context of employment, employees who owe fiduciary duties to their employers have the following obligations: (1) the duty not to appropriate his or her employer's trade secrets; (2) the duty not to solicit his or her employer's customers while still working for his employer; (3) the duty not to

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to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.' . . . . 'the agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.") (quoting Restatement (Second) of Agency); *Crim. Truck & Tractor Co. v. Navistar Int'l Transportation Corp.,* 823 S.W.2d 591, 593-94 (Tex. 1992) (recognizing that the principal/agent relationship is one that gives rise to a fiduciary duty) (*citing Kinzbach Tool Co. v. Corbett-Wallace Corp.,* 160 S.W.2d 509, 513 (1942); *National Plan Administrators, Inc. v. National Health Ins. Co.,* 235 S.W.3d 695, 700, 704 (Tex. 2007) (**"**An agency relationship imposes certain fiduciary duties on the parties. But even in an agency relationship *such as employer-employee*, courts take all aspects of the relationship into consideration when determining the nature of fiduciary duties flowing between the parties."); *Mabrey v. Sandstream Inc.,* 124 S.W.3d 302, 316 (Tex.App.—Ft. Worth, 2003, no pet.)("Even apart from any written contract, a fiduciary relationship arises from an employment relationship forbidding an employee from using trade secrets or confidential or proprietary information in a manner adverse to the employer. The obligation survives termination of the employment relationship.").

[45] For example, in *Sands v. Estate of Buys*, 160 S.W.3d 684, 688 (Tex. App.—Fort Worth 2005), the fact that independent contractors had access to information that a business claimed were trade secrets was a factor used by the court to deny trade secret protection.

[46] *National Plan Administrators, Inc. v. National Health Ins. Co.,* 235 S.W.3d 695, 700, 704 (Tex. 2007) ("Whether a fiduciary duty exists is a question of law. . . . Whether a party owes a fiduciary duty is a legal matter."); *Crim. Truck & Tractor Co. v. Navistar Int'l Transportation Corp.,* 823 S.W.2d 591, 593-94 (Tex. 1992) ("Historically, we have recognized that certain relationships give rise to a 'fiduciary' duty as a matter of law."); *Crim. Truck & Tractor Co. v. Navistar Int'l Transportation Corp.,* 823 S.W.2d 591, 594 (Tex. 1992) (internal citations omitted) ("We have also recognized that certain informal relationships may give rise to a fiduciary duty. Such informal fiduciary relationships have also been termed 'confidential relationships' and may arise 'where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one'. . . . The existence of a confidential relationship is usually a question of fact.").

[47] *Crim. Truck & Tractor Co. v. Navistar Int'l Transportation Corp.,* 823 S.W.2d 591, 594 (Tex. 1992) (internal citations omitted).

[48] *See Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.,* 160 S.W.2d 509, 512-13 (Tex. 1942) (finding that a salesman had a fiduciary relationship with his employer because "[t]he term includes those informal relations which exist whenever one party trusts and relies upon another."); *Molex, Inc. v. Nolen,* 759 F.2d 474, 479 (5th Cir. 1985) (applying Texas law) (finding that a sales representative was a fiduciary of his employer).

[49] *Johnson v. Pritchard,* 73 S.W.3d 193, 200 (Tex. 2002) (quoting Restatement (Second) of Agency).

carry away certain information, such as lists of customers; (4) the duty not to act for his or her future interests at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer.[50]

On the flip side, an employer is more likely to be held liable for the acts of his or her common-law employee than his or her independent contractor.[51] It is also important to remember, however, that courts are occasionally prone to results-oriented reasoning and under extreme facts may find a way to obviate the distinction between "employee" and "independent contractor." For example, in *Read v. Scott Fetzer*, the Texas Supreme Court held a vacuum manufacturer and its distributor were liable for a rape committed by an independent contractor engaged by the distributor to sell the manufacturer's vacuums door-to-door.[52] Among other things, the Court reasoned the manufacturer and distributor required in-home sales of the product, thus retaining control over the aspect of the independent contractor that enabled the rape, and had negligently exercised that portion of retained control by failing to conduct adequate background checks that could have revealed the independent contractor's previous criminal history.[53]

B. Internal Revenue Service Test

The Internal Revenue Service ("IRS") test for determining the relationship between a worker and a business is a modified common law test focusing on control, independence, and opportunity.[54] The IRS test focuses on control and independence and the IRS categorizes the facts it reviews into three categories, which are then broken down into subcategories:

- **Behavioral control**
  - Instructions that the business gives to the worker
  - Training that the business gives to the worker
- **Financial control**
  - Extent to which the worker has unreimbursed business expenses
  - Extent of the worker's investment
  - Extent to which the worker makes his or her services available in the market
  - How the business pays the worker

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[50] *Johnson v. Pritchard,* 73 S.W.3d 193, 202 (Tex. 2002) (quoting Restatement (Second) of Agency). Note, however, that the duties related to confidential information have likely been displaced by the passage of the Texas Uniform Trade Secret Act. *See* TEX. CIV. PRAC. & REM. CODE, § 143A.007.

[51] *Limestone Products Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (dismissing case against business on summary judgment holding that business was not vicariously liable for an accident caused by a driver when the driver was an independent contractor).

[52] *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736 (Tex. 1998) (holding that business that had independent contractor distributor, was liable when independent contractor of the independent contractor distributor raped a women, because the business required in-home sales of its product and therefore retained control over that aspect of the second level independent contractor and negligently exercised that retained control because a background check would have revealed the independent contractor's previous criminal history).

[53] *Id.*

[54] *Employer's Supplemental Tax Guide*, Internal Revenue Service Publication 15-A, p. 7 (2016).

- Extent to which the worker can realize a profit or loss

- **The type of relationship**
  - Written contracts describing the relationship
  - Whether or not the business provides the worker with employee-type benefits
  - The permanency of the relationship
  - The extent to which the services performed by the worker are a key aspect of the regular business of the company.[55]

The "behavioral control" category examines whether the possible employer has "a right to direct and control how the worker does the task for which the worker is hired."[56] Significantly, the IRS has explicitly stated that even if no instructions are given to workers, the *right* to give instructions to the worker may indicate an employment relationship, even if the business has not exercised the right.[57]

The "financial control" category examines whether the business has a right to control the business aspects of the workers' job.[58] For example, unreimbursed business expenses are typically a sign of an independent contractor.[59] If the worker has a significant investment in the facilities or tools used by him or her, it tends to indicate independent contractor status. Likewise, if the worker makes his or her services available to the market at large instead of just one company, it tends to suggest an independent contractor relationship.[60] How the worker is compensation is also significant. If the worker is compensated based on his or her time, it suggests an employment relationship.[61] On the other hand, if the worker is paid in some other manner (e.g., a flat fee or piece rate), it suggests an independent contractor relationship.[62] Notably, each of these factors help illustrate the extent to which the worker has an opportunity to realize a profit by being more efficient in how he or she provides the service. A worker who is paid by the hour and either provided or reimbursed for his or her materials has limited opportunity to make more money by being efficient. By contrast, a worker who provides his or her own materials and is compensated with a flat fee can increase his or her profit by being smart about securing materials and by being efficient in delivering his or her services or product.

The "type of relationship" category looks at the underlying nature of the relationship itself and considers any written agreement, the provision of employee-like benefits, the permanency of the relationship, and the significance of the worker's service to the recipient's business. Generally, the lack of a written contract, the provision of employee-like benefits and an indefinite relationship all point towards an employment relationship, whereas a written agreement, the absence of benefits, and a finite relationship all suggest an independent contract relationship. At a certain level, these

[55] *Id.* p.7-8.
[56] *Id.* p.7.
[57] *Id.*
[58] *Id.*
[59] *Id*. p. 7.
[60] *Id.* p. 8.
[61] *Id.*
[62] *Id.*

factors are all within the parties' control: they can enter into an agreement, specifically agree no benefits will be provided, and identify a finite period for the relationship. By contrast, the final factor in this category—the extent to which worker's service performed by the worker are integral to the regular business of the recipient—is more likely to dictated by business reality.

Like many states the IRS has also entered into an information sharing partnership with the Department of Labor to combat misclassification of employees as independent contractors.[63] Similarly, in Texas, the Texas Workforce Commission will notify the IRS of the results of its investigation if the Workforce Commission determines that the employer did not properly pay taxes.[64]

A business may submit Form SS-8 to the IRS to trigger a voluntary review of whether a service relationship being considered by the business is an employment relationship or a contractor relationship.[65] Of course, doing so may create far more challenges than it solves and is something to be considered only after consultation with legal counsel.

C. Department of Labor Test

On July 15, 2015, the DOL issued Administrator's Interpretation 2015-1, setting forth the DOL's formal position on the misclassification of workers as independent contractors rather than employees under the FLSA.[66] Noting the classification of workers as independent contracts "results in lower tax revenues," the Department of Labor succinctly summarizes the thrust of its new guidance by bluntly stating "most workers are employees under the FLSA."[67]

The 2015 Administrator's Interpretation describes the history of the FLSA, its interpretation of the Act's "suffer or permit to work" standard in the definition of "employ," and explains the six factors that drive its "economic realities" test for determining whether a worker is an employee or independent contractor.[68] As the 2015 Administrator's Interpretation notes, "the factors are a guide to make this ultimate determination of economic dependence or independence," with no one factor

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[63] *Memorandum of Understanding Between The Internal Revenue Service and the US Department of Labor*, September 19, 2011 found at http://www.dol.gov/whd/workers/MOU/irs.pdf. (last accessed April 5, 2019).

[64] *Especially for Texas Employers*, Office of the Commissioner Representing Employers, Texas Workforce Commission, at: http://www.twc.state.tx.us/news/efte/twc_audits.html (last visited April 4, 2016) ("Non-payment of taxes leads TWC to inform the Internal Revenue Service that the non-paying employer is not entitled to the federal tax credit with respect to the wages in question, which in turn can lead to an IRS audit.").

[65] Internal Revenue Service, Form SS-8, found here: https://www.irs.gov/pub/irs-pdf/fss8.pdf (last viewed April 5, 2019).

[66] http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm. The formal name is "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." Cited herein as "2015 Administrator's Interpretation." In a footnote the Department of Labor states that the definition is the same under the Migrant and Seasonal Agricultural Worker Protection Act and the Family and Medical Leave Act. *See* 2015 Administrator's Interpretation n.3.

[67] 2015 Administrator's Interpretation p. 2.

[68] 2015 Administrator's Interpretation p.2; *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019) (same).

controlling.[69] The 2015 Administrator's Interpretation also goes out of its way to describe this standard as broader than the common law control test.[70] The factors considered by the DOL follow:

- The extent to the which the work performed is an integral part of the employer's business;
- The worker's opportunity for profit or loss depending on his or her managerial skill;
- The extent of the relative investments of the employer and the worker;
- Whether the work performed requires special skills and initiative;
- The permanency of the relationship; and
- The degree of control exercised or retained by the employer.[71]

The DOL makes plain its view that "the economic realities of the relationship, and not the label the employer gives it, are determinative.[72] In other words, the existence of a mutual agreement between a company and a service provider labeling the service provider a "contractor" is not controlling.[73] The DOL also notes the Memoranda of Understanding ("MOUs") it has entered into with several states (including Texas) to cooperate in the investigation of employee misclassification.[74] As a result of these MOUs, any investigation of worker classification by a state agency (e.g., in connection with a claim for unemployment filed by a worker the company classified as a contractor) may very well result in the state agency notifying the DOL, thereby triggering a broader federal-level audit of the company's practices.[75]

It is also worth noting the DOL has a strong view regarding the use of "unpaid interns." More specifically, the DOL believes an employment relationship exists (meaning the interns cannot be unpaid) unless ***all*** of the following six conditions are met:

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[69] 2015 Administrator's Interpretation p.2; *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.").
[70] *Id* at p.3.
[71] *Id.* at p.4; *but see Eberline v. Media Net, L.L.C.*, 15-60413, 2016 WL 279092, at *2 (5th Cir. Jan. 21, 2016) (5th Circuit uses five non-exhaustive factors that track the ones used by the Department of Labor except not including the extent to which the work performed is an integral part of the employer's business.) *citing Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008).
[72] *Id.* at p. 5.
[73] *Id.*
[74] Information about this initiative can be found at http://www.dol.gov/whd/workers/misclassification/. The states that have partnered with the Department of Labor are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming.
[75] *See e.g. Memorandum of Understanding between United States Department of Labor, Wage and Hour Division and State of Texas – Texas Workforce Commission*, found at http://www.dol.gov/whd/workers/MOU/tx.pdf.

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[76]

A recent high profile Second Circuit decision declined to use the DOL's six-factor test, however, finding it was "basically a distillation of the facts" of an earlier Supreme Court case and noting the DOL had "no special competence or role in interpreting a judicial decision."[77] Instead, the Second Circuit adopted a "primary beneficiary" test under which an "employment relationship is not created when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation."[78] To aid in determining who the primary beneficiary is, the court articulated seven non-exhaustive considerations:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

[76] DOL, Wage & Hour Div., Fact Sheet # 71, Internship Programs Under The Fair Labor Standards Act (April 2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.
[77] *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2016).
[78] *Id.* at 535.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[79]

Unlike the DOL's test, the Second Circuit's primary beneficiary test explicitly states these considerations are non-exhaustive and non-dispositive and does ***not*** require ***all*** of them to point in favor of an internship to find no employment relationship.[80] The Second Circuit recently reaffirmed this test and applied it in the context of a trainee at a for-profit vocational academy, finding that the plaintiff was the "primary beneficiary" of the relationship, and thus he was not an employee for purposes of federal and state compensation laws.[81]

D. Texas Workforce Commission Test

In April 2019, the Texas Workforce Commission voted 2-1 to adopt the Marketplace Contractor Rule, which effectively represents the Commission's approach to applying the standard 20-factor test (which has *not* changed) to true gig workers. The Rule is carefully constructed and only applies to "marketplace contractors" who enter into an agreement with a "marketplace platform" to connect with others seeking services of the type offered by the marketplace contractor, provided certain conditions are met.[82]

"Marketplace contractor" is defined as "any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform's digital network to provide services to the public (including third-party individuals and entities) seeking the type of service or services offered by the marketplace contractor." A "marketplace platform," in turn, is defined as "a corporation, partnership, sole proprietorship, or other entity operating in this state that: (1) uses a digital network to connect marketplace contractors to the public (including third-party individuals and entities) seeking the type of service or services offered by the marketplace contractors; (2) accepts service requests from the public (including third-party individuals and entities) only through its digital network, and does not accept service requests by telephone, by facsimile, or in person at physical retail locations; and (3) does not perform the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state." Finally, a "digital network" is defined as "an online-enabled application, software website, or system offered by a marketplace platform for the public (including third-party individuals and entities) to use to find and contact a marketplace contractor to perform one or more needed services."

Notably, the definition of marketplace platform requires, among other things, that the platform accept service request (from users) only via its "digital network" (its online app or website), as

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[79] *Id.* at 536-537.
[80] *Id.* at 537.
[81] *Velarde v. GW GJ, Inc.*, 914 F.3d 779, 781 (2d Cir. 2019).
[82] 40 Tex. Admin. Code § 815.134(b); https://twc.texas.gov/files/agency/pr-ch-815-status-test-approved-12-4-18-twc.pdf.

opposed to requests made via telephone or in person. The definition of marketplace platform further excludes an entity that offers the services from a physical business location in Texas operated by the platform.

Assuming the definitions of "marketplace contractor" and "marketplace platform" are met, each of the following nine conditions must then be met to apply the Rule and thereby exclude the arrangement from the definition of employment:

(1) all or substantially all of payments to the contractor are on a per-job or per-transaction basis;
(2) the marketplace platform does not dictate specific hours the contractor must be available;
(3) the contractor is not prohibited from using other platforms;
(4) the contractor is not restricted from having other jobs or businesses;
(5) the platform does not control where and when the contractor works or accesses the platform;
(6) the contractor bears all or substantially all of his/her own expenses;
(7) the contractor provides his/her own tools, equipment, and materials;
(8) the platform does not control the details or methods of performance or require the contractor to follow specific, mandatory instructions; and
(9) the platform does not require mandatory meetings or mandatory trainings.[83]

Opponents of the Rule suggested its adoption would end traditional employment in Texas. In truth, the Rule simply confirms that if each of the above is true, then the relationship is not an employment relationship under the traditional TWC test for determining employment, which has not changed and still represents the IRS's old 20-factor test, formalized into TWC Form C-8:[84]

1. INSTRUCTIONS:	11. ORAL OR WRITTEN REPORTS
An Employee receives instructions about when, where and how the work is to be performed. *An Independent Contractor does the job his or her own way with few, if any, instructions as to the details or methods of the work*	An Employee may be required to submit regular oral or written reports about the work in progress. *An Independent Contractor is usually not required to submit regular oral or written reports about the work in progress.*
2. TRAINING	12. PAYMENT BY THE HOUR, WEEK OR MONTH
Employees are often trained by a more experienced employee or are required to attend meetings or take training courses.	An Employee is typically paid by the employer in regular amounts at stated intervals, such as by the hour or week.

40 Tex. Admin. Code § 815.134(b); https://twc.texas.gov/files/agency/pr-ch-815-status-test-approved-12-4-18-twc.pdf.
[84] 40 Tex. Admin. Code § 821.5, graphic found at http://texreg.sos.state.tx.us/fids/200700686-1.pdf.

An Independent Contractor uses his or her own methods and thus need not receive training from the purchaser of those services	*An Independent Contractor is normally paid by the job, either a negotiated flat rate or upon submission of a bid.*
3. INTEGRATION	13. PAYMENT OF BUSINESS & TRAVEL EXPENSE
Services of an Employee are usually merged into the firm's overall operation; the firm's success depends on those Employee services. *An Independent Contractor's services are usually separate from the client's business and are not integrated or merged into it*	An Employee's business and travel expenses are either paid directly or reimbursed by the employer. *Independent Contractors normally pay all of their own business and travel expenses without reimbursement.*
4. SERVICES RENDERED PERSONALLY	14. FURNISHING TOOLS & EQUIPMENT
An Employee's services must be rendered personally; Employees do not hire their own substitutes or delegate work to them. *A true Independent Contractor is able to assign another to do the job in his or her place and need not perform services personally.*	Employees are furnished all necessary tools, materials and equipment by their employer. *An Independent Contractor ordinarily provides all of the tools and equipment necessary to complete the job.*
5. HIRING, SUPERVISING AND PAYING HELPERS	15. SIGNIFICANT INVESTMENT
An Employee may act as a foreman for the employer but, if so, helpers are paid with the employer's funds. *Independent Contractors select, hire, pay and supervise any helpers used and are responsible for the results of the helpers' labor.*	An Employee generally has little or no investment in the business. Instead, an Employee is economically dependent on the employer. *True Independent Contractors usually have a substantial financial investment in their independent business.*
6. CONTINUING RELATIONSHIP	16. REALIZE PROFIT OR LOSS
An Employee often continues to work for the same employer month after month or year after year. *An Independent Contractor is usually hired to do one job of limited or indefinite duration and has no expectation of continuing work.*	An Employee does not ordinarily realize a profit or loss in the business. Rather, Employees are paid for services rendered. *An Independent Contractor can either realize a profit or suffer a loss depending on the management of expenses and revenues.*
7. SET HOURS OF WORK	17. WORKING FOR MORE THAN ONE FIRM AT A TIME

An Employee may work "on call" or during hours and days as set by the employer. *A true Independent Contractor is the master of his or her own time and works the days and hours he or she chooses.*	An Employee ordinarily works for one employer at a time and may be prohibited from joining a competitor. *An Independent Contractor often works for more than one client or firm at the same time and is not subject to a non-competition rule.*
8. FULL TIME REQUIRED	18. MAKING SERVICE AVAILABLE TO THE PUBLIC
An Employee ordinarily devotes full-time service to the employer, or the employer may have a priority on the Employee's time. *A true Independent Contractor cannot be required to devote full-time service to one firm exclusively*	An Employee does not make his or her services available to the public except through the employer's company. *An Independent Contractor may advertise, carry business cards, hang out a shingle or hold a separate business license.*
9. LOCATION WHERE SERVICES PERFORMED	19. RIGHT TO DISCHARGE WITHOUT LIABILITY
Employment is indicated if the employer has the right to mandate where services are performed *Independent Contractors ordinarily work where they choose. The workplace may be away from the client's premises*	An Employee can be discharged at any time without liability on the employer's part. *If the work meets the contract terms, an Independent Contractor cannot be fired without liability for breach of contract*
10. ORDER OR SEQUENCE SET	20. RIGHT TO QUIT WITHOUT LIABILITY
An Employee performs services in the order or sequence set by the employer. This shows control by the employer. *A true Independent Contractor is concerned only with the finished product and sets his or her own order or sequence of work.*	An Employee may quit work at any time without liability on the Employee's part. *An Independent Contractor is legally responsible for job completion and, on quitting, becomes liable for breach of contract*

Indeed, applying the factors set forth in the TWC's new Marketplace Contractor rule, it is plain that any relationship that meets each of the nine requirements of the Rule is not an employment relationship under the 20-factor test. Moreover, by providing guidance in advance, the Rule makes it much more likely that Marketplace Platforms will be certain to structure their relationships to match the requirements of the Rule and thereby guarantee the Marketplace Contractor freedom in deciding whether, when, how, and for whom to render service. Finally, it is important to recognize the underlying test has not changed for another reason: if a app or service provider does not meet the definition of a digital network or marketplace contractor, or if their relationship does not satisfy

all nine elements set forth in the Rule for automatic exclusion from the definition of employment, the app or service provider may yet be able to demonstrate that their relationship does not meet the definition of employment under the traditional 20-point test.

E. Federal Anti-Discrimination Statutes (Federal Common Law)

Broadly speaking, federal anti-discrimination laws apply to "employers" of a certain number of "employees" and prohibit discrimination with respect to "employment." Given the central nature of "employment" to these laws, one might expect to find a carefully considered statutory definition of "employee." Nope. Title VII unhelpfully defines "employee" as "an individual employed by an employer."[85] In the words of the Supreme Court, the definition "is completely circular and explains nothing."[86]

As the Supreme Court has further explained, "Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[87] Indeed, with specific reference to the term "employee," the Supreme Court has repeatedly held that Congress intended to describe the master-servant relationship as understood by common-law agency doctrine.[88] Notably, the Court has purposefully avoided using the law of any particular state, relying instead on the "general common law of agency," so as to reflect the fact that "federal statutes are generally intended to have uniform nationwide application."[89]

Accordingly, the Fifth Circuit has used "a variation of the common law agency test" that considers both control and economic reality to determine "employee" status under Title VII.[90] The economic-reality portion of the federal common-law test asks whether the worker is "dependent" upon the business to which the service is rendered.[91] The control portion of the test, which the Fifth Circuit has said should be emphasized over the economic reality portion, has 11 factors designed to determine whether "the extent to which the one for whom the work is being done has the right to control the details and means by which the work is to be performed."[92] The 11 factors are as follows:

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[85] 42 U.S.C. §2000e(f).
[86] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 1348, 117 L. Ed. 2d 581 (U.S. 1992) (describing the same definition in ERISA).
[87] *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2172 (1989).
[88] *Id*. (Copyright Act) (citing *Kelley v. Southern Pacific Co.*, 95 S. Ct. 472, 475–476 (1974) (Federal Employers' Liability Act); *Baker v. Texas & Pacific R. Co.*, 79 S. Ct. 664, 665 (1959) (per curiam) (same); *Robinson v. Baltimore & Ohio R. Co.*, 35 S.Ct. 491, 494 (1915) (same); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (ERISA); *but cf. NLRB v. Hearst Publications, Inc.*, 64 S.Ct. 851, 857–861 (1944) (NLRA) (rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition).
[89] *Id*. at 2173 (citing *Kelley*, 95 S. Ct. at 475-76; *Baker*, 79 S. Ct. at 665; *Ward v. Atlantic Coast Line R. Co.*, 80 S. Ct. at 792 (1960); and quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1605, (1989).
[90] *Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir. 2013) (Title VII), *quoting Arbaugh v. Y & H Corp*., 380 F.3d 219, 226 (5th Cir. 2004) *rev'd on other grounds by* 546 U.S. 500 (2006) (Title VII) (in turn quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (ERISA)).
[91] *Id.*
[92] *Id.* at 434-35.

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, *i.e.,* by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[93]

The Age Discrimination in Employment Act,[94] the Genetic Information Nondiscrimination Act,[95] the Americans with Disabilities Act as Amended[96] all define "employee" the same as it is defined in Title VII or cite directly to Title VII's definition. Unsurprisingly, courts have interpreted these definitions in concert with Title VII.[97]

F. National Labor Relations Act (Also Federal Common Law)

Like Title VII one would expect the National Labor Relations Act ("NLRA") to have carefully considered statutory definition of "employee." Like Title VII, one would be wrong. The NLRA states "employee"

> *shall include any employee*, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.[98]

"Although the words might appear hopelessly circular"[99] the courts and the Board use the common-law agency test articulated by the Supreme Court in *NLRB v. United Insurance Co.* to

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[93] *Id.* at 434-435 (internal citations and quotation marks omitted).
[94] 29 U.S.C. § 630 ("The term 'employee' means an individual employed by any employer…").
[95] 42 U.S.C.§ 2000ff(2)(A)(i) ("The term 'employee' means an employee (including an applicant), as defined in section 2000e(f) of this title").
[96] 42 U.S.C. § 12111(4) ("The term 'employee' means an individual employed by an employer").
[97] *Hermosillo v. Linwood Trawlers, Inc.*, 35 F. Supp. 3d 806, 810 (S.D. Tex. 2014) (ADEA); *Bailey v. City of Chesapeake*, 2:13CV333, 2013 WL 6145718, at *5 n.2 (E.D. Va. Nov. 20, 2013) (GINA); *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 761 (8th Cir. 2014) (ADAAA).
[98] 29 U.S.C. § 152 (emphasis added).
[99] *Seattle Opera v. N.L.R.B.*, 292 F.3d 757, 762 (D.C. Cir. 2002) (internal citations omitted).

straighten the circle.[100] "To determine whether a worker is an employee or an independent contractor, the Board applies the common law agency test."[101]

The NLRB looks at ten non-exhaustive factors, none of which are dispositive: (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 part of the regular business of the employer. (i) Whether or not the parties believe they are creating the relation of master and servant. (j) Whether the principal is or is not in the business.[102]

The Board recently reaffirmed this standard in *SuperShuttle DFW, Inc.*, finding that shuttle-van-driver franchisees of SuperShuttle at Dallas-Fort Worth Airport were independent contractors excluded from the Act's coverage, considering the franchisees' leasing or ownership of their work vans, their method of compensation, their control over their daily work schedules (all of which provided the franchisees with significant entrepreneurial opportunity for economic gain and working conditions), along with the absence of supervision, and the parties' understanding that the franchisees are independent contractors.[103] In so holding, the Board expressly overruled *FedEx Home Delivery*, a 2014 NLRB decision, which the Board found "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis."[104] According to the Board, the SuperShuttle decision "return[ed] the Board's independent-contractor test to its traditional common-law roots."[105]

G. Worker Inventions (Also Federal Common Law)

Under the Copyright Act of 1976, copyright ownership "vests initially in the author or authors of the work."[106] As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.[107] The Copyright Act carves out an important exception, however, for "works made for hire," more commonly referred to as "works for hire," where "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary.[108] Classifying a work as "made for hire" determines not only the initial ownership

[100] *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968).
[101] *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, 75 (2019) (citing *NLRB v. United Ins. Co*., 390 U.S. at 256).
[102] *Id*.
[103] *Id*.
[104] *Id*. (citing *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx*), enf. denied 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*).
[105] *Id*.
[106] *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166, 2171 (1989) (citing 17 U.S.C. § 201(a)).
[107] *Id*. (citing 17 U.S.C. § 102).
[108] *Id*. (citing 17 U.S.C. § 201(b)).

of its copyright, but also the copyright's duration, and the owners' renewal rights, termination rights, and right to import certain goods bearing the copyright.[109]

Section 101 of the Copyright Act provides that a work is "for hire" under two sets of circumstances:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.[110]

The Copyright Act then goes on to define several of the "specially ordered or commissioned" works identified in the "work made for hire" definition.[111] If a work does not fit in one these categories, *or* if there is no written instrument signed by the parties designating the work as a work made for hire, then the dispositive question becomes whether the work was "prepared by an employee in the scope of his or her employment."[112]

Although it defines a great many things, the Copyright Act does *not* define "employee" or "scope of employment."[113] As noted above, however, "Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[114] Accordingly, the Supreme Court has applied general common-law agency principles to determine whether a service provider is an "employee" for purposes of the Copyright Act.[115]

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[109] *Id.* (citing 17 U.S.C. §§ 203(a), 302(c), 304(a), 601(b)(1)).
[110] *Id*. at 738 (quoting 17 U.S.C. § 101).
[111] *See* 17 U.S.C.§ 101 (defining "collective work," "motion pictures," "audiovisual work," "compilation," "supplementary work," and "instructional text.").
[112] *Community for Creative Non-Violence*, 109 S. Ct. at 2171 ("Sculpture does not fit within any of the nine categories of 'specially ordered or commissioned' works enumerated in that subsection, and no written agreement between the parties establishes 'Third World America' as a work for hire. The dispositive inquiry in this case therefore is whether 'Third World America' is 'a work prepared by an employee within the scope of his or her employment' under § 101(1).").
[113] *Id*. (citing 17 U.S.C. § 101).
[114] *Id.* 109 S. Ct. at 2172.
[115] *Id.* (citations omitted).

The Court explicitly rejected a "right to control the product" test, noting the Copyright Act plainly focuses on the nature of the relationship between the parties in deciding whether a work is "made for hire."[116] Likewise, the Court explicitly rejected an "actual control of the product" test, which considers whether a bona fide independent contractor was so extensively controlled and supervised in the creation of a particular work as to be effectively deemed an "employee" under the first portion of the "work made for hire" definition, because it would erode the distinction between works made by employees and works made by independent contractors.[117] As the Court explained,

> We therefore conclude that the language and structure of § 101 of the Act do not support either the right to control the product or the actual control approaches. The structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.[118]

In short, whether a service provider is an employee or an independent contractor is extremely significant under the Copyright Act. If the service provider is not an employee, his or her work product will not be considered "work for hire" unless (1) it fits into one of the categories identified in Section 101 of the Copyright Act and (2) there is a written agreement specifically identifying the work as work made for hire. By contrast, if the service provider is an employee, the employee's work product will be considered "work for hire" if it was developed within the scope of his or her employment.

Similarly, with respect to patents, the general rule is that an invention "remains the property of him who conceived it," even if the inventor conceived it during employment.[119] That said, if an inventor is hired to research and develop a particular product or technological innovation, the result of that work belongs to the employer.[120] Moreover, even if an employee is employed generally (*i.e.*, not to invent the invention), the employer may be entitled to a "shop right" to make nonexclusive use of the employee's invention if the employee takes work time or company materials to pursue an invention.[121] In such a situation, the employee retains ownership of the invention (and the right to merchandize and profit from it) but the employer gains the royalty-free right to use it.[122] Notably, an independent contractor relationship generally cannot give rise to a

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[116] *Id*. at 2173.
[117] *Id.*
[118] *Id*.
[119] *United States v. Dubilier Condenser Corp.*, 53 S.Ct. 554, 558 (1933).
[120] *Dubilier*, 53 S. Ct. at 557 ("One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained."); *Banks v. Unisys Corp.*, 228 F.3d 1357, 1359 (Fed. Cir. 2000) ("[W]here an employee is hired to invent something or solve a particular problem, the property of the invention related to this effort may belong to the employer.").
[121] *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996) ("[A]n employer may obtain a shop right in employee inventions where it has contributed to the development of the invention."); *Wommack v. Durham Pecan Co.*, 715 F.2d 962, 965 (5th Cir. 1983) ("As commonly stated, a shop right will be found where the employer shows that the invention was developed by his employee during the employer's time or with the assistance of the employer's property or labor.")
[122] *Dubilier*, 53 S. Ct. at 557, *Wommack*, 715 F.2d at 965 ("A shop right permits the employer to use the subject of the patent for his own purposes, but not to sell or prohibit others from using it."); *Hobbs v. United States*, 376 F.2d 488, 494 (5th Cir. 1967) ("The classic shop rights doctrine ordains that when an employee makes and reduces to practice

shop right.[123] Obviously, the better practice is to have the service provider explicitly assign his or her inventions and all rights therein, but in the absence of such an agreement the existence of an employment relationship may become an alleged infringer's sole defense.

H. Control v. ABC

Okay. So this is a paper about employment law aimed at a Texas crowd and written by a bunch of Texas lawyers. Still, there is no way you can have a meaningful discussion about where the fight over employment is headed without diving into what's going on out in Cali. I mean, the California Supreme Court just blew up decades of established law to reach a particular result. So, here we go.

Cotter v. Lyft

In *Cotter v. Lyft*, *Inc.*, several drivers sued Lyft, alleging it had improperly classified them as independent contractors rather than employees under California law.[124] In evaluating the parties' cross-motions for summary judgment, the court delved into the facts and catalogued various aspects of the relationship between Lyft and the members of the purported class.

According to the court, to drive for Lyft a driver must download the app, have his or her car inspected, and undergo a background check.[125] To receive a ride, a rider must download the app and provide payment information.[126] With respect to payment, when the *Cotter* plaintiffs drove for Lyft, payment for the ride was based on a "donation" system:

> After the driver dropped off the rider at her destination, the app recommended a donation for the ride. The rider could decide whether to accept this amount, pay a different amount, or pay nothing at all. If the rider took no action within 24 hours after the end of the ride, Lyft automatically charged the recommended amount to the rider's credit card. But if the rider chose to pay a different amount, Lyft instead charged that amount to the rider's credit card (or charged nothing, if the rider so chose). Lyft retained a 20 percent "administrative fee" from each charge and paid the remainder to the driver, with the driver receiving payment from Lyft on a weekly basis for all rides given during that week.[127]

The court also noted that Lyft drivers were initially required to sign up to drive on a particular day, although Lyft soon began allowing drivers to accept rides by logging into the app without being scheduling to drive (when demand outstripped driver supply).[128] The court further noted that Lyft deactivated drivers whose ride acceptance rate fell "well below the community standard" and eventually "terminated" drivers who sustained low ride acceptance rates.[129] Likewise, Lyft

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an invention on his employer's time, using his employer's tools and the services of other employees, the employer is the recipient of an implied nonexclusive, royalty-free license.").

[123] *Hobbs*, 376 F.2d at 494 ("Shop rights generally arise only where there is a direct employer-employee relationship.").

[124] *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015).

[125] *Id*.

[126] *Id.*

[127] *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070-71 (N.D. Cal. 2015)

[128] *Id*. at 71.

[129] *Id.*

regularly ended its relationship with drivers who had high cancellation rates or regularly received low star ratings from riders.[130]

The court also reviewed the Terms of Service agreement Lyft required all drivers to accept as a condition of driving.[131] In the Terms of Service, a driver represents that he or she (1) is at least 23 years old; (2) has a valid driver's license; (3) owns or has a legal right to use the vehicle and is named on the insurance policy covering the vehicle; (4) will only use the vehicle previously registered with Lyft; (5) the vehicle is in good condition; (6) will not offer or provide services for profit, as a public carrier or taxi service; and (7) will not offer rides exceeding 60 miles.[132] The court noted Lyft also provides drivers with a guide that included "rules to live by," including not talking on the phone unless it is to a passenger, not picking up street hails, and not having anyone else riding with the driver, like a pet, child, or friend.[133] This so-called "handbook" was later replaced with an FAQ that included similar instructions but with more examples of prohibited behavior and specific warnings, such as the fact that drivers could have their accounts cancelled if they requested passenger contact information.[134]

The named plaintiff, Patrick Cotter, drove for Lyft while also working for Facebook and eventually had his Lyft account cancelled for using a substitute vehicle instead of the vehicle Lyft had approved.[135] Prior to the end of his relationship with Lyft, Cotter had driven approximately 410 miles in roughly four months. The other lead plaintiff drove approximately 5 and 20 hours per week and completed about 30 rides in that time, before she had her relationship cancelled for accumulating a low average star rating from passengers.[136]

Under California law, a person performing a service for another is presumed to be an employee, and the company claiming the person is an independent contractor has the burden to prove independent contractor status.[137] In addition, California law directs courts to "apply the test with an eye towards the purposes those statutes were meant to serve, and the type of person they were meant to protect."[138] As the *Cotter* court explained, California "has decided that employees need these protections as a check against the bargaining advantage employers have over employees—particularly unskilled, lower-wage employees—and the corresponding ability employers would otherwise have to dictate the terms and conditions of the work."[139] The court also noted the

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[130] *Id*.
[131] *Id.*
[132] *Id.* 1071-1072.
[133] *Id*. at 1072 The rules also included: "Greet every passenger with a big smile and fist bump;" "Keep your car clean on the inside and outside;" "Keep your seats and trunk clear for use by your passengers;" "Do not request tips. If asked by the passenger, let them know that the app will suggest a price;" "Do not accept any cash;" "Go above and beyond with good service such as helping passengers with luggage or holding an umbrella for passengers when it's raining;" and "If you ever need to cancel a Lyft, call support first."
[134] *Id.* at 1073.
[135] *Id.*
[136] *Id*.
[137] *Id*. *citing Narayan v. EGL, Inc.,* 616 f.3d 895, 900 (9th Cir. 2010).
[138] *Id*. at 1075.
[139] *Id.* at 1074.

employer-employee relationship has implications "upon which other state social legislation depends."[140]

Notably, under California law the question of control relates to whether the company had the right to control, whether or not it actually did control.[141] In addition, under California law, the right to terminate "at will" is a strong indicia of an employment relationship, because it indicates that if "instructions were given, they would have to be obeyed on pain of at-will discharge [] for disobedience."[142]

The court then turned to the parties' arguments. For its part, Lyft argued the drivers did not perform services for it and that Lyft should be thought of as an Ebay for rides.[143] The court discounted this argument, in part because of Lyft's marketing efforts, instructions provided to drivers, and statements in the drivers guide and FAQ, all of which indicated the drivers were "driving for Lyft."[144] The court further found the myriad of instructions given to the drivers (not talking on a phone, not picking up non-Lyft passengers, not having other people in the car, not smoking, not requesting tips, not seeking passenger contact information, washing their cars weekly, greeting riders with a smile and a fist bump, offering riders a cell phone charge, and using the route provided by a GPS device if the rider does not have a preference) and Lyft's ability to terminate drivers at-will favored a finding that the drivers were employees.[145]

In terms of secondary factors, the court noted the work performed by the drivers is wholly integrated into Lyft's business and requires no special skill to perform, further suggesting an employment relationship as opposed to an independent contractor relationship.[146] Likewise, even though the drivers provided their own vehicles, the vehicles were not specialized commercial vehicle but instead regular commuter vehicles. On the flip side, the drivers were paid on the basis of individual rides instead of pursuant to an hourly rate, which was more consistent with an independent contractor relationship.[147] At the same time, the individual ride fee and the "administrative fee" charged by Lyft were both non-negotiable for the driver, limiting the opportunity for the driver to profit through cunning judgment or negotiation.[148] Accordingly, after reviewing the applicable facts and factors, the court denied Lyft's motion for summary judgment.[149]

With respect to the plaintiffs' motion for summary judgment, the court noted the flexibility the drivers enjoyed in determining when and how often to work, where they performed the work, which individual rides to accept or reject, their minimal contact with Lyft management, the fact they did not drive with Lyft full time, and the undeniable fact that driving for Lyft was not the

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[140] *Id. citing S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations,* 48 Cal. 3d 341, 345, 769 P.2d 399, 400 (1989).
[141] *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1075 (N.D. Cal. 2015).
[142] *Id.* at 1076 *quoting Toyota Motor Sales U.S.A., Inc. v. Superior Cour*t, 220 Cal.App.3d 864, 269 Cal.Rptr. 647, 653 (1990) (internal quotation marks omitted).
[143] *Id*. at 1078.
[144] *Id.*
[145] *Id.* at 1078-1079.
[146] *Id.* at 1079.
[147] *Id.* at 1080.
[148] *Id.*
[149] *Id.* at 1080-1081.

primary source of income for the drivers.[150] As the court explained, given the "relatively sparse work schedules, one could easily imagine a reasonable jury concluding that they were independent contractors, even if other Lyft drivers with heavier or more regular schedules might properly be deemed employees."[151] Accordingly, the court denied the plaintiffs' motion as well.

After denying both parties' cross motions for summary judgment, the court concluded its opinion with an apt analogy:

> As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide. That is certainly true here.[152]

After the denial of the motions for summary judgment, the parties engaged in settlement talks, and, in 2017, the court approved a final settlement of the dispute for the identified class of Lyft drivers.[153]

Lawson v. Grubhub

Less than a year later, the U.S. District Court for the Northern District of California issued its landmark (but potentially short-lived) decision in *Lawson v. Grubhub*.[154] Applying the seminal California decision *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, which focused on control and had long been used to determine employee versus contractor status in a variety of contexts, the federal court held Lawson (a driver) was an independent contractor, not an employee:

> The *Borello* factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Here, some secondary factors favor an employee/employer relationship: namely, Mr. Lawson's delivery work was part of Grubhub's regular business in Los Angeles; the work was low-skilled; Mr. Lawson was not engaged in a distinct delivery business of which Grubhub was just one client; and, slightly less, Grubhub's method of payment. The other factors, however, favor a finding that Mr. Lawson was an independent contractor. Of primary significance, Grubhub did not control the

[150] *Id.* at 1081.
[151] *Id.*
[152] *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081-1082 (N.D. Cal. 2015).
[153] *Cotter v. Lyft, Inc.*, No. 3:13-CV-04065-VC (N.D. Cal. Nov. 16, 2016) (Motion by Plaintiff for approval of revised class action settlement); *Cotter v. Lyft, Inc.*, No. 3:13-CV-04065-VC (N.D. Cal. Mar. 16, 2017) (Order Granting Final Approval of Settlement Agreement).
[154] *Lawson v. Grubhub, Inc.*, 302 F. Supp.3d 1071 (N.D. Cal. 2018).

> manner or means of Mr. Lawson's work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub's competitors at the same time he had agreed to deliver for Grubhub. Grubhub also did not provide Mr. Lawson with any of the tools for his work (other than a downloadable mobile app) and neither Grubhub nor Mr. Lawson contemplated the work to be long term or regular, but rather episodic at Mr. Lawson's sole convenience. And while Grubhub had the right to terminate the Agreement at will upon 14 days' notice, under the specific circumstances of this case, this right did not allow Grubhub to exert control over Mr. Lawson's work. After considering all the facts, and the caselaw regarding the status of delivery drivers, the Court finds that all the factors weighed and considered as a whole establish that Mr. Lawson was an independent contractor and not an employee.[155]

Razak v. Uber Technologies

Shortly thereafter, on April 11, 2018, United States District Court for the Eastern District of Pennsylvania issued the first federal decision to directly address the question of rideshare driver classification under the Fair Labor Standards Act.[156] In *Razak v. Uber Technologies*, UberBLACK drivers Ali Razak, Kenan Sabani, and Khaldoun Cherdoud brought a class action on behalf "[a]ll persons who provided limousine services, now known as UberBLACK, through Defendants' App in Philadelphia, Pennsylvania."[157] After denying Uber's motion to compel arbitration in 2016 and its partial motion for summary judgment in 2017, the court granted Uber's motion for summary judgment attacking the plaintiffs' status as employees.[158] Before doing so, however, the *Razak* court joined the *Cotter* court in observing that existing law seemed ill suited to addressing the new business model presented by Uber and Lyft:

> The Court notes, before approaching the legal distinction between employees and independent contractors, that these two categories are not the only two types of business relationship that exist under law, even if they may be the only relationships relevant to the present motion. Transportation network companies ("TNCs"), such as Uber and its most frequent U.S. competitor, Lyft, present a novel form of business that did not exist at all ten years ago, available through the use of "apps" installed on smart phones. With time, these businesses may give rise to new conceptions of employment status.[159]

The *Razak* court then examined the six factors considered to determine FLSA employee status under existing Third Circuit precedent:

Control – The court found this factor weighed "heavily" in favor of independent contractor status:

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[155] Id. at 1091-92 (internal citations omitted).
[156] *Razak v. Uber Technologies, Inc.*, 2018 WL 1744467 (E.D. Pa. April 11, 2018).
[157] *Id*. at *1.
[158] *Id*. at *1-2.
[159] *Id*. at 13 (footnote discussing the similarities between a joint venture model and Uber's relationship with its drivers omitted).

> Given the unique business model which TNCs, such as Uber, have created, and their applicability to Uber BLACK drivers, the fact that Uber does exercise some control when UberBLACK drivers are Online does not convert UberBLACK drivers into employees. The Court likens this situation to a carpenter, or a plumber, who is engaged to complete a renovation project for a homeowner. Very often, the exact date and time that the plumber/carpenter will come to the home is negotiated, but if the contractor is late or cancels, there is little the homeowner can do. The homeowner may impose certain requirements while the carpenter/plumber is in the house, such as not permitting certain fumes, footwear, music, or other conditions—but all of these conditions apply only while the carpenter/plumber is in the home—and they certainly do not suffice to conclude that the carpenter/plumber is an employee.[160]

Opportunity for Loss or Profit – The court similarly found this factor "strongly favors" finding the drivers were not employees.

> It is undisputed that UberBLACK drivers are permitted to work as much or as little as they would like, subject to certain limitations, discussed earlier. They are also permitted to work during whichever hours they choose, and to drive (within territorial limits) wherever they choose. They can concentrate their efforts around certain "high times" of the day, week, month, or year, in order to capitalize on "surge" pricing. UberBLACK drivers can also—and indeed actually do—choose to work for competitors when they believe the opportunity for profit is greater by doing do.[161]

Employee Investment – Once again, the court found this factor was "strong evidence" the drivers were independent contractors, noting the drivers themselves did not seem to disagree:

> The major investment here is that UberBLACK drivers must purchase (or lease) their own expensive vehicles. Plaintiffs basically concede that this factor is strong evidence that they are not employees, instead stating that the "control" factor "moots" this factor. Although Plaintiffs are correct insofar as they acknowledge that the Court is tasked with a holistic assessment of the "economic realities" of the alleged employment relationship, it remains unclear how Plaintiffs' extensive personal investments are "mooted" by the "control" factor.
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> For example, Plaintiffs contend—and Uber concedes—that "Uber deducts money" from Plaintiffs for "vehicle finance payments." What Plaintiffs do not emphasize is that Plaintiffs have chosen to undertake this financing arrangement, which is not required of drivers for UberBLACK. The fact that Uber presents this option, as well as insurance and incorporation referrals does not convert Uber into an employer under the FLSA. Furthermore, the fact that Plaintiffs receive financing for some of their companies' vehicles does not somehow minimize that it was Plaintiffs, rather

[160] *Id*. at 16.
[161] *Id*. at *16 (internal citations omitted).

> than Uber, that made significant capital investments which remain in their possession even if they choose to work for another company or individual.[162]

Special Skill – The court found this factor weighed in favor of employee status, because driving is not a special skill. At the same time, the court found this factor did not "carry much weight," in part because UberBLACK drivers did more than just drive and instead had to replicate the "limousine experience," which included a high-level of customer service.[163]

Relationship Permanence – The court found this factor weighed in favor of independent contractor status, dismissing plaintiffs' attempts to urge the length of their service as an indication of permanence and instead characterizing it as a byproduct of the plaintiffs' choice to work as much or little as they liked:

> Plaintiffs contend that, because Plaintiffs have driven for Uber for years, and for "many hours per week," there is "relationship permanence." Although facially persuasive, this "fact" reflects Plaintiffs' choices rather than Uber's necessity. It is also simply untrue. Plaintiffs sought profits as they saw fit, during hours and on days that they chose with no advance notice as to when, where, or for how long they would work. In other words, just as in the case of the black-car drivers in *Saleem*, Plaintiffs used this freedom to, at times, work many hours per week, but this does not weigh in favor of "employee" status. …[164]

Integrality of Service – Finally, the court found this factor weighed in favor of the drivers being employees, but only "slightly":

> As noted elsewhere in this opinion, and in other cases, Uber drivers are an essential part of Uber's business as a transportation company. Indeed, it seems beyond dispute that if Uber could not find drivers, Uber would not be able to function. Similarly, Uber's drivers depend on Uber's technology in getting jobs. However, it is worth noting that UberBLACK is only one of the many services that Uber provides through its Uber app.[165]

Ultimately, the court found four factors weighed "strongly or heavily" in favor of contractor classification, while only two weighed "slightly" in favor of employee status. Accordingly, the court found the plaintiffs had failed to carry their burden of establishing a fact issue on their employee status as a matter of law and entered summary judgment against their FLSA claim.[166] That decision is currently on appeal.

Dynamex Operations West v. Superior Court of Los Angeles, and Progeny

On April 30, 2018, in the immediate wake of these back-to-back decisions finding gig drivers to be contractors using traditional tests focused on control, the California Supreme Court issued its

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[162] *Id*. at *17-18 (internal citations and footnote omitted).
[163] *Id*. at *18.
[164] *Id*. at 19 (citation omitted).
[165] *Id*.
[166] *Id*.

decision in *Dynamex Operations West v. Superior Court of Los Angeles*.[167] Procedurally, *Dynamex* was positioned to determine whether a class action brought by two delivery drivers challenging their independent contractor classification for purposes of the California wage order applicable to the transportation industry had been properly certified by the trial court.[168] Substantively, however, *Dynamex* addressed certain competing definitions of "employ" in California law and which controlled employee status for purposes of California's wage orders.[169]

To resolve the issue, the *Dynamex* court first held the distinction between employee and independent contractor status for purposes of the wage order was *not* controlled by its prior decision in *Borello*, which was so accepted as the law of the land that it had been argued by *both* parties at the trial court level.[170] According to the *Dynamex* court, *Borello* called for an examination of statutory purpose and thus could not be applied to the transportation wage order without reference to the history and purpose of the wage order.[171]

With *Borello* effectively out of the way, the court held it was the wage order's definition of "employ" that controlled whether a worker was considered an employee or an independent contractor.[172] Given the transportation wage order used a definition of "employ" that was very similar to the federal Fair Labor Standards Act (*i.e.*, "engage, suffer, or permit to work")—and which had very recently produced the first ruling that rideshare drivers were not employees—the *Dynamex* court further explained its view that the multifactored tests adopted for purposes of the FLSA were impractical and did not provide the necessary guidance to workers and businesses trying to understand their rights and obligations vis-à-vis one another.[173] Finally, the court set forth its view of why an expansive definition of employment was needed for purposes of the wage order and then adopted the so-called "ABC" test for determining whether a worker met the definition of "employ" found in the wage order:

> [W]e conclude it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is

[167] *Dynamex Operations, Inc. W. v. Superior Court*, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1, 6-7 (Cal. 2018).
[168] *Id*.
[169] *Id*.
[170] *Id*. at 20-25 (discussing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (Cal. 1989)).
[171] *Id*. at 20-25.
[172] *Id*. at 31-32.
[173] *Id*. at 33-34.

> customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[174]

From there, the court held there was sufficient commonality as to this question among the purported class members and that the lower courts had properly rejected Dynamex's attempt to decertify the class.[175]

It is difficult to overstate the significance of the *Dynamex* decision. To reach a very different result from two federal decisions—one applying California law as it had existed just prior to the decision and the other applying a federal law using language almost identical to that being construed in the decision—*Dynamex* abandoned the control-focused *Borello* test in favor of the ABC test. In other words, Dynamex changed the standard for determining who was and was not an employee. Not missing the significance of this change in approach, Senator Bernie Sanders (I-VT) introduced the Workplace Democracy Act (S. 2810) just ten days after *Dynamex*, proposing to amend the National Labor Relations Act to adopt the ABC test to determine whether a worker is an employee for purposes of the NLRA.[176]

At the same time, the California Chamber of Commerce, industry groups, and several sharing economy companies—including Uber, Lyft, Handy, Instacart, and Doordash—wrote Governor Brown and the California State Legislature to urge legislative action to overturn the *Dynamex* decision:

> With one judicial opinion, nearly 30 years of established law has been overturned virtually overnight (and possibly retroactively as well). This decision from the Supreme Court takes California backwards into ideas about employment that have no relation to the modern workforce and that have never been considered by elected officials or agencies. The Industrial Welfare Commission, which was empowered to promulgate and amend the Wage Orders, including the Wage Order at issue in Dynamex, was defunded over 15 years ago. This means that, when the Wage Orders were finalized, the use of technology, platforms, and the flexible work arrangements that now exist in California's economy were never considered.
>
> The Court was limited in the information it considered in its opinion, but the Legislature is not. Legislative discussions and hearings that invite all stakeholders from all sides of this discussion together could better identify a test for independent contractor versus employee that reflects California's economy today and provide a comprehensive solution that protects workers, yet also maintains California's innovation and growth.[177]

Not surprisingly, the fight over ABC continues. On March 25, 2019, U.S. District Court for the Northern District of California relied on *Dynamex* to deny a motion to dismiss filed by a

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[174] *Id*. at 42 (footnote omitted).
[175] *Id*. at 49-50.
[176] https://www.congress.gov/bill/115th-congress/senate-bill/2810.
[177] California Chamber of Commerce *et al.*, Letter to Governor Edmund G. Brown, June 20, 2018, https://www.electran.org/wp-content/uploads/Dynamex-Coalition-Letter.pdf (last visited April 5, 2019).

chauffeured limousine and luxury car transportation service, finding the defendant had failed to meet Part B of the ABC test and thus the plaintiff's claims were free to proceed.[178]

A few days later, on March 29, 2019, the U.S. District Court for the Eastern District of California rejected a trucking service organization's argument asserting *Dynamex*'s ABC test was preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") and federal safety regulations and further rejected the argument that it violated the dormant Commerce Clause of the United States Constitution.[179] Western States, a nonprofit trade association with over 1,000 member companies and 5,000 affiliated member motor carriers, argued that the ABC test "fundamentally 'discarded decades of settled California law' by discarding previous precedent for assessing whether an individual is deemed an employee or an independent contractor," and it "throws into question the legality of the entire trucking industry in California."[180] More specifically, Western States contended (1) the ABC test directly impacts the price, routes, and services of its motor carrier members, and is therefore preempted by the FAAAA; (2) the test "on its face discriminates against out-of-state and interstate trucking companies," thereby violating the dormant Commerce Clause; and (3) the ABC test is preempted in any event by Federal Motor Carrier Safety Regulations, as enacted at 49 C.F.R. §§ 300-399.[181] The court rejected these arguments and dismissed Western States' claims, holding Western States had failed to state a viable claim on either preemption or constitutional grounds.[182] The court found that "Nothing in … *Dynamex* … precludes a motor carrier from hiring an independent contractor for individual jobs or assignments; instead, all that is required if a carrier chooses to so hire is that the wage order's requirements be satisfied. The mere fact that increased costs may result does not trigger preemption."[183]

I. Legislatures Enter The Fray

Even before *Dynamex*, the battle over the sharing economy had spilled out of the courts and into state legislatures and city halls, and it continues to be on the forefront of legislative change. Several states have passed "marketplace contractor" laws, including Tennessee, Indiana, Iowa, Kentucky, Utah, Arizona, and Florida. These statutes vary in their specifics but bear many similarities to the Texas Workforce Commission Rule discussed above, with the notable distinction that they apply with the force of a state statute, whereas the TWC's Rule is simply a recitation of its approach to applying the 20-factor employment test for determining unemployment to particular types of marketplace platform relationships. The Indiana Law, for example, uses a test very similar to the one embodied in the TWC's Rule and confines itself to the question of whether or not the relationship is an employment relationship for purposes of unemployment.[184]

Others, however, apply more broadly. For example, the Tennessee statute provides a marketplace contractor can be considered an independent contractor and not an employee of the marketplace

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[178] *Alabsi v. Savoya, LLC*, 18-CV-06510-KAW, 2019 WL 1332191, at *15 (N.D. Cal. Mar. 25, 2019).
[179] *W. States Trucking Ass'n v. Andre Schoorl*, 218CV01989MCEKJN, 2019 WL 1426304, at *1 (E.D. Cal. Mar. 29, 2019).
[180] *Id*. at *2.
[181] *Id*. at *3.
[182] *Id.* at *12.
[183] *Id.* at *10.
[184] *See* IND. CODE § 22-3-6-1 *et seq.*

platform "for all purposes under state and local laws," if ten conditions are set forth in a written agreement between the parties.[185] Notably, the Tennessee law expressly exempts a "transportation network company," which is defined as an entity operating in the state "that uses a digital network to connect transportation network company riders to transportation network company drivers who provide prearranged rides."[186] "Marketplace contractor" bills have also been introduced in California, Colorado, and Georgia but have failed to pass.

Cities are also getting involved in gig worker classification issues. For example, Seattle's City Council recently passed a resolution related to potential misclassifications and asked for semi-annual updates from the Office of Labor Standards and Labor Standards Advisory Commission regarding its investigation and correction of potential misclassifications.[187]

Likewise, at the federal level, there have been calls to create a hybrid category situated between employee and independent contractor status. Proponents claim that having an intermediate category for gig workers would provide stability and certainty to businesses and also be advantageous to gig workers if they received some benefits typically reserved for employees.[188] U.S. Senator Mark Warner (D-Virginia), for example, has advocated for a new worker classification, noting that "The 20th century model doesn't work in an age when you can monetize your parking space."[189] In 2015, he stated, "The one thing everybody knows is that unless this is stopped by litigation, this wave is going to continue to come. The trick is can we get ahead of it on a policy way before everybody gets into their partisan crouches."[190]

Thus far, the idea of a hybrid classification hasn't gained much traction in the U.S. – current bills are focused more on gaining protections for independent contractors in the form of things like "portable benefits," which would be provided outside the traditional employment relationship, and could be taken by workers from job to job or project to project.[191] However, other countries, like Canada, have recognized the idea of a third classification of worker, known as the "dependent contractor."[192]

While advocates and critics of the gig economy obviously disagree over the right approach to gig workers, an increasing number of legislatures and governmental bodies at all levels are voicing concern over the inadequacy of the existing employee-contractor dichotomy as applied to this new

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[185] TENN. CODE §§ 50-8-101, 102.
[186] *Id*.; TENN. CODE § 65-15-301.
[187] *See* Seattle City Council Legislative Summary, http://seattle.legistar.com/View.ashx?M=F&ID=7129125&GUID=F5A27A85-E82C-4187-AAD0-36745762CD1A.
[188] Miriam A. Cherry and Antonio Aloisi, *"Dependent Contractors" In the Gig Economy: A Comparative Approach*, 66 Amer. U. Law Review 646 (2017).
[189] Andy Medici, "Washington Business Journal: U.S. Senator Mark Warner: Here's Why We Must Rethink Employment, Benefits in the Uber 'Gig Economy,'" Nov. 9, 2015, https://www.warner.senate.gov/public/index.cfm/mobile/issueslegislation?ID=84d1b0e7-d35d-404e-a90f-d0a268ea5a05.
[190] *Id*.
[191] Ruth Reader, "Senator Mark Warner has a new plan to protect gig economy workers," Feb. 26, 2019, https://www.fastcompany.com/90312184/senator-mark-warner-has-a-new-plan-to-protect-gig-economy-workers.
[192] Miriam A. Cherry and Antonio Aloisi, *"Dependent Contractors" In the Gig Economy: A Comparative Approach*, 66 Amer. U. Law Review 651 (2017); Lauren Weber, "What if There Were a New Type of Worker? Dependent Contractor," Jan. 28, 2015, https://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831.

form of business relationship and the lack of clarity for businesses and service providers alike trying to make use of it.

III. CONCLUSION

The gig economy represents a new model of economic engagement that requires a new way of thinking about the aggregation of demand and the delivery of service. While there are sharp and serious disagreements regarding the best approach, the growing consensus is that the existing employee-contractor paradigm is ill-suited to the task of addressing the rapidly evolving relationships between consumers, service providers, and the companies that connect them. While traditional employment is unlikely to be displaced in its entirety any time soon, it is plain the gig engagement model now represents a significant and growing part of modern engagement models. The sooner we figure out how best to make use of this new model, the better, for all of us.

This paper is not legal advice and definitely not tax advice. Hire a lawyer.