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Identity Crisis: The Misclassification of California Uber Drivers

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IDENTITY CRISIS: THE MISCLASSIFICATION OF CALIFORNIA UBER DRIVERS

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The Uber ridesharing service is synonymous with the rise of mobile application-based services. This business model has spurred a number of novel legal questions, particularly surrounding the proper identification of Uber drivers. Are they employees, guaranteed the ample protections and workers' rights under California law? Or independent contractors, less subject to employer control, but without the same protections the State provides to employees? With the proliferation of these types of services, answering this question is of critical importance, both to current Uber drivers as well as the countless others who will enter this rapidly-developing field in the coming years. This Article provides an answer to that question by applying longstanding California employment law to the Uber model with the aim of properly and accurately characterizing its drivers as legally-recognized employees.

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I. INTRODUCTION

San Francisco-based Uber Technologies, Inc. ("Uber") has become synonymous with the ridesharing phenomenon that has swept the globe in recent years. Uber has turned the taxi industry on its head, and catalyzed the growth of an entirely new subset of the technology industry by pioneering the idea of using a mobile application to "broker" services between consumers and providers.

Uber operates by providing a digital platform that connects passengers with independent drivers in real-time through an application accessed from a mobile device.[1] The application allows a potential passenger to view a car's location, the driver's photograph, and customer ratings before choosing whether to accept a driver's offer for a ride.[2] Passengers pay for the service and receive receipts through interfacing with Uber's mobile application.[3]

The "independent contractor" is instrumental to Uber's business model. By classifying its drivers as independent business entities, and not treating them as "employees," Uber is exempted from providing them with certain benefits afforded to workers classified as "employees," including minimum wage and overtime.[4] The practice of classifying workers as independent contractors is common, and has led to accusations that some businesses purposely misclassify their employees as independent contractors in order to avoid the costs associated with maintaining an employer-employee relationship.[5]

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1. Catherine Lee Rassman, *STAFF ARTICLE SERIES: Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance "Gap," and Why Pennsylvania Should Get on Board*, 15 PITT. J. TECH. L. & POL'Y 81, 83 (2014).

2. *Id.*

3. *Id.*

4. *Independent contractor versus employee*, ST. OF CAL. DEP'T OF INDUS. REL., http://www.dir.ca.gov/dlse/faq_independentcontractor.htm (last visited Dec. 23, 2015). The list of employer benefits is extensive: "Employers using independent contractors also do not have to pay payroll taxes, comply with other wage and hour law requirements such as providing meal periods and rest breaks, or reimburse their workers for business expenses incurred in performing their jobs. Additionally, employers do not have to cover independent contractors under workers' compensation insurance, and are not liable for payments under unemployment insurance, disability insurance, or social security." *Id.*

5. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How It Ought to Stop* Trying, 22 BERKELEY J. EMP. & LAB. L. 295, 337 (2001) ("The costs of payroll taxes, the administrative costs and liabilities of wage and benefits laws, the risks of employment discrimination law, the obligation to bargain with unions, the burden of providing family or medical leave, and the general uncertainty that many employers feel with respect to the law, are reason enough for many employers to consider loosening a few strings in order to convert employees to independent contractor status.").

Opponents of Uber's business model argue that companies like Uber (and rival Lyft) are essentially providing "passenger for hire" services, and thus, should be subjected to the same regulations that more traditional providers (e.g., taxi companies) are required to comply with.[6] Uber, on the other hand, contends that its service is distinct from traditional "taxi-style" models, and merely provides "a digital marketplace that connects voluntary consumers with voluntary drivers, who . . . are independent contractors driving their own cars and setting their own schedules."[7]

Whether or not Uber is properly classifying its drivers has become a contentious point. Several California Uber drivers have successfully contested their statuses as independent contractors in administrative contexts, in front of both the California Labor Commissioner's Office and the California Employment Development Department ("EDD").[8] Additionally, a class composed of all Uber drivers who operate in California has filed a federal lawsuit against the ride-for-hire company in a case currently being heard in San Francisco.

The parties' arguments in both of these contexts boil down similarly. Drivers claim that their job duties entitle them as a matter of law to classification as employees,[9] while Uber contends essentially that due to the ostensibly hands-off approach it uses to manage its drivers, they are classified properly as independent contractors.[10]

However the dust settles around this issue, the fate of the California Uber driver has significant implications not only for the thousands driving for the company in the state and across the nation (and, for that matter, around the world), but for any would-be

6. Rassman, *supra* note 1, at 83 ("Whereas taxis require a permit, inspection, maintenance, insurance, and their drivers screened and trained, critics scoff that rideshare drivers need only a car, some gas, a smartphone, and a bank account.") (internal quotation marks omitted).

7. *Id.*

8. *See, e.g.*, Berwick, 80 Cal. Comp. Cases 936 (Cal. Labor Comm'r June 3, 2015) (finding that an Uber driver was misclassified as an independent contractor), and *Decision*, LICHTEN & LISS-RIORDAN, P.C. (June 6, 2015), http://uberlawsui t.com/Uber%20Case %20No.%205 371509.pdf (finding an Uber driver to be an employee for purposes of unemployment benefits).

9. *See, e.g.*, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) ("Plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections codified in the California Labor Code.").

10. *Id.* at 1137 ("Uber argues the drivers are not its employees but instead are independent contractors, and therefore not entitled to the protection of the California Labor Code as asserted herein.").

entrepreneurs seeking to capitalize on the newest tech-based business model as well.

While there is certainly merit on both sides of the debate surrounding proper classification of Uber drivers, the extensive body of California law that has developed in this realm may provide a definitive answer. Based on the applicable rules, tests, and case law that have developed in California over the last several generations, Uber drivers are most properly classified as employees, entitled to all of the attendant benefits associated with such a title.

Part II of this Article will discuss California law as it has built on this subject. Part III applies this law to Uber's business model and explains the conclusion introduced above. Finally, Part IV considers the prudential value of classifying Uber drivers as employees and attempts to place the decision in context.

II. EMPLOYMENT CLASSIFICATION LAW

Independent contractor law in California has quite an extensive history, stretching back at least to the 1940s.[11] While there were several important cases in the intervening period between then and the 1980s, the California Supreme Court consolidated this body of law and announced the now-current framework for employment classification in 1989 with its decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.[12]

A. The Borello *Framework*

Borello is the seminal case for determining employment classifications in California.[13] There, the court was asked to determine whether agricultural laborers engaged to harvest cucumbers under a written "sharefarmer" agreement were "independent contractors" exempt from workers' compensation coverage.[14] The grower in the operation claimed the "sharefarmer" harvesters were independent contractors because they "manage[d] their own labor, share[d] the profit or loss from the crop, and agree[d] in writing that they [were] not employees."[15]

11. *See, e.g.*, Empire Star Mines Co. v. Cal. Emp't Comm'n, 168 P.2d 686 (Cal. 1946).
12. 769 P.2d 399 (1989).
13. Lara v. Workers' Comp. Appeals Bd., 105 Cal. Rptr. 3d 769, 779 (Cal. Ct. App. 2010).
14. *Borello*, 769 P.2d at 400.
15. *Id.*

In tackling the question, the *Borello* court extensively discussed the body of cases that make up employment classification law in California,[16] settling eventually on what is essentially a two-part inquiry for determining worker status: (1) the primary "right to control" test, and (2) consideration of several secondary factors.[17]

First, the court looks at the degree of control the alleged employer maintains over the person doing the work.[18] The court explained this "control of details" test first arose at common law in the context of limiting one's vicarious liability for the misconduct of a person rendering services to him.[19] The right to control work details was thus particularly important because "the extent to which the employer had a right to control activities was . . . highly relevant to the question whether the employer ought to be legally liable for [the misconduct]."[20]

The second element rises out of a concern that the right to control work details, while being the "most important" or "most significant" consideration, is inherently limited in evaluating "the infinite variety of service arrangements."[21] The *Borello* court therefore opted to endorse a number of "secondary indicia" of the nature of a service relationship in order to aid the inquiry.[22] These secondary factors include:

> (a) Whether the one performing services is engaged in a distinct occupation or business;
>
> (b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
>
> (c) The skill required in the particular occupation;

16. *See generally Id.* at 403–07 (The *Borello* court considered cases from as early as 1946 in order to synthesize what would become *Borello*'s two-part test, including *Empire Star Mines Co. v. Cal. Emp't Comm'n*, 168 P.2d 686 (1946), *Perguica v. Indus. Acc. Comm'n*, 179 P.2d 812 (1947), *Isenberg v. Cal. Emp. Stabilization. Comm'n*, 180 P.2d 11 (1947), *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975 (1970), *Laeng v. Workmen's Comp. Appeals Bd.*, 494 P.2d 1 (1972), *Kowalski v. Shell Oil Co.*, 588 P.2d 811 (1979), and *Germann v. Workers' Comp. Appeals Bd.*, 176 Cal. Rptr. 868 (1981)).

17. *Borello*, 769 P.2d at 403–04.

18. *Id.* at 403.

19. *Id.*

20. *Id.*

21. *Id.* at 404.

22. *Id.* The *Borello* opinion would seem to indicate that "the right to discharge at will, without cause" is also a secondary factor to be considered along with the others, but later cases have more often interpreted this factor largely as informing the primary "right to control" analysis instead.

> (d) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (e) The length of time for which the services are to be performed;
> (f) The method of payment, whether by the time or by the job;
> (g) Whether or not the work is a part of the regular business of the principal; and
> (h) Whether or not the parties believe they are creating the relationship of employer-employee.[23]

Applying this newly expounded framework to the facts at hand, the *Borello* court found the grower's arguments unpersuasive.[24] With regard to the "right to control" test, the court held that because Borello, the employer, controlled "all meaningful aspects" of the business relationship (price, crop cultivation, fertilization and insect prevention, payment, and right to deal with buyers), it thereby retained all *necessary* control over the harvest portion of its operations.[25]

The court then applied the secondary multi-factor criteria described above, finding that a number of the factors were indicative of an employment relationship. It focused on the harvesters' roles as "regular and integrated portion[s]" of Borello's business operation and the permanence of the relationship between Borello and the individual harvesters.[26] It also briefly addressed several of the other factors:

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23. *Id.* The *Borello* court also noted a six-factor test developed by other jurisdictions for determining independent contractor status, which includes the following factors (some of which overlap with those listed above): (1) the "right to control the work"; (2) the alleged employee's opportunity for profit or loss depending on his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship, and; (6) whether the service rendered is an integral part of the alleged employer's business. *Id.* at 407. In the few cases that actually cite to these factors, their analysis and application are largely folded into the inquiry regarding the main secondary factors listed above. *See, e.g.*, Gonzales v. Workers' Comp. Appeals Bd., 54 Cal. Rptr. 2d 308, 313–14 (Cal. Ct. App. 1996); *see also* Johnson v. Berkofsky-Barret Prods., 260 Cal. Rptr. 67, 70 (Cal. Ct. App. 1989). These additional factors are rarely given any independent analysis, and, in some instances, are relegated to a footnote. *See, e.g.*, Air Couriers Int'l v. Emp't Dev. Dep't, 59 Cal. Rptr. 3d 37, 44 (Cal. Ct. App. 2007). Thus, they are accorded the same treatment here.

24. *Borello*, 769 P.2d at 400–01.

25. *Id.* at 408.

26. *Id.* at 408.

> [T]he sharefarmers and their families exhibit no characteristics which might place them outside [Worker's Compensation coverage]. They engage in no distinct trade or calling. They do not hold themselves out in business . . . They invest nothing but personal service and hand tools. They incur no opportunity for 'profit' or 'loss'; like employees hired on a piecework basis, they are simply paid by the size and grade of cucumbers they pick.[27]

The court, concerned that a finding of independent contractor status for the sharefarmers would "suggest a disturbing means of avoiding an employer's obligations under . . . California [law]," held that Borello failed to demonstrate that the sharefarmers were independent contractors.[28]

B. Borello *Applied*

Since *Borello*, California courts have applied the above framework a number of times. These cases refine and clarify the scope and application of both the "right to control" test and the secondary factors propounded by the California Supreme Court.

1. The Right to Control

In applying the "right to control" test, courts have emphasized that the salient inquiry is "whether the hirer 'retains all necessary control' over its operations."[29] Further, "what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains the *right* to exercise."[30] This has resulted in findings of employment relationships both when an employer remains intricately involved in the details of the work and when the employer maintains some distance between himself and his workers.

In *Ruiz v. Affinity Logistics Corp.*,[31] the Ninth Circuit, applying California law, found a group of drivers who worked for a logistics corporation were employees because the company retained "absolute control over drivers' rates, payment, routes, schedules, trucks, equipment, appearance, decision to hire helpers, choice of helpers, and

27. *Id.* at 409.
28. *Id.* at 410.
29. *See* Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014).
30. *Id.* at 172 (citing Perguica v. Indus. Accident Comm'n, 179 P.2d 812, 813 (Cal. 1947)).
31. 754 F.3d 1093 (9th Cir. 2014).

the right to deal with customers."[32] The court held these circumstances were more than sufficient to establish that the employer retained all "necessary control."[33]

On the other hand, courts have not hesitated to find employment relationships even when a putative employer utilizes a more hands-off approach. In another case involving drivers, *JKH Enterprises, Inc. v. Department of Industrial Relations*,[34] the California Court of Appeal found an employer-employee relationship between a courier company and its couriers despite both the company's lack of control over the details of the work and its being more concerned with results rather than means of accomplishment: "By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all necessary control over the operation as a whole."[35]

Similarly, in *Yellow Cab Coop. v. Workers' Comp. Appeals Board*,[36] the California Court of Appeal rejected a taxi company's claim that it was only concerned with the result of the work conducted by its drivers.[37] The court held that "[i]f Yellow [Cab] were only contracting for the 'particular result' . . . it would be concerned with little more than collecting rent and protecting the leased property. Instead, it had an obvious interest in the drivers' performance *as drivers*. To protect that interest, it treated them as employees."[38]

In *State Comp. Ins. Fund v. Brown*,[39] however, the California Court of Appeal returned the opposite result, finding a group of truck drivers to be properly classified as independent contractors in part because the employer's "participation [was] limited to offering the assignments and paying compensation upon proof of delivery."[40]

In addition, courts have placed particular weight on whether an alleged employer retains the right to terminate a worker without cause as an indicator of the right to control.[41] As the California Supreme

32. *Id.* at 1103.
33. *Id.*
34. 48 Cal. Rptr. 3d 563 (Cal. Ct. App. 2006).
35. *Id.* at 579.
36. 277 Cal. Rptr. 434 (Cal. Ct. App. 1991).
37. *See id.* at 441.
38. *Id.* (emphasis in original).
39. 38 Cal. Rptr. 2d 98 (Cal. Ct. App. 1995).
40. *Id.* at 105.
41. *See, e.g.*, Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 172 (Cal. 2014) ("Whether a right of control exists may be measured by asking whether or not, if instructions were given, they would have to be obeyed on pain of at-will discharge for disobedience.") (internal

Court has explained, "the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities."[42] In *Toyota Motor Sales U.S.A., Inc. v. Superior Court*,[43] the court found employment status for a pizza delivery driver where the employer retained the express contractual right to terminate the relationship: "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so."[44]

These cases demonstrate an important point: an employment relationship can be found regardless of the control actually exercised by the employer. As long as he retains the ability to control the details of the work, courts remain satisfied that the right to control has been established; it is not a requirement that the employer micromanage every aspect of the job's duties. The natural conclusion from this point is that the "right to control" test is largely fact-determinative, and its result depends on the totality of the circumstances in conjunction with the secondary factors.[45]

2. Secondary Indicia

While it is true that both the "right to control" test and the secondary factors are perhaps best understood when taken together, it is important to remember the secondary Borello factors are just that: secondary. Thus, they should be weighed as such, with a healthy deference to the right to control.

Additionally, as with the "right to control" test, application of the secondary factors is fluid and circumstantial. "These factors 'generally . . . cannot be applied mechanically as separate tests; they are intertwined, and their weight depends often on particular

quotation marks omitted) (citing Toyota Motor Sales U.S.A., Inc. v. Superior Court, 269 Cal. Rptr. 647, 653 (Cal. Ct. App. 1990).

42. *Ayala*, 327 P.3d at 171 (citing Malloy v. Fong, 232 P.2d 241, 249 (Cal. 1951)). Indeed, the significance of the right to terminate without cause far predates *Borello*; a testament to its relative weight in the analysis.

43. 269 Cal. Rptr. 647 (Cal. Ct. App. 1990).

44. *See id.* at 653–54 (internal quotation marks omitted); *see also* Yellow Cab Coop. v. Workers' Comp. Appeals Bd., 277 Cal. Rptr. 434, 442 (Cal. Ct. App. 1991) (employment status found in part due to the conclusion that "indirect control was effected through . . . the threat of termination.").

45. *See Ayala*, 327 P.3d at 177 ("[T]he significance of any one factor and its role in the overall calculus may vary from case to case depending on the nature of the work and the evidence.").

combinations.'"[46] Proceeding with the above in mind, the cases following *Borello* elaborate on the meaning and analysis of each of the secondary factors.

a. Distinct occupation or business

A worker's engagement in a distinct occupation or business suggests that the worker is an independent contractor.[47] *Borello* itself noted that the sharefarmers "engage[d] in no distinct trade or calling" and "d[id] not hold themselves out in business."[48] A number of other cases have agreed with this sentiment, finding employment status when workers were not operating an independent business apart from that of the alleged employer.

In *Antelope Valley Press v. Poizner*,[49] the court found employment status for newspaper deliverers where there was no evidence that any of them held themselves out as being part of an independent delivery service.[50] Similarly, in *Air Couriers International v. Employment Develop Department*,[51] the Court of Appeal upheld a trial court's determination that a group of couriers, working for a courier company, were employees, and not "engaged in a separate profession or operating an independent business."[52]

b. Supervision

For obvious reasons, this factor is closely tied to the "right to control" test, as close supervision is clearly indicative of an employer's ability to control the details of the work. Consequently, increased supervision points to classification as an employee.[53] What the cases make clear, however, is that the existence of a certain amount of freedom in a particular position does not necessarily cut in favor of an independent contractor classification.[54] Rather, to repeat the

46. Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 989 (9th Cir. 2014) (citing S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989)).

47. Harris v. Vector Mktg. Corp., 656 F. Supp. 2d 1128, 1138–39 (N.D. Cal. 2009).

48. *Borello*, 769 P.2d at 409.

49. 75 Cal. Rptr. 3d 887 (Cal. Ct. App. 2008).

50. *Id.* at 892–93.

51. 59 Cal. Rptr. 3d 37 (Cal. Ct. App. 2007).

52. *Id.* at 47.

53. Malloy v. Fong, 232 P.2d 241, 249 (Cal. 1951) ("The existence of the right of control and supervision establishes the existence of an agency relationship.").

54. Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014) ("[T]he fact that a certain amount of freedom of action is inherent in the nature of the work does not change the

refrain, what matters is whether the hirer retains "necessary control" over the worker's actions.[55]

c. Required skill

Where no special skill is required of a worker, that fact supports a conclusion that the worker is an independent contractor.[56] Consideration of this factor is also tied to application of both the "right to control" test and the "supervision" factor above. Courts have found that when a particular job does not require a specialized set of skills, in-depth control of work details is not strictly necessary; this apparent lack of control, then, does not necessarily favor independent contractor status as long as, again, "necessary control" is maintained.[57] Factually, courts have been particularly unsympathetic to the idea that any type of courier or delivery position requires an inordinately high level of skill, finding employment status for cab drivers,[58] newspaper deliverers,[59] and delivery truck drivers.[60]

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character of the employment where the employer has general supervision and control over it.") (internal quotation marks omitted).

55. *See, e.g.*, Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1104 (9th Cir. 2012) (finding employee status where a company "closely supervised the drivers' work through various methods," which pointed to them working under the principal's direction).

56. Harris v. Vector Mktg. Corp., 656 F. Supp. 2d 1128, 1139 (N.D. Cal. 2009).

57. Air Couriers Int'l v. Emp't Dev. Dep't., 59 Cal. Rptr. 3d 37, 46 (Cal. Ct. App. 2007) ("The [trial] court noted that the simplicity of the work (take this package from point A to point B) made detailed supervision, or control, unnecessary. Instead, [the employer] retained all necessary control over the overall delivery operation.").

58. Yellow Cab Coop. v. Workers' Comp. Appeals Bd., 277 Cal. Rptr. 434, 441 (Cal. Ct. App. 1991) ("The work did not involve the kind of expertise which requires entrustment to an independent professional . . . and the skill required on the job is such that it can be done by employees rather than specially skilled independent workmen.").

59. Antelope Valley Press v. Poizner, 75 Cal. Rptr. 3d 887, 900 (Cal. Ct. App. 2008) ("Delivering papers requires no particular skill.").

60. *See* JKH Enters., Inc. v. Dep't of Indus. Relations, 48 Cal. Rptr. 3d 563, 579 (Cal. Ct. App. 2006) ("[T]he functions performed by the drivers, pickup and delivery of papers or packages and driving in between, did not require a high degree of skill."); *see also* Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 995 (9th Cir. 2014) ("FedEx drivers need no experience to get the job in the first place and [the] only required skill is the ability to drive.") (internal quotation marks omitted). *But see* State Comp. Ins. Fund v. Brown, 38 Cal. Rptr. 2d 98, 105 (Cal. Ct. App. 1995) (finding independent contractor status for truck drivers: "[T]ruck driving—while perhaps not a skilled craft—requires abilities beyond those possessed by a general laborer (or, indeed, possessors of ordinary driver's licenses), and the manner in which the services are provided require a greater exercise of the driver's discretion . . . .").

d. Instrumentalities, tools, and place of work

When an alleged employer provides the "instrumentalities, tools, and place of work" for the worker, courts have been more inclined to find employee status.[61] Relevantly, in many of the cases involving drivers of various types, courts have found employee status despite the fact that a driver might provide his own vehicle in order to complete the work.[62]

e. Length of time

Where a worker is employed for a lengthy period of time, the relationship with the employer looks more like an employer-employee relationship.[63] Analysis of this factor generally focuses on two points: whether the job is one in which workers generally remain employed for extended periods of time,[64] and whether at the time the relationship is entered into, there is a contemplated end point.[65]

f. Method of payment

In general, hourly payment formats favor employee status, while per-job payment favors independent contractor status.[66] However, when other evidence leans toward a finding of employee status, courts have not allowed a per-job payment system to change the result.[67]

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61. *Alexander*, 765 F.3d at 995 (citing Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1104 (9th Cir. 2014) as holding that, where "Affinity supplied the drivers with the major tools of the job by encouraging or requiring that the drivers obtain the tools from them through paid leasing arrangements, this factor favored employee status.").

62. *Air Couriers*, 59 Cal. Rptr. 3d at 47 ("[A]ll [the employer] required of a driver was a vehicle and automobile insurance; drivers did not make any major investments in equipment or materials."). *But see Alexander*, 765 F.3d at 995 (finding employment status for FedEx drivers even while conceding that the fact that drivers provide their own vehicles and are not required to get other equipment from FedEx "slightly favors" independent contractor status).

63. Harris v. Vector Mktg. Corp., 656 F. Supp. 2d 1128, 1140 (N.D. Cal. 2009).

64. *See, e.g.*, *Ruiz*, 754 F.3d at 1105 ("[T]here was no end to the service relationship when Affinity and the drivers signed their contracts, and drivers often stayed with Affinity for years.") (internal quotation marks omitted)*; see also Air Couriers*, 59 Cal. Rptr. 3d at 47 ("[M]any of the drivers delivered for Sonic for years. At trial, the drivers testified to lengthy tenures with Sonic, another factor inconsistent with independent contractor status.").

65. *See, e.g.*, Narayan v. EGL, Inc., 616 F.3d 895, 903 (9th Cir. 2010) ("This was not a circumstance where a contractor was hired to perform a specific task for a defined period of time. There was no contemplated end to the service relationship at the time that the plaintiff [d]rivers began working for [FedEx].").

66. *Alexander*, 765 F.3d at 996.

67. *See Ruiz*, 754 F.3d at 1105 (holding that even though drivers were paid by the delivery, findings that drivers made approximately eight deliveries per day and the amount paid to each driver "essentially remained the same" led to the conclusion that the drivers were essentially paid by a regular rate of pay); *see also Alexander*, 765 F.3d at 996 ("Where . . . there is ample

g. Part of the regular business

When workers are found to be part of the regular business of the employer, this factor favors employee status.[68] In applying this factor, courts have focused largely on the indispensability of the workers to the hirer's business, and have tended to find employee status when a worker's duties are essential to the operation as a whole.[69]

Thus, in *Ruiz*, the Ninth Circuit found employee status for home delivery drivers when the "drivers perform[ed] those home delivery services that are the core of [the company's] regular business," because "[w]ithout drivers, [the company] could not be in the home delivery business."[70]

h. Parties' beliefs

As with the "method of payment" factor above, the parties' beliefs about whether a worker is an employee or an independent contractor are relevant, but will be ignored if their conduct establishes otherwise.[71] This is true even when (or perhaps especially when) there exists a written agreement that the worker will be classified as an independent contractor.[72]

Armed with the exegesis of law in this area by California courts over the last several decades, application of these concepts to Uber drivers provides the solution as to their proper classification.

III. APPLICATION TO UBER

While there are obviously novel aspects to Uber's business model that aren't precisely encapsulated by the law outlined above, the law is sufficiently broad for Uber's core tenets and policies to fall sufficiently within its purview.

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independent evidence that the employer has the right to control the actual details of the employee's work . . . , the fact that . . . the employee is paid by the job rather than by the hour appears to be of minute consequence.") (internal quotation marks omitted).

68. S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 408 (Cal. 1989).

69. Air Couriers Int'l. v. Emp't Dev. Dep't., 59 Cal. Rptr. 3d 37, 47 (Cal. Ct. App. 2007) (finding that where the company set rates, billed customers, and collected payment, drivers' deliveries were "integral," "essential," and "part of [the company's] regular business").

70. *Ruiz*, 754 F.3d at 1105.

71. *Id.* ("As the California Court of Appeal has noted . . . "the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship.") (citing Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 336 (Cal. Ct. App. 2007)).

72. *Alexander*, 765 F.3d at 996 (finding that while the contract at issue identified the driver as an independent contractor, "[u]ltimately . . . neither [FedEx]'s nor the drivers' own perception of their relationship . . . is dispositive.").

A. Uber's Right to Control

As has been made abundantly clear by the case law outlined above, the "right to control" aspect of an employment configuration is the most important consideration. As the circumstances surrounding Uber's business model and, more specifically, the interactions between Uber and its drivers demonstrate, Uber does indeed exercise "all necessary control" over its drivers' activities.

Beginning with the hiring stage, it would be difficult to argue that Uber does not exercise substantial control over the work details of its drivers. In order to drive for Uber, applicants must undergo a fairly involved application and screening process. This includes being required to upload driver's license and vehicle information, passing a background check, attending a traditional interview with an Uber employee, and passing a "city knowledge test."[73] Only after an applicant completes these steps and signs a contract with Uber (discussed below) is he or she able to begin driving for the company.

Once approved to join Uber's ranks, a driver is free to perform his duties as he wishes—to an extent. On one hand, Uber drivers technically have the freedom to sign in to Uber's mobile application as rarely or as often as they like, subject only to minimally restrictive contractual provisions.[74] Additionally, once a driver picks up a passenger, he is free to complete the route in any appropriate manner.[75] However, it should be noted that drivers have no input whatsoever in setting fares—Uber does this on a unilateral basis.[76]

On the other hand, and on a more practical level, Uber drivers are expected to abide by certain regulations and standards during their interactions with passengers. For instance, Uber expects that its drivers will accept all ride requests it receives,[77] despite the language included in the contracts drivers are required to sign.[78]

Uber also instructs its drivers to comply with numerous other detail-oriented requirements. These include "dressing professionally,"

73. O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015).

74. *Id.* at 1149 ("Uber further claims that the right to control element is not met because drivers can work as much or as little as they like, as long as they give at least one ride every 180 days (if on the uberX platform) or every 30 days (if on the uberBlack platform).").

75. *Id.*

76. *Id.* at 1142.

77. *Id.* at 1149. Supplemental literature provided by Uber provides that it expects drivers not to reject ride requests, notwithstanding contractual language to the contrary (see below).

78. Exhibit 223-15 at 3, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. C-13-3826 EMC) ("You shall have no obligation to the Company to accept any request.").

sending passengers text messages when 1–2 minutes from the pickup location, tuning the car's radio to specific stations, opening doors for passengers, and ensuring that drivers' cars are equipped with umbrellas in case of rain.[79]

Further evidence of Uber's right to control its drivers' work details comes in the form of its processes for evaluating and measuring driver performance. Uber closely monitors various aspects of its drivers' activities, including the rate and frequency at which drivers accept, reject, and cancel potential passengers, how consistently drivers arrive on time, and the quality of drivers' vehicles.[80]

Uber also utilizes a rating system, whereby passengers have the ability to rate their driver's services (from one to five stars), and drivers in turn are able to rate their passengers.[81]

Uber then uses these metrics to evaluate its drivers. Based on a driver's performance in these areas, Uber reserves the right to deactivate the accounts of (i.e., terminate) drivers who fall below certain "quality standards."[82] Specifically, Uber documents suggest that the company will "follow up on *every* quality issue," and driver contracts provide that Uber may terminate any driver whose star rating falls below a specified level.[83] In order to prevent drivers from falling below these levels, Uber periodically sends "suggestions" to at-risk drivers about how to improve their ratings, including further recommendations on attire, surpassing arrival time expectations, and other rather specific suggestions such as providing bottled water for passengers.[84]

In analyzing the above information in light of California law, it is worth reiterating several points. First, and most specifically, these aspects of Uber's business model are particularly relevant in light of

79. *O'Connor*, 82 F. Supp. 3d at 1149–50. At least in the context of the *O'Connor* litigation, Uber contends that these requirements are merely "suggestions." *Id.* at 1150. Uber's efforts to enforce these rules, however (discussed below), indicate otherwise.

80. Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion for Summary Judgment at 4:5–7, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. CV 13-3826-EMC).

81. Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 4:11–12, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-03826-EMC).

82. *Id.* at 4:13–15.

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

84. Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 4:15–19, *O'Connor*, 82 F. Supp. 3d 1133 (No. 13-03826-EMC).

the observation in Part II that the right to terminate at will is a weighty indicator of employee status.[85] Additionally, and more generally, the most important considerations here are (1) that there is a critical difference between the level of control *actually* exercised by an alleged employer and the level of control an employer retains the *right* to exercise,[86] and (2) that in order to satisfy this element of the *Borello* framework, an employer must only exercise "necessary" control over its putative employees.[87]

Guided by these considerations, and returning to the realities of driving for Uber, it is clear that the company does indeed exercise considerable control over its drivers; control that, at the very least, rises to a level that satisfies threshold requirements of California law.

Beginning with the right to terminate, this element cuts sharply in favor of satisfying the "right to control" test. The evaluation methods discussed above result essentially in a de facto "right to terminate," and Uber's ability to unilaterally suspend or deactivate drivers' accounts, readily apparent from its contracts with drivers and its supporting literature, is highly indicative of a more explicit right to terminate at will.[88]

Setting aside the right to terminate, the remaining factual circumstances also indicate substantial control over work details. To be sure, Uber drivers do enjoy a level of freedom in their work that is arguably uncommon under a traditional employment relationship. Based on this alone, Uber has a colorable argument that it is primarily interested in the results of the work as opposed to the details of the actual transportation process. In reality, however, Uber's efforts to manage many of the details of the job belie such a conclusion.

Far from remaining disinterested, Uber has its hand in every step of the process. It would be disingenuous to suggest that, in a situation in which a worker is subject to evaluation and/or discipline for, *inter alia*, failing to heed "suggestions" about what music to listen to or about providing bottled water to passengers, Uber is not retaining "all necessary control" over its operations. In fact, these examples arguably push Uber's micromanagement beyond the level of

85. *See* Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 172 (Cal. 2014).

86. *Id.*

87. *Id.* at 171.

88. As has been alluded to, the parties' beliefs and language contained in contracts are not necessarily dispositive, but consideration of surrounding circumstances in conjunction with the above evince a compelling case for Uber's right to terminate.

necessary control and into the realm of the unnecessary, further highlighting the point that Uber's interest in work details meets at least the required threshold level under California law.

Comparisons to case law underscore this conclusion. The facts surrounding Uber drivers in part echo *Borello* itself, where the court found that the employer's control over price, crop cultivation, fertilization, payment, and right to deal with buyers constituted all *necessary* control over its sharefarmer employees.[89] Similarly, Uber controls who its drivers are (and what they drive, for that matter),[90] determines the fares charged to passengers, and reserves the right to terminate drivers it deems unsatisfactory. In this sense, there can be little doubt that Uber controls "all meaningful aspects"[91] of the relationship it maintains with its drivers.

Additionally, language from *JKH Enterprises, Inc. v. Department of Industrial Relations*,[92] discussed above, is particularly apposite here, as Uber maintains "necessary control" "by obtaining the clients in need of the service and providing the workers to conduct it."[93]

As mentioned above, Uber contends at least in some contexts that its means of control are properly characterized as "suggestions" rather than regulations that Uber actually makes an effort to enforce.[94] Even if this were the case, however, retaining the *right* to do so firmly indicates satisfaction of the "right to control" test.

With the right to control element strongly favoring an employer-employee relationship, the inquiry proceeds to *Borello*'s secondary indicia.

B. Borello*'s Secondary Indicia*

While subordinate to the right to control work details, the secondary *Borello* factors do provide useful metrics for a deeper analysis of an alleged employment relationship. In Uber's case, while certain factors do support an independent contractor classification, the

89. S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 408 (Cal. 1989).

90. Exhibit 223-15 at 4, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. C-13-3826 EMC) (Uber's contract with drivers provides, "You agree that you shall maintain a vehicle that is a model approved by the Company. Any such vehicle shall be no more than ten (10) model years old, and shall be in good operating condition.").

91. *Borello*, 769 P.2d at 408.

92. 48 Cal. Rptr. 3d 563 (Cal. Ct. App. 2006).

93. *Id.* at 579.

94. O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133, 1150 (N.D. Cal. 2015).

preponderance of factors, in conjunction with the "right to control," do not.

1. Distinct Occupation or Business

Because Uber's business model is entirely dependent on its drivers in order to function, it would take a stretch of the imagination to argue that drivers engage in an occupation that is distinct from Uber's. Where, as here, "the work performed by the drivers is wholly integrated into [the] operation,"[95] the businesses are indistinguishable.

To be sure, it should be acknowledged that some drivers do solicit business from other sources and affiliate themselves with transportation companies other than Uber,[96] which in theory does support independent contractor status. However, because the services provided by drivers are such a necessary component of Uber's operations, this fact is far more akin to having multiple jobs than it is to acting as an independent contractor doing business with multiple distinct entities.

Uber's argument on this point would likely be to point to its self-characterization as a "lead generation" platform, as opposed to a transportation company, as evidence that its drivers are engaged in a wholly distinct business.[97] While creative, and theoretically plausible, such distinctions disappear upon closer scrutiny of the reality of the working relationship between Uber and its drivers.

This factor therefore weighs in favor of employee status.

2. Supervision

As mentioned above, this factor is intimately related to the "right to control" test, and similar factual elements control both inquiries.

As discussed more extensively above, Uber's interest in the activities of its drivers, including its evaluation metrics and monitoring of ride requests and acceptances, can hardly be described as anything

95. Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 995 (9th Cir. 2014).

96. Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 23:27–28, 24:1–2, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-03826-EMC).

97. Exhibit 223-15 at 3, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. C-13-3826 EMC) ("Raiser (an Uber affiliate) is engaged in the business of providing lead generation to the Transportation Provider comprised of requests for transportation service made by individuals using Uber Technologies, Inc.'s mobile application.").

other than "supervisory," notwithstanding the fact that drivers' duties do afford an inherent amount of freedom in their execution.

Thus, while there are points to be made on either side regarding this factor, it more strongly favors an employment relationship when considered in light of the "right to control" test.[98]

3. Required Skill

As foreshadowed in Part II, comparisons to case law suggest an obvious conclusion regarding this factor. As far as the skill required to drive for Uber is concerned, there is little distinguishing it from any of the other driving-related positions mentioned in previous cases, which have overwhelmingly found that these jobs do not require a high degree of skill. Indeed, some of the positions in those cases, namely newspaper deliverers and delivery truck drivers, arguably require more skills than those required to drive for Uber, and yet employment relationships were found in all instances.[99]

It may be true that some drivers fare better than others based on their abilities to maximize their ratings, but such accolades are merely a result of Uber's imposition of its own quality control system, rather than any objective measure, and the fact nevertheless remains that the only skills truly required to drive for Uber are the same skills required to drive in California at all—a driver's license and automobile insurance.[100]

Therefore, the lack of particularized skill required of Uber drivers weighs in favor of employee status.

4. Instrumentalities, Tools, and Place of Work

One of Uber's strongest arguments lies under this factor, as there is no denying the fact that drivers do indeed provide the necessary

98. Recall the California Supreme Court's discussion in Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014), of the non-dispositive nature of a position's intrinsic freedom.

99. *See* Yellow Cab Coop. v. Workers' Comp. Appeals Bd., 277 Cal. Rptr. 434 (Cal. Ct. App. 1991) (taxi driver), Antelope Valley Press v. Poizner, 75 Cal. Rptr. 3d 887 (Cal. Ct. App. 2008) (newspaper deliverer), and JKH Enters., Inc. v. Dep't of Indus. Relations, 48 Cal. Rptr. 3d 563 (Cal. Ct. App. 2006) (delivery truck driver).

100. Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion for Summary Judgment at 23:8–9, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. CV 13-3826-EMC). These circumstances also certainly fall short of providing any "true entrepreneurial opportunity depending on how well the independents perform their transportation services." State Comp. Ins. Fund v. Brown, 38 Cal. Rptr. 2d 98, 105 (Cal. Ct. App. 1995).

equipment in the form of their own vehicles.[101] That said, these circumstances are not substantially different from cases like *Air Couriers*,[102] discussed above, where, apart from supplying a vehicle, drivers made no "major investments in equipment or materials."[103]

Alternatively, it is worth considering that the Uber application itself, which is obviously provided by Uber, might constitute a significant portion of the "instrumentalities" required by the job. Through this lens, Uber arguably *does* provide the instrumentalities needed by drivers to execute their duties, which leans heavily toward an employment relationship. All things considered, this factor is difficult to analyze, as there is little guidance in the annals of California law as to the proper application of this factor to such a novel business configuration.

In either case, because drivers do provide their own vehicles, which accounts for at least all of the physical machinery required for the position, this factor, on balance, weighs in favor of independent contractor status.

5. Length of Time

This factor strongly favors employee status. Contracts entered into between drivers and Uber do not contemplate an automatic end point. Driver contracts provide that they can be terminated by several means—including material breaches, mutual consent, and extended inactivity—but do not contain any language indicating a point at which the agreement will simply cease to be operative, whether due to a lapse of time or completion of a specific task, as one might expect from a traditional independent contractor relationship.[104]

The working relationship between Uber and its drivers also bears little resemblance, if any, to the more familiar independent contractor relationship wherein a contractor is hired to perform a specific task for

101. Technically, Uber drivers are provided an illuminated magnet to affix to their vehicles as a signal to passengers. Such "equipment," however, is more related to branding and perhaps safety than anything else, and should not count against Uber in analysis of this factor. Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 25:13–15, *O'Connor*, 82 F. Supp. 3d 1133 (No. 13-03826-EMC).

102. 59 Cal. Rptr. 3d 37 (Cal. Ct. App. 2007).

103. *Id.* at 47.

104. Exhibit 223-15 at 10, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. C-13-3826 EMC).

a specified amount of time.[105] For these reasons, the "length of time" factor leans heavily toward an employer-employee relationship.

6. Method of Payment

Analysis in this area presents another example of a factor that cuts in favor of independent contractor status, but may prove to be inconsequential in the grand scheme. Rather than being paid by the hour, Uber drivers are generally paid per trip.[106] Thus, while this factor is indicative of independent contractor status, it should be reiterated that based on case law, such a conclusion is not enough to overcome independent evidence that an employer maintains the right to control work details.[107]

7. Part of the Regular Business

This factor largely overlaps with the first secondary factor (distinct occupation or business). Accordingly, it weighs heavily in favor of employee status as well, considering that based on the points discussed above, Uber's drivers are literally indispensable to its operations, and must certainly account for, at minimum, a *part* of Uber's "regular business."

In this regard, the circumstances here once again bear resemblance to those in *Air Couriers*, as Uber also sets rates for rides, bills passengers, and collects payment.[108] As was the case in *Air Couriers*, the drivers' activities here are "integral," "essential," and "part of [Uber's] regular business."[109]

8. Parties' Beliefs

Case law has shown this factor to be arguably the least probative of *Borello*'s secondary indicia.[110] Because courts tend to ignore this

105. *See* Narayan v. EGL, Inc., 616 F.3d 895, 903 (9th Cir. 2010).

106. Interestingly, there is some indication that despite paying drivers by the trip, Uber advertises possible hourly rates as a means of attracting new applicants. Plaintiffs' Opposition to Defendant Uber Technologies, Inc.'s Motion for Summary Judgment at 23:17–19, O'Connor v. Uber Techs. Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. CV 13-3826-EMC) ("Uber frequently advertises or guarantees hourly rates to its drivers.").

107. *See* Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 996 (9th Cir. 2014).

108. Air Couriers Int'l v. Emp't Dev. Dep't., 59 Cal. Rptr. 3d 37, 47 (Cal. Ct. App. 2007).

109. *Id.*

110. *See* Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1104 (9th Cir. 2012) (discussed above in Part II), and *Alexander*, 765 F.3d at 996.

factor if conduct establishes a different outcome than the one contemplated by the parties, its analytical value is limited.

For the sake of being thorough, however, it should be noted that this factor does support an independent contractor relationship. The contracts signed by drivers explicitly state: "You represent that you are an independent contractor engaged in the independent business of providing the transportation services described in this agreement . . . ."[111] Under a heading entitled "Relationship of Parties," the contract adds, "[t]he Parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The Parties are not employees, agents, joint venturers or partners of each other for any purpose."[112]

The contracts between Uber and its drivers thus contain multiple instances of language professing the drivers' statuses to be that of independent contractors, which makes it fair to assume that, at least at the outset, the parties all believed as such. Therefore, this factor leans toward an independent contractor relationship.

Consideration of *Borello*'s secondary indicia reveals that with the exception of three liberally-construed factors (instrumentalities, method of payment, and the parties' beliefs), the analysis comes down strongly in favor of employee status for Uber drivers, and does little to alter the similar conclusion reached as a result of the "right to control" test.

IV. CONCLUSION

Upon thorough evaluation of both the "right to control" element and the secondary indicia of *Borello*'s framework, it is clear that in the eyes of California law, Uber drivers are employees, not independent contractors. It is true that several of the secondary *Borello* factors indicate an independent contractor relationship, but the primary "right to control" test simply returns a result that is too conclusively in favor of employee status to overturn. Consequently, a court hearing this evidence is likely to give credit to these factors supporting Uber's independent contractor model, but is unlikely to be able to look past the glaring conclusion reached through the primary portion of the

111. Exhibit 223-15 at 3, *O'Connor*, 82 F. Supp. 3d 1133 (No. C-13-3826 EMC).
112. *Id.* at 9.

test—that Uber just retains too much control over its drivers in order to properly classify them as independent contractors.

This is not to say that Uber's business model is inherently unworkable; rather, it is more a matter of Uber needing to manage its expectations. If Uber wishes to reap the benefits that accompany classification of its drivers as independent contractors, it should alter its practices and exercise less control over its employees. In short, Uber needs to—essentially—treat its drivers like independent contractors.

In practice, this may prove difficult to accomplish. If, for example, Uber began by dispensing with its passenger-driver rating system, thereby lessening its hold over the right to terminate its drivers, it is difficult to predict what would occur as a result. The status of drivers would begin to look more like that of independent contractors, but without a rating system, quality might begin to suffer. If ensuring high quality, passenger-reviewed customer service was a primary consideration of Uber's as it contemplated how it would establish its business (and there is no reason to believe that it was not), then altering such fundamental aspects of its company may force Uber to confront these types of uncomfortable realities.

Regardless of these potentially prohibitive consequences, Uber's responsibility, if it wishes to run a business, is to do so in compliance with established labor law in California; if doing so would indeed prove prohibitive for Uber, perhaps this is an indication that its success in revolutionizing the transportation industry, at least under its current practices, may have merely been a flash in the pan, and that further industry innovation is required before a permanent shift is able to occur.

This conclusion should also serve as a useful signpost for new businesses looking to Uber as a blueprint for their own ventures. Uber's business model is that of employer-employee, and emerging entrepreneurs should not see its success thus far as an invitation to haphazardly classify employees as independent contractors as a means of improving their bottom line or making an unprofitable business plan profitable. In fact, based on the analysis conducted here, Uber is likely to see a successful challenge waged against its own design. Accordingly, newcomers to the field should heed this warning and take pains to ensure that they do not suffer Uber's anticipated fate as well.