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# Agency Law and the New Economy

Mark J. Loewenstein

*University of Colorado Law School*

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# Agency Law and the New Economy

By Mark J. Loewenstein\*

*This article considers the status of workers in the “new economy,” defined as the sharing economy (e.g., Uber, Lyft) and the on-demand economy. The latter refers to the extensive and growing use of staffing companies by established businesses in many different industries to provide all or a portion of their workforce. Workers in both the sharing economy and the on-demand economy are, generally speaking, at a disadvantage in comparison to traditional employees. Uber drivers, for example, are typically considered independent contractors, not employees, and therefore are not covered under federal and state laws that protect or provide benefits to employees. Similarly, employees of a staffing company may consider themselves employees of the client company and, therefore, entitled to negotiate collectively with the client company and receive the same benefits as the client company’s employees, yet the client company may take the position that it is not the employer or even a “joint employer” of such workers. Courts considering the claims of these workers typically look to the common-law definition of “employee,” as legislatures have typically neglected to define “employee” when drafting laws to protect employees. The resulting litigation has generated judicial decisions that are difficult to parse and often treat workers unfairly. This article takes a fresh approach to this problem, considering the shortcomings of the common-law definition and suggesting solutions.*

## I. INTRODUCTION

Competition among businesses ideally results in lower prices and/or superior products or services for consumers. To achieve these goals, businesses generally reduce costs, employ technology, or increase the productivity of their workforces. In any case, businesses operate in a legal environment, one that generally increases the cost of doing business but also offers the opportunity to gain a competitive advantage if a business can avoid or reduce the cost of those legal rules. The stunning growth of Uber, Lyft, and numerous other businesses that have contributed to what is often called the “sharing economy”<sup>1</sup> illustrates mul-

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\* Monfort Professor of Commercial Law, University of Colorado Law School. The author wishes to thank his colleague, Scott Moss, and the reviewers of this article, Jeffrey Rubin and Vicki Tucker, for their insightful and helpful comments.

1. The sharing economy has been described as “[a]n economic model based on sharing underutilized assets . . . for monetary or non-monetary benefits.” Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST CO. (Nov. 21, 2013), <http://www.fastcoexist.com/3022028/the-sharingeconomy-lacks-a-shared-definition>. This simple definition describes Uber and other ride-

multiple strategies for achieving a competitive advantage.<sup>2</sup> Uber, for instance, uses a sophisticated mobile app to connect drivers to fare-paying customers (or riders). The company leverages this technology by structuring its legal relationship with the drivers so that they are independent contractors and not employees, thus avoiding employment-related costs and regulations and providing a competitive advantage over traditional taxi services, whose drivers are classified as employees.<sup>3</sup> In a sense, Uber's use of regulatory arbitrage has reduced or eliminated at least some of the costs it would otherwise have incurred (e.g., workers' compensation, unemployment compensation, and social security contributions) and shifted those costs to the drivers.<sup>4</sup> It should come as no surprise that Uber's advantages have caused a reaction from traditional taxi companies, which seek to

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sharing services: The "underutilized assets" are the cars owned by the drivers, who employ those cars in exchange for a fare. Uber has captured a good deal of media attention because of its success: Over 400,000 individuals currently serve as Uber drivers, see *O'Connor v. Uber Techs. Inc.*, 201 F. Supp. 3d 1110, 1122 (N.D. Cal. 2016); Uber drivers are available in 614 cities, see *UBER*, <http://www.uber.com> (last visited June 19, 2017). Uber has faced challenges to its business model in numerous jurisdictions, both in the United States and abroad, see, e.g., *O'Connor*, 201 F. Supp. 3d at 1119 n.6; and Uber itself has been valued at over \$50 billion, see Chris Higson, *The Value of Uber*, *FORBES* (Oct. 9, 2015, 12:15 PM), <http://www.forbes.com/sites/lbsbusinessstrategyreview/2015/10/09/the-value-of-uber/#7b1658ac7dda> (discussing Uber's market valuation); Tracey Lien, *A Thorn in Uber's Side*, *L.A. TIMES*, Jan. 24, 2016, at C1 (same). Although Uber may be the face of the sharing economy, many other new businesses operate on a similar model. Airbnb, for instance, allows property owners to "share" parts or all of their property with paying guests. See *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 789 (Sup. Ct. 2014). The Airbnb model has been challenged by the lodging industry because the property owners who list their property on the Airbnb website may be able to avoid the taxes and regulatory requirements that apply to traditional hotels and motels. See *id.* at 790–91. The Airbnb model does not raise the issue as to whether the property owners are employees of the company, but it does raise other agency law issues. For instance, are property owners who list their property on Airbnb agents of Airbnb for certain purposes? This article is less concerned with such issues than the employee/independent contractor issue raised by the business models of companies such as Uber.

2. Aside from what might be called the sharing economy, the labor force has been changing in recent years. A recent study of "alternative work arrangements"—defined as temporary help agency workers, on-call workers, contract workers, and independent contractors—found that the percent of workers in this category rose from 10.1 percent of the labor force in 2005 to 15.8 percent in 2015. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 22667, Sept. 2016), <http://www.nber.org/w22667.pdf>. One scholarly report recently estimated that, by the year 2020, over 40 percent of workers will fall into that category. INTUIT, INTUIT 2020 REPORT: TWENTY TRENDS THAT WILL SHAPE THE NEXT DECADE 21 (2010) (projecting various changes in labor markets). These alternative work arrangements have been accelerated by the use of online platforms—such as Uber—that allow service providers to locate customers, and vice versa, thus creating a triangular relationship among workers, customers, and intermediaries. In addition to being referred to as the sharing economy, this triangular relationship is sometimes called the gig economy, the on-demand economy, or the 1099 economy (referring to the fact that independent contractors receive an IRS Form 1099 from the person that pays them for services).

3. Of course, structuring the employment relationship so that the worker will fall within the definition of an independent contractor is hardly a new phenomenon, and companies often go to great lengths to achieve that result, as this article seeks to demonstrate. See *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 72–73 (Kan. 2014) ("As FedEx's counsel acknowledged at oral argument, the company carefully structured its drivers' operating agreements so that it could label the drivers as independent contractors in order to gain a competitive advantage, i.e., to avoid the additional costs associated with employees. In other words, this is a close case by design, not happenstance.").

4. Uber's success is attributable to more than its regulatory arbitrage; Uber has reduced the transaction costs of the ride service industry. See Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV.

have Uber subjected to the same legal requirements (e.g., licensing and other regulatory requirements) that they face.<sup>5</sup> Additionally, Uber's drivers have challenged their classification as independent contractors, arguing that they are employees and thus entitled to the federal, state, and local protections that employees enjoy.<sup>6</sup> For the most part, the resolution of the status of Uber drivers (and workers in similar situations<sup>7</sup>) turns on common-law doctrines of agency law developed many years ago.

A second hallmark of the new economy, and one that parallels the sharing economy, is businesses' use of staffing companies to provide all or a portion of the labor that the business may need at a given facility, particularly temporary employees. This frees the client business from maintaining a large, permanent workforce and, instead, allows it to call on staffing companies as the need arises. As a result, temporary employment is one of the fastest-growing segments of the new economy.<sup>8</sup> The arrangement, which may be characterized as the "on-demand economy" and is called "contingent employment" by the U.S. Bureau of Labor Statistics,<sup>9</sup> typically provides that, contractually, the staffing company is the "employer" of those workers for all purposes, including hiring, firing, discipline, and supervision, thereby relieving the client company of the normal responsibilities and liabilities of an employer. Staffing companies compete with one another to provide their clients with the lowest labor costs, thus driving down the wages of the staffing company's employees.<sup>10</sup> As in the Uber example,

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Dialogue 85, 87–89 (2015) (discussing the ways in which Uber reduced transaction costs compared to the traditional taxi industry).

5. *E.g.*, *Greenwich Taxi, Inc. v. Uber Techs., Inc.*, 123 F. Supp. 3d 327 (D. Conn. 2015) (granting Uber's motion to dismiss claims based on Lanham Act, state unfair practices act, and other laws); *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, No. 4:14-0941, 2015 WL 1034254 (S.D. Tex. Mar. 10, 2015) (denying Uber's motion to dismiss various state law claims); *Manzo v. Uber Techs., Inc.*, No. 13-C-2407, 2014 WL 3495401 (N.D. Ill. July 14, 2014) (denying Uber's motion to dismiss various state law claims); *Yellow Grp. LLC v. Uber Techs., Inc.*, No. 12-C-7967, 2014 WL 3396055 (E.D. Ill. July 10, 2014) (granting Uber's motion to dismiss on various state law claims); *Boston Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148 (D. Mass. Mar. 27, 2014) (denying Uber's motion to dismiss claims of unfair competition under Massachusetts law). A recent news story reported that Uber faced more than seventy federal law suits, many of them challenging its failure to comply with regulatory requirements relating to traditional transportation companies. Marisa Kendall, *Uber Battling More than 70 Federal Lawsuits*, BIRMINGHAM NEWS, July 17, 2016, at D3, 2016 WLNR 21946192.

6. See Second Amended Class Action Complaint & Jury Demand, *O'Connor v. Uber Techs., Inc.*, No. CV-13-3826-EMC (N.D. Cal. Nov. 12, 2014), 2014 WL 10805308.

7. There are many similar triangular arrangements. See Casey Leins, *Who's a Sharing Economy Worker?*, U.S. NEWS & WORLD REP. (Aug. 21, 2015, 1:49 PM), <http://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers>. Other well-known firms include Etsy (handmade goods), TaskRabbit (chore platform), GrubHub (food delivery), and Washio (laundry). See *id.*

8. See *In re Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (2015), 2015 WL 5047768, at \*11, \*15; CATHERINE RUCKELSHAUS ET. AL., WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 21 (2014) (describing the growth of contingent employment); Marc Lifsher, *A Fight over 'Perma-Temp' Work*, L.A. TIMES, May 7, 2014, at B2 (discussing the growth of the staffing industry).

9. See *infra* notes 105–06 and accompanying text.

10. See DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 20–21 (2010), <http://www.dol.gov/whd/resources/strategicenforcement.pdf> (reporting to the Wage and

this arrangement may create a competitive advantage to the extent that the client company's competitors are burdened with higher labor costs. Such arrangements have been and increasingly are being challenged.

A typical example of contingent employment was at the center of a labor law dispute involving Browning-Ferris Industries of California, Inc. ("BFI"), which used a staffing company to furnish about 240 full-time, part-time, and on-call sorters, screener cleaners, and housekeepers to work at a recycling facility operated by the company.<sup>11</sup> BFI also directly employed about sixty workers at the same facility. A union petitioned to represent the staffing company employees and took the position that the staffing company and BFI were joint employers of those workers and obligated to negotiate with the union. BFI argued that it was not their employer, a position that the National Labor Relations Board ("NLRB" or "Board") ultimately rejected, as more fully discussed below.<sup>12</sup>

The new economy is thus one that, among other things, has altered the relationship of many workers to their work. In Uber's view, Uber drivers do not work for Uber, even though their passengers may view them as equivalent to individuals who drive for, and are employees of, a taxi company.<sup>13</sup> Employees of the staffing company who worked at BFI's facility appeared, for all intents and purposes, to be BFI's employees and, indeed, may have so considered themselves. Although independent contractors and staffing agencies have long been a part of the business landscape, their use has dramatically increased in recent years, initially as a result of the Great Recession.<sup>14</sup>

At the heart of both of these arrangements is the legal question of what it means to be an employee, a question often resolved by reference to a common-law definition of the term. This definition was developed by courts for the purpose of determining whether the employee's purported employer would be vicariously liable for the employee's tortious conduct.<sup>15</sup> Bearing in mind that the relationship

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Hour Division of the Department of Labor); see also Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1690–91 (2016).

11. *Browning-Ferris*, 2015 WL 5047768, at \*3.

12. See *infra* Part III.B.

13. See *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 226 (D.D.C. 2015).

14. See Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 202–04 (2011) (discussing disaggregation).

15. Under the terminology of the *Restatement (Second) of Agency*, the employer would be vicariously liable for the torts of its "servants." See RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958). The *Restatement* makes this clear in its definitions of "master," "servant," and "independent contractor":

The word "servant" is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from other persons for whose physical conduct the employer is not responsible. These latter persons fall into two groups: those who are agents but do not respond to the tests for servants, and those who are not agents. For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term "independent contractor" is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible except in the performance of nondelegable duties.

*Id.* § 2 cmt. b.

between businesses and their workers is traditionally the subject of a number of different federal and state laws protecting those workers, it is problematic, to say the least, to make those protections—such as minimum wage, retirement benefits, and the right to unionize—subject to a common-law definition of “employee” developed for an entirely different purpose.<sup>16</sup> Many workers in the new economy who are classified as independent contractors are as deserving of the same protection as their fellow workers laboring in the traditional economy who are classified as employees;<sup>17</sup> indeed, fundamental concepts of justice require that similarly situated persons be treated equally under the law.<sup>18</sup>

This article thus considers how the law could be reshaped to accommodate the needs of those workers, considering first employees in the sharing economy and then employees in the on-demand economy. This article concludes with two suggestions. First, to the extent that the determination of whether a worker is an employee turns on common-law doctrines, courts should reconsider those doctrines, recognizing the limited purpose for which they were developed. A simpler way to think about the common-law classification problem would draw on precedents under the federal securities laws that use a “family resemblance” test to determine whether a promissory note is a security.<sup>19</sup> Similarly, to determine whether a worker is an employee or independent contractor, courts might recognize a paradigmatic independent contractor and determine whether the worker in question bears a strong resemblance to an independent contractor (based on characteristics that typically define an independent contractor) or bears a stronger resemblance to a paradigmatic employee (again, based on the characteristics that typically define an employee). Second, legislatures enacting employment-related laws or agencies promulgating rules need to grapple with the difficult question of coverage: that is, for purposes of the legislation in question, who should be considered an employee? This article discusses some tentative ideas about how a law or rule might define what constitutes an employee for purposes of such law or rule.

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16. The need to extend statutory protections to independent contractors has been recognized in federal law. For example, although Title VII of the Civil Rights Act of 1964 does not protect non-employees, racial discrimination against independent contractors is unlawful. *See* 42 U.S.C. § 1981 (2012); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Alexander v. Fulton Cty.*, 207 F.3d 1303 (11th Cir. 2000) (holding that statistical evidence may be used to establish discrimination).

17. In this context, it makes little sense to shape the definition of employee to take advantage of the economic efficiencies that companies like Uber offer. *Cf.* Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 *STAN. TECH. L. REV.* 293 (2016) (arguing that economic efficiencies should influence the way we think about classification issues).

18. For example, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

19. *Reves v. Ernst & Young*, 494 U.S. 56, 64–65 (1990).

## II. THE COMMON LAW OF AGENCY

### A. THE ELEMENTS OF AN EMPLOYMENT RELATIONSHIP

Although modified in some statutes that define an employment relationship, as explored below, the core of the definition of employee can be traced back to the common law. The early common-law courts and the first two *Restatements of Agency* used the term “master” to describe what modern courts call an “employer,” and they used “servant” to describe what modern courts and the *Restatement (Third) of Agency* call an “employee.”<sup>20</sup> The *Restatement (Third) of Agency* defines an employee as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.”<sup>21</sup> It is worth noting, however, that this definition is both underinclusive and overinclusive.

The definition is underinclusive because it excludes persons who are normally thought of as employees and are treated as such by their employers. For example, a physician employed by a hospital might not be deemed an employee, as defined by the *Restatement*, because the hospital/employer (not itself being a doctor) lacks the authority or wherewithal to control the way the physician practiced medicine.<sup>22</sup>

The definition is overinclusive because it captures agents who act gratuitously and are not considered employees, as that term is commonly understood.<sup>23</sup> For example, if a person (the agent) volunteers to help a friend (the principal) in a task—say, washing a car—and the helper accepts direction from the principal, the helper is deemed to be an “employee” under the *Restatement (Third) of Agency*.<sup>24</sup> This is so even though the helper is uncompensated, may have no previous or ongoing similar relationship with the principal, and in common parlance would never be called an employee.<sup>25</sup>

The definition of “servant” or “employee” often departs from common understanding because the drafters of the *Restatement* intended to describe a relationship that *should* result in vicarious liability for the master/employer if the servant/employee negligently injured another when acting within the scope of employ-

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20. See RESTATEMENT (FIRST) OF AGENCY § 2 (AM. LAW INST. 1933); RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958); RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006).

21. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a).

22. RESTATEMENT (SECOND) OF AGENCY § 223 cmt. a (AM. LAW INST. 1958) (“[T]he physician employed by a hospital to conduct operations is not, in the normal case, a servant of the hospital . . . .”); see *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1043–44 (Ohio 1990) (holding that hospital lacked sufficient control over physician with staff privileges to justify liability under respondeat superior), overruled in part by *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994).

23. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(b) (“[T]he fact that work is performed gratuitously does not relieve a principal of liability.”).

24. See *id.*; see also *Heims v. Hanke*, 93 N.W.2d 455 (Wis. 1958) (holding uncle vicariously liable for negligence of nephew who was helping uncle wash his car).

25. RESTATEMENT (THIRD) OF AGENCY § 1.04(3) (AM. LAW INST. 2006) (defining “gratuitous agent”); see also *id.* § 7.07 cmt. f (“The fact that an agent performs work gratuitously does not relieve a principal of vicarious liability when the principal controls or has the right to control the manner and means of the agent’s performance of work.”).



ment.<sup>26</sup> As the hospital cannot control the way its employee/physician practices medicine, the common law did not impose vicarious liability on the hospital.<sup>27</sup> By contrast, in the example of the volunteer car washer, if that volunteer negligently injured a third person while washing the car, the principal would bear vicarious liability because, by assumption, the principal could control the conduct of the agent. One cannot overstate the importance of the underlying rationale for the common-law definition of “employee.” It makes little sense to apply federal employment laws to a wholly voluntary and gratuitous relationship (e.g., the volunteer car washer) and still less to deny the benefits of those laws to, for example, our hypothetical hospital-employed physician.

In addition to the definition of “employee,” the common law developed a contrasting definition, that is, an “employment” relationship that would not result in vicarious liability for the employer. If the employer lacked the right to control the worker, the worker would likely be characterized as an “independent contractor,” and the employer would not be liable for the negligent conduct of that worker. The *Restatement (Second) of Agency* defines an independent contractor as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”<sup>28</sup> This definition is thus the obverse of the definition of an employee; both definitions center on the question of control. Courts have sought to identify the characteristics of a worker whose employer typically lacked such control. Those characteristics are succinctly captured in a comment in the *Restatement (Third) of Agency*:

[T]he extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal’s direction or without supervision; the skill required in the agent’s occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent’s work is part of the principal’s regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is

26. Indeed, the *Restatement (Third) of Agency* defines employee in the section that establishes an employer’s vicarious liability for a tort committed by an employee within the scope of employment. *Id.* § 7.07. In at least one case, a court considered whether an Uber driver was an employee for purposes of respondeat superior liability and determined that the allegations in plaintiff’s complaint were sufficient to withstand Uber’s motion to dismiss. *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222 (D.D.C. 2015).

27. See RESTATEMENT (THIRD) OF AGENCY 7.07 cmt. b (“An employer’s ability to exercise control over its employees’ work-related conduct enables the employer to take measures to reduce the incidence of tortious conduct.”).

28. RESTATEMENT (SECOND) OF AGENCY § 2(3) (AM. LAW INST. 1958). Compare RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006) (abandoning the term independent contractor, but noting that the term “independent contractor” is “equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers”).

not in business. Also relevant is the extent of control that the principal has exercised in practice over the details of the agent's work.<sup>29</sup>

Applying these factors, or variations thereof developed by various courts, has been challenging for the courts and has yielded inconsistent results.<sup>30</sup>

B. THE IMPORTANCE OF THE COMMON-LAW DEFINITION:  
*NATIONWIDE MUTUAL INSURANCE CO. v. DARDEN*

*Nationwide Mutual Insurance Co. v. Darden*,<sup>31</sup> a precedent from the U.S. Supreme Court, illustrates the influence of the common-law definitions of employee and independent contractor in a case that does not involve vicarious liability but rather the applicability of a federal statute protecting a worker's retirement benefits. Alleging a violation of the Employee Retirement Income Security Act ("ERISA"),<sup>32</sup> an individual who sold insurance policies issued by the defendant, Nationwide Mutual Insurance Co. ("Nationwide"), claimed that his contract entitled him to certain retirement benefits after he ceased to be a Nationwide agent, even though he violated a one-year noncompetition agreement. The plaintiff claimed that ERISA precluded Nationwide from terminating his retirement benefits.<sup>33</sup> Nationwide, in turn, argued that ERISA only related to benefits promised employees, and the plaintiff was an independent contractor rather than Nationwide's employee. The Supreme Court held in favor of Nationwide in a case that saw two trips to the U.S. Court of Appeals for the Fourth Circuit.

The first opinion of the appellate court followed a district court decision in favor of Nationwide. The appellate court vacated that decision, holding that the district court's reliance on the common-law definition of "employee" was erroneous and that the district court should have used a definition that was consistent with the "declared polic[ies] and purposes" of ERISA.<sup>34</sup> On remand, the district court developed such a definition and entered a judgment in favor of the plaintiff, which was then affirmed on appeal.<sup>35</sup> The issue before the Supreme Court was simply whether the term "employee" in ERISA incorporated the common-law definition or whether the statute should be interpreted in light of the purposes for which it was enacted. The Supreme Court held that the term "employee," as used in ERISA, meant common-law employee and thus remanded the case for a determination as to whether the plaintiff would qualify as an employee "under traditional agency law principles."<sup>36</sup>

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29. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f.

30. See Paul A. Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365, 372 (1930) ("[O]n the same . . . facts, with two courts applying the same test, one will say 'there is' and the other will say 'there is not' such control, or right of control, as to produce the master-servant relation.").

31. 503 U.S. 318 (1992).

32. 29 U.S.C. §§ 1001–1461 (2012).

33. *Nationwide*, 503 U.S. at 320 (referencing plaintiff's claim that the retirement benefits were non-forfeitable because they already vested under the terms of ERISA, 29 U.S.C. § 1053(a)).

34. *Id.* at 321 (quoting *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 706 (4th Cir. 1986)).

35. *Id.* at 322.

36. *Id.* at 328.

In its opinion, the Supreme Court noted that, in construing two other federal statutes (the National Labor Relations Act (“NLRA”) and the Social Security Act (“SSA”)), it had declined to use the common-law definition of “employee.”<sup>37</sup> In each case, the Court adopted a definition that it determined was more consistent with the purpose of each statute in question, decisions that Congress subsequently rejected by amending the statute in question to make clear that “employee,” as used in that statute, meant a common-law employee. In light of this history, the Court in *Nationwide* took the safe road: Unless Congress provides a definition of “employee” in the federal statute using the term, “employee” has its common-law meaning. In ERISA, Congress defines “employee” as “any individual employed by an employer,”<sup>38</sup> which the Court decided was “completely circular and explain[ed] nothing,”<sup>39</sup> but it left the Court with no choice other than to apply the common-law definition.

### C. GAMING THE DEFINITION: THE FEDEX LITIGATION

As noted above, the common law of agency developed a multipronged test to determine whether a person is an independent contractor and therefore not an employee. The *Nationwide* Court cited that test with approval,<sup>40</sup> and as a result of that and other cases, businesses often have crafted contracts to fit their workers within the definition of independent contractor. No business has been more creative in that regard than FedEx Ground Package Systems, Inc. (“FedEx”), whose efforts to craft an independent contractor relationship with its drivers spawned litigation across the country.<sup>41</sup>

FedEx has a straightforward business model: It picks up packages from its customers and delivers them as instructed by those customers. At the heart of this business model are its drivers, who drive readily identifiable FedEx trucks, wear distinctive FedEx uniforms, and pick up packages from FedEx distribution points for delivery to customers in the driver’s designated territory. To execute its business plan, FedEx requires thousands of drivers. Its business plan antici-

37. *Id.* at 324–27 (discussing *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944) (interpreting NLRA, 20 U.S.C. §§ 151–169 (2012)), and *United States v. Silk*, 331 U.S. 704 (1947) (interpreting the SSA, 42 U.S.C. §§ 301–1397mm (2012))).

38. *Id.* at 323 (quoting 29 U.S.C. § 1002(6)).

39. *Id.*

40. *Id.* at 323–24 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958)).

41. See *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (holding that drivers were not employees for purposes of the NLRA); *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 997 (8th Cir. 2015) (reversing grant of summary judgment to plaintiffs, after finding genuine dispute of material fact that plaintiffs were employees); *Craig v. FedEx Ground Package Sys., Inc.*, 792 F.3d 818, 821 (7th Cir. 2015) (reviewing the independent contractor classification of FedEx delivery drivers); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1326 (11th Cir. 2015) (reversing summary judgment for FedEx regarding employee status of drivers); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1037 (9th Cir. 2014) (holding that drivers were employees under Oregon law); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989–97 (9th Cir. 2014) (holding that plaintiffs were employees as a matter of California law); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (vacating the NLRB’s order after concluding that drivers were independent contractors).

pated that the drivers would not be FedEx employees; rather, each driver would be an independent contractor responsible for pickups and deliveries in a designated territory and would enter into a formal written contract with FedEx. Finding that the status of an independent contractor was inferior to that of an employee, FedEx drivers brought numerous actions across the United States, challenging that designation.

The FedEx litigation resulted in a consolidation of numerous (though not all) cases that FedEx drivers brought against the company. Interestingly, the cases raised issues under numerous federal and state laws, yet in consolidating many cases in the U.S. District Court for the Northern District of Indiana, the parties and the court relied on the common-law definition of independent contractor.<sup>42</sup> More narrowly, in the multidistrict litigation, the district court chose one case as its “lead” case, which was based on ERISA and the Kansas Wage Payment Act.<sup>43</sup> Relying on the traditional tests for classifying workers, the district court held that the drivers were independent contractors.<sup>44</sup> On appeal, the U.S. Court of Appeals for the Seventh Circuit referred the question of whether the drivers were employees to the Kansas Supreme Court,<sup>45</sup> which ruled in favor of the drivers.<sup>46</sup>

For present purposes, the significance of these cases stems from the lengths to which FedEx went to create an independent contractor relationship and the fact that different courts reached different conclusions on the same facts.<sup>47</sup> The FedEx/driver contract, which was termed an “Operating Agreement” (and one example of which ran thirty-eight pages not including seven addendums),<sup>48</sup> was clearly drafted to bolster the case that the drivers were independent contractors. The contract included, as a preamble, a “background statement” that em-

42. *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557 (N.D. Ind. 2010), *rev'd*, 792 F.3d 818 (7th Cir. 2015) (per curiam).

43. *See id.* at 559 (“This opinion sets forth facts commonly applicable to all certified class actions . . .”); *id.* (interpreting the Kansas Wage Payment Act, KAN. STAT. ANN. §§ 44-313 to -327).

44. *Id.* at 560.

45. *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423 (7th Cir. 2012) (per curiam) (referring question of whether the drivers were independent contractors to the Kansas Supreme Court).

46. *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66 (Kan. 2014) (per curiam) (holding that drivers were employees under the Kansas Wage Payment Act); *see also In re FedEx Ground Package Sys., Inc.*, 792 F.3d at 821 (“The Kansas Supreme Court’s decision necessitates the reversal of the MDL court’s grant of summary judgment in favor of FedEx and denial of the plaintiff drivers’ summary judgment motion.”).

47. *Compare Wells v. FedEx Ground Package Sys., Inc.*, 979 F. Supp. 2d 1006, 1024–25 (E.D. Mo. 2013) (holding that drivers were employees), *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 331 (Ct. App. 2007) (same), *and Craig*, 335 P.3d at 71 (same), *with FedEx Home Delivery*, 563 F.3d at 504 (holding that drivers were independent contractors), *FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d at 560 (same), *and Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 292–93 (Wash. 2012) (en banc) (concluding that jury instruction regarding employee status was reversible error).

48. *FedEx Ground Package Sys., Inc., Pick-Up and Delivery Contractor Operating Agreement* (June 2002) [hereinafter *FedEx Operating Agreement*], <http://leg.wa.gov/JointCommittees/Archive/UECI/Documents/112009/Fed%20Ex%20Contractor%20Op%20Agreement.pdf>. The form contract is governed by Pennsylvania law. *Id.* § 19, at 37.

phasized that the drivers were independent contractors and not employees.<sup>49</sup> FedEx included several salient terms in the contract to establish an independent contractor relationship:

- Drivers had to supply and maintain their own trucks.<sup>50</sup>
- Drivers were responsible for all operating costs and expenses.<sup>51</sup>
- Tellingly, drivers were responsible

for exercising independent discretion and judgment to achieve the business objectives and results specified [in the contract], and no officer, agent or employee of FedEx Ground [had] the authority to direct Contractor as to the manner or means employed to achieve such objectives and results. For example, no officer, agent or employee of FedEx Ground [had] the authority to prescribe hours of work, whether or when the Contractor [took] breaks, what route the Contractor [was] to follow, or other details of performance.<sup>52</sup>

- Drivers were authorized to employ others but were responsible for all costs and expenses related to such employees.<sup>53</sup>

FedEx could not, however, simply contract with drivers to pick up and deliver packages without exercising some control over how those functions were handled by the drivers. Put simply, FedEx had to monitor the way in which the drivers performed, or it would run the risk of tarnishing its brand and losing the public's trust. It thus had to find a way to exercise the sort of control that an employer typically has over its employees, and, in that regard, the contract also addressed the following matters:

- The driver's truck had to bear the appropriate colors and logos "to identify the Equipment as a part of the FedEx Ground system."<sup>54</sup>
- Significantly, section 1.10 of the contract established specific performance standards for drivers so that FedEx could achieve its "business objectives," which included a "standard of service that is fully competitive with that offered by other national participants in the [package delivery] industry." For instance, this section required drivers to "[f]oster the professional image and good reputation of FedEx . . . with shippers and consignees, including adhering to vehicle identification and [driver] appearance standards [specified in the contract]."<sup>55</sup>

49. *Id.* at 1 ("Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of FedEx Ground for any purpose.").

50. *Id.* §§ 1.1, 1.2, at 2–3.

51. *Id.* § 1.3, at 3.

52. *Id.* § 1.15, at 10–11.

53. *Id.* § 2.2, at 11–12.

54. *Id.* § 1.5, at 4.

55. *Id.* § 1.10, at 7–9.

- Similarly, “each person having contact with the public under the provisions of this Agreement [had to] wear a FedEx Ground-approved uniform, maintained in good condition, and . . . otherwise keep his/her personal appearance consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by FedEx Ground. In addition, the Equipment [had to] be maintained in a clean and presentable fashion free of body damage and extraneous markings, in accordance with the standards of the industry.”<sup>56</sup>
- Finally, “qualified FedEx Ground terminal personnel [could], at their option, visit customer locations with [the driver] four times annually to verify that [the driver was] meeting the standards of customer service provided in this Agreement.”<sup>57</sup>

These provisions, unusual in the typical principal/independent contractor relationship, suggest that drivers were subject to the kind of control that employees experience. As a result of the adverse rulings by the Kansas Supreme Court and other factors, in June 2016, FedEx settled this litigation, agreeing to pay \$240 million to 12,000 drivers.<sup>58</sup> This extensive and costly litigation raises the question as to whether there is not a better approach to this problem. The Uber litigation raises the same problem in the context of a technology firm and is discussed in the following section.

#### D. GAMING THE DEFINITION: THE UBER LITIGATION

Uber presents itself as a technology company that simply allows people seeking a ride to find drivers willing to provide that ride (for a fee); or, in Uber’s characterization, it provides “peer-to-peer . . . passenger transportation services.”<sup>59</sup> In fact, Uber does more than it represents. For starters, Uber must recruit and

56. *Id.* § 1.12, at 9–10.

57. *Id.* § 1.14, at 10. The agreement also provided that: drivers were required to maintain their equipment “in accordance with the safety and equipment standards specified in applicable federal, state and municipal laws and any rules, regulations and orders of any applicable agency,” *id.* § 1.2, at 2; FedEx was authorized to pay applicable licenses, taxes, and fees and deduct those payments (together with any expenses incurred by FedEx in making such payments) from amounts otherwise due the drivers, *id.* § 1.3, at 3; and drivers were prohibited from using their equipment except for the carriage of goods of FedEx, *id.* § 1.4, at 3–4. These provisions are unusual in a contract between a company and an independent contractor.

58. See Pepper Hamilton LLP, *\$240 Million Settlement Closes Chapter on FedEx IC Misclassification Lawsuits*, JD SUPRA (June 17, 2016) (describing settlement of consolidated litigation in the Seventh Circuit); see also *id.* (describing \$226 million settlement of California class action). FedEx has not conceded the question in other cases. See *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (concluding that FedEx prevailed in an appeal from a decision of the NLRB that its drivers were employees); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (same).

59. Grant E. Brown, Comment, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. ENDNOTES 15, 19 (2016) (quoting Rasier, LLC, Software License and Online Services Agreement 1 (Nov. 10, 2014), [https://uber-regulatory-documents.s3.amazonaws.com/country/united\\_states/p2p/Partner%20Agreement%20November%2010%202014.pdf](https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Partner%20Agreement%20November%2010%202014.pdf)). Rasier, LLC is a subsidiary of Uber. *Id.* at 16 n.7. The Uber business model is succinctly described in *O’Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015). It is as follows:

screen the drivers; not everyone is eligible to be an Uber driver. Prospective drivers must apply, provide evidence of current licensure and insurance, pass a background check and “city knowledge” test, own or rent a late-model vehicle, and interview with an Uber employee.<sup>60</sup> A person who successfully clears these hurdles must sign a contract with Uber, which Uber titles the “Software License and Online Services Agreement” (the “Uber/Driver Agreement”).<sup>61</sup> As in the FedEx Operating Agreement discussed above, the Uber/Driver Agreement includes terms intended to establish an independent contractor relationship. The Uber/Driver Agreement’s preamble includes this statement: “Uber does not provide transportation services and is not a transportation carrier.”<sup>62</sup> Such a statement was likely included with an eye toward litigation; it does not define the obligation of either party to the contract. More narrowly, the Uber/Driver Agreement includes terms that support an independent contractor relationship:

- A provision states that the “relationship between the Parties is solely that of independent contracting parties,”<sup>63</sup> and another provision, somewhat duplicative, states that the agreement is “not an employment agreement or employment relationship.”<sup>64</sup>
- A provision grants a license to drivers to use the Uber software.<sup>65</sup>
- A provision imposed on drivers the sole responsibility for “any obligations or liabilities” that arise from providing services to passengers through the Uber app.<sup>66</sup>

The Uber/Driver Agreement is not executed until after Uber has approved a person to be a driver, a process that parallels the hiring of a taxi driver by a traditional taxi company or, more generally, the hiring of any employee: application, verification of licensing, background check, test, and interview. Moreover, the Uber/Driver Agreement includes provisions that seem designed to protect Uber’s reputation and, of necessity, provide Uber with some measure of control:

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In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger.

*Id.* at 1135.

60. *O’Connor*, 82 F. Supp. 3d at 1136–38.

61. Uber, Software License and Online Services Agreement (July 2013), <http://www.hostcarsla.com/Software%20License%20and%20Online%20Services%20Agreement.pdf>.

62. *Id.* at 1.

63. *Id.* § 7.1, at 7.

64. *Id.* § 7.2, at 7. To further bolster its position in litigation, the agreement is formally between Uber and what is referred to as the “Transportation Company.” *Id.* at 1. Presumably, the Transportation Company is itself an independent entity that employs drivers. In fact, the drivers are unlikely to be entities and, in any event, only individuals who are approved by Uber, as described above, are eligible to enter into the Uber/Driver Agreement.

65. *Id.* § 2.1, at 2. The license is non-exclusive and non-transferable. *Id.*

66. *Id.* § 3.1, at 3.

- Passengers are encouraged to rate their drivers after each ride, and Uber reserves the right to terminate the software license if a driver, on average, falls below a certain rating.<sup>67</sup>
- Drivers must “maintain high standards of professionalism and service, including but not limited to professional attire.”<sup>68</sup>
- Uber reserves the right to terminate the agreement if the driver “no longer qualifies, under applicable law or *the quality standards of Uber*, to provide the [service] or operate the [driver’s] Vehicle.”<sup>69</sup>

Outside of the Uber/Driver Agreement, Uber seeks to exercise some control over its drivers. For instance, Uber recommends, among other things, that drivers play soft jazz or NPR on car radios, dress professionally, open the door for clients, and provide an umbrella for clients.<sup>70</sup> Uber facilitates the ability of its drivers to rent cars from three different vendors, including one that is a subsidiary of Uber.<sup>71</sup> A company hiring an independent contractor typically would not be in the business of providing that independent contractor with essential tools, but Uber recognizes that individuals who might be drivers might not have the late-model cars required by Uber. In short, as with FedEx, the contract between the company and the worker is designed to negate an employment relationship, even though the realities of that relationship include at least some of the earmarks of an employment relationship.

On balance, the courts have not been receptive to Uber’s argument that its drivers are independent contractors. Each of two key cases was resolved by the U.S. District Court for the Northern District of California: *O’Connor v. Uber Technologies, Inc.*,<sup>72</sup> which involved alleged violations of various provisions of the California Labor Code, and *Yucesoy v. Uber Technologies, Inc.*,<sup>73</sup> which involved alleged violations of Massachusetts law. The cases were eventually consol-

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67. *Id.* § 4.3.3, at 5. Technically, Uber would “deactivate the Driver’s access to the Software and Service.” *Id.*

68. *Id.*

69. *Id.* § 9.1, at 9 (emphasis added); see *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (“Uber is deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices.”).

70. *O’Connor*, 82 F. Supp. 3d at 1149–50.

71. Uber promotes these arrangements on its website. *Drive with Uber*, UBER, [goo.gl/mc6q9s](http://goo.gl/mc6q9s) (last visited June 21, 2017) (“Need wheels? We’ve got you covered. Short and long-term vehicle options are now available.”). The vendors include Xchange Leasing, Enterprise, and Hertz. *Id.* The web page states, for the Xchange Leasing option, that it provides a “[f]lexible lease program designed just for drivers on the Uber platform.” *Id.* Xchange Leasing is a subsidiary of Uber. See *id.*

72. *O’Connor*, 82 F. Supp. 3d at 1135 (evaluating the independent contractor status of Uber drivers).

73. 109 F. Supp. 3d 1259, 1261 (N.D. Cal. 2015). After plaintiffs filed a putative class action in Massachusetts Superior Court, Uber removed the case to federal court in Massachusetts; the case was transferred to the Northern District of California pursuant to a forum selection clause in the Uber/Driver Agreement. *Id.* at 1261–62.



idated for purposes of settlement,<sup>74</sup> although the *O'Connor* case did generate an important substantive decision by the district court.

In the course of ruling on Uber's motion for summary judgment in the *O'Connor* case, the court discussed the applicable California law on the question of whether drivers were independent contractors. That law is somewhat unique in its approach to the employee/independent contractor question because it recognizes a presumption that a person is an employee if that person "performs services" for the benefit of the employer.<sup>75</sup> The burden then shifts to the employer to rebut that presumption, which requires the employer to address the extent to which the employer controls the way the employees perform their duties and a number of other factors identified by the California Supreme Court:

(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; (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.<sup>76</sup>

These are, of course, similar to factors set forth in the *Restatement (Third) of Agency*, as noted above.<sup>77</sup> However, the California courts have also stated that "the most significant consideration" is the putative employer's "right to control the work details."<sup>78</sup> The *O'Connor* court concluded that the plaintiff had established, as a matter of law, that "Uber's drivers render services to Uber, and thus are Uber's presumptive employees."<sup>79</sup> The court thus rejected Uber's argument that it was merely a technology company that provided drivers with "leads" that the driver could accept or reject. The court concluded that Uber simply used technology in its business, as do other companies, and that Uber was, in fact, in the transportation business and promoted itself as such.<sup>80</sup> It follows from this conclusion, the court said, that the drivers perform a service for Uber because "Uber would not be a viable business without its drivers."<sup>81</sup> The court also noted the various ways that Uber exercised control over its drivers (e.g., Uber sets fares and prohibits drivers from answering passenger inquiries

74. See *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1116–17 (N.D. Cal. 2016).

75. *O'Connor*, 82 F. Supp. 3d at 1138 (citing *Yellow Cab Coop., Inc. v. Worker's Comp. Appeals Bd.*, 277 Cal. Rptr. 434 (Ct. App. 1991)).

76. *Id.* at 1139 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)).

77. See *supra* note 29 and accompanying text.

78. *O'Connor*, 82 F. Supp. 3d at 1139 (quoting *Borello*, 769 P.2d at 404).

79. *Id.* at 1145.

80. *Id.* at 1141–42. The court noted: "Uber's own marketing bears this out, referring to Uber as 'Everyone's Private Driver,' and describing Uber as a 'transportation' system and the 'best transportation service in San Francisco.'" *Id.* (quoting Uber's Official Blog).

81. *Id.* at 1142.

about booking directly with a driver) but concluded that there remained questions of material fact regarding the determination of whether the control exercised by Uber over its drivers was sufficient to establish that the drivers were employees. The determination was a mixed question of fact and law, requiring further proceedings.<sup>82</sup> On the brink of the trial to resolve that question, the parties in both cases reached a settlement agreement, requiring Uber to make some changes to its contract with drivers and to make a payment of up to \$100 million.<sup>83</sup> The district court, however, refused to approve that settlement, ruling that it needed additional information from the parties in order to determine whether the settlement were “fair and adequate.”<sup>84</sup> As of this writing, the settlement has not been finally approved.

### E. TAX LAW

The employee/independent contractor issue is a significant one for purposes of federal income taxes. Whether, for example, employers are required to withhold income taxes from their workers (and to pay social security taxes on their behalf) turns on whether the workers are employees or independent contractors. Cost savings, as noted above, incentivize employers to classify their workers as independent contractors, a classification that is often challenged by the Internal Revenue Service (“IRS”). The stakes are often high in such challenges, yet the relevant code provision (section 3121(d) of the Internal Revenue Code (“IRC”)) relies largely on the common law for the definition of employee: “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”<sup>85</sup> As in the *Restatements* and numerous court decisions, the IRS provided guidance on the definition of a common-law employee by promulgating a twenty-factor test in a 1987 Revenue Ruling.<sup>86</sup> Each factor, in some way, is designed to shed light on whether the employer exercises control over the worker or, as the IRS stated in its release, “twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship.”<sup>87</sup> Although this listing may be helpful in making a determination, the ultimate decision is still a difficult one. The IRS made clear in the Revenue Ruling that the importance of any factor depends on the circumstances and that “formalistic aspects of an arrangement” must give way to the “substance of the arrangement.”<sup>88</sup> In other words, arrangements (such as those evident in the Uber

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82. *Id.* at 1152.

83. *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1113, 1116–17 (N.D. Cal. 2016) (rejecting plaintiffs’ motion for preliminary approval of settlement). Similar litigation involving Uber’s competitor, Lyft, was settled about the same time. See Tracey Lien, *Judge OKs \$27M Settlement of Drivers’ Suit Against Lyft*, SAN DIEGO UNION-TRIB., June 25, 2016, at 3, 2016 WLNR 19464013.

84. *O'Connor*, 201 F. Supp. 3d at 1113.

85. 26 U.S.C. § 3121(d)(2) (2012).

86. Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 WL 419174.

87. *Id.*

88. *Id.*

and FedEx cases) will be scrutinized because they were designed to “achieve a particular status.”<sup>89</sup>

Interestingly, IRC section 3121(d) does set out four kinds of workers who, by definition, are deemed to be employees.<sup>90</sup> These work categories could easily be structured as independent contractor relationships, so it appears that for some policy reason, Congress sought to preempt that possibility. For instance, a person who works as a full-time life insurance salesman or a home worker who finishes goods furnished by another is deemed to be an employee. Although one can imagine reasons why Congress may have identified these specific categories for inclusion within the definition of “employee,” the statute at least demonstrates a way of defining “employee” other than relying on the common law or a twenty-factor explication of the common law.

## F. SUMMARY

It should be clear at this point that the definition of who is an employee and who is an independent contractor is intensely factual and often unpredictable. Various courts and administrative agencies making those determinations use different tests, with the result that a person may be an employee for some, but not for other, purposes. Proposals for bringing some degree of consistency to this area of the law are considered below. Before doing so, however, this article turns to a second, related question dogging the new economy: Are joint employers present? As noted above, a second feature of the new economy is an in-

89. *Id.*

90. For pertinent purposes, the IRC defines the term “employee” to mean:

any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(B) as a full-time life insurance salesman;

(C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term “employee” under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed . . . .

26 U.S.C. § 3121(d)(3) (2012).

creased reliance on staffing companies to provide some or all of the workers that a business needs. This arrangement, considered in the next section, raises issues similar to that of the employee/independent contractor issue discussed above because the worker may argue that he or she meets the employee test with respect to each putative employer.

### III. THE JOINT EMPLOYER DOCTRINE

#### A. INTRODUCTION

The joint employer doctrine was developed by the courts to describe situations in which more than one employer has some control over an employee<sup>91</sup> and, therefore, may be vicariously liable for the tortious conduct of the employee<sup>92</sup> or otherwise bear the responsibilities of an employer with respect to that employee,<sup>93</sup> notwithstanding the fact that the two employers were otherwise unaffiliated with one another.<sup>94</sup> Until the last twenty years or so, the joint employer doctrine was not a frequently litigated issue. In early litigation, the issue arose in the “borrowed servant” context—that is, where an employee of one company (the “general employer”) is loaned or leased to a second company (the “special employer”). Typically, if the special employer exercises control over the employee,<sup>95</sup> the special employer becomes the “employer” for purposes of vicarious liability<sup>96</sup> and various state and federal employment laws.<sup>97</sup> Traditionally, the courts have been skeptical about imposing joint and several liability on

91. See generally Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLINE J. PUB. L. & POL’Y 321, 323–28 (1989) (discussing the control test’s focus on end-user firms and intermediaries).

92. *Seaboard Air Line Ry. Co. v. Ebert*, 138 So. 4, 10 (Fla. 1931) (“[W]here a servant is jointly employed by two masters the latter are jointly and severally liable for the servant’s wrongful act toward third parties committed while acting in behalf of all.”).

93. E.g., 9 EMPLOYMENT COORDINATOR: LABOR RELATIONS § 4:27 (2017) (summarizing the joint employer doctrine: “Two separate entities are joint employers in relation to a given group of employees and, therefore, subject to NLRB jurisdiction where they choose to codetermine or share matters governing essential terms and conditions of employment.”).

94. “Joint employment” should be distinguished from two other situations in which an entity may be saddled with the responsibilities and/or liabilities of an employer even though, nominally, that entity does not directly employ the individuals in question. One such situation is when two or more otherwise nominally independent entities are so interrelated that they are considered a “single employer” or “integrated enterprise.” *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 992 (6th Cir. 1999). The other is where one entity acts as an agent of another. *Id.* In this article, I am concerned only with situations in which a staffing company, otherwise unaffiliated with its client entity, furnishes (via lease or other legal construct) workers to that client while contractually retaining the rights and responsibilities of a legal employer.

95. *Charles v. Barrett*, 135 N.E. 199, 200 (N.Y. 1922) (“[A]s long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division.”).

96. *Keitz v. Nat’l Paving & Contracting Co.*, 134 A.2d 296, *aff’d on reh’g*, 136 A.2d 229 (Md. 1957).

97. *Rowe v. Grapevine Corp.*, 456 S.E.2d 1, 4 (W. Va. 1995) (holding that placement agency and orchard that employed foreign nationals were joint employers for purposes of the West Virginia Wage Payment and Collection Act).

more than one employer,<sup>98</sup> noting the complexity and unfairness of doing so.<sup>99</sup> In any case, litigation regarding whether a controversy involved the doctrine was not common until relatively recently. A search on Westlaw reveals that the term “joint employer” appeared in only sixty opinions between 1892 and 1950, only ten of which were issued by the federal courts. Starting in the 1960s, however, federal agencies began to apply the doctrine in the context of the federal labor statutes,<sup>100</sup> and in the ensuing decades under various other federal employment statutes.<sup>101</sup> The reliance of federal agencies on the doctrine has accelerated in recent years: During 2000–2009, the doctrine was cited in 829 federal opinions (and 165 state opinions), and between January 1, 2010, and May 1, 2017, the doctrine has been cited in 1,983 federal opinions (and 182 state opinions). Perhaps the most prominent recent decision came from the NLRB in 2015: *In re Browning-Ferris Industries of California, Inc.* (“*Browning-Ferris*”),<sup>102</sup> which, it has been argued, has implications beyond the field of labor law.<sup>103</sup>

## B. THE *BROWNING-FERRIS* DECISION

In *Browning-Ferris*, the NLRB addressed, but did not define, “contingent employment” relationships.<sup>104</sup> The Bureau of Labor Statistics (“BLS”), however, defines “contingent workers” as “those individuals who do not perceive themselves

98. E.g., *DePratt v. Segio*, 306 N.W.2d 62 (Wis. 1981) (refusing to adopt joint liability in borrowed servant context).

99. *Id.* at 65. The plaintiff was an employee of the special employer and was injured by the negligence of a worker of the general employer, that is, a “borrowed servant,” who was loaned to the plaintiff’s employer by another company. The court noted that, if liability were imposed on both employers, it would have to determine how much of the liability each should bear. *Id.* Also, in the context of this suit, the plaintiff’s employer would be protected by the workers’ compensation statute, so only the general employer would bear liability. *Id.* This, the court opined, would be unfair. *Id.*

100. E.g., *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (reversing lower court decisions that overturned decision of NLRB that bus company and independent contractor providing cleaning and maintenance employees for bus company were joint employers of those employees under NLRA).

101. See Steven A. Carvell & David Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. U. BUS. L. REV. 5, 12–13 (2015) (footnotes omitted) (noting that “there are three different administrative agencies whose use of the joint-employer doctrine is relevant to employers on a day-to-day basis: the EEOC (Title VII of the Civil Rights Act of 1964 . . . , Age Discrimination in Employment Act . . . , and Americans with Disabilities Act . . . ); the DOL (the Fair Labor Standards Act . . . ); and the NLRB (the NLRA)”; *id.* at 13 (“[E]ach agency employs a somewhat different test to determine joint-employer liability.”)).

102. *In re Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (2015), 2015 WL 5047768.

103. Carvell & Sherwyn, *supra* note 101, at 6 (referring to the *Browning-Ferris* decision and observing that the “joint-employer doctrine is perhaps the hottest issue in labor and employment law for 2015 and the foreseeable future”). The likelihood of finding a joint employer relationship in a franchise increases if the test of *Browning-Ferris* were to apply. See, e.g., Press Release, Nat’l Labor Relations Bd., NLRB Office of the General Counsel Authorizes Complaints Against McDonald’s Franchisees and Determines McDonald’s, USA, LLC Is a Joint Employer (July 29, 2014). Franchisors typically exercise some degree of control over the franchisee’s operations and, therefore, employees. Similarly, licensors of trademarks exercise control over their licensees and run the risk of a finding that they are the joint employers of their licensee’s employees. See Rochelle Spandorf, *Twelve Tips for Licensors to Reduce Joint Employer Risks Under Today’s Legal Standards—Revised*, BUS. L. TODAY 1, 1–6 (Feb. 2016).

104. *Browning-Ferris*, 2015 WL 5047768, at \*2 (discussing the “recent dramatic growth in contingent employment relationships”).

as having an explicit or implicit contract for ongoing employment.”<sup>105</sup> The BLS also acknowledged that the “term contingent work has been used, however, to refer to a variety of work arrangements[, including] part-time work, self-employment, employment in the business services industry, and, in fact, almost any work arrangement that might be considered to differ from the commonly perceived norm of a full-time wage and salary job.”<sup>106</sup> It appears, based on the facts of *Browning-Ferris*, that the NLRB used the term in the broadest sense.

In *Browning-Ferris*, BFI contracted with Leadpoint Business Services (“Leadpoint”) to supply workers for the BFI recycling facility in San Jose, California, primarily to sort recycling materials moving on a conveyor belt. Under the terms of the agreement, Leadpoint would “recruit, interview, test, select, and hire personnel to perform work for BFI.”<sup>107</sup> The agreement also provided that Leadpoint was the sole employer of the personnel it supplied and that nothing in the agreement should be construed as “creating an employment relationship.”<sup>108</sup> BFI agreed to compensate Leadpoint based on a rate schedule that reimbursed Leadpoint for each worker’s wage, plus a specified percentage markup that varied according to whether the work occurred during regular hours or overtime.<sup>109</sup> BFI employees also worked at the same facility, but they did different work and were unionized.<sup>110</sup> Leadpoint employees at the facility sought union recognition from BFI under the theory that BFI was their joint employer together with Leadpoint. The regional director of the NLRB determined that Leadpoint was the sole employer of the employees in question, and the union appealed that decision to the NLRB. In a controversial three-to-two decision, the NLRB reversed and, in the course of its opinion, modified the rule that it had applied for over thirty years.

Despite the contract language in the BFI/Leadpoint agreement, the realities of BFI’s operation necessitated a degree of control or supervision by BFI over the workers supplied by Leadpoint. For instance, Leadpoint could not refer workers who had previously been fired by BFI or who failed a drug test. More importantly, BFI could “reject” or “discontinue the use” of any personnel “for any reason or no reason.”<sup>111</sup> BFI unilaterally set the shift schedules, determined whether to run into overtime, dictated when the line would stop so employees could take breaks, and signed the time sheets of the workers supplied by Leadpoint.<sup>112</sup> BFI also provided safety training to those workers.<sup>113</sup>

In considering these and other actions of BFI, the NLRB determined the appropriate standard for determining whether BFI was a joint employer: Do the

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105. BUREAU OF LABOR STATISTICS, NEW DATA ON CONTINGENT AND ALTERNATIVE EMPLOYMENT (1995), 1995 WL 501664.

106. *Id.*

107. *Browning-Ferris*, 2015 WL 5047768, at \*4.

108. *Id.* at \*3.

109. *Id.* at \*5.

110. *Id.* at \*3.

111. *Id.* at \*5 (quoting the BFI/Leadpoint agreement).

112. *Id.* at \*6.

113. *Id.* at \*8.

two employers “share or codetermine those matters governing the essential terms and conditions of employment”?<sup>114</sup> The NLRB articulated the following test to determine whether the standard were satisfied:

In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.<sup>115</sup>

Citing the facts noted above (together with other facts not noted here), the NLRB decided that BFI was a joint employer and, therefore, subject to the NLRA with respect to the Leadpoint employees in question.<sup>116</sup> In the course of its opinion, the NLRB rejected precedents that required that (1) a joint employer not only possess the authority to control employees’ terms and conditions of employment but also exercise that authority, and (2) the putative joint employer’s control be exercised directly (as opposed to indirectly, as through an intermediary).<sup>117</sup> By dropping these additional requirements, the NLRB expanded the number of firms falling under the definition of joint employer, and the impact of this change is clear from the facts of *Browning-Ferris*.

In previous cases, the NLRB stated that “[t]o establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”<sup>118</sup> These matters were, by contract, allocated exclusively to Leadpoint, so for the NLRB to rule in favor of the employees, it had to find that BFI’s *indirect influence* over these matters was meaningful. The NLRB concluded that BFI wielded meaningful indirect influence because it had influence over who could work at its facility, the work processes and assignments, and the employees’ wages. As to wages, the contract fixed the reimbursement amount, which, in effect, placed a cap on what Leadpoint could pay its employees. In addition, the contract provided that Leadpoint could not pay its employees more than BFI paid its employees performing similar tasks.<sup>119</sup> In theory, Leadpoint could pay its employees less, but that would still mean that BFI had influence over the wage scale.

From a policy perspective, the NLRB expressly indicated that its ruling was intended to take into account the growing contingent employment sector.<sup>120</sup>

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114. *Id.* at \*2 (quoting *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)).

115. *Id.*

116. *Id.* at \*24–25.

117. *Id.* at \*2.

118. *In re Laerco Transp. & Warehouse*, 269 N.L.R.B. No. 61 (1984), 1984 WL 36182, at \*3, *overruled by Browning-Ferris*, 2015 WL 5047768, at \*1–3.

119. *Browning-Ferris*, 2015 WL 5047768, at \*5.

120. *Id.* at \*1–2 (“[T]he Board, without explanation, has . . . imposed additional requirements for finding joint-employer status, which have no clear basis . . . in the common law, or in the text or policies of the Act. . . . [T]hese additional requirements—which serve to significantly and unjustifi-

The workers, the NLRB suggested, ought to have the protections of the federal labor laws.

The *Browning-Ferris* decision redefining “joint employer” appears to align federal labor laws with the interpretation of laws by other federal agencies that administer employment-related laws. The definitions of employer under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the NLRA are similar,<sup>121</sup> yet prior to *Browning-Ferris*, the Equal Employment Opportunity Commission (“EEOC”), which administers Title VII, employed a more flexible approach to determining when an employer qualified as a joint employer. The EEOC filed an amicus brief in *Browning-Ferris*, urging the NLRB to adopt the EEOC’s approach, under which “staffing firms [such as Leadpoint] and their clients [such as BFI] generally qualify as joint employers.”<sup>122</sup> The NLRB appears to have embraced that position with its decision in *Browning-Ferris*.<sup>123</sup> Similarly, the Department of Labor (“DOL”), administering the Fair Labor Standards Act (“FLSA”),<sup>124</sup> adopted a flexible approach to its definition of “employer” and thus to the definition of “employee,” an approach that has resulted in a liberalized definition of joint employer.<sup>125</sup>

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ably narrow the circumstances where a joint-employment relationship can be found—leave the Board’s joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes.”).

121. Compare 42 U.S.C. § 2000e(b) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .”), with 29 U.S.C. § 152(2) (2012) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly . . .”).

122. Brief of EEOC as Amicus Curiae at 9, *In re Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (2015) (No. 32-RC-109684), <https://www.eeoc.gov/eeoc/litigation/briefs/browning.html>.

123. See *In re Retro Envtl., Inc.*, 364 N.L.R.B. No. 70 (2016), 2016 WL 4376615 (applying *Browning-Ferris*).

124. 29 U.S.C. §§ 201–219 (2012).

125. See *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 204–08 (S.D.N.Y. 2014) (denying motion to dismiss because complaint stated a plausible claim that the franchisor defendants were the joint employers of franchisee employees under the FLSA); see also *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) (developing the concept of joint employment under the FLSA). In *Salinas*, the court emphasized the importance of the relationship between the two employers (a contractor and subcontractor). *Id.* at 145–49. According to the court, for purposes of the FLSA, joint employment exists when

(1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker’s employment and (2) the two entities’ combined influence over the essential terms and conditions of the worker’s employment render the worker an employee as opposed to an independent contractor.

*Id.* at 129–30. The appellate court opinion focused on whether the general contractor, which had prevailed on a motion for summary judgment in the district court, was a joint employer with the subcontractor. *Id.* at 129. The appellate court ruled that the district court had applied the wrong test and reversed the lower court judgment, holding that the general contractor was a joint employer. *Id.* Insofar as the relationship between the general contractor and the subcontractor’s employees was concerned, the appellate court discussed the extensive control that the general contractor exercised over the subcontractor’s employees. *Id.* at 145–49.



### C. JOINT EMPLOYMENT UNDER THE FLSA

Almost unique among federal employment law statutes, the FLSA includes a definition of “employee,” albeit one that is opaque. The FLSA defines “employee” as “any individual employed by an employer” (not a helpful definition at all), but the statute defines “employ” as including “to suffer or permit to work.”<sup>126</sup> Combining the two, an employee is a person who an employer suffers or permits to work, a rather broad definition of employee. In *Nationwide*, the Supreme Court observed that this definition is broader than the common law definition: “This . . . definition [of ‘employ’] . . . stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>127</sup> The Supreme Court, however, has considered only one case in which the definition was at issue, and in that case, the Supreme Court affirmed an appellate court decision that found an employment relationship,<sup>128</sup> holding that there was sufficient evidence to support the appellate court’s decision.<sup>129</sup> In that context, the Supreme Court avoided a close examination of what the FLSA definition might mean.<sup>130</sup>

Federal appellate courts, however, have considered the question, especially in the context of joint employment. In *Zheng v. Liberty Apparel Co.*,<sup>131</sup> for instance, the U.S. Court of Appeals for the Second Circuit resolved an outsourcing case in which garment manufacturers hired contractors to stitch and finish pieces of clothing. The contractors, in turn, hired the plaintiffs to do such work for numerous manufacturers. The plaintiffs claimed that the manufacturers were joint employers together with their contractors under the FLSA and, therefore, liable for their minimum wage, overtime, and other claims under federal and state law. The appellate court reversed a lower court decision, which, the appellate court held, applied too narrow a definition of employee in holding for the defendant manufacturers.<sup>132</sup>

The appellate court in *Zheng*, after reviewing previous Circuit and Supreme Court decisions, set out a six-factor test to determine whether the garment workers were employees of the manufacturers:

- (1) whether [the manufacturers’] premises and equipment were used for the plaintiffs’ work; (2) whether the Contractor Corporations had a business that could or did

126. 29 U.S.C. § 203(e), (g) (2012).

127. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); see generally James Reif, “To Suffer or Permit to Work”: Did Congress and State Legislatures Say What They Meant and Mean What They Said?, 6 NE. U. L.J. 347, 362–71 (2014) (analyzing lower courts’ interpretations).

128. *Walling v. Rutherford Food Corp.*, 156 F.2d 513 (10th Cir. 1946), *aff’d*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

129. *Rutherford Food Corp.*, 331 U.S. at 730.

130. In another FLSA case, *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961), the Supreme Court reversed an appellate court decision that home workers who were members of a cooperative and did piecework in their homes were not employees of the cooperative. The Supreme Court’s opinion does not include analysis of the statutory language or why that language means that the common law definition does not apply in FLSA cases.

131. 355 F.3d 61 (2d Cir. 2003).

132. *Id.* at 63–64.

shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the manufacturers'] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [manufacturers] or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the [manufacturers].<sup>133</sup>

These factors, the court said, addressed the "economic realities" of the plaintiffs' employment, which is the essence of the FLSA mandate.<sup>134</sup> However, in this context, "economic realities" appears to be another term for "functional control," because after the court laid out these factors, it immediately discussed whether their application demonstrated that the manufacturers had such control over the plaintiff workers.<sup>135</sup> The six-factor test of the Second Circuit bears a strong resemblance to the independent contractor test discussed above,<sup>136</sup> and it may not expand the instances in which a worker would be deemed an employee under the FLSA, notwithstanding the Supreme Court's suggestion in *Nationwide* that it would.<sup>137</sup>

Had the *Zheng* court taken the statutory phrase "suffer or permit to work" literally, the analysis would have been simpler and the outcome predictable. At least arguably, the defendant manufacturers permitted the employees of the contractor to work for them. The manufacturers knew that the contractors had employees and that those employees finished the garments that the manufacturers delivered to the contractors, which the contractors returned to the manufacturers once completed. Moreover, the language of the FLSA was cribbed by Congress from state child labor laws, which were purposely broad in their scope to provide the widest possible protection for children,<sup>138</sup> so an interpretation of the FLSA that held a manufacturer liable for the mistreatment of employees by a contractor would not be inconsistent with the origins of the phrase "suffer or permit to work."<sup>139</sup> The federal courts, however, have not given the FLSA that broad a meaning, as *Zheng* makes clear. Rather, the courts, with varying tests and

133. *Id.* at 72.

134. *Id.* at 71 (emphasizing assessment of "the circumstances of the whole activity," *Rutherford*, 331 U.S. at 730, viewed in light of "economic reality," *Goldberg*, 366 U.S. at 33).

135. *Id.* at 72 (noting the importance of "functional control . . . even in the absences of . . . formal control").

136. See *supra* note 29 and accompanying text. For instance, the first *Zheng* test focuses on "premises and equipment," *Zheng*, 355 F.3d at 72, while the *Restatement* test asks, "whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it." RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (AM. LAW INST. 2006). The other *Zheng* criteria similarly have cognates in the *Restatement* factors.

137. See *Reif*, *supra* note 127, at 368 ("[T]he functional control standard for determining employment under the FLSA, as articulated by the Second Circuit in *Zheng*, does not appear to be distinct in a meaningful way from the common law standard: both treat control as the basic criterion.").

138. *Id.* at 380–86 (discussing how an application of the "suffer or permit" language, true to its original meaning, would operate).

139. See, e.g., *Vincent v. Riggis & Sons, Inc.*, 285 N.E.2d 689 (N.Y. 1972) (concluding that fact that child was an independent contractor under common law test did not preclude a finding that he was an employee under the "permitted or suffered to work" statutory language of New York law, N.Y. LAB. LAW § 2(7) (Consol. 2003)).

language, have focused on the control that the putative employer exercised or had a right to exercise, the heart of the common-law test. Indeed, in *Zheng*, the Second Circuit reversed the trial court because the four-factor test that the trial court had used—from an earlier Second Circuit decision<sup>140</sup>—was too narrow and overly focused on a putative employer’s “formal right to control the physical performance of another’s work.”<sup>141</sup>

#### D. DOL GUIDANCE

Although the NLRB has relied on litigation to develop guidance on what constitutes joint employment, the DOL has provided guidance on that question in a regulation issued under the Migrant and Seasonal Agricultural Worker Protection Act (“MWPA”).<sup>142</sup> The DOL regulation provides that an “agricultural employer” may be the joint employer of a farm worker employed by an independent contractor who contracts with the agricultural employer, if the worker is “economically dependent” on the agricultural employer.<sup>143</sup> Economic dependency, in turn, may be determined by considering seven factors articulated by the DOL.<sup>144</sup>

The regulation, however, also stated that these factors “are illustrative only and are not intended to be exhaustive; other factors may be significant and, if so, should be considered, depending upon the specific circumstances of the rela-

140. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).

141. *Zheng*, 355 F.3d at 69.

142. 29 U.S.C. §§ 1801–1872 (2012).

143. See 29 C.F.R. § 500.20(h)(5)(iv)(A)–(G) (2016).

144. *Id.* The DOL identified the following factors:

(A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);

(B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);

(C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

(D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

(E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

(F) Whether the work is performed on the agricultural employer/association’s premises, rather than on premises owned or controlled by another business entity; and

(G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers’ compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).

tionship among the parties. How the factors are weighed depends upon all of the facts and circumstances.”<sup>145</sup> This qualification by the DOL makes the factors difficult, if not impossible, to apply.<sup>146</sup> The real problem, however, is that regardless of whether a four-factor,<sup>147</sup> five-factor,<sup>148</sup> six-factor,<sup>149</sup> seven-factor,<sup>150</sup> or eight-factor<sup>151</sup> test is employed, the inquiry is complex, and the result is often unpredictable.<sup>152</sup> Moreover, all of these tests, including the MWPA seven-factor test, ultimately focus on control, leaving courts and counsel with, at best, a modified common-law test.

## E. SUMMARY

As in the independent contractor/employee area, the determination of when a company should be considered a joint employer together with one or more other companies yields controversial and inconsistent results. This, too, is ripe for restatement.

## IV. CURRENT PROPOSALS FOR REFORM

### A. PROPOSAL TO REDEFINE CONTROL

Scholars have grappled with the definition of employee, and the increased importance of contingent employment has intensified interest in the topic. Many proposals for reform have urged the judiciary to adopt a more flexible definition of control to reach more employment arrangements.<sup>153</sup> A typical example of this

145. *Id.* § 500.20(h)(5)(iv).

146. See generally John P. McAdams & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 TRIAL ADVOC. Q. 16, 19–20 (2006) (examining FLSA liability when multiple entities employ workers and lauding the DOL for promulgating guidance under the MWPA).

147. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 10–15 (2d Cir. 1984) (applying four-factor test to determine whether prison inmates who taught classes in a program managed by a community college were employees of the college for purposes of FLSA); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (applying four-factor test to determine whether an employment relationship existed under FLSA).

148. *United States v. Silk*, 331 U.S. 704, 716 (1947) (considering question of employment in context of Social Security Act).

149. *Zheng*, 355 F.3d at 72 (applying six-factor test to determine whether garment workers were jointly employed by manufacturer).

150. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (May 11, 2001), 2001 WL 1558966, at \*2 (applying seven-factor test to determine whether joint employment existed); see *infra* note 192 (setting forth those seven factors).

151. *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (applying eight-factor test in the context of a joint employer inquiry).

152. Of course, if the factors all point in the same direction—a predictable case—the matter is unlikely to be litigated.

153. See, e.g., Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 690 (2008) (arguing that courts have not properly interpreted the meaning of “suffer or permit”); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 989 (1999) (asserting that courts have not “operationalized” FLSA’s definition of “employ”); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187, 207 (1999) (arguing that the judiciary has misinterpreted the FLSA’s definition of “employ”); Benja-

approach is set out in Professor Cunningham-Parmeter's recent article, *From Amazon to Uber: Defining Employment in the Modern Economy*.<sup>154</sup> Professor Cunningham-Parmeter considers the definition primarily in the context of the FLSA. Noting that the FLSA includes a broad definition of "employ," Professor Cunningham-Parmeter is highly critical of those courts that have defined the term with reference to control, generally relying on the common-law definition or variations thereof. In his view, however control is defined, the analysis devolves to a question of whether the putative employer exercises direct, daily supervision of the worker or workers in question. He suggests, instead, that the concept of control be expanded to include what he calls the subject of control, the direction of control, and the obligation of control. The subject of control would require courts to focus on the extent to which the putative employer influences working conditions, not workers.<sup>155</sup> The direction of control looks at whether the worker, as a practical matter, has control over workplace decisions. He articulates this concept in various ways, including "whether the worker is really 'in business for himself.'"<sup>156</sup> Finally, obligation of control refers to "a firm's power over work relationships and any risk-creating conduct that gives rise to [FLSA] violations."<sup>157</sup> Taking these concepts of control together, he posits, will enable courts to identify the party that "significantly influence[s] the circumstances of work."<sup>158</sup>

It is doubtful that Professor Cunningham-Parmeter's proposal would yield consistent and predictable results. The ultimate goal of his inquiry—identifying who determines working conditions—is unduly narrow. In considering the question of who is an employee, more is at stake than working conditions. The question, it seems, is more broadly the relationship between the employer and the worker. Moreover, and perhaps more importantly, the additional tests of control invite additional contracting and gamesmanship. Nevertheless, if control is the touchstone, then these additional inquiries into what control means should prove helpful to the courts and other decision makers. This, of course, begs the question: Should control be the test? This question is addressed in Part V below.

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min Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1515 (2016) (proposing overarching inquiry that focuses on the flexibility that workers have in determining the time, place, price, manner, and frequency of the work that they perform); Reif, *supra* note 127, at 359 (arguing that the judiciary has misinterpreted the FLSA's definition of "employ"); Brown, *supra* note 59, at 16 (recommending that courts focus on (1) whether the worker can improve his economic opportunity through managerial skills, and (2) whether the worker's services are integral to the employer's business). See generally U.S. DEP'T OF LABOR & U.S. DEP'T OF COMM., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 21–22, 93–103 (1994) (containing policy recommendations concerning contingent workforce); Symposium, *The Regulatory Future of Contingent Employment*, 52 WASH. & LEE L. REV. 725 (1995) (collecting articles discussing legal and policy issues affecting contingent workers).

154. Cunningham-Parmeter, *supra* note 10.

155. *Id.* at 1705–06.

156. *Id.* at 1708 (quoting *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)).

157. *Id.* at 1712.

158. *Id.* at 1727.

## B. THE “INDEPENDENT WORKER” PROPOSAL

The “independent worker” proposal, suggested by Professors Seth Harris and Alan Krueger, writing for the Brookings Institute,<sup>159</sup> is not moored to control, but it has its own shortcomings. Their proposal is premised on a new category of workers, labeled “independent workers,”<sup>160</sup> who do not neatly fit within the definition of employee or independent contractor. They focus primarily (but not exclusively) on workers in the “gig economy,”<sup>161</sup> such as drivers for Uber and Lyft. Such workers are part of an arrangement in which their livelihood is at least partially dependent upon an intermediary (such as an app provided by Uber) that links the worker with the customer. In the offline world, such an intermediary may be a temporary employment agency that provides workers to its client firms.

Professors Harris and Krueger argue that because current law provides the courts with only a binary choice for characterizing such a worker—either as an employee or independent contractor—inefficiencies are inevitable. For instance, they argue, the intermediary (such as Uber) may eschew providing benefits to the workers, thereby forgoing the efficiencies of pooling (such as risk pooling for insurance), because doing so increases the risk that the relationship between the workers and the intermediary will be judged to be an employment relationship.<sup>162</sup> In addition, leaving such workers without the protections of federal law, such as the right to organize, minimum wage, and overtime laws, violates the “social compact,” which Professors Harris and Krueger describe as “a synthesis between the desire to enhance the efficiency of the operation of the labor market (e.g., to overcome information asymmetries and imperfections) and to ensure that the employment relationship treats workers fairly in light of the unequal bargaining power that typifies most employee–employer relationships.”<sup>163</sup> Although one can quibble as to whether such a social compact exists, their proposal seems to be grounded on their sense of fairness; it is unfair for a large and growing segment of the labor force to be denied these rights and protections.<sup>164</sup> Consequently, their proposal describes which of such rights and protections ought to be available to independent workers based on certain organizing principles that they identify.<sup>165</sup> For instance, based on these principles, independent workers would have the right to organize under federal labor

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159. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* (Brookings Inst., Discussion Paper No. 10, Dec. 2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

160. *Id.* at 5.

161. *Id.*

162. *Id.* at 17.

163. *Id.* at 6.

164. *Id.* at 5 (“[I]f an intermediary succeeds by displacing traditional employers who offer the same service because the intermediary gains a cost advantage by avoiding provision of certain legally mandated benefits and protections, then welfare is reduced by the innovation.”).

165. *Id.* at 13–14 (setting forth three organizing principles to identify “independent workers”: immeasurability of work hours, neutrality, and efficiency).

law, but they would not be entitled to overtime protection or unemployment insurance.<sup>166</sup>

This is a thoughtful proposal, and it has much to commend it. The proposal, however, addresses only a slice of the new economy: enterprises that involve an intermediary such as Uber. Left unaddressed are the independent contractor problems evident in companies such as FedEx and the joint employer issue of *Browning-Ferris*. More importantly, determining who falls within the definition of an independent worker is itself a knotty problem. The authors describe independent workers by, essentially, describing the Uber-driver-customer relationship.<sup>167</sup> Variations in this relationship, whether by contract or operation, would complicate the question of inclusion or exclusion. In addition, litigation over the issue would now involve a three-part examination: Is the worker an employee, independent contractor, or independent worker? The authors propose that Congress draft a statute providing certain protections to independent workers, but writing that definition will prove difficult from a technical perspective (and perhaps impossible from a political one).

## V. NEW PROPOSALS TO CONSIDER

This part introduces two proposals, one geared toward the adjudicative process and the other to legislation or rulemaking that courts, administrative agencies, and legislators (as the case may be) might consider in resolving issues of worker classification. The purpose of this part is not to provide comprehensive guidelines but rather to introduce what might be more practical and sensible approaches, leaving more comprehensive guidelines for another day.

### A. THE FAMILY RESEMBLANCE PROPOSAL: AN OPTION FOR COURTS AND ADMINISTRATIVE AGENCIES

In thinking about how to classify workers in the absence of statutory definition, it is instructive to start with key paradigms. The paradigmatic independent contractor is a person who has a business of providing specialized services to multiple clients or customers. Think of an individual plumber or plumbing contractor. The paradigmatic employee, by contrast, is a person who has no independent business and works for one or a few employers. Think of a factory

166. *Id.* at 15–21. An alternative proposal would allow a “Jobseeker’s Allowance”—“a small, short-term weekly allowance to support work search and preparation”—to workers who do not qualify for traditional unemployment insurance. Rachel West et al., *Strengthening Unemployment Protections in America*, CTR. AM. PROGRESS (June 16, 2016, 10:00 AM), <https://www.americanprogress.org/issues/poverty/report/2016/06/16/138492/strengthening-unemployment-protections-in-america/>.

167. Harris & Krueger, *supra* note 159, at 9 (“Independent workers operate in a triangular relationship: they provide services to customers identified with the help of intermediaries. The intermediaries create a communications channel, typically an ‘app,’ that customers use to identify themselves as needing a service—for example, a car ride, landscaping services, or food delivery . . . . The intermediaries’ apps allow independent workers to select which customers they would like to serve. The intermediary does not assign the customer to the independent worker; rather, the independent worker chooses or declines to serve the customer (sometimes within broadly defined limits).”).

worker on a production line. Basically, as a matter of common law, courts reverse-engineered criteria that describe these two contrasting workers. Many businesses, like FedEx and Uber, responded to that common law by structuring their relationship with their workers to fit the criteria of one definition (typically that of independent contractor). A better approach may be to use a “family resemblance” test: that is, consider the reality of the operations of the business in question and ask whether the worker involved bears a closer resemblance to our paradigmatic plumber/independent contractor or to the factory worker/employee.

The U.S. Supreme Court employed that analysis in an entirely different context to resolve a similar problem. In *Reves v. Ernst & Young*,<sup>168</sup> the legal issue was whether the promissory note issued by an agricultural cooperative was a “security” within the meaning of the Securities Exchange Act of 1934 (“1934 Act”) and therefore subject to its provisions.<sup>169</sup> The Court first observed that, based on what it perceived to be Congress’s intent, not all promissory notes are subject to the provisions of the 1934 Act.<sup>170</sup> Rather, Congress intended to cover only those notes that were investments, as opposed to notes issued in a commercial or consumer context.<sup>171</sup> Given the broad language of the statute, however, the Court recognized a presumption that a promissory note is an investment and therefore a security.<sup>172</sup> This presumption may be overcome if a litigant establishes that the note in question was commonly recognized as a commercial or consumer note, or it had more characteristics in common with a note issued in a commercial or consumer context than one issued in an investment context.<sup>173</sup> The Court then described the characteristics of the two kinds of notes.<sup>174</sup> Finally, the Court considered the characteristics of the note then before it and compared those characteristics to the two paradigms.<sup>175</sup> It held that the note at issue bore a greater resemblance to an investment note than to a consumer note, and, therefore, it fell under the terms of the 1934 Act.<sup>176</sup>

The *Reves* opinion cited with approval the approach of the Second Circuit, which had generated an actual list of notes that would not be considered securities because they arose in a commercial or consumer context. In examining the Second Circuit’s enumerated list, the Supreme Court identified four characteristics that are relevant to determining whether a note falls within the definition.<sup>177</sup> This same approach may be helpful to courts and administrative agencies faced

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168. 494 U.S. 56 (1990).

169. 15 U.S.C. § 78c(10) (2012) (defining “security” to mean, among other things, “any note,” “unless the context otherwise requires”). The plaintiffs sought the anti-fraud protections afforded by the 1934 Act. See *Reves*, 494 U.S. at 59.

170. *Reves*, 494 U.S. at 63.

171. *Id.* at 62.

172. *Id.* at 65.

173. *Id.*

174. *Id.* at 66–67.

175. *Id.* at 67–70.

176. *Id.* at 70.

177. *Id.* at 66–67 (identifying the following four factors: the motivations of the buyer and seller, the plan of distribution, the reasonable expectations of the investing public, and whether another regulatory scheme reduces the risk of the instrument).



with the determination of whether a worker is an employee or independent contractor, especially if combined with a presumption. Given that employment laws are intended to protect workers, it makes sense to create a presumption, as the California courts have done,<sup>178</sup> that a worker who “performs services” for the benefit of the purported employer is an employee of that employer. An employer could overcome this presumption by proving that its relationship with this worker bore a strong resemblance to a recognized principal/independent contractor relationship. The challenge under this approach, then, is to identify examples of independent contractors and the factors that typify them.

Knowledgeable observers would likely agree that paradigmatic independent contractors have their own businesses and are engaged by customers or clients to achieve a particular, agreed-upon outcome. The *Restatement of Employment Law* captures this idea by moving away from the concept of control solely as it relates to the way agents perform their services to asking whether they have “entrepreneurial control over business decisions.”<sup>179</sup> Workers with entrepreneurial control “can seek to increase their personal economic returns not simply by working harder in performing the service for the principal but also by working at their discretion for other customers, by hiring assistants and by deploying or substituting for labor their own equipment or capital.”<sup>180</sup> Control as a factor, it should be remembered, arose in the context of respondeat superior, and it ought not to be an issue—or at least should be much less of an issue—when the question is coverage under employment and labor statutes. It may turn out that, under the approach suggested here, workers are deemed employees under an employment law statute, but their employer is not vicariously liable for the workers’ tortious conduct because their employer lacked “control [over] the manner and means” of the performance of their work.<sup>181</sup> That outcome seems preferable to the prevailing view, however, which requires that control exist for statutory as well as common-law purposes before a worker is considered an employee, unless the operative statute provides otherwise.

Under this proposal, the FedEx and Uber cases, for instance, arguably would have been more easily resolved. Typical FedEx drivers did not have their own business delivering packages *before* being hired by FedEx.<sup>182</sup> The FedEx Operating Agreement was fashioned to *create* an independent business for the drivers,

178. See *supra* note 75 and accompanying text.

179. RESTATEMENT OF EMPLOYMENT LAW § 1.01 cmt. e (AM. LAW INST. 2015).

180. *Id.*; see also Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002) (noting that the critical difference between employees and independent contractors is “the degree to which each functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder”). The *Restatement* comment, however, continues with a strong reference to the importance of control: “Service providers who are subject to employer control of their performance that effectively prevents them from providing services as independent businesspersons are employees, regardless of the manner of their compensation or the flexibility of their work hours.” RESTATEMENT OF EMPLOYMENT LAW § 1.01 cmt. e.

181. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006).

182. It is possible that a driver did have such a business, but, if so, he or she likely sold it before going to work for FedEx. It is hard to imagine that many, if any, drivers were operating such a business before or while working for FedEx.

and the courts should have distinguished workers who had independent businesses before contracting with a purported employer from those who did not. Uber is a more difficult case because some drivers also might drive or have driven for Lyft or other similar companies. But as with FedEx, the drivers for Uber did not have an independent business in which they were engaged by customers or clients to achieve a particular, agreed-upon outcome. The fact that some Uber drivers might have driven for Lyft or a similar company, or may do so in the future, does not necessarily mean that they had an independent business before becoming Uber drivers. Independent businesses promote themselves to potential customers and typically stand ready to provide their services to multiple customers. The typical Uber driver, according to Uber's promotional materials, is not a professional driver; rather, he or she may be a student or a worker in another field entirely. Again, the focus on control misses the point of the relationship between the worker and purported employer.

A more challenging case, and one that typifies many situations,<sup>183</sup> is presented by the facts in *NLRB v. Dial-A-Mattress Operating Corp.*<sup>184</sup> *Dial-A-Mattress* involved a business model similar to FedEx: drivers, with their own trucks (called owner-operators in the opinion), delivered merchandise for Dial-A-Mattress Operating Corp. ("Dial"). The twist in this case was that many of the owner-operators owned multiple trucks and employed several drivers, and, unlike FedEx, the Dial owner-operators had greater freedom to reject deliveries, did not have to mark their vehicles with any company logo, and could use their vehicles to deliver for other customers (although not for competitors of Dial). On the basis of these facts, the NLRB ruled that the owner-operators were independent contractors. The NLRB was heavily influenced by the lack of control exercised or exercisable by Dial:

- The owner-operators arranged their own training, hired their own employees, and had sole control over and complete responsibility for their employees, including setting their terms and conditions of employment.
- Dial also played no part in the selection, acquisition, ownership, financing, inspection, or maintenance of the vehicles used by the owner-operators.
- There was no minimum compensation guaranteed the owner-operators to minimize their risk of performing deliveries for Dial, and they could decline orders without penalty.
- The owner-operators were not required to provide delivery services each scheduled workday.

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183. Short-haul truck drivers, who service the nation's largest ports, are currently challenging their status as independent contractors. The drivers move containers from large ships to nearby rail yards and distribution centers and are similar to the drivers in *Dial-A-Mattress*. See, e.g., Erica E. Phillips, *Contract Drivers Take Battle to Ports*, WALL ST. J., May 12, 2016, at B1; Kirk Siegler & Byron Contreras, *Truckers Strike at Two California Ports, Larger Labor Dispute Looms*, NAT'L PUB. RADIO (July 8, 2014), 2014 WLNR 18508882.

184. 326 N.L.R.B. 884 (1998).

- In short, their separateness from Dial was manifested in many ways, including significant entrepreneurial opportunity for gain or loss.<sup>185</sup>

The Board was not unanimous in its conclusion; its chairman dissented, arguing that the majority was overly influenced by the form of the arrangement between Dial and its owner-operators and that it underappreciated the substance of the arrangement.<sup>186</sup> The Board could have paid greater attention to whether any particular owner-operator had a separate delivery business that predated its contract with Dial and, therefore, fit within the paradigm of an independent contractor. Based on the facts of *Dial-A-Mattress*, it appears that some of the drivers did have businesses that extended beyond Dial, but most did not. It would be sensible to differentiate among the owner-operators, finding at least some as employees and others as independent contractors, even though the control element was similar for all. With regard to owner-operators who hired others to drive their vehicles, those drivers would appear to be employees of both Dial and the owner-operator.

The joint employer issue similarly suffers from overemphasis on the control factor. Businesses ought not to be able to shirk or avoid the responsibilities of employment and labor law by having their workers report to an intermediary. The contract between a client firm and intermediaries, as in *Browning-Ferris* and *Dial-A-Mattress*, are structured so that the intermediary is an independent contractor vis-à-vis the client firm. It is fair to ask whether the services furnished by the intermediary firm are typically provided by an independent contractor and whether the intermediary is in the business to which the contract relates. Many intermediary firms are in the business of supplying labor for a client firm and not organized to operate in a particular business. In *Browning-Ferris*, for example, the intermediary, Leadpoint, was not generally in the recycling business. In that regard, Leadpoint was like Uber drivers in that Leadpoint's contract with BFI created Leadpoint's independent recycling business. The *Browning-Ferris* case focused heavily on the relationship between BFI and the Leadpoint workers to determine whether BFI had sufficient control over those workers to be deemed their employer. That proved to be a difficult test to meet. The NLRB could have taken a different approach and focused more on the relationship between BFI and Leadpoint: was Leadpoint in the business of furnishing waste disposal companies ("BFI") with recycling services, or was Leadpoint's recycling "business" created by its contract with BFI? It seems that the latter was the case,<sup>187</sup> and, if the proposed inquiry had been used, the NLRB

185. *Id.* at 884–89.

186. *Id.* at 894 (Gould, Ch., dissenting).

187. On its website, Leadpoint describes its business as follows:

Leadpoint provides high performance work teams, on demand. Our *Workforce Optimization Process* streamlines the hiring, on-boarding, employee and management training, labor development, and performance measurement resulting in sustained productivity gains. Founded in 1994, Leadpoint has thousands of employees working at our customer partners in operations across the country. Leadpoint is also a Woman Owned Business and certified Minority Business Enterprise (MBE).

could have more easily found BFI to be the employer, together with Leadpoint, of the employees in question. Similarly, most of the owner-operators in *Dial-A-Mattress* were in the business of supplying trucks and drivers to Dial and not otherwise in the trucking business.

The efficacy of the family resemblance test in this context is made manifest by the DOL's effort to describe the factors relevant to determining whether farm workers are employees of more than one entity. Although the DOL identified seven factors relevant to the determination, in the end, its guidance is of limited use because it cautioned that those seven factors were "not . . . exhaustive" and because the DOL failed to indicate how the factors are to be weighed.<sup>188</sup> Similarly, in the context of an FLSA case, the Second Circuit reversed a lower court decision that had applied a four-factor test from a previous Second Circuit opinion.<sup>189</sup> In reversing the lower court's decision that the worker in question was not an employee, the appellate court said that it had never held that "a positive finding on those four factors is *necessary* to establish an employment relationship."<sup>190</sup> The appellate court then identified a six-factor test that would be "pertinent" to identifying the "economic realities" of the employment relationship in the "circumstances" of that case.<sup>191</sup> The DOL, in an opinion letter interpreting the FLSA, identified seven factors "relevant" to determining whether a joint employment situation exists.<sup>192</sup> An approach that cuts through these multifactor tests may yield more consistent, predictable results. That is at least worth a try.

## B. THE STATUTORY PROPOSAL

A second proposal involves consideration of the classification of workers in context. Regarding any law that involves the employer/employee relationship, one should be aware of the goals that the legislators sought to accomplish. For instance, the federal minimum wage law is intended to protect workers from exploitation by setting a floor, albeit a somewhat arbitrary floor, on the worker's compensation. If a person drives for Uber, is there any reason not to apply that minimum? Isn't the risk of exploitation the same for such workers?

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LEADPOINT, <http://leadpointusa.com/> (last visited June 24, 2017). According to its website, Leadpoint serves the following industries: "Waste and Recycling, Manufacturing, [and] Logistics and Warehousing." *Id.* (setting forth industries via drop-down menu under heading "Industries Served").

188. 29 C.F.R. § 500.20(h)(5)(iv) (2016).

189. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) (vacating district court's erroneous reliance on *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984)).

190. *Id.* at 69.

191. *Id.* at 72; see *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 143 (2d Cir. 2008) (discussing *Zheng*).

192. See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (May 11, 2001), 2001 WL 1558966, at \*2 (identifying relevant factors to include (1) power to control or supervise workers or work performed; (2) power, whether alone or jointly, directly or indirectly, to hire, fire, or modify employment conditions of individual; (3) permanency and duration of relationship; (4) level of skill involved; (5) whether worker's activities are integral part of overall business operations; (6) where work is performed and whose equipment is used; and (7) who performs payroll and similar functions). The question, however, is whether joint employment exists from the "totality of the evidence." *Barfield*, 537 F.3d at 149.

Consider instead the rule relating to the allocation of vicarious liability to an employer. Although the intent of this rule is a bit elusive, it encourages employers to exercise control over their employees to minimize the harm that employees might cause to others in performing their jobs and to provide a source of compensation for persons injured by the employees of others.<sup>193</sup> Uber requires insurance of its drivers (as does state law), and Uber is not in a position to supervise their driving. It therefore makes little sense to impose vicarious liability on Uber for its drivers' negligent driving.

Rather than focus on control (or an enhanced control inquiry, as Professor Cunningham-Parmeter suggests), a better approach—one that could be specifically addressed by statute or rule—would have legislators or administrators focus on whether the statute or rule should apply to a worker who functions as an employee of the covered business, that is, a person who renders services that are part of the firm's regular business. To further ensure that true independent contractors are not captured under the mandate, the law might include some sort of numerical test when the workplace includes workers formally employed by an intermediary. That is, the statute might cover workers if such services are rendered for at least a certain number of hours per day, over a certain period of time, and if at least a certain number of individuals are compensated by the intermediary in a similar way. So, for instance, a minimum wage law might cover any worker who provides services for the employer (whether paid directly by the employer or paid by an intermediary) when there are at least a certain number of similarly situated individuals providing the same or similar services for the same employer for an extended period of time. This would, of course, be in addition to any workers who are classified by the employer as employees. This sort of formulation skirts the question of whether the employer exercises control.

The key to this analysis is a return to the paradigms. Suppose a yoga studio has a plumbing problem and contacts an unaffiliated firm to correct the problem. Suppose further that the yoga studio already employs an aggregate of thirty teachers and office personnel. Would the yoga studio be an employer of the plumber, assuming that it clearly would not be under the common-law definition? In other words, would this approach radically change the common law? The answer is no. The plumber is not rendering services that are part of the yoga studio's business. The yoga studio is in the business of teaching yoga classes, not providing plumbing services, so neither the plumber nor any of the plumber's employees would be considered employees of the yoga studio.<sup>194</sup>

193. See J. DENNIS HYNES & MARK J. LOEWENSTEIN, *AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES* 155–56 (9th ed. 2015) (summarizing rationales for the doctrine of respondeat superior, with citations to various authorities).

194. If the yoga studio regularly employed a plumber—because, for instance, the studio also had a spa and other facilities that justified retaining a fulltime plumber—that plumber would be considered an employee of the yoga studio under this analysis. The plumber *functions* as an employee of the studio, supporting facilities that are part of the studio's regular business. Moreover, the plumber doesn't satisfy the criteria for an independent contractor because he or she is not engaged in a distinct business.

This follows from the emphasis of different common-law factors—whether the one employed is engaged in a distinct occupation or business and whether the work is part of the regular business of the employer—and a de-emphasis on the control factor—the extent of control the employer exercises over the details of the work.

How would this approach apply to Uber? After all, Uber claims that its drivers are not rendering services for Uber but rather are working for themselves. Notwithstanding its claims, Uber is in the business of at least arranging or facilitating transportation services, and the drivers are directly furthering Uber's business; transportation services are part of the regular business of Uber.

Some have expressed concern that treating Uber drivers as employees and not independent contractors will have a dampening effect on technological innovation.<sup>195</sup> Nonetheless, policy decisions regarding wages and other aspects of employment protection ought not to be displaced just to encourage innovation. Rather, employment policies are the playing field on which technology must compete, and the playing field ought not to be altered to accommodate or encourage certain technologies. More fundamentally, if employment laws create economic inefficiencies—if, for instance, the costs, in the aggregate, to employers of compliance with the Family and Medical Leave Act<sup>196</sup> exceed the societal benefits—then changes to the law ought to be considered.

## VI. CONCLUSION

Although not widely recognized, a person who works for another may be classified as an employee for some purposes and as an independent contractor for other purposes. This can easily happen if the worker, while operating under a formal independent contractor agreement, injures a third party. That injured person may persuade a fact-finder that the degree of control exercised by the putative employer over the worker satisfied the common law employer/employee test, even though the worker is not an employee under, for example, certain tax laws.

This article argues that statutory law should unmoor itself from the common-law definition, which, as noted above, developed in the context of vicarious liability, not in the context of worker or consumer protection. Ideally, legislators adopting employment-related laws would specify, by definition, who is intended to be covered by such legislation. With statutory definitions, a worker may be deemed an employee for some purposes but not others, and this result makes perfect sense, as different interests are at stake.<sup>197</sup> For extant legislation lacking

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195. E.g., Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 462–65 (2015).

196. 29 U.S.C. §§ 2601–2654 (2012).

197. See Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 240 (1997) (“The question of whether independent contractors should fall within the aegis of statutes designed to protect workers does not yield a single, blanket analysis and answer. After all, the purposes and operations of, for example, the Fair Labor Standards Act (‘FLSA’) differ from those of the Occu-

such specificity, this article suggests a test—the “family resemblance test”—that might substitute for (and, hopefully, improve upon) the common-law control test that has dominated the employee classification question. In the family resemblance test that the U.S. Supreme Court adopted to determine whether a promissory note should be classified as a security, the Court compared the characteristics of the promissory note at issue with notes that clearly are securities (i.e., investment notes) and notes that clearly are not securities (i.e., commercial or consumer notes). For worker classification cases, a similar analysis might be used, with the fact-finder’s comparing the worker in question to a paradigmatic employee and paradigmatic independent contractor. This article suggests that this approach is a worthy challenger for the multifactor, control-centric tests reflected in judicial precedents and one that can reshape the common-law definition of “employee.”

Properly classifying workers as employees or independent contractors has been a challenge for both state and federal courts, and the resulting decisions are not always consistent with one another or with the underlying intent of the law in question. Many commentators have suggested tweaks to the judicially created tests, but this article recommends a somewhat more radical approach for both legislators and judges to consider.

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pational Safety and Health Act (‘OSHA’). As discussed below, the task of defining ‘employee’ should be conducted separately for different types of employment-related statutes, particularly when statutes such as FLSA affect labor market competition much more directly than statutes such as OSHA.”).

