THE WORKER CLASSIFICATION DILEMMA: THE IRS TEST AND THE PLATFORM ECONOMY

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I. INTRODUCTION

Recent technological innovations enabled the creation of the platform economy—a range of activities centered around digital platforms. In the platform economy, employers often seek to utilize independent contractors to accomplish work that employees traditionally performed.[1] The platform economy relies on the active participation of self-employed people to perform tasks traditionally performed by employees.[2] Proponents suggest that the platform economy offers the benefits of entrepreneurship to great numbers of people that would otherwise lack opportunity.[3] Detractors argue that the platform economy robs workers of the benefits and protections provided to employees.[4] A classification decision carries significant consequences.

The question of proper worker classification continues to confuse employers, employees, and the court system. Courts, states, and administrative agencies use a confusing array of classification tests to determine whether workers are employees or independent contractors.[5] These tests share roots in the common law agency test, which grew out of the historic rules of the master-servant relationship.[6] Courts created the common law test for the purpose of determining an employer's liability for the acts of an employee.[7] The vicarious liability doctrine requires the "master" (employer) to answer for the acts of the "servant" (employee) committed within the scope of employment.[8] Classification requires courts to determine the amount of control the employer exercises over the service provided by the employee.[9]

The common law agency test, created in a different time and for a different purpose, does not address the problems of the modern workplace.[10] In search of a test better suited to deal with issues created by the platform economy, many states turned to the use of the ABC worker classification test, a test that starts with the rebuttable presumption of employee status.[11] Multiple states have already adopted some form of the ABC test.[12] Under the ABC test, the law presumes that a worker is an employee unless three

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1. *See* John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1 (2018).
2. *See id.*
3. *See id.* at 2.
4. *See id.* at 2–3.
5. *See infra* Part III (explaining the various tests used).
6. *See infra* Part III (explaining the common law roots of the various tests adopted by the courts).
7. Pearce & Silva, *supra* note 1, at 6.
8. *Id.*
9. *Id.*
10. *Id.* at 1.
11. *Id.*
12. *See infra* note 209 and accompanying text (listing the states that have adopted some form of the ABC test).

conditions exist.[13] Because the ABC test starts with the presumption of employee status, the test increases the likelihood of an employee designation.[14] California has drawn much attention for its statutory adoption of the ABC test for all state law classification purposes.[15] The California legislature, spurred by the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*,[16] incorporated the ABC test into state law as the proper classification test to determine employment status for all questions under state law.[17]

The ABC classification test joins worker classification tests used in other areas of the law: the common law agency test, the economic reality test, and, most importantly for this Article, the Internal Revenue Service (IRS) test.[18] The IRS, an entity mindful of the consequences of proper classification, promulgated and revised its own classification test many years ago.[19] In this Article we compare the ABC test to the IRS classification test. We conclude that the IRS test provides the best measure of employment status. Unlike the ABC test, the IRS test has been widely construed and interpreted. Moreover, the laws of many states already incorporate the factors that the IRS test utilizes.[20] The ABC test's rigid mandates will force the reclassification of many workers to employee status, changing the business models of platform economy businesses, and pushing higher prices to consumers.[21] In contrast, the IRS test classifies workers based on the relationship already in place, preserving the hiring party and worker's freedom of choice in establishing the dynamics of their business relationship.[22] Accordingly, when choosing the appropriate worker classification methodology, legislatures and state agencies should use the IRS test. For the modern workforce, and specifically the platform economy, the IRS test remains the best choice for determining worker classification.

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13. *See infra* Part IV (discussing why the ABC test should not be used for platform economy purposes).

14. Pearce & Silva, *supra* note 1, at 1–2.

15. Makeda Easter, *How AB5 Has Instilled Fear and Confusion in California's Arts Community*, L.A. TIMES (Jan. 29, 2020, 8:19 AM), https://www.latimes.com/entertainment-arts/story/2020-01-29/ab5-independent-contractor-california-2020-arts.

16. Dynamex Operations W. v. Super. Ct., 416 P.3d 1, 36 (Cal. 2018).

17. CAL. LABOR CODE § 2750.3 (West 2020).

18. Pearce & Silva, *supra* note 1, at 9 (explaining that the ABC test is a hybrid test that combines several tests).

19. *See Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee (last updated Apr. 13, 2021) [hereinafter IRS, *Independent Contractor or Employee?*].

20. *See infra* Part IV.B (discussing the states that have already adopted the IRS test).

21. *See infra* Part IV.C (explaining the weaknesses of the ABC test).

22. *See infra* Part V (explaining why the IRS test is the better test).

II. THE CHANGING WORKPLACE AND THE DISTINCTION BETWEEN EMPLOYEE AND INDEPENDENT CONTRACTOR

A. The Continued Evolution of the Workplace

The workplace continues to evolve, driven by economic, demographic, and technical changes.[23] The standard employment relationship model—an employee performing work within the framework of a full-time and open-ended relationship—seems likely to disappear within the decade.[24] Many employers have crafted work solutions involving nonstandard forms of work, relying on temporary and part-time workers.[25] These innovations often involve the use of the independent contractor model, in which workers agree to forego the benefits and protections of the employment relationship.[26]

Following the recession of 2008, many US businesses changed their organizational structures.[27] These restructured organizations resulted in significant changes to the proportion of employees to independent contractors.[28] In fact, statistics show that employers continued to hire workers but not as employees.[29] In the years following 2009, employment rose by only six percent, but staffing hires grew by forty-one percent.[30]

The desire for cost savings drove the adoption of new employment structures.[31] But there was more than the desire to save money underlying these significant changes.[32] Employers using independent contractors rather than employees enjoy a great deal of flexibility, a flexibility that employers could not have by using employees.[33] Use of independent contractors allows

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23. *See* Mansoor Iqbal, *Uber Revenue and Usage Statistics*, BUSINESSOFAPPS, https://www.businessofapps.com/data/uber-statistics/, (last updated May 15, 2021) (recognizing that since Uber launched in New York City, taxi usage has declined sharply while apps like Uber and Lyft have been on the rise).

24. *See* Paul Schoukens & Alberto Barrio, *The Changing Concept of Work: When Does Typical Work Become Atypical?*, 8 EUR. LAB. L.J. 306, 312 (2017) (arguing that the typical employment relationship has been on the decline due to the gradual weakening of its essential characteristics).

25. *See id.* at 314 (finding that "[t]emporary work, part-time work[,] and self-employment represent a third of all employment" in countries within the Organization for Economic Cooperation and Development).

26. *See* Yuki Noguchi, *Freelanced: The Rise of the Contract Workforce*, NPR (Jan. 22, 2018, 5:00 AM), https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now (recognizing that the number of people engaged in alternative work arrangements, including contract workers, "grew from 10.1[%] in 2005 to 15.8[%] in 2015").

27. *See id.*

28. *See id.*

29. *See* Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein & Eunice Cho, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, NAT'L EMP. L. PROJECT 19 (2014), https://www.onlabor.org/wp-content/uploads/2016/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

30. *Id.*

31. *See id.*

32. *See id.*

33. *See U.S. Department of Labor Proposes Rule to Clarify Employee and Independent Contractor Status Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB. (Sept. 22, 2020), https://www.dol.gov

for flexibility to scale production up or down, depending on economic factors.[34] A workplace model based on independent contractors provides companies with the ability to handle uncertain demand and future conditions. Uncertainty can make strategic planning difficult.[35]

Today's workplaces share many characteristics: work from multiple locations, often from a location other than premises of the employer; the use of information technologies for conducting the work; and schedules that are set by the worker.[36] These innovations permit employers to offer services that previously proved cost prohibitive.[37] But workers also benefit from the flexibility, enjoying the opportunity to make their own schedule, work their own hours, and to choose how little or much to work.[38] The platform economy arguably allows workers to become micro-entrepreneurs.

But of course, not all is positive. These new forms of employment offer lower and irregular earnings, reduce social security coverage, and lack of access to benefits like health care and retirement plans.[39] Moreover, the new business model tends to transfer the risk of income instability from the employer to its workers.[40] Employees are traditionally shielded by such risk through minimum wage and unemployment compensation laws.[41] A host of other labor and employment laws may not protect nontraditional workers.[42]

B. The Master and Servant Relationship and Its Incorporation into Employment Law

The master and servant doctrine, which incorporated historic rules that applied to a worker and his master, gave rise to modern employment law.[43] Traditionally, a fixed status governed worker rights and duties. Service and

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/newsroom/releases/whd/whd20200922; *see also* Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60,600 (Sept. 25, 2020) (to be codified at 29 C.F.R. pt. 780, 788, and 795).

34. *See* Ruckelshaus et al., *supra* note 29.

35. Hugh Courtney, Jane Kirkland & Patrick Viguerie, *Strategy Under Uncertainty*, HARV. BUS. REV. (Nov.–Dec. 1997), https://hbr.org/1997/11/strategy-under-uncertainty.

36. Grant E. Brown, Comment, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. ENDNOTES 15, 20 (2016) (recognizing the vast autonomy that the independent contractor has in dictating how the job will be completed).

37. *See* Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes that Target the Construction Industry*, 39 J. LEGIS. 295, 308 (2012) (recognizing that when a company classifies employees as independent contractors they avoid having to pay certain employee benefits such as minimum wage, overtime wage, health and pension benefits, as well as union bargaining; and without these costs, companies are able to offer other services or products at a discounted rate).

38. *See* Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES IN SCI. & TECH., no. 3, (Mar. 2016), https://issues.org/the-rise-of-the-platform-economy/.

39. *Id.*

40. Catherine Rampell, *The Dark Side of "Sharing Economy" Jobs*, WASH. POST (Jan. 26, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-the-dark-side-of-sharing-economy-jobs/2015/01/26/4e05daec-a59f-11e4-a7c2-03d37af98440_story.html.

41. *Id.*

42. *Id.*

43. *See* Boswell v. Laild, 8 Cal. 469 (1857).

submission to an employer—whether "landowner, craftsman, captain, or master"—fixed one's status as a servant.[44] A person who accepted a position of subservience to the master was necessarily a servant.[45] As such, the master possessed the right to control the work of the servant.[46]

The common law master-servant relationship created the concept of vicarious liability, the legal doctrine that shifted the liability for torts from employees to their employers.[47] In determining employer liability under respondeat superior, courts sought to determine whether the tort was committed while the servant acted under the "order, control and direction" of the employer.[48] This early means of determining liability eventually became known as the "right of control" test.[49] The doctrine of respondeat superior made masters liable for the acts of servants, as long as those acts were within the course and scope of the master's business.[50] Common law held masters strictly liable, regardless of whether the master had acted negligently.[51] In fact, the master was liable even if it exercised no control over the work of the servant.[52] Because the master had the right to control the work, it faced strict liability for any harm committed by the servant performing the work.[53] The right of control test permitted nineteenth century courts to determine whether the tortfeasor was an employee, which would impute the negligent act to the employer or an independent contractor, in which case it would not.[54]

Early worker classification cases had nothing to do with the scope of statutory protections for workers.[55] Few employee protective statutes existed, thereby negating the need for debate about classification.[56] The first employee protection laws did not come into existence until the twentieth century.[57] Instead, classification tests arose out of the need to distinguish between types of worker to determine when respondeat superior, the legal doctrine that creates employer liability for the negligence of employees for

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44. Richard R. Carlson, *Employment by Design: Employees, Independent Contractors and the Theory of the Firm*, 71 ARK. L. REV. 127, 146 (2018).

45. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 305 (2001).

46. *See id.*

47. *Id.*

48. Sproul v. Hemmingway, 31 Mass. 1, 5 (1833).

49. Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 68 (2013).

50. Boswell v. Laird, 9 Cal. 469, 489–90 (1857).

51. *See* Harold J. Lasri, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 109–10 (1916).

52. *See id.*

53. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 75–76 (1984).

54. Carlson, *supra* note 45, at 304–05.

55. *See* Kwak, *supra* note 37, at 302–03.

56. *See id.*

57. *The U.S. Department of Labor Timeline – Alternate Version*, U.S. DEP'T OF LAB., https://www.dol.gov/general/history/100/timeline (last visited May 12, 2021).

acts committed in the course and scope of employment, should apply.[58] An employer bore responsibility for the torts of its employees, but not for those of independent contractors.[59] Early cases of disputed worker classification revolved around the tort liability of the employer.[60]

C. The Common Law Approach to Worker Classification

Absent a statute that directs otherwise, courts use the common law understanding of "employee" to classify workers.[61] The common law's distinction between employee and independent contractor grew out of the need to test for vicarious liability.[62] The master-servant relationship dictated that the master would assume vicarious responsibility for the torts of its employees but not for the acts of independent contractors.[63] When courts first created rules for holding employers vicariously liable for the acts of their workers, employees acting in the interests of their employer seemed different from those outside workers that presumably were acting in their own interests.[64] This divide, and the rules developed by early English courts, provided the basics of the common law approach to classification.[65]

Vicarious liability requires employers to compensate third parties for harms caused by employees that occur within the scope of employment, even if the employer has done everything possible to prevent such harm.[66] Because of the strict liability standard, the law mandates employer responsibility even though the employer has acted in a non-negligent manner.[67] Similarly, the law would also hold the employer liable if it did not exercise control at all.[68]

Traditionally, courts defined the scope of an employer's liability as limited. For example, in the 1685 King's Bench decision of *Kingston v. Booth*, the court stated, "if I command my servant to do what is lawful, and he misbehave himself . . . I shall not answer for my servant, but my servant for himself."[69] But over time, courts expanded the scope of liability for employers.[70] The law transitioned from the rule that masters should pay only

58. *Id.* at 304, 315.
59. *Id.* at 314–15.
60. *Id.* at 315.
61. Pearce & Silva, *supra* note 1, at 5.
62. Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 399 (2019).
63. *Id.* at 401.
64. *Id.* at 399–402.
65. *Id.*
66. *See id.*
67. *See id.*
68. *See id.*
69. Kingston v. Booth, 90 Eng. Rep. 105, 105 (K.B. 1683); O. Kahn-Freund, *Servants and Independent Contractors*, 14 MOD. L. REV. 504, 505 (1951); Jesse Andrews Raymond, *Agency-Agent's Liability to Third Persons for Nonfeasance*, 9 TEX. L. REV. 224, 226 (1931) (discussing the historical expansion of a master's liability for his servants' torts).
70. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. &

for the harms they created to the concept that masters should be liable for damages resulting even from unauthorized acts by their servants.[71] In the words of one English jurist, "[b]y employing him[,] I [the master] set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."[72] Thus, masters bore responsibility for the acts of their servants because masters controlled the servant's work.[73] Today's common law test continues to emphasize control as the best indicator of the difference between employee and independent contractor.[74]

Nevertheless, to balance competing interests, courts identified a class of workers separate from employees. Presumably, these workers—independent contractors—could bear any potential tort costs that they might cause.[75] Classification as an independent contractor removed the possibility of tort liability on the part of the employer.[76]

D. The Rise of Modern Employment

The Industrial Revolution spurred change in employer–worker relations.[77] The growth of industrial society permitted firms to become masters.[78] Employees replaced servants.[79] The Industrial Revolution fostered a variety of work and work arrangements.[80] Some employers chose to hire employees to perform work, while other employers purchased the work from non-employees.[81] The divisions between employee and independent contractor arose from this ability.[82]

In the early years of the twentieth century, it became more important to be able to distinguish between employees and non-employees. The New Deal brought legislation that sought to protect employees—to give them statutory rights and benefits.[83] These new laws required the ability to distinguish

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MARY L. REV. 75, 96 (1984) (discussing the historical origins of vicarious employer liability).

71. Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 106–07 (1916) (arguing that judges failed to justify this shift in the law).

72. Duncan v. Findlater, 7 Eng. Rep. 934, 940 (H.L. 1839).

73. *See id.*

74. Pivateau, *supra* note 49 at 68.

75. Cunningham-Parmeter, *supra* note 62, at 404.

76. *Id.*

77. Carlson, *supra* note 45, at 304.

78. *See id.* at 146–51.

79. *See id.*

80. *See id.*

81. *See id.* at 177.

82. *See id.* at 128.

83. *See generally* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/history/flsa1938 (discussing employee protections under the New Deal) (last visited May 12, 2021).

between independent contractors and employees to determine the scope of the statute's reach.[84]

Unfortunately, statutory definitions of employee provided little guidance for employers or employees. For instance, Title VII to the Civil Rights Act of 1964 includes similar language.[85] Title VII states "[t]he term 'employee' means an individual employed by an employer."[86] Similarly, the Fair Labor Standards Act (FLSA) fails to adequately define what an "employee" is.[87] The FLSA provides the following definitions: (1) "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."; (2) "'[E]mployee' means any individual employed by an employer."; and (3) "'Employ' includes to suffer or permit to work."[88]

In a similar manner, the National Labor Relations Act (NLRA) does not adequately describe the protected class that it applies to.[89] The NLRA fails to include a precise definition of employee.[90] The statute states:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor.[91]

Nevertheless, the statute does expressly define those who are *not* employees—independent contractors.[92] The NLRA expressly excludes independent contractors from the definition of employee.[93] As excluded workers, independent contractors do not have the rights to organize, join unions, or bargain collectively.[94] The NLRA extends the right to organize only to employees.[95]

Statutory definitions fail to provide employees, employers, or the court system with a basis for making a worker status determination. An employer,

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84. *See id.*

85. *See* Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e-1–17 (2018).

86. 42 U.S.C. § 2000e(f) (2018).

87. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) (2018) ("'Employee' means any individual employed by an employer.").

88. *Id.* §§ 203(d), (e)(1), (g) (defining "Employer," "Employee," and "Employ").

89. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (2018).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* § 157.

95. *Id.* § 152(3) (defining the term "employee" and listing categories of workers excluded from the NLRA's coverage).

even when making a good-faith decision as to independent contractor status, may face investigations and lawsuits.[96] The multiplicity of tests and factors continue to cause confusion.[97]

E. The Platform Economy

The development of the platform economy has driven much of current attention on proper worker classification. The platform economy is just one name for the new digital economy that has appeared in the last decade.[98] Terminology often seems to be based on whether one is a booster or critic of the phenomenon. Its proponents refer to it as the "Sharing Economy."[99] Its detractors prefer to refer to it by labels such as the "Gig Economy," focusing on the financial precariousness of those platform workers.[100]

"Platform economy" represents a more neutral term.[101] Furthermore, platform economy more accurately describes the digitally-enabled activities that are centered around digital platforms.[102] The platform economy relies on the use of non-employees to take an active role in the development of the economy.[103] For instance, Uber and Lyft allows drivers to monetize their automobiles by using an underutilized asset.[104] Similarly, Airbnb enables a homeowner to utilize spare bedrooms or garage apartments as a source of income.[105]

The platform economy continues to expand, with recent annual growth topping 300%.[106] Some have estimated that the platform economy will become a $335 billion business by 2025.[107] Workers will benefit to some extent. Platforms provide individuals with the opportunity to have a "side hustle"—a means to earn money outside of their normal work.[108] Numerous

96. *See generally* Pearce & Silva, *supra* note 1, at 4 (using the FedEx drivers' lawsuit as an example).

97. *See id.* at 5.

98. *See* Kenney & Zysman, *supra* note 38; *see also The Rise of the Platform Economy*, DELOITTE (Dec. 2018), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/humancapital/deloitte-nl-hc-reshaping-work-conference.pdf.

99. *See* Bernard Marr, *The Sharing Economy - What It Is, Examples, and How Big Data, Platforms and Algorithms Fuel It*, FORBES (Oct. 21, 2016, 2:16 AM), https://www.forbes.com/sites/bernardmarr/2016/10/21/the-sharing-economy-what-it-is-examples-and-how-big-data-platforms-and-algorithms-uel/?sh=1f49136b7c5a.

100. *See* W. Kamau Bell, *Why the Gig Economy Is a Scam*, CNN (Aug. 9, 2020, 7:46 AM), https://www.cnn.com/2020/08/09/opinions/united-shades-of-america-gig-economy-kamau-bell/index.html.

101. Kenney & Zysman, *supra* note 38, at 62.

102. *Id.*

103. *Id.*

104. *See id.*

105. *See id.*

106. *See* Rick Bales, *Resurrecting Labor*, 77 MD. L. REV. 1, 16–17 (2017) (discussing the relationship between platform work and other forms of precarious employment).

107. *The Sharing Economy*, PWC 15 (2015), https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf.

108. Cunningham-Parmeter, *supra* note 62, at 389.

workers will likely appreciate the independence afforded to independent contractors. In an age where employment is precarious, many would enjoy the ability to easily have some opportunity, even if limited, to make money.[109]

Technology has enabled millions of Americans to access products and services only when needed, creating a new business model based on the independent contractor framework.[110] The platform economy has, however, threatened the institution of employment. It blurred the lines between those that perform work as traditional employees and those that labor as independent contractors.[111] Many have described the poor pay and conditions that come with platform work.[112] It may be that proponents are correct: platform businesses matching workers with tasks should make labor markets more efficient.[113] But if the platform industry becomes the predominant business model, work schedules will become more fragmented. We can expect to see an explosion of part-time work without access to employment benefits.

The growth of the platform economy created a need for a more accurate classification test.[114] Courts remain confused about classification. A decision by a California court clearly articulated the dilemma this new economic model has caused the courts.[115] In a case involving Lyft drivers seeking to be classified as employees, the court described the problem with a graphic analogy:

> As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem . . . . But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide.[116]

The workplace has continued to evolve. Existing work will continue but in a different context—future jobs will be organized and defined differently.[117] Those who work for regulated service providers, like hotels and taxis, will find their employment threatened.[118] But at the same time, the platform economy is creating new value by enabling jobs that have never

109. *See* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1637 (2017).
110. *See id.*
111. *See* Calo & Rosenblat, *supra* note 109, at 1637.
112. *See generally* Cunningham-Parmeter, *supra* note 62.
113. *See id.*
114. *See* Brown, *supra* note 36, at 15.
115. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).
116. *Id.*
117. *See The Rise of the Platform Economy*, *supra* note 98.
118. *See* Kenney & Zysman, *supra* note 38, at 63.

existed before.[119] The idea of a full-time, professional YouTuber would have seemed ludicrous a decade ago. But in today's world, YouTube allows creators an outlet that is separate from the classic hierarchical model.[120] Many creators make a living that would have been impossible without the YouTube platform.[121]

In any event, in a post-industrial world, current worker classification tests remain tied to twentieth century notions of industrial employment.[122] The demand for innovative work solutions requires a new classification test.[123]

III. CURRENT EMPLOYMENT TESTS LAG BEHIND A CHANGING WORKPLACE

A. Designation as Employee or Independent Contractor Has Consequences

The separation between employees and independent contractors is fundamental to employment law.[124] Classification as an employee or independent contractor has significant consequences.[125] Most state and federal employment statutes provide protections to employees but not independent contractors.[126] Proper worker classification continues to confound workers, employers, and the court system.[127] The system for designating workers as either employees or independent contractors has not kept up with the ever changing workplace.[128] The business world has been confronted with much change in recent years.[129] The legal tests used by courts and governmental agencies to determine worker status have not kept pace with these changes, resulting in confusion, inconsistent results, and an inability to reflect the evolving employment relationship.[130]

In the twentieth century, the United States enacted its first statutory protections for employees.[131] Because these protections extended only to

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119. *See id.*

120. *See id.*

121. *See* Michael Price, *Here's How a 21-Year-Old Earns a Living Making Videos on YouTube*, HUFFPOST (Dec. 6, 2017, 1:54 PM), https://www.huffpost.com/entry/heres-how-a-21-year-old-earns-a-living-making-videos-on-youtube_b_5785584.

122. *See* Cotter v. Lyft, Inc. 60 F. Supp. 3d. 1067, 1081–82 (N.D. Cal. 2015).

123. *See id.*

124. Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1085 (2015).

125. *See* Brown, *supra* note 36, at 31.

126. *See id.*

127. Carlson, *supra* note 45, at 296.

128. *Id.*; Brown, *supra* note 36, at 28 n.78.

129. World Econ. Forum, *The Future of Jobs Report 2018*, CTR. NEW ECON. & SOC'Y 7 (2018), http://reports.weforum.org/future-of-jobs-2018/.

130. Carlson, *supra* note 45, at 299 ("While judges frequently speak of *the* 'common law' test of employee status and employment relations, they have generally failed to articulate any consistent rule or test.").

131. *Id.*

employees, the scope of employment law depended on the answer to the question of worker status.[132] Those classified as anything other than an employee were not entitled to protection under the statutes.[133]

Financial incentives weigh in favor of independent contractor status. If a firm hires employees rather than contractors, the firm will pay unemployment compensation taxes,[134] will pay half the cost of the worker's social security and Medicare taxes, and must withhold taxes from the worker's paychecks.[135] Those designated as independent contractors must pay the full costs of social security and Medicare taxes.[136]

B. Problems with the Current Tests

According to the United States Government Accountability Office, federal worker classification tests are "complex, subjective, and differ from law to law."[137] Often, the status of workers outside of the full-time norm remains unclear, leaving both employers and employees without guidance as to whether they fall within the scope of employment or not.[138]

The ongoing struggle to distinguish between employees and independent contractors has proved "lengthy and confused."[139] Defining the line between worker and independent contractor has troubled courts and administrative agencies for years. The United States Supreme Court acknowledged this difficulty, noting, "[t]here are innumerable situations . . . where it is difficult to say whether a particular individual is an employee or an independent contractor."[140]

In making classification decisions, employers must choose a designation with little guidance from official sources.[141] Employers wishing to strike contractual agreements to clarify independent contractor status will likely be frustrated, as courts and agencies will often disregard the language of the contract.[142] Ordinarily a court construing the validity of a contractual agreement will base its analysis on the actual language of the agreement.[143]

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132. *Id.*

133. Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 313 (2011).

134. 26 U.S.C. § 3306(i).

135. 26 U.S.C. §§ 3101, 3121(b).

136. *See* Jayesh M. Rathod & Micbal Skapski, *Reimagining the Law of Self-Employment: A Comparative Perspective*, 31 HOFSTRA LAB. & EMP. L.J. 159, 175–76 (2013).

137. *Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification*, U.S. GOV'T ACCOUNTABILITY OFF. (May 8, 2007), https://www.gao.gov/assets/gao-07-859t.pdf.

138. *See generally id.* (explaining the difficulties of determining worker classification).

139. Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 353 (2011).

140. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

141. Hirsch, *supra* note 139, at 353.

142. *See* Jost, *supra* note 133.

143. CSC Credit Servs., Inc. v. Equifax Inc., 119 F. App'x 610, 613 (5th Cir. 2004).

But this approach does not work in the classification arena.[144] Instead, the agreement between the employer and the worker receives little weight in the determination of employment status.[145]

The multiple legal standards used to classify workers presents employers, employees, governmental agencies, and the court system with a confusing and ambiguous situation. The confusion rests in three areas. First, the multiplicity of tests leaves courts and other agencies often unable to determine the proper test to be used. Second, all the tests require analysis of multiple factors.[146] With the multiplication of factors, without standards of weighting one factor against another, different courts and agencies can reach substantially different results.[147] Third, the tests require consideration of factors that may appear outdated or not applicable to the present situation.[148]

C. The United States Common Law Agency Test

In the United States, employee status tends to be based on the common law principles found in the Restatement of Agency.[149] The common law test focuses on the employer's ability to control the worker in the scope of his duties.[150] Courts examine whether the hiring party was able to "control the manner and means by which the product is accomplished."[151] The common law agency test, created in England, migrated to the United States in 1857.[152] A court applying the test inquires whether the person in question was under the control of another to such a sufficient degree to allow the latter to be held accountable for the torts of the former.[153] The right to control test adopts the notion that the relationship between master and servant is defined by the amount of control exerted on the servant by the master.[154] Black's Law Dictionary echoes the common law test.[155] It defines an independent contractor as "[o]ne who is entrusted to undertake a specific project but who

144. Jost, *supra* note 133, at 346.

145. *Id.*

146. *See* Pearce & Silva, *supra* note 1, at 9–10.

147. *Id.* at 15–16.

148. *See id.*

149. *See* David Millon, *Keeping Hope Alive*, 68 WASH. & LEE L. REV. 369, 371 (2011); *see also* Carlson, *supra* note 45, at 299, 315.

150. Carlson, *supra* note 45, at 338.

151. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

152. *See* Boswell v. Laird, 8 Cal. 469, 489–90 (1857) (applying English common law, which holds a master vicariously liable for the torts of his servant under the theory of respondeat superior).

153. *Id.* at 493.

154. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (AM. L. INST. 1958) (noting that the control of a master differentiates a servant from an independent contractor); RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (abandoning the master/servant language in favor of principal and agent).

155. *Independent Contractor*, BLACK'S LAW DICTIONARY 785 (8th ed. 2004).

is left free to do the assigned work and to choose the method for accomplishing it."[156]

Since the middle of the nineteenth century, courts have used this common law test to determine worker status.[157] To apply the standard, a court must examine the amount of control retained by the employer over the work of the putative employee.[158] The more control exerted by the employer over the work of the worker, the more likely it is that the worker will be considered an employee.[159] If the employer exerts or retains less control, courts are more likely to determine that the employer has hired an independent contractor.[160]

Nevertheless, the right to control is not the only factor to consider in applying the test. While courts focus on the right to control, there are additional factors to consider.[161] The common law test is composed of numerous factors, each to be weighed individually by the decision maker.[162] There is no consensus on how the various factors should be weighed—which are more important and which are less important.[163] The nature of the test ensures that no bright line rule of worker status exists.[164] The Supreme Court, in *Community for Creative Non-Violence v. Reid*, named thirteen factors that constituted a non-exhaustive list of factors to consider when applying the common law agency test:

> (1) [T]he hiring party's right to control the manner and means by which the product is accomplished[;]
> (2) [T]he skill required;
> (3) [T]he source of the instrumentalities and tools;
> (4) [T]he location of the work;
> (5) [T]he duration of the relationship between the parties;
> (6) [W]hether the hiring party has the right to assign additional projects to the hired party;
> (7) [T]he extent of the hired party's discretion over when and how long to work;
> (8) [T]he method of payment;
> (9) [T]he hired party's role in hiring and paying assistants;

156. *Id.*

157. Pivateau, *supra* note 49, at 79.

158. *Id.* at 76 (explaining the use of the right of control test); *see also* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257 (2006).

159. Pivateau, *supra* note 49, at 68.

160. *Id.* at 68–69.

161. Millon, *supra* note 149, at 371–73.

162. The Restatement of Agency includes a list of ten factors which, as the Restatement cautions, is not an exhaustive list. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

163. *See* Millon, *supra* note 149, at 371.

164. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

> (10) [W]hether the work is part of the regular business of the hiring party;
> (11) [W]hether the hiring party is in business;
> (12) [T]he provision of employee benefits;
> (13) [T]he tax treatment of the hired party.[165]

Unsurprisingly, application of thirteen factors, without guidance on their relative importance, provides uncertain results. Little guidance exists as to how the factors are to be weighed and balanced. Application of the test creates "a legal standard that is often vague and indeterminate."[166] Decisions of worker status are heavily fact-dependent, requiring courts to analyze the cases individually.[167] But the delay and inefficiency of the common law test are not its only failings. Instead, the confusing test and uncertain results provide little guidance to employers. Moreover, because the common law test focuses on employer control, it removes consideration of the worker's perspective.[168] The worker is left essentially voiceless in the determination of his legal status.

D. The Economic Reality Test

In disputes involving the Fair Labor Standards Act (FLSA), courts utilize the economic reality test.[169] This test attempts to determine "whether, as a matter of economic reality, the individuals 'are dependent upon the business to which they render service.'"[170] Financial considerations are paramount in the use of the economic reality test.[171] Worker status is determined not by the nature of the work, but on the financial realities that accompany the work.[172] The test should measure economic independence.[173] Some variation of the economic reality test is used to classify workers under the FLSA, the Equal Pay Act of 1963, Family and Medical Leave Act of 1993, and the Employee Polygraph Protection Act of 1988.[174]

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165. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) (citations omitted).
166. Millon, *supra* note 149, at 371.
167. *Id.*
168. *Id.*
169. Brown, *supra* note 36, at 26.
170. Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991) (quoting Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir. 1985)).
171. *Id.*
172. *Id.*
173. *See* Mednick v. Albert Enters., 508 F.2d 297, 303 (5th Cir. 1975).

> An employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the F.L.S.A., by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate.

Id.
174. *See* MICHAEL S. HORNE ET AL., THE CONTINGENT WORKFORCE: BUSINESS AND LEGAL STRATEGIES §§ 2.07[1]–[4] (2017).

The economic reality test is a creature of federal courts.[175] In *Goldberg v. Whitaker House Cooperative*, the Supreme Court opined that courts should not focus on "technical concepts" but instead should examine "economic reality."[176] The Court suggested that workers are likely employees for FLSA purposes where they "are regimented under one organization, [doing] what the organization desires and receiving the compensation the organization dictates."[177]

The economic reality test examines the financial dependence of the worker.[178] Review of employer control remains, but the more important measuring test is whether the worker is "economically dependent" on the employer or in business for him or herself.[179] The economic reality test goes beyond technical common law concepts of the master and servant relationship to determine whether, as a matter of economic reality, a worker is dependent on an employer.[180] This standard focuses on "whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself."[181]

While the question of control remains, it is not meant to be determinative for purposes of the economic reality test.[182] As noted by the Supreme Court in *Walling v. Portland Terminal Co.*:

> [I]n determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.[183]

The economic reality test grew out of a concern for employee rights to organization, and not vicarious liability.[184] In the past, courts have often given weight to the non-control factors of the common law test "when the effect was to extend protection to needy workers, rather than to impose tort liability on employers."[185] The concept of "employee" for protection purposes was

175. *See* Barfield v. New York City Health & Hosps. Corp., 537 F.3d 132, 141 (2d Cir. 2008) (explaining that unless the statute indicates otherwise, Congress meant to incorporate the common law meaning of "employer" and "employee").

176. Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961).

177. *Id.* at 32.

178. Brown, *supra* note 36, at 26.

179. *Fair Labor Standards Act Advisor: Independent Contractors*, U.S. DEP'T OF LAB.: ELAWS ADVISORS, https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp (last visited May 12, 2021).

180. Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998).

181. Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984) (internal citation omitted).

182. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 150–51 (1947).

183. *Id.* (citation omitted).

184. Kwak, *supra* note 37, at 297.

185. *Id.*

broad.[186] This approach focused on control but a different kind of control.[187] Instead of personal control, the economic reality test focused on the employer's control over two things: capital and the specific project.[188]

Recently, the U.S. Department of Labor (DOL) proposed a federal independent contractor rule revising its interpretation of the Fair Labor Standards Act's worker classification test to revise the economic reality test.[189]

IV. THE ABC TEST IS A POOR CHOICE FOR PLATFORM ECONOMY CLASSIFICATION PURPOSES

A. An Overview of the ABC Test

Many states have utilized the ABC test for state statutes that are meant to distinguish employees from independent contractors, such as unemployment insurance statutes.[190] The ABC test is not new, it originated in Maine in 1935.[191] Since that time, it has become common for reformers to argue for the use of the ABC test for state and independent contractor definitions.[192]

The ABC test may be characterized as a simplified version of the common law test. Although the test changes from state to state, the ABC test creates a rebuttable presumption in favor of employment.[193] An employer must contravene this presumption by establishing three separate prongs.[194] All prongs must be satisfied to overcome the presumption of employment.[195]

The test requires employees to show that the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact, that the service is performed outside the usual course of business of the employer, and that the individual is customarily engaged in an independently established trade,

186. United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945). The FLSA contains "the broadest definition [of employee] that has ever been included in any one act." *Id.*

187. *See* Kwak, *supra* note 37, at 297.

188. *Id.*

189. Jill K. Bigler & Christopher T. Page, *Department of Labor Proposes Rule Adopting "Economic Reality" Test to Assess Independent Contractor Status*, BRICKER & ECKLER: INSIGHTS & RES. (Sept. 25, 2020), https://www.bricker.com/insights-resources/publications/department-of-labor-proposes-rule-dopting-%E2%80%9Ceconomic-reality%E2%80%9D-test-to-assess-independent-contractor-status.

190. *See infra* note 209 (listing state statutes).

191. Eric Markovits, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee–Independent Contractor Status*, 2020 CARDOZO L. REV. DE NOVO 224, 238 (2020).

192. *See id.*

193. *Id.* at 238–39.

194. *Id.*

195. *Id.*

occupation, profession, or business of the same nature as that involved in the service performed.[196]

State legislatures favor the ABC test for several reasons. First, because it presumes employment, it becomes more difficult for employers to misclassify employees.[197] States are interested in increasing the number of workers classified as employees.[198] The presumption of employment establishes a bias on the status of employment.[199] Presumably, the bias corrects the natural advantage given to employers, who are usually the party with the greatest control over the aspects of the relationship.[200]

States also appreciate the flexibility of the test. The ABC test requires that the employer prove that an independent contractor relationship exists.[201] This presumption in favor of employment allows the ABC test to apply to large and small employers, as well as numerous different types of business structures.[202] No matter the service or product produced by the employer, the ABC test requires employers to justify how their classification fits within the boundaries of the definition of independent contractor.[203]

Finally, states appreciate the simplicity of the ABC test. The other classification tests require analysis and weighing of multiple factors.[204] Factors, such as intent and location, are subject to employer manipulation.[205] Courts tend to ignore some factors and favor others, and there is little guidance as to which are more important than others.[206] The ABC test eliminates those factors and requires courts and agencies to only examine three dispositive factors.[207] Furthermore, this checklist is made even more simple by the fact that if any box is not checked, the decision is made, and employment is established.[208]

B. Many States Have Embraced the ABC Test

Many states use the ABC test for purposes of employee qualification for state statutes regarding wages, maximum hours, unemployment insurance, and working conditions.[209] Depending on the state, the ABC test differs, but

196. *Id.*
197. *Id.*
198. *Id.*
199. *See id.* at 248.
200. *See id.*
201. *See id.* at 238.
202. *See id.* at 248–50.
203. *See generally* Pearce & Silva, *supra* note 1 (discussing requirements of the ABC test).
204. *See* Markovits, *supra* note 191, at 238 (describing the application of the ABC test).
205. *Id.* at 251.
206. *See id.*
207. *Id.* at 238.
208. *Id.* at 238–39.
209. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 7 (Cal. 2018); *see, e.g.*, ALASKA STAT. ANN. § 23.20.525(a)(8) (West 2009); CAL. LAB. CODE § 2750.3 (West 2020); CONN. GEN. STAT. ANN.

it begins with the rebuttable presumption of employment. The worker is an employee unless all the following factors are met:

> (A) [The] worker is free from the control and direction of the hiring entity in connection with the performance of the work . . . ,
> (B) [the] worker performs work that is outside the usual course of the hiring entity's business, and
> (C) [the] worker is customarily engaged in an independently established trade, occupation, or business.[210]

The ABC test limits an employer's ability to classify workers as independent contractors.[211] Part A of the test requires the employer to "show that it neither

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§ 31-222(a)(B)(ii) (West 2017); DEL CODE ANN. tit. 19, § 3302(10)(k) (West 2019); HAW. REV. STAT. ANN. § 383-6 (West 1984); 820 ILL. COMP. STAT. ANN. 185/2 (West 2015); IND. CODE ANN. § 22-4-8-1(b) (West 2006); LA. STAT. ANN. § 23:1472(12)(E) (2014); MASS. GEN. LAWS ANN. ch. 149, § 148B(a) (West 2004) (applicable also to minimum wage and overtime actions); NEB. REV. STAT. ANN. § 48-604(5) (West 2018); NEV. REV. STAT. ANN. § 612.085 (West 1993); N.H. REV. STAT. ANN. § 282-A:9(III) (West 2011); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2017); N.M. STAT. ANN. § 51-1-42(F)(5) (West 2015); P.R. LAWS ANN. tit. 11, § 202(j)(5) (1995); VT. STAT. ANN. tit. 21, § 1301(6)(B) (West 2014); V.I. CODE ANN. tit. 24, § 302(k)(5) (2009); WASH. REV. CODE ANN. § 50.04.140(1) (West 1991); W. VA. CODE ANN. § 21A-1A-16(7) (West 1997). These statutes predominantly apply to unemployment compensation claims. *See generally supra* (listing states codifying the ABC Test). Illinois and Nevada have additional ABC tests that apply solely to the construction industry, while the District of Columbia, Maryland, and New York have also adopted the ABC test but limit it strictly to the construction industry. D.C. CODE ANN. §§ 32-1331.02, 32-1331.04(c)(2) (West 2013); 820 ILL. COMP. STAT. ANN. 185/5, 185/10(b) (West 2008); MD. CODE ANN., LAB. & EMPL. §§ 3-902, 3-903(c) (West 2012); NEV. REV. STAT. ANN. § 608.0155(2) (West 2019); N.Y. LAB. L. § 861-c(1) (McKinney 2010). Finally, four additional states have adopted only Parts A and C of the ABC test. COLO. REV. STAT. ANN. § 8-70-115(1)(b) (West 2016); IDAHO CODE ANN. § 72-1316(4) (West 2008); S.D. CODIFIED LAWS § 61-1-11 (2011); UTAH CODE ANN. § 35A-4-204(3) (West 2006) (applicable to unemployment insurance claims); *see also* GA. CODE ANN. § 34-8-35(f) (West 2012) (adopting Parts A and C, but adding an alternative element to satisfy part C: the worker is subject to an IRS determination against employee status); MONT. CODE ANN. § 39-71-417(4)(a) (West 2011) (using only Parts A and C but applicable only for obtaining an independent contractor certification); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(a) (West 2011) (adding an additional requirement to Parts A and C: a written contract to perform the services in question; applicable only to the construction industry). Further, in Wyoming, for unemployment insurance purposes:

> An individual who performs service for wages is an employee for purposes of this act unless it is shown that the individual: (i) Is free from control or direction over the details of the performance of services by contract and by fact . . . (v) Represents his services to the public as a self-employed individual or an independent contractor; and (vi) May substitute another individual to perform his services.

WYO. STAT. ANN. § 27-3-104(b) (West 2014) (subsections (ii)–(iv) repealed); *see also* WYO. STAT. ANN. § 27-14-102(a)(xxiii) (West 2018) (same definition applicable to workers' compensation claims).

210. *Dynamex*, 416 P.3d at 34.

211. *See* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55 (2015).

> Employees are shielded by antidiscrimination laws, wage and hour laws, and family and medical leave protections; independent contractors are not. Employees can access federal and state programs, including unemployment insurance and workers' compensation; independent contractors cannot. In turn, employers are subject to liability and tax and benefit contribution requirements under these laws only for their employees.

exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work."[212] Although some dispute whether Part A reflects the common law "right of control" test,[213] the test reduces the importance of the control element found in employment tests. If the employer cannot establish Parts B or C, the worker is an employee, notwithstanding a lack of control exercised over the work.[214]

Part B prevents independent contractor classification unless the worker performs work that falls outside the hiring entity's usual course or type of business. This element is often found within discussion of the common law test.[215] But in this case, it moves from a mere consideration to a mandatory element.[216] For example, application of Part B of the test would prevent Uber and Lyft from classifying workers as independent contractors, as driving passengers to their destination is the essence of a ride sharing enterprise.[217] This aspect of the test ensures that only certain types of jobs would fall outside the employee classification.[218] This includes those positions most likely to be outsourced: maintenance, payroll, accounting, and information technology.[219]

Nevertheless, Part B is not as simple as it might appear. Firms often seek to avoid hiring employees to perform services ancillary to those of the company.[220] Determining the "usual course" of the employer's business may require analysis.[221] The factors used by courts to answer this question resemble those found in the common law test.[222] A court can test "whether the worker's business is a key component of the putative employer's business[;] how the purported employer defines its own business[;] which of the parties supplies equipment and materials[;] and whether the service the worker provides is necessary to the business of the putative employer or is merely incidental."[223]

Part C of the test provides an even tougher hurdle for employers, as it requires the putative independent contractor to have "a profession that will plainly persist despite the termination of the challenged relationship."[224] The

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Id.

212. Hargrove v. Sleepy's, LLC, 106 A.3d 449, 459 (N.J. 2015).

213. *See* Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733 (2020).

214. *Id.*

215. *See id.*

216. *See id.*

217. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 37 (Cal. 2018).

218. *Id.* (explaining that this extension of the employee status further ensures that all workers in the usual course of business are protected by the wage order provisions).

219. *Id*. at 8. In addition to the positions noted above, jobs such as electricians and plumbers are noted by the court in *Dynamex* as those that are typically outsourced by a business for contracting work. *Id.*

220. *See generally id.* (explaining that firms outsource work to avoid hiring employees).

221. Great N. Constr., Inc. v. Dep't of Lab., 161 A.3d 1207, 1210 (Vt. 2016).

222. *Id.* at 1214.

223. *Id.* at 1216.

224. Hargrove v. Sleepy's, LLC, 106 A.3d 449, 459 (N.J. 2015).

requirement places a burden on the employer not only to prove that the worker has a right to engage in an independently established trade, occupation, or business, but that the worker did so.[225] Application of Part C seems to indicate that independent contractor classification will be limited to professionals, especially licensed workers such as chiropractors and massage therapists.[226]

But once again, Part C's simplicity is deceiving. To establish this element, a court may look at several factors, none of them dispositive.[227] A court may examine whether "the putative employee maintained a home office, that he was independently licensed by the state, that he had business cards, that he sought similar work from third parties, that he maintained his own liability insurance, and that he advertised his services to third parties."[228]

C. The Dynamex *Decision*

In 2018, in *Dynamex Operations West v. Superior Court*, the California Supreme Court held that the ABC test was the proper vehicle for classifying workers as independent contractors and not employees for purposes of wage claims.[229]

The *Dynamex* case arose out of a suit by two plaintiffs against a trucking company.[230] The plaintiffs sued on behalf of hundreds of drivers that the company had converted from employees to independent contractors.[231] The drivers had been considered employees and received pay according to California wage and hour legislation.[232] Following adverse findings in lower courts, Dynamex filed a petition for review with the California Supreme Court challenging the employer/independent contractor test utilized by the appellate court.[233] That test, referred to as the *Martinez* test, offered three separate definitions for "employ": "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship."[234]

The *Dynamex* court decided to create a new ABC test to interpret the "suffer or permit to work" standard found in California's wage and hour laws.[235] The court drew its inspiration from a multi-factor common law test called the *Borello* test, the *Martinez* test, the federal economic reality test,

225. Kirby of Norwich v. Adm'r, Unemployment Comp. Act, 176 A.3d 1180, 1187 (Conn. 2018).
226. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 39 (Cal. 2018).
227. *Kirby of Norwich*, 176 A.3d at 1188.
228. *Id.*
229. *See Dynamex*, 416 P.3d 1.
230. *See id.*
231. *Id.* at 5.
232. *Id.* at 8.
233. *Id.* at 8–13.
234. Martinez v. Combs, 231 P.3d 259, 278 (Cal. 2010).
235. *Dynamex*, 416 P.3d at 40.

and ABC tests from other states.[236] The supreme court interpreted the "suffer or permit to work" standard:

> (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[237]

The California court noted that its ruling protects three parties.[238] The court believed that the ABC test would protect workers who "possess less bargaining power" than their employers.[239] The court further sought to protect the public, which "assume[s] responsibility for the ill effects" caused by the problem of worker misclassification.[240] Finally, the court noted that its efforts will protect "law-abiding businesses" that face "unfair competition from competitor businesses that utilize substandard employment practices."[241]

Subsequently, the California legislature passed Assembly Bill 5 (AB5), which codified *Dynamex*.[242] The new law requires the ABC test to be utilized in cases arising out of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission.[243]

D. Criticism of the ABC Test

California's institutionalization of the ABC test did not go well.[244] Both industry and platform workers pushed back.[245] One issue that drove much controversy surrounded the numerous exemptions found in the statute.[246]

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236. *Id.*
237. *Id.* at 35.
238. *Id.* at 32.
239. *Id.*
240. *Id.*
241. *Id.*
242. CAL. LAB. CODE § 2750.3 (West 2020).
243. *Id.*
244. *See* Makeda Easter, *How AB5 Has Instilled Fear and Confusion in California's Arts Community*, LA TIMES (Jan. 29, 2020, 8:19 AM), https://www.latimes.com/entertainment-arts/story/2020-01-29/ab5-independent-contractor-california-2020-arts.
245. *Id.*
246. *Id.*

Even before its passage, numerous groups lobbied for exceptions to its coverage.[247] The law expressly included exceptions for doctors, dentists, psychologists, insurance agents, stockbrokers, lawyers, accountants, engineers, and real estate agents.[248]

The law sowed confusion among both employers and workers regarding which occupations are exempt from the law. Some of the strongest criticism came from members of the arts community.[249] The law excluded "fine artist[s]" in the list of exempted occupations, but many remained unsure whether musicians and actors qualified.[250] Under one interpretation, the law "essentially require[s] session musicians, producers, songwriters and others who often collaborate on a gig-by-gig basis to either be legally designated as employees or not work together at all."[251] Some have complained that AB5 "was meant for companies that have resources."[252]

Similarly, the law met backlash from translators and interpreters.[253] Employers proved reluctant to contract with California-based translators to avoid the possibility of steep penalties for not classifying the workers as employees.[254] The legislation's chilling effect led employers to increasingly utilize workers outside of the state of California.[255]

After months of confusion, the California legislature passed AB2257, which immediately rewrote many of the provisions of AB5.[256] Although AB2257 retained the ABC test, it expanded the number of available exceptions.[257]

California voters expressed their displeasure with the revised misclassification law in 2020.[258] California Proposition 22 allowed companies to continue to classify rideshare drivers and delivery service

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247. *Id.*

248. *Id.*

249. *See id.*

250. *Id.*

251. Tatiana Cirisano, *California Legislators Amend AB5 Gig Economy Law to Protect Music Professionals*, BILLBOARD (Apr. 17, 2020), https://www.billboard.com/articles/business/9360514/california-ab5-gig-economy-law-amended-protect-music-professionals.

252. Easter, *supra* note 250.

253. Seyma Albarino, *California Translators, Interpreters Win Exemption from Gig Worker Bill AB5*, SLATOR (Sept. 1, 2020), https://slator.com/industry-news/california-translators-interpreters-win-exemption-from-gig-worker-bill-ab5/.

254. *See id.*

255. *Id.*

256. Eric Lloyd, Scott P. Mallery & Kerry Friedrichs, *AB 2257: Sweeping Changes to AB 5 Independent Contractor Law*, SEYFARTH: CAL. PECULIARITIES EMP. L. BLOG (Sept. 8, 2020), https://www.calpeculiarities.com/2020/09/08/ab-2257-sweeping-changes-to-ab-5-independent-contractor-law/.

257. *Id.*

258. *See generally* Seth Sandronsky, *Poll: California's Proposition 22 on Uber, Lyft Drivers Too Close to Call*, CTR. SQUARE (Nov. 2, 2020), https://www.thecentersquare.com/california/poll-california-s-proposition-22-on-uber-lyft-drivers-too-close-to-call/article_68d7f9d2-1d52-11eb-b8b2-e3b224e8d77b.html (stating that 36% of voters opposed it).

providers as independent contractors rather than employees.[259] The ballot initiative drew the support of 58% of voters.[260] Proposition 22 declares app-based drivers to be independent contractors, not employees, and provides certain "engaged time" protections for them, such as healthcare subsidies, and accident and accidental death insurance.[261]

The passage of Proposition 22 illustrated several of the flaws inherent in the ABC test. The test places a heavy burden on the employer to overcome the presumption of employment.[262] With this burden, an employer may find it difficult to create a workplace model based on a flexible workforce. Employers who wish to retain the independent contractor model while providing benefits to workers may encounter severe difficulties. In fact, Proposition 22 includes many protections for platform workers, including provisions setting a base hourly compensation guarantee, healthcare, and training.[263] Those benefits do not extend to those independent contractors that do not fall within one of the exceptions.[264]

The ABC test in actual use is not as simple as it appears. Instead, courts and agencies applying the test may be hiding analysis of the control factors. For example, in the case of *Carpet Remnant Warehouse v. New Jersey Department of Labor*, the New Jersey Supreme Court used several common law factors to evaluate the first prong of the ABC test.[265] The court even suggested that the first prong was essentially the common law control test.[266]

The ABC test lacks flexibility. Because of its simplistic nature, use of the test may well give rise to circumstances where there is evidence that a person should not be classified as employee but nevertheless is. That person may be described as an employee because of a technical inability to satisfy one of the dispositive prongs.[267]

Finally, the ABC test unfairly punishes those workers without political power. The California experience established that the ABC test only works if the legislature provides broad exemptions to industries or trades.[268] The California legislature granted exemptions to those trades with strong

259. Sara Ashley O'Brien, *Prop 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN BUS. (Nov. 4, 2020, 4:02 AM), https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html.

260. *Id.*

261. *Id.*

262. *See id.*

263. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#:~:text=Proposition%2022%20enacted%20labor%20and,to%20a%20driver's%20engaged%20time_(2020) (last visited May 12, 2021).

264. *See id.*

265. Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab., 593 A.2d 1177, 1185 (N.J. 1991).

266. *Id.*

267. *See* Markovits, *supra* note 191, at 238–39.

268. *See* Lloyd et al., *supra* note 256.

lobbying power.[269] Thus, the use of the ABC test rewards those industries that have political power, while punishing those that do not.[270]

V. STATES SHOULD USE THE IRS TEST IN MAKING EMPLOYEE CLASSIFICATION DECISIONS

A. A History of the IRS Test

Arguably, the governing body most interested in regulating worker classification is the Internal Revenue Service.[271] More specifically, the IRS is concerned with worker *misclassification*, as it is reported that misclassification of workers as "independent contractors" when they should be "employees" can cost the government billions of dollars in lost tax revenue.[272] For workers deemed employees, the Internal Revenue Code of 1986, as amended, requires an employer to withhold from the employee's compensation federal income taxes and half of the employee's contribution to Social Security and Medicare taxes.[273] The employer also pays federal and state unemployment taxes for each of its employees.[274] Employers withhold nothing from the compensation of independent contractors, and because independent contractors reportedly underreport their compensation more than employees, there is a significant tax windfall when an employer misclassifies its worker as an independent contractor.[275] In addition, it is clear that such misclassifications rob "Social Security, Medicare, unemployment insurance, and workers' compensation funds of billions of dollars" and reduce "federal, state, and local tax revenues."[276]

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269. *See id.*

270. *See id.*

271. Debbie Whittle Durban, *Independent Contractor or Employee? Getting It Wrong Can Be Costly*, 21 S.C. L. 30, 35 (2010).

272. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 140 (2015).

273. *Id.* at 139–40; *see also* DEP'T OF TREASURY INTERNAL REVENUE SERVS., PUBLICATION 15 (CIRCULAR E), EMPLOYER'S TAX GUIDE 6, 21, 24 (2021), https://www.irs.gov/pub/irs-pdf/p15.pdf.

274. Bauer, *supra* note 272, at 140.

275. *Id.* The IRS has declared that "[i]t is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors" and that employers must "withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee," but generally do not "withhold or pay any taxes on payments to independent contractors." *Independent Contractor (Self-Employed) or Employee?*, IRS.GOV, [hereinafter IRS, *Independent Contractor or Employee?*] https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee (last updated Mar. 17, 2021).

276. Bauer, *supra* note 272, at 147. In his 2015 article, Bauer notes that, "[a]ccording to a 2009 report, the IRS's most recent estimates of the costs of misclassification are $54 billion in underreported employment tax, including losses of $15 billion in unpaid FICA taxes and [unemployment insurance] taxes." *Id.*

To promote proper classification, the IRS crafted a test for determining worker status. This test, known historically as the IRS 20-Factor test,[277] was established in 1987 through IRS's Revenue Ruling 87-41.[278] The factors, and their explanations, were chosen based on an examination of prior cases and IRS rulings,[279] and their origin is found in the common law right to control test.[280] Under this common law standard, "an employer-employee relationship exists when the business for which the services are performed has the right to direct and control the worker who performs the services."[281] While it is not necessary that the business actually control the manner in which the services are performed, if the business has the right to control what work shall be done and how it will be accomplished, there is sufficient control to establish an employer-employee relationship.[282] The "20 Factors" were developed as an analytical tool to assist business representatives in determining whether the necessary control over the worker is present in specific employment situations.[283] The 20 Factors include:

(1) **Instructions.** A worker who must comply with the business's instructions about when, where, and how to work is ordinarily an employee.

(2) **Training.** If the worker is trained (by an experienced employee or through training sessions), this indicates that the business wants the services performed in a particular manner, and the worker is an employee.

(3) **Integration.** If the worker's services are integrated into the business's business operations, this indicates employee status.

(4) **Services Rendered Personally.** If the worker must perform the services personally rather than hire them out, this suggests the business

277. *See* David Houston, *The "New" IRS Independent Contractor Test—The More Things Change the More They Stay the Same*, FRASER TREBILCOCK: BLOG (Jan. 30, 2020), https://www.fraserlawfirm.com/blog/2020/01/the-new-irs-independent-contractor-test-the-more-things-change-the-more-they-stay-the-same/.

278. JOINT COMMITTEE ON TAXATION, NO. JCX-26-07, at 3 (2007), https://www.jct.gov/publications/2007/jcx-26-07/. The IRS explains the purpose of its revenue rulings as follows:

> A revenue ruling is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts. Revenue rulings are published in the Internal Revenue Bulletin for the information of and guidance to taxpayers, IRS personnel and tax professionals. For example, a revenue ruling may hold that taxpayers can deduct certain automobile expenses.

Understanding IRS Guidance – A Brief Primer, IRS.GOV, https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer (last updated Sept. 24, 2020).

279. JOINT COMMITTEE ON TAXATION, *supra* note 278.

280. *See* INTERNAL REVENUE SERVS., INDEPENDENT CONTRACTOR OR EMPLOYEE? TRAINING MATERIALS, TRAINING NO. 3320-102, at 2-3 (Oct. 30, 1996) [hereinafter IRS, TRAINING MATERIALS], https://www.irs.gov/pub/irs-utl/emporind.pdf.

281. *Id.* (emphasis omitted).

282. *Id.*

283. *Id.*

is interested in the methods used to accomplish the work, which indicates employee status.

(5) **Hiring, Supervising, and Paying Assistants.** If the worker hires, supervises, or pays assistants pursuant to a contract in which the worker provides materials and labor and is only responsible for the result, this indicates independent contractor status.

(6) **Continuing Relationship.** When the relationship between the worker and the business is continuing, and where work is performed at frequently recurring (although potentially irregular) intervals, this suggests employee status.

(7) **Set Hours of Work.** If the worker is to perform work within set hours, that indicates control, which suggests employee status.

(8) **Full Time Required.** A requirement that the worker devote substantially full time to the business's business suggests employee status, while an independent contractor is free to work when and for whom he chooses.

(9) **Doing Work on Employer's Premises**. If the worker performs the work on the business's premises, that suggests employee status (especially if the work could be performed elsewhere). Work performed off the premises indicates some freedom from control.

(10) **Order or Sequence Set.** It suggests control, and thus employee status, if the worker must perform services in the order or sequence set designated by the business.

(11) **Oral or Written Reports.** A worker who must submit regular or written reports to the business suggests employee status.

(12) **Payment by Hour, Week, Month.** Payment at a set time, such as by the hour, week, or month suggests employee status, while payment by the job or on straight commission suggests independent contractor status.

(13) **Payment of Business and/or Traveling Expenses.** If the business pays the worker's business or traveling expenses, this suggests employee status.

(14) **Furnishing of Tools and Materials.** If the business furnishes significant tools, materials, and other equipment, that suggests employee status.

(15) **Significant investment.** The worker's investment in facilities he uses suggests independent contractor status.

(16) **Realization of Profit or Loss.** If the worker can realize a profit or suffer a loss as a result of his services, he is generally an independent contractor.

(17) **Working for More than One Firm at a Time.** If the worker performs more than de minimis services for multiple persons or firms at the same time, that suggests independent contractor status.

(18) **Making Service Available to General Public.** If the worker makes his services available to the general public on a regular and consistent basis, that suggests independent contractor status.

(19) **Right to Discharge.** If the business has the right to discharge the worker, that suggests employee status. An independent contractor cannot be terminated so long as he produces a result that meets contract specifications.

(20) **Right to Terminate**. A worker's right to end the relationship with the business at any time without incurring liability suggests employee status.[284]

In 1996, the IRS issued its most comprehensive explanation of the 20-Factor test when it published an IRS training manual to assist business representatives in making worker classification designations.[285] Although the materials caution that they were "designed specifically for training purposes only" and should not be cited as authority, the materials provide thorough guidance on the steps to determine worker classification.[286]

The 20 factors fall into three specific categories of evidence: behavioral control, financial control, and type of relationship.[287] In doing so, the IRS attempted to simplify and refine the test to make it more user-friendly.[288] Although the 20 factors remain valid, this simplification to three categories provides additional order and guidance to the relevant criteria, but it does not invalidate or change the 20-Factor test.[289]

Mirroring much of the language of the 1996 training manual, IRS's Publication 15-A provides guidance on the three categories and the criteria contained within them:

> 1. **Behavioral control**. The relevant inquiry for this category is whether the business has the right to control and direct how the worker completes the task for which the worker is hired. Relevant considerations include whether the business provides "instructions" and "training" to the worker.[290]

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284. Rev. Rul. 87-41, 1987-1 C.B. 296.

285. IRS, TRAINING MATERIALS, *supra* note 280, at i; *see also* Ernst & Young LLP, *Employers Have Questions on How to Proceed After New California Law Further Restricts Classifying Workers as Independent Contractors*, TAXNEWS.EY.COM (Oct. 23, 2019) [hereinafter *Employers Have Questions*], https://taxnews.ey.com/news/2019-1884-employers-have-questions-on-how-to-proceed-after-new-california-law-further-restricts-classifying-workers-as-independent-contractors (noting that "[t]he Training Guidelines remain the most comprehensive IRS description of the common-law factors for worker classification").

286. IRS, TRAINING MATERIALS, *supra* note 280, at cover page.

287. *Topic No. 762 Independent Contractor vs. Employee*, INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc762 (last updated Mar. 12, 2021).

288. *Id*.

289. Houston, *supra* note 277.

290. INTERNAL REVENUE SERV., PUBLICATION 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 7 (2020) [hereinafter IRS PUBLICATION 15-A], https://www.irs.gov/pub/irs-pdf/p15a.pdf.

Regarding instructions, Publication 15-A provides the following examples of the type of instructions a business may give about how to do the work that would demonstrate behavioral control: "When and where to do the work," "[w]hat tools or equipment to use," "[w]hat workers to hire or to assist with the work," "[w]here to purchase supplies and services," "[w]hat work must be performed by a specified individual[,]" and "[w]hat order or sequence to follow."[291] Further, a "suggestion" to a worker about how to perform the work does not amount to an "instruction," unless compliance with the suggestion is mandatory.[292]

As to training, the IRS notes that periodic or on-going training "about procedures to be followed and methods to be used" indicates control and is strong evidence of an employer-employee relationship.[293] However, not all training rises to this level, and "orientation or information sessions about the business's policies, new product line, or applicable statutes or government regulations," and voluntary unpaid training sessions do not suggest the requisite degree of control for an employment relationship.[294]

> 2. **Financial control.** This category considers whether the business has the right to control the business aspects of the worker's job, and it considers "[t]he extent to which the worker has unreimbursed business expenses," "[t]he extent of the worker's investment" in the tools or facilities he or she uses, "[t]he extent to which the worker makes his or her services available to the relevant market," "[h]ow the business pays the worker," and "[t]he extent to which the worker can realize a profit or loss."[295] This category does not consider whether the worker is economically dependent on the business, but rather focuses only on the control the business has on the financial aspect of the worker's activities.[296]
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> 3. **Type of relationship.** This category examines facts that illustrate how the parties perceive their relationship, and it indicates their intent concerning the business's control over the worker.[297] Specifically, it considers "[w]ritten contracts describing the relationships the parties intended to create," "[w]hether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay," "[t]he permanency of the relationship," and "[t]he extent to which services performed by the worker are a key aspect of the regular business of the company."[298]

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291. *Id.* at 7–8.
292. IRS, TRAINING MATERIALS, *supra* note 280, at 2-12.
293. *Id.* at 2-15.
294. *Id.*
295. IRS PUBLICATION 15-A, *supra* note 290, at 7–8 (emphasis omitted).
296. IRS, TRAINING MATERIALS, *supra* note 280, at 2-16.
297. *Id.* at 2-22.
298. IRS PUBLICATION 15-A, *supra* note 290, at 8 (emphasis omitted).

In providing additional guidance to its classification standards in the training manual, the IRS also notes that certain factors under the 20-Factor test are of "lesser importance" than others.[299] The IRS acknowledges that these factors were probably given more weight in the past, but that subsequent court decisions give them "little independent weight," due to the changing dynamics of the modern workplace.[300] Although these factors remain relevant in the analysis, they are less important than others, and this IRS guidance only helps to refine the 20-Factor test even further.[301] The factors include:

> 7. **Set Hours of Work.** Modern technology has broadened the options for communication, which has increased the ease of performing work outside normal business hours, and now many businesses are offering flexibility in work schedules to improve employee morale.[302] Thus, "[i]n today's world, flexible hours are consistent with either independent contractor or employee status."[303]
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> 8. **Full Time Required.** Given the nature of today's economy, the inquiry of whether the worker performs services on a part-time basis or works for more than one business is a neutral factor.[304] It is becoming increasingly common for businesses to hire part-time workers who may be categorized as employees or independent contractors, and independent contractors may work full-time for one business when contracts with other businesses are lacking.[305]
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> 9. **Doing Work on Employer's Premises.** Today's workforce is often mobile, and "[w]hether work is performed on the business's premises or at a location selected by the business often has no bearing on worker status."[306] It is relevant only to the extent that it "illustrates the business's right to direct and control how the work is performed."[307]
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> . . .
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> 17. **Working for More than One Firm at a Time.** Because many employees "moonlight" by working for a second employer, working for more than one firm no longer strongly points to an independent contractor designation.[308]

The three simplified categories, along with guidance on which factors are of lesser importance, prove helpful to business representatives in

299. IRS, TRAINING MATERIALS, *supra* note 280, at 2-29.
300. *Id.*
301. *Id.*
302. *Id.* at 2-30.
303. *Id.*
304. *Id.* at 2-29.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*

determining worker classification, as their inquiries apply to a broad spectrum of industries and make the classification determination less complicated.[309] The IRS notes that businesses must weigh the factors within the three categories in classifying workers, and that some factors may point to employee status while others point to independent contractor status, but the key is "to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination."[310] The IRS further notes that in weighing the evidence, the key issue is whether "evidence of control or autonomy predominates."[311] The training manual provides the following example of this weight for determination:

> You may, for example, find that the business requires the worker to be on site during normal business hours, but has no right to control other aspects of how the work is to be performed, that the worker has a substantial investment and unreimbursed expenses combined with a flat fee payment; and that contractual provisions clearly show the parties' intent that the worker be an independent contractor. In this case, you would logically conclude that the worker was an independent contractor despite the instructions about the hours and place of work.[312]

Businesses also have the benefit of seeking a determination from the IRS on whether the worker should be classified as an employee or an independent contractor.[313] The IRS Form SS-8 can be filed by either the business or the worker, and the IRS will review the facts provided on the form and issue a classification determination.[314] Form SS-8 provides a series of questions regarding the circumstances of the worker's employment, dividing the questions into the three categories: behavioral control, financial control, and relationship of the worker to the business.[315]

B. Many States Already Utilize the 20-Factor Test

Many states have already adopted the 20-Factor test for the purpose of classifying workers under specific state statutes. No fewer than nine states,

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309. *Employers Have Questions*, *supra* note 285 (noting that "[i]n the past, some taxpayers were critical of what was viewed as an overly mechanical attempt to apply the [20-Factor] test when many of the factors were not relevant to particular industries," and thus the IRS established the three categories of inquiry).

310. *Independent Contractor or Employee?*, *supra* note 275.

311. IRS, TRAINING MATERIALS, *supra* note 280, at 2-31.

312. *Id.*

313. *Independent Contractor or Employee?*, *supra* note 275.

314. *Id.*

315. INTERNAL REVENUE SERV., OMB NO. 1545-0004, DETERMINATION OF WORKER STATUS FOR PURPOSES OF FEDERAL EMPLOYMENT TAXES AND INCOME WITHHOLDING (2014), https://www.irs.gov/pub/irs-pdf/fss8.pdf.

including Tennessee, Kansas, Oklahoma, Arkansas, Virginia, Texas, Michigan, Missouri, and New Jersey utilize the test for purposes ranging from wage and hour issues, to unemployment compensation coverage, to pension and benefit coverage.[316]

For example, Tennessee expressly rejected the "strict" ABC test in favor of the 20-Factor test for its wage and hour claims.[317] Through Tennessee House Bill 539, the Tennessee legislature provides that an "employee," for purposes of wage and hour issues, "[m]eans an individual who performs services for an employer for wages under a contract [for] hire if the services performed by the individual qualify as an employer-employee relationship with the employer" under the 20-Factor test found in Internal Revenue Service Ruling 87-14.[318] Tennessee also adopted the 20-Factor test for its designation of an employee under the Tennessee Employment Security Law,[319] the Occupational Safety and Health Act of 1972,[320] and the Drug-Free Workplace Programs.[321]

Kansas has also implemented the 20-Factor test for wage and hour purposes.[322] In the 2014 Kansas Supreme Court case of *Craig v. FedEx Ground Package System, Inc.*, the court held that FedEx drivers were improperly labeled as independent contractors under the Kansas Wage Payment Act (KWPA).[323] The Kansas Supreme Court heard the matter as a certified question from the United States Court of Appeals for the Seventh Circuit, and it acknowledged that it had not previously identified a test for determining worker status under the KWPA.[324] The court ultimately held that "the 20–[F]actor test . . . is the tool to be used in Kansas to determine whether an employer/employee relationship exists under the KWPA. This test includes economic reality considerations, while maintaining the primary focus on an employer's right to control."[325]

Oklahoma and Arkansas similarly adopted the 20-Factor test for state wage and hour issues. In 2019, Oklahoma's House Bill 1095 solidified the adoption, providing that:

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316. *See supra* notes 274–93 (discussing the nine states that have adopted the 20-Factor test for various purposes).

317. Suellen Oswald & Adam L. Lounsbury, *Tennessee Adopts 20-Factor Test in Independent Contractor Analysis*, JACKSONLEWIS (June 14, 2019), https://www.jacksonlewis.com/publication/tennessee-adopts-20-factor-test-independent-contractor-analysis.

318. H.B. 539, 111th Gen. Assemb. (Tenn. 2019).

319. Sandra S. Benson & Timothy R. Koski, *Redefining the Employee-Employer Relationship: Will the New Law Simplify or Complicate the Worker (Mis)Classification Issue?*, 56 TENN. B.J. 1, 12–13 (Jan. 2020) (citing TENN. CODE ANN. § 50-7-207(b)(2)(B) (amended 2020)).

320. *Id.*

321. *Id.*

322. *See id.*

323. Craig v. FedEx Ground Package Sys., Inc., 335 P.3d 66, 71 (Kan. 2014).

324. *Id.* at 71–74.

325. *Id.* at 76.

> [S]ervices performed by an individual for wages shall be deemed to be employment subject to the Employment Security Act of 1980 if the services are performed by the individual in an employer-employee relationship with the employer using the 20-factor test used by the Internal Revenue Service . . . in Revenue Ruling 87-41 . . . ."[326]

The same year, Arkansas enacted the Empower Independent Contractors Act of 2019, adopting the 20-Factor test for not only wage and hour issues, but also taxation and workers' compensation issues.[327]

Several states also utilize the 20-Factor test in determining worker classification for unemployment insurance purposes. Virginia adopted the 20-Factor test in its Unemployment Compensation Act, noting that "the standard used by the Internal Revenue Service for [employee] determinations" governs coverage under the Act.[328] Texas also uses this standard for unemployment coverage issues governed by the Texas Workforce Commission, citing the three simplified categories of behavioral control, financial control, and type of relationship,[329] and reciting the twenty detailed factors in its guidance to employers.[330] Michigan similarly uses the 20-Factor test for unemployment insurance purposes,[331] as does Missouri.[332] While Missouri has not codified the IRS's language, its courts have expressly adopted the test when interpreting the relevant statutory language.[333] Missouri's unemployment statute provides that "[i]n determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied."[334] The Missouri Supreme Court and its court of appeals have affirmed use of the 20-Factor test as an appropriate method in applying the "common law of agency" to determine worker classification for unemployment compensation purposes.[335] Curiously,

326. H.B. 1095, 57th Leg., 1st Sess. (Okla. 2019).

327. H.B. 1850, 92d Gen. Assemb., Reg. Sess. (Ark. 2019) ("For purposes of this title, an employer or agency charged with determining the employment status of an individual shall use the [T]wenty-[F]actor test enumerated by the Internal Revenue Service in Rev. Rul. 87-41, 1987-1 C.B. 296, in making its determination . . . .").

328. VA. CODE ANN. § 60.2-212(C) (West 2020).

329. *Appendix D, Independent Contractor Test*, TEX. WORKFORCE COMM'N, https://www.twc.texas.gov/news/efte/appx_d_irs_ic_test.html (last visited May 12, 2021).

330. *Appendix E, TWC Independent Contractor Test*, TEX. WORKFORCE COMM'N, https://www.twc.texas.gov/news/efte/appx_e_twc_ic_test.html (last visited May 12, 2021).

331. *See Unemployment Insurance Agency Fact Sheet*, STATE OF MICH. (Oct. 2019), https://www.michigan.gov/documents/uia/116_-_Employee_Misclassification_5_15_11_358059_7.pdf.

332. *See* MO. REV. STAT. § 288.034.5 (2010).

333. *See* cases cited *infra* note 356.

334. MO. REV. STAT. § 288.034.5 (2010).

335. *See* Gateway Taxi Mgmt. v. Div. of Emp. Sec., 461 S.W.3d 830, 834 (Mo. 2015) (noting that in applying § 288.034.5, the relevant criteria to consider include "case law, [IRS] regulations and [IRS] letter rulings," including "the IRS's revenue ruling that creates 20 factors for determining employment status"); CPR Plus, LLC v. Div. of Emp. Sec., 572 S.W.3d 96, 101 (Mo. Ct. App. 2019) (noting that in *Gateway*, the "Missouri Supreme Court . . . approved [the IRS's] twenty factors for consideration in determining whether an entity is an employee or independent contractor").

however, Missouri has expressly codified use of the 20-Factor test for purposes of classifying taxicab drivers as employees or independent contractors for unemployment compensation purposes.[336]

Finally, New Jersey utilizes the 20-Factor test in determining eligibility under its Public Employees' Retirement System (PERS).[337] While New Jersey courts utilized this test long before it was codified, the New Jersey legislature amended the PERS in 2008 to expressly reference the IRS's criteria as the governing test.[338]

C. The IRS Produces More Consistent Results

An examination of worker classification cases reveals that the IRS test produces the most consistent results and allows business entities and their workers greater flexibility in establishing the working relationship they see fit. Although it is assumed that workers overwhelmingly desire the protections that an employee designation provides, that is simply not true for all workers.[339] Some prefer the flexibility and autonomy of working as an independent contractor.[340] The IRS test, with its specific and guided criteria, seeks to determine if the critical facts of the working relationship demonstrate the lack of employer control necessary for an independent contractor designation.[341] The IRS test does not mandate presumptions in favor of one designation over the other, and unlike the ABC test, the IRS test does not present roadblocks that interfere with the goals of the business entity and its contracted worker in how they carry out their business relationship.

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336. MO. REV. STAT. § 288.032.5 (2016).

> For purposes of this chapter, a taxicab driver shall not be considered to be an employee of the company that leases the taxicab to the driver or that provides dispatching or similar rider referral services unless the driver is shown to be an employee of that company by application of the Internal Revenue Service twenty-factor right-to-control test.

Id.

337. Cohen v. Bd. of Trs. of the Pub. Emps.' Ret. Sys., No. A-1219-16T4, 2019 WL 302896, at *2 (N.J. Super. Ct. App. Div. Jan. 24, 2019).

338. *Id.*; N.J. STAT. ANN. § 43:15A-7.2(b) (West 2018). The statute provides the following:

> A person who performs professional services for a political subdivision of this State or a board of education, or any agency, authority or instrumentality thereof, shall not be eligible, on the basis of performance of those professional services, for membership in the Public Employees' Retirement System, if the person meets the definition of independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code.

Id.

339. *See* Olson v. California, No. CV-19-10956-DMG (RAOx), 2020 WL 905572, at *3 (C.D. Cal. Feb. 10, 2020).

340. *Id.* (noting that the plaintiff Uber driver attested "that she intentionally [chose] to work as an independent contractor for the flexibility and autonomy, as well as to help stabilize her fluctuating income").

341. *See generally infra* text accompanying notes 346–54 (showing how the factors of the IRS test are applied to determine worker classification).

Classification cases involving cosmetologists provide a clear example of the efficacy of the IRS test and the problems with the strict, bright-line mandates of the ABC test.[342] It is widely known that cosmetologists often perform their work as independent contractors. It has become an industry practice for some professionals to rent a booth at a salon, pay rent, and operate a business independently.[343] Other business arrangements, however, are quite different, with the salon employing the cosmetologists and controlling many aspects of their work. These distinctive sets of facts rightly lead to contrasting classification results under the IRS test, but the ABC test would classify them all as employees, regardless of their factual differences.

For example, a group of cosmetologists were deemed independent contractors under the IRS test in *Cheryl A. Mayfield Therapy Center v. Commissioner*, when they received no set salary, but instead paid a weekly booth rent to the salon owner, set their own hours, and furnished their own supplies.[344] In coming to this conclusion, the court found that facts relating to factors 1, 7, 12, 13, 14, 15, and 16 pointed to independent contractor status.[345] The cosmetologists were provided minimal instructions under factor 1, and the salon did not tell them how to provide their services to clients.[346] Under factor 7, the workers set their own hours, and although they told the salon in advance which hours they planned to work, they could change those hours as they pleased.[347] Factor 12, involving method of payment, was significant to the court, as the court highlighted the requirement that the cosmetologists pay a weekly rent to the salon, and although the customers paid the salon directly for their services, and the salon then paid the cosmetologists on a weekly basis, the workers were paid on a straight commission basis with no minimum guaranteed level of payment.[348] Under factor 13, the salon did not pay the cosmetologists' business or travel expenses,[349] and under factor 14, the cosmetologists furnished their own supplies, "such as shampoo, conditioner, hair dye, combs, brushes, curling irons, and scissors."[350] The court recognized under factor 15 that

342. *See infra* text accompanying notes 346–76 (discussing cases involving cosmetologists and the application of the test).

343. This practice is so common that some states have codified this within their definition of independent contractor status. In Minnesota, for example, a cosmetologist or "barber" is statutorily deemed an independent contractor if the barber rents a booth chair for a "flat sum per week, month, or similar time basis," if the barber retains all customer payments for services, if the barber furnishes his or her own tools, if the salon does not have the right to control the means and manner of the barber's performance, and if the parties execute a written agreement designating the barber as an independent contractor. MINN. STAT. § 5224.0030(2) (1993).

344. Cheryl A. Mayfield Therapy Ctr. v. Comm'r, 100 T.C.M. (CCH) 376, *2 (2010).

345. *See id.* at *5–6.

346. *Id.* at *6.

347. *Id.*

348. *Id.* at *5–6.

349. *Id.* at *6.

350. *Id.* at *3. The court provided this information when articulating the case facts, but it failed to note it again when directly applying the IRS test later in the opinion. *See id.*

cosmetologists require significant investment to carry out their profession,[351] and pursuant to factor 16, the cosmetologists had the opportunity to realize a profit by working longer hours to provide services to clients, as well as the ability to suffer a loss by virtue of the fixed weekly booth rent.[352]

The court acknowledged that facts relating to factors 2, 3, 5, 9, and 18 supported employee status, in that the salon provided at least some informal training to new workers under factor 2, and the cosmetologists' services were clearly integrated into the salon's operations under factor 3.[353] Under factor 5, the salon provided assistants to book appointments and receive payments, and under factor 9, the cosmetologists worked on the salon's premises.[354] Finally, under factor 18, there was no showing that the cosmetologists made their services available to the general public apart from working at the salon.[355]

The court deemed the remaining IRS factors neutral or immaterial, and after weighing the relevant ones, it concluded that the cosmetologists' "autonomy" outweighed any "control" the salon had over them, and the cosmetologists were independent contractors.[356]

Under a very different set of facts, which showed a strong degree of employer control and a low level of financial risk, the court in *Barcelos v. United States* classified a group of cosmetologists as employees under the IRS test.[357] Different from the workers in the *Cheryl A. Mayfield* case, these cosmetologists paid a percentage of their gross receipts to the salon after ringing their sales up on a central cash register.[358] For this reason, and because the salon furnished specific supplies for the stylists, such as hair chemicals, the cosmetologists were never faced with the possibility "that their expenses would exceed their income."[359] The cosmetologists were also subject to employer control.[360] They performed all work on the employer's premises, and they were required to do so within the shop's designated business hours.[361] The cosmetologists were not at liberty to perform services for free, and one cosmetologist was terminated for failure to ring up a sale on the salon's cash register.[362] The salon had the ability to require the cosmetologists to work full-time to meet the demands of the salon, and it was at liberty to fire its cosmetologists, as it did on at least two occasions.[363]

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351. *Id.* at *7 n.8.
352. *Id.* at *6.
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.* at *7.
357. Barcelos v. United States, No. C-94 20222 PVT, 1995 WL 364309, *9 (N.D. Cal. June 12, 1995).
358. *Id.* at *3, *7.
359. *Id.* at *7.
360. *See id.* at *6–7.
361. *Id.* at *6.
362. *Id.*
363. *Id.* at *6, *8.

Under these facts, the court determined there was "ample evidence" that the cosmetologists were employees and not independent contractors.[364]

The factual differences between the *Cheryl A. Mayfield* and *Barcelos* cases led to opposite findings under the IRS test,[365] but these differences are irrelevant under the ABC test. As discussed earlier in this Article, the ABC test creates a rebuttable presumption of employee status that can only be overcome by showing: (1) "[The] worker is free from the control and direction of the [company that hired them while they perform their work,]" (2) "the worker [is] perform[ing] work that is outside the usual course of the hiring entity's business," and (3) "the worker is customarily engaged in an independently established trade, occupation, or business."[366] Because of prong two's requirement, any cosmetologist working for a salon could not be deemed an independent contractor, as the cosmetologist's services fall squarely within the salon's usual course of business.[367] Absent some specific exemption, even the facts of *Cheryl A. Mayfield*, in which the stylists paid a booth fee, set their own hours of work, and enjoyed professional autonomy in an independently run business,[368] would lead to an employee designation under the ABC test. This may run afoul of the parties' goals for the working relationship and fundamentally change the way contracted workers, such as cosmetologists, do business.

The same is true for workers of the platform economy. For example, drivers for companies like Uber, Lyft, and Postmates perform services intricately connected to the hiring entity's usual course of business.[369] In fact, in performing delivery services through a web-based app, these workers essentially *are* the business,[370] and such workers could never be deemed independent contractors under prong two of the ABC test absent specific carve-outs in the rule—such carve-outs are not always easy to come by.[371] Notably, when drafting AB5, the California legislature chose not to exempt

364. *Id.* at *9.

365. *See supra* notes 301–16, 318–26 and accompanying text (discussing the courts' findings in *Cheryl A. Mayfield* and *Barcelos*).

366. Dynamex Operations W. v. Super. Ct., 416 P.3d 1, 7 (Cal. 2018).

367. *See, e.g.*, Cheryl A. Mayfield Therapy Ctr. v. Comm'r, 100 T.C.M. (CCH) 376, *6 (2010) (finding that cosmetologists' "services were integrated into the spa's operations").

368. *Id.* at *5–7.

369. *See* Olson v. California, No. CV-19-10956-DMG (RAOx), 2020 WL 905572, at *5 (C.D. Cal. Feb. 10, 2020) (noting that Postmates is "an online marketplace . . . that connects local merchants, consumers and drivers to facilitate the purchase, fulfillment, and—when applicable—delivery of goods from merchants," and Uber connects local consumers with drivers for the purpose of providing rides or delivering food).

370. *See id.*

371. As discussed in Part IV.D of this Article, seeking such a carve-out may require extensive lobbying and expense. *See supra* Part IV.D (explaining the process that critics of the California proposal took).

the platform economy businesses,[372] and it took a vote to achieve an exemption for app-based drivers.[373]

The ramifications of the employee designation for the platform industry are great. As it stands, drivers for companies like Uber enjoy great flexibility in determining when and how often to work.[374] They set their own schedules and determine which locations they will serve.[375] A reclassification to employee status could threaten these freedoms in forcing the hiring entity to fundamentally restructure its business model. In California, for example, a finding of employee status under the ABC test would require the employer to furnish its employees with "basic rights and protections," to include workers' compensation coverage, unemployment benefits, paid sick leave, and paid family leave.[376] In a lawsuit challenging California's AB5 platform economy businesses (Uber and Postmates), which predated the California voters' decision on the matter, the federal district court acknowledged that "[i]f the ABC test is found to require the reclassification of their drivers [as employees], Uber and Postmates would . . . suffer significant harms associated with restructuring their businesses."[377] In that lawsuit, representatives from both Uber and Postmates attested that reclassification of their drivers to employee status would require "significant" and "radical" changes to their business models.[378] The companies would have to "decrease the number and availability of [their] drivers," and prices would increase, harming workers and consumers.[379]

Thus, states should remain cognizant of the sweeping consequences at stake in choosing a worker classification test. The IRS test presents the better alternative for the modern workforce, and specifically for the platform economy. Under the IRS test, courts would consider the critical facts underlying the working relationship in determining proper classification.[380] For app-based drivers working for companies like Uber and Lyft, the court would consider their designation based on facts centering on the three simplified categories of behavioral control, financial control, and the type of relationship the worker and the hiring business have instituted.[381] Using the 20-Factors Test for a detailed analysis, the court would consider facts surrounding the instructions and training the drivers receive, the longevity of

372. *See* Olson v. California, No. CV-19-10956-DMG (RAOx), 2020 WL 905572, at *5–6 (C.D. Cal. Feb. 10, 2020).

373. *California Proposition 22, supra* note 263.

374. *See* McGillis v. Dep't of Econ. Opportunity, 210 S.O.3d 220, 222 (Fla. Dist. Ct. App. 2017).

375. *Id.*

376. *Olson*, 2020 WL 905572, at *6 (quoting A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019)).

377. *Id.* at *14.

378. *Id.*

379. *Id.* at *16.

380. *See supra* Part V (explaining why the IRS test is the better test).

381. *See supra* text accompanying notes 287–98 (explaining application of the three simplified categories).

the relationship, the source of the tools and materials, and other facts that ultimately determine whether "evidence of control or autonomy predominates" the business relationship.[382] It should be up to the hiring entity and its contracted worker to determine the dynamics of the business relationship, and such freedom should not be removed from the marketplace, especially as the rise of the platform economy continues to advance and expand.

VI. CONCLUSION

The American workplace will continue to evolve. The platform economy will continue to grow. The ability to distinguish between employees and independent contractors will continue to carry consequences. Considering these facts, state legislatures and agencies should utilize the IRS worker classification test. The common law agency test, created in a different time and for a different purpose, does not address the problems of the modern workplace. The California experience established that the ABC test will not suffice. The IRS test accurately measures the characteristics of an employee.

382. IRS, TRAINING MATERIALS, *supra* note 280, at 2-31.