

# ARE AIRBNB HOSTS EMPLOYEES MISCLASSIFIED AS INDEPENDENT CONTRACTORS?

*Robert Sprague*\*

## INTRODUCTION

In response to the economic impacts arising from the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020.<sup>1</sup> One portion of the CARES Act provides “Pandemic Unemployment Assistance” (PUA) to self-employed workers who are not otherwise eligible for unemployment compensation.<sup>2</sup> It is generally assumed that this assistance was targeted to Uber drivers, Airbnb hosts, and other platform-based workers.<sup>3</sup> As noted by the *Washington Post*, without the PUA, “some workers for on-demand companies would have been unable to obtain such aid: That’s because these laborers—in the eyes of the law and the Silicon Valley tech giants that they serve—are not treated the same as traditional full-time employees and afforded similar help when they’re facing financial duress.”<sup>4</sup>

Many companies have long sought to classify their workers as self-employed independent contractors rather than as employees.<sup>5</sup> The battle over appropriate worker classification—employee vs. independent contractor—has become more protracted in recent years due to the rise of online platform-based business models that provide on-demand services, such as Uber and

---

\* J.D., M.B.A. Professor of Legal Studies in Business, University of Wyoming.

<sup>1</sup> Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 15 U.S.C.S. § 9001 (2020).

<sup>2</sup> *See id.* at § 9021(a)(3)(A)(ii)(II).

<sup>3</sup> *See, e.g.,* Tony Romm & Faiz Siddiqui, *Uber Drivers, Airbnb Hosts Could Soon Receive Unemployment Checks. Some Call It a “Bailout” for Big Tech.*, WASH. POST (Mar. 27, 2020 6:07 PM), <https://www.washingtonpost.com/technology/2020/03/27/airbnb-uber-lyft-unemployment/> [<https://perma.cc/7DJC-LQLH>] (“The expansion to the country’s social safety net . . . is set to put hundreds of dollars each week in the pockets of eligible Americans who no longer can transport passengers, deliver meals or rent out their homes as a primary source of income because they have been ordered to stay indoors.”).

<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g.,* NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111 (1944) (considering whether independent “newsboys” should be reclassified as employees); *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547 (2nd Cir. 1914) (considering whether independent coal miners should be reclassified as employees); James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1015 (1941) (“As the financial burdens imposed on the employer grow heavier, there is a temptation to avoid them by fashioning contracts transforming employer-employee relationships by legal guises into those of . . . independent contractor.”) (footnotes omitted).

Lyft (ride hailing), Grubhub and Postmates (home food deliveries), and TaskRabbit (home chores).<sup>6</sup> Missing from these classification contests are Airbnb hosts (those who rent out a room, apartment, or house for short-term stays).<sup>7</sup> To date, no one seems to question that Airbnb hosts are self-employed independent contractors. Now that Congress has effectively lumped together Uber drivers and Airbnb hosts, perhaps now is the time to consider whether Airbnb hosts—like Uber and Lyft drivers and other on-demand workers—are actually employees misclassified as independent contractors.

This Article first briefly reviews the more “traditional” tests used to determine whether workers have been properly classified as independent contractors, particularly applied to twenty-first century platform-based businesses. This article then introduces a different classification test—the “ABC Test”—recently adopted by case law<sup>8</sup> and statute<sup>9</sup> in California. Citing to the State of California’s lawsuit against Uber and Lyft that seeks to enforce California’s ABC Test by forcing Uber and Lyft to classify their drivers as employees rather than independent contractors,<sup>10</sup> this Article compares the elements of the ABC Test as alleged against Uber and Lyft to consider applications of these standards against Airbnb hosts. A California Superior Court has ruled that Uber and Lyft are in violation of California’s ABC Test by continuing to classify their drivers as independent contractors instead of employees.<sup>11</sup> The California Superior Court’s and other courts’ similar holdings are used to analyze similarities between Uber and Lyft drivers and Airbnb hosts. This Article argues that application of the ABC Test to Airbnb hosts could lead to the conclusion they are actually misclassified employees.

---

<sup>6</sup> See Luke Darby, *Uber and Lyft Just Lost a Big Fight in a Blow to the Gig Economy*, GQ (Sept. 11, 2019), <https://www.gq.com/story/california-uber-workers-employees> [<https://perma.cc/AW2S-BZFU>].

<sup>7</sup> See, e.g., SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER,” THE HAMILTON PROJECT (2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf) [<https://perma.cc/YHR5-8ZDD>] (defining the online gig economy as involving “the use of an Internet-based app to match customers to workers who perform discrete *personal tasks*, such as driving a passenger from point A to point B, or delivering a meal to a customer’s house[.]” excluding intermediaries that facilitate the sale of goods and impersonal services to customers, such as Etsy.com, where individuals sell handmade or vintage goods, and Airbnb) (alteration in original).

<sup>8</sup> *Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

<sup>9</sup> CAL. LAB. CODE § 2750.3(a)(1) (Deering 2020).

<sup>10</sup> Complaint for Injunctive Relief, *California v. Uber Techs., Inc.*, (Cal. Super. Ct. May 5, 2020) No. CGC-20-584402.

<sup>11</sup> Order on People’s Motion for Preliminary Injunction and Related Motions at 32–33, *California v. Uber Techs., Inc.*, (Cal. Super. Ct. Aug. 10) No. CGC-20-584402, *aff’d*, *California v. Uber Techs., Inc.*, (Cal. Ct. App. Oct. 22, 2020) Nos. A160701, A160706.

## I. WORKER CLASSIFICATION IN THE TWENTY-FIRST CENTURY

The twenty-first century has seen a growth in the so-called “sharing economy,” in which individuals use their own personal or real property or skills to provide a service to third parties—such as giving someone a ride (e.g., Uber or Lyft), or letting them sleep in a spare bedroom (e.g., Airbnb), or performing a chore (e.g., TaskRabbit).<sup>12</sup> Platform-based businesses epitomized by Uber and Airbnb serve as online intermediaries to connect—for a fee—those seeking services with those offering the services (e.g., Uber connecting passengers with drivers and Airbnb connecting travelers with hosts offering accommodations).<sup>13</sup> This arrangement is also frequently referred to as the “gig economy,” denoting sporadic, often part-time work with no underlying security.<sup>14</sup> In particular, platform-based businesses generally rely on independent contractors rather than employees to deliver goods and services, leaving those workers vulnerable.<sup>15</sup>

Whether a worker is classified as an employee or an independent contractor has significant ramifications for both the worker and the employer. Employees—and *not* independent contractors—are generally entitled to protections under the National Labor Relations Act, the Fair Labor Standards Act, the Family and Medical Leave Act, federal anti-discrimination laws such as Title VII of the Civil Rights Act and the Americans with Disabilities Act, as well as workers’ and unemployment compensation schemes.<sup>16</sup> Meanwhile,

---

<sup>12</sup> See Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 990 (2016) (“In this so-called ‘sharing economy,’ startups such as Uber, Airbnb, and TaskRabbit enable consumers to summon rides, rent accommodations, or hire services from peers via personal computer or a mobile app, in exchange for payment.”).

<sup>13</sup> See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (2016) (describing platform companies as online intermediaries “between buyers and sellers of goods and services . . . enhanced with the modern power afforded by cloud computing, algorithmic matching, pervasive wireless Internet access, scaled user-networks, and near-universal customer ownership of smartphones and tablets”); Laurie E. Leader, *Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 96, 97 (2019) (“The gig economy has also emerged, where workers are labeled as independent contractors and where the ‘hiring party’ provides platforms for work rather than work itself.”).

<sup>14</sup> See, e.g., Arne L. Kalleberg & Michael Dunn, *Good Jobs, Bad Jobs in the Gig Economy*, 20 PERSP. ON WORK 10, 10 (2016) (noting “skeptics argue that gig jobs leave workers open to exploitation and low wages as employers compete in a race to the bottom”).

<sup>15</sup> See Steven Vallas & Juliet B. Schor, *What Do Platforms Do? Understanding the Gig Economy*, 46 ANN. REV. SOC. 16.1, 16.8 (2020) (“Bereft of long-standing protections such as a minimum wage, safety and health regulation, retirement income, health insurance, and worker compensation, platform workers are forced to assume forms and levels of risk that were previously shouldered by employers and the state. . . . [P]recarity is often an apt descriptor of the conditions that platform workers confront as they struggle to keep their balance under conditions of rising uncertainty.”).

<sup>16</sup> 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, 54–55 (2015) (summarizing workplace protections afforded to employees); Shu-Yi Oei & Diane M. Ring, *Tax*

many businesses regard employees as a legal and financial burden,<sup>17</sup> and many platform-based businesses that rely on independent contractors to provide their services have been at the center of the employee–independent contractor classification debate throughout the twenty-first century.<sup>18</sup> Over the years, courts, legislatures, and regulatory agencies have fashioned different classification tests to determine whether workers have been properly classified as independent contractors with varying levels of success.<sup>19</sup> Thus, there is no single, clear-cut legal mechanism to determine whether a worker has been properly classified as an employee or an independent contractor.<sup>20</sup>

### A. Common Law “Control” Test

Labor and employment statutes rarely clearly define “employee.”<sup>21</sup> For this reason, courts usually default to the common law, agency-based “right to

*Law’s Workplace Shift*, 100 B. U. L. REV. 651, 667–68 (2020) (summarizing same); 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, 254 (2006) (summarizing same).

<sup>17</sup> See Deknatel & Hoff-Downing, *supra* note 16, at 55 (noting that businesses can avoid employee-related liabilities and tax and benefit contribution requirements by misclassifying workers as independent contractors); Wolfe, *supra* note 5, at 1015.

<sup>18</sup> See, e.g., Razak v. Uber Techs., Inc., 951 F.3d 137 (3d Cir. 2020); Islam v. Cuomo, No. 20-CV-2328 (LDH), 2020 U.S. Dist. LEXIS 133082, at \*1 (E.D. N.Y. July 28, 2020); Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071 (N.D. Cal. 2018); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015); O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015); Albert v. Postmates Inc., No. 18-CV-07592-JCS, 2019 U.S. Dist. LEXIS 35239, at \*1 (N.D. Cal. Mar. 5, 2019); Colopy v. Uber Techs. Inc., No. 19-cv-06462-EMC, 2019 U.S. Dist. LEXIS 216020, at \*1 (N.D. Cal. Dec. 16, 2019); Matter of Vega, 149 N.E.3d 401 (N.Y. 2020); Lowman v. Unemployment Comp. Bd. of Review, No. 41 EAP 2018, 2020 WL 4250088 (Pa. July 24, 2020); Complaint for Injunctive Relief, California v. Uber Techs., Inc., (Cal. Super. Ct. May 5, 2020) No. CGC-20-584402. Platform-based businesses are not the only business models that rely on independent contractors and have been subject to misclassification claims. See, e.g., Jammal v. American Family Ins. Co., 914 F.3d 449 (6th Cir. 2019) (classifying insurance agents); Hart v. Rick’s Cabaret Int’l, Inc., 967 F. Supp. 2d 901 (S.D. N.Y. 2013) (classifying exotic dancers); State *ex rel.* Indus. Comm’n. v. Sky Down Skydiving, LLC, 462 P.3d 92 (Idaho 2020) (classifying tandem skydiving instructors).

<sup>19</sup> See, e.g., Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016) (“For over 100 years, America has classified workers into these two categories [independent contractor or employee], yet the law continuously fails to do so in a uniform, predictable, and purposeful way.”).

<sup>20</sup> *Id.*

<sup>21</sup> 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, 296 (2001) (“Employment laws . . . [A]re frequently baffling in defining who is an ‘employee’ or what constitutes ‘employment.’”).

control” multi-factor test.<sup>22</sup> Although it is a multi-factor test,<sup>23</sup> as its moniker implies, the hiring party’s (employer’s) right to control the worker is the key factor—the more control exercised over the work, the more likely the worker should be properly classified as an employee. In contrast, the more the worker controls the manner and means of the work performed, the more likely the worker should be classified as an independent contractor.<sup>24</sup> As a result, worker classification is heavily fact-dependent.<sup>25</sup>

### B. “Economic Realities” Test

A variation of the right to control test is the “economic realities” test, which is applied primarily in Fair Labor Standards Act (FLSA) cases.<sup>26</sup> “These cases interpret the ‘suffer or permit to work’ definition of ‘employ’ in the FLSA as intend[ing] to treat as employees those workers who, as a matter of economic reality, are economically dependent upon the hiring business, rather than realistically being in business for themselves[.]”<sup>27</sup> and

<sup>22</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989) (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992); 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, 7 (2018) (“The right-to-control test is the predominant analysis applied when classifying workers.”).

<sup>23</sup> See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

<sup>24</sup> See *Darden*, 503 U.S. at 323; *Reid*, 490 U.S. at 751; *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1083 (N.D. Cal. 2018) (“Grubhub’s right to control work details is the *most important or most significant* consideration. That is, its right to control the manner and means of accomplishing the result desired.”) (internal quotation marks omitted) (citations omitted); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1148–49 (N.D. Cal. 2015) (“[T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”) (internal quotation marks omitted); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1075 (N.D. Cal. 2015) (“[T]he ‘principal’ question is whether the person [or company] to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”) (internal quotation marks omitted) (alterations omitted); Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 N.E. U. L.J. 311, 319 (2014) (“[W]hile other factors . . . might be considered in some tests, the hiring party’s control over the manner of work is still typically a significant, perhaps the most important, factor.”); Carlson, *supra* note 21, at 344 (“[C]ourts have frequently looked to other factors beyond control to expand their search for evidence of employee status. Unfortunately, any of the additional factors courts have listed as evidence of employee status are, in reality, additional aspects of control, or they present the same problems as the control factor.”).

<sup>25</sup> See Charlotte S. Alexander & Mohammad Javad Feizollahi, *Decisional Shortcuts and Selection Effects: An Empirical Study of Ten Years of U.S. District Courts’ Employee Misclassification Decisions* 6 (Apr. 16, 2019) (unpublished manuscript) (on file with author).

<sup>26</sup> See *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 30 n.20 (Cal. 2018).

<sup>27</sup> *Id.* (citing 29 U.S.C. § 203(g) (2016)).

thus deserve protection by the FLSA.<sup>28</sup> Five factors are considered: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business.<sup>29</sup>

The economic realities test considers both an employer's control and the relationship of economic dependence between a worker and the employer.<sup>30</sup> Consequently, the more a worker exerts significant control over meaningful aspects of the services performed, the more the worker is likely to be considered an independent contractor.<sup>31</sup> Richard Carlson argues that control is still the dominant concern in both the common law control and economic realities tests.<sup>32</sup>

### C. IRS Test

The IRS uses a twenty-factor test focusing on behavioral, financial, and relational factors to determine whether a worker is an employee or an independent contractor.<sup>33</sup> Shu-Yi Oei and Diane Ring state that the "twenty factors are actually a distillation of years of common law and reflect the adoption of the common law control test for federal employment tax purposes (and the rejection of the economic realities test)."<sup>34</sup> In addition, the IRS test does not include any presumption in favor of either employee or independent

---

<sup>28</sup> See *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311–12 (5th Cir. 1976).

<sup>29</sup> See *Dynamex*, 416 P.3d at 30, n.20; *Usery*, 527 F.2d at 1311. See also Alexander & Feizollahi, *supra* note 25, at 5 (adding the worker's employment of other workers as an additional element under factor 2) (citing *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006)).

<sup>30</sup> See, e.g., *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 143 (3d Cir. 2020) ("[C]ourts should examine the circumstances of the whole activity, determining whether, as a matter of economic reality, the individuals are dependent upon the business to which they render service.") (internal quotation marks omitted).

<sup>31</sup> See *Usery*, 527 F.2d at 1311.

<sup>32</sup> Carlson, *supra* note 21, at 314 ("Both have control and domination as their central concern; the former [control test] purporting to focus on control over the worker's performance of services for the employer as a matter of contractual right, and the latter [economic realities test] purporting to look at an employer's sources of power that give it true, if not contractually specified, control."). But see Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 953–54 (2017) (reporting empirical data indicating that in cases in which the parties had a written contract specifying the plaintiff was an independent contractor, courts were more likely to rule the plaintiff was properly classified as an independent contractor, and to point to the contract itself as definitive; applied to Title VII discrimination cases); Alexander & Feizollahi, *supra* note 25, at 25 (reporting similar results; suggesting the presence of a written contract specifying the worker is an independent contractors is used by courts as a decisional shortcut to bypass the more difficult multi-factor decisional analysis).

<sup>33</sup> See Rev. Rul. 87-41, 1987-1 C.B. 296; Oei & Ring, *supra* note 16, at 683.

<sup>34</sup> Oei & Ring, *supra* note 16, at 684.

contractor status.<sup>35</sup> As with the other classification tests, the IRS test still focuses on control.<sup>36</sup>

*D. Additional Classification Schemes: “Marketplace Contractor” Statutes and the NEW GIG Act*

At least seven states have enacted “Marketplace Contractor” statutes that effectively codify independent contractor status for platform-based service providers.<sup>37</sup> These statutes specify that service providers are independent contractors when they provide services through an app-based platform that has no physical location, as long as their contract with the platform designates them as such.<sup>38</sup>

In early 2019, Representative Tom Rice (R-SC) introduced the New Economy Works to Guarantee Independence and Growth (NEW GIG) Act of 2019.<sup>39</sup> This bill would amend the Internal Revenue Code to create a presumption of independent contractor status for service providers who, *inter alia*, incur deductible business expenses, are not paid by the hour, provide services primarily using equipment they supply, and whose contract with the payor essentially specifies that the service provider is an independent contractor.<sup>40</sup>

Both the state statutes and proposed federal legislation prescribe independent contractor status particularly when the contract specifies such a relationship.<sup>41</sup> Charlotte Alexander has warned that these may be sham

<sup>35</sup> *Id.* In contrast, the ABC Test starts with a presumption that a worker is an employee (and not an independent contractor) unless all three of its elements are met. *See infra*, text accompanying note 53.

<sup>36</sup> Rev. Rul. 87-41, 1987-1 C.B. 296, at \*4 (“[G]enerally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.”); *see also* Oei & Ring, *supra* note 16, at 684 (“On balance, a worker is typically classified as an independent contractor for tax law purposes if the person for whom the work is performed controls only the results of the work and not the details of its execution.”).

<sup>37</sup> ARIZ. REV. STAT. ANN. §§ 23-1601-1604 (2016); FLA. STAT. ANN. §§ 451.01–.02 (West 2018); IND. CODE ANN. § 22-1-6-3 (West 2018); IOWA CODE ANN. §§ 93.1–.2 (West 2018); KY. REV. STAT. ANN. § 336.137 (West 2018); TENN. CODE ANN. §§ 50-8-101–103 (West 2018); UTAH CODE ANN. §§ 34-53-101–102, 201 (West 2018). In addition, the Texas Workforce Commission has adopted the marketplace contractor definitions for purposes of regulating unemployment compensation. 40 TEX. ADMIN. CODE § 815.134 (2019).

<sup>38</sup> *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, 746–48 (2020).

<sup>39</sup> NEW GIG Act of 2019, H.R. 1625, 116th Cong. (2019). Senator John Thune (R-SD) simultaneously introduced an identical bill in the NEW GIG Act of 2019, S. 700, 116th Cong. (2019).

<sup>40</sup> *See supra* notes 33–36 and accompanying text.

<sup>41</sup> *See supra* notes 37, 39 and accompanying text.

contracts—“workers may sign them not because they intend to create an independent contractor relationship, but because they fear losing their job if they refuse.”<sup>42</sup>

### *E. The Classification Quagmire*

Unfortunately, application of the various multi-factor tests described above has resulted in more uncertainty than clarity as to the proper classification of platform-based service providers in particular.<sup>43</sup> They provide a framework “remarkably lacking in structure, as every formulation of the legal distinction between employees and independent contractors essentially boils down to a totality of the circumstances analysis.”<sup>44</sup> As noted above, the common law, economic realities, and IRS tests rely heavily on the amount of control exercised by either the employer or the worker over the details of the work to be performed.<sup>45</sup> As noted by Richard Carlson, courts generally find that employers control the *details* of an employee’s work, but control only the *results* of an independent contractor’s work.<sup>46</sup> However, this distinction can be illusory, Carlson argues, particularly in light of the growing diversity of skills and work methods of the industrial and post-industrial world.<sup>47</sup> “For modern employment law purposes, control is an indistinct cloud that may or may not cross a vague line set arbitrarily by a judge or agency as the boundary of employee status.”<sup>48</sup>

---

<sup>42</sup> Alexander, *supra* note 33, at 954; *see also* *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 39 (Cal. 2018) (“[A] business cannot unilaterally determine a worker’s status simply by . . . requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor.”).

<sup>43</sup> *See, e.g., Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (“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.”); Diane M. Ring, *Silos and First Movers in the Sharing Economy Debates*, 13 LAW & ETHICS HUM. RTS. 61, 65–66 (2019) (“Historically, worker classification has been a messy task, which is not surprising given that the answer turns on the application of a multi-factor test. Against the backdrop of this longstanding challenge in worker classification, the advent of the sharing economy introduced a new level of ambiguity into the classification and treatment of workers.”); Blake E. Stafford, *Riding the Line Between “Employee” and “Independent” Contractor in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1232 (2016) (noting that given the number of factors that can be examined, courts have reached conflicting results while purporting to use the same test).

<sup>44</sup> Alexander & Feizollahi, *supra* note 25.

<sup>45</sup> *See also infra*, Parts II.A & 0.0 for a further discussion of the control element.

<sup>46</sup> *See* Carlson, *supra* note 21, at 339 (emphasis added).

<sup>47</sup> *See id.* at 339–40; *see also id.* at 340 (asking how control is measured, as well as “how much control is enough to create an employer/employee relationship”).

<sup>48</sup> *Id.* at 340.



Misclassification has proven an economical and relatively low-risk strategy for companies in an environment of vague legal standards and lax enforcement,<sup>49</sup> but that may be changing.

## II. THE ABC CLASSIFICATION TEST

The most radical departure from these various classification tests is the so-called “ABC Test.” Under the ABC Test—exemplified by California’s recently enacted version—a worker is *presumed* to be an employee unless *all three* of the following conditions are met:

- A. The person 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.
- B. The person performs work that is outside the usual course of the hiring entity’s business.
- C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.<sup>50</sup>

Sixteen states and two territories—in addition to California—have adopted the ABC Test,<sup>51</sup> while five states have adopted only Parts A and C of the ABC Test.<sup>52</sup>

Importantly, under the ABC Test, a worker is presumed to be an employee and cannot be properly classified as an independent contractor unless all of the above elements are satisfied.<sup>53</sup> Although the first element of

<sup>49</sup> Alexander, *supra* note 32, at 912.

<sup>50</sup> CAL. LAB. CODE § 2750.3(a)(1) (Deering 2020) (emphasis added).

<sup>51</sup> ALASKA STAT. ANN. § 23.20.525(a)(8)(A)–(C) (West 2009); CONN. GEN. STAT. ANN. § 31-222(a)(B)(ii) (West 2017); DEL. CODE ANN. tit. 19, § 3302(10)(k)(i)–(iii) (West 2019); HAW. REV. STAT. ANN. § 383-6 (West 1984); 820 ILL. COMP. STAT. ANN. 185/10(b)(1)–(4) (West 2008); IND. CODE ANN. § 22-4-8-1(b) (West 2006); LA. STAT. ANN. § 23:1472(12)(E)(I)–(III) (2014); MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1)–(3) (West 2004); NEB. REV. STAT. ANN. § 48-604(5)(a)–(c) (West 2018); NEV. REV. STAT. ANN. § 612.085 (West 1993); N.H. REV. STAT. ANN. § 282-A:9(III)(a)–(c) (2011); N.J. STAT. ANN. § 43:21-19(i)(6)(A)–(C) (West 2017); N.M. STAT. ANN. § 51-1-42(F)(5)(a)–(c) (West 2015); P.R. LAWS ANN. tit. 11, § 202(j)(5)(A)–(C) (1995); VT. STAT. ANN. tit. 21, § 1301(6)(B)(i)–(iii) (West 2014); V.I. CODE ANN. tit. 24, § 302(r)(5)(A)–(C) 2009; WASH. REV. CODE ANN. § 50.04.140(1)(a)–(c) (West 1991); W. VA. CODE ANN. § 21A-1A-16(7)(A)–(C) (West 1997).

<sup>52</sup> See COLO. REV. STAT. ANN. § 8-70-115(1)(b) (West 2016); IDAHO CODE ANN. § 72-1316(4)(a)–(b) (West 2008); 43 PA. STAT. AND CONS. STAT. ANN. § 753(1)(2)(B) (West 2013); S.D. CODIFIED LAWS § 61-1-11 (2011); UTAH CODE ANN. § 35A-4-204(3)(a)–(b) (West 2006).

<sup>53</sup> See, e.g., *Athol Daily News v. Bd. of Div. of Emp’t & Training*, 786 N.E.2d 365, 369–70 (Mass. 2003) (applying Massachusetts’s ABC test) (“The employer bears the burden of proof, and, because the conditions are conjunctive, its failure to demonstrate any one of the criteria set forth in subsections [A, B, or C], suffices to establish that the services in question constitute ‘employment . . . .’”).

the ABC Test relates to control, it is less significant than in other tests because if either part B or C is not established, the worker will be classified as an employee regardless of the amount of control (or lack thereof) exercised over the work to be performed.<sup>54</sup>

The ABC Test could potentially have a substantial impact on employee-independent contractor classification for the platform-based business model, particularly in California.<sup>55</sup> California's ABC Test is a codification (enacted in 2019 through A.B. [Assembly Bill] 5) of the state's Supreme Court adoption of the test in *Dynamex Operations W., Inc. v. Superior Court*.<sup>56</sup> After *Dynamex* and the passage of A.B. 5, California courts immediately began re-evaluating employee-independent contractor classification for platform-based businesses.<sup>57</sup> It is arguable that Uber (and other platform-based businesses) may consider this development an existential threat.<sup>58</sup> While A.B. 5 became effective on January 1, 2020, on January 8, 2020, Uber, Postmates, and two of their respective drivers sought to enjoin implementation of the new law on the basis that it violates the U.S. and

<sup>54</sup> See, e.g., Kirby of Norwich v. Adm'r, Unemployment Comp. Act, 176 A.3d 1180, 1186 (Conn. 2018) ("Because this statutory provision is in the conjunctive, unless the party claiming the exception to the rule that service is employment shows that all three prongs of the test have been met, an employment relationship will be found.") (internal quotation marks omitted); Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 593 A.2d 1177, 1185 (N.J. 1991) ("[F]ailure to satisfy any one of the three criteria results in an 'employment' classification.").

<sup>55</sup> See, e.g., *Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services: Hearing on A.B. 5 Before the Pub. Util. Comm'n*, 2020 Sess. 4-5 (Cal. 2020) (concluding that Transportation Network Company (TNC) drivers, e.g., Uber and Lyft drivers, are presumed to be employees).

<sup>56</sup> *Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

<sup>57</sup> See, e.g., *Rogers v. Lyft, Inc.*, No. 20-cv-01938-VC, 2020 WL 1684151, at \*2 n.1 (N.D. Cal. Apr. 7, 2020) ("[T]he California Legislature has now spoken . . . and it has decided that workers like those who drive for Lyft must be classified as employees."); *O'Connor v. Uber Technologies, Inc.*, No. 13-cv-03826-EMC, 2019 U.S. Dist. LEXIS 54608, at \*27 (N.D. Cal. Mar. 29, 2019) ("In the wake of *Dynamex*, Uber bears a hefty burden to establish that its drivers are not employees, since they are presumptively considered employees and Uber can only overcome that presumption by satisfying all three of the 'ABC' conditions."); *Albert v. Postmates Inc.*, No. 18-cv-07592-JCS, 2019 U.S. Dist. LEXIS 35239, at \*15 (N.D. Cal. Mar. 5, 2019) (finding sufficient allegations "to support a plausible inference" of willful misclassification where plaintiff alleged that defendant held "itself out to the public as a delivery service" and plaintiff performed services within defendant's "usual course of business as a delivery service"); *Colopy v. Uber Techs. Inc.*, No. 19-cv-06462-EMC, 2019 U.S. Dist. LEXIS 216020, at \*19 (N.D. Cal. Dec. 16, 2019) (concluding plaintiff had made a plausible claim that any misclassification by Uber is willful in a complaint that alleged Uber was a specific target of A.B. 5) (citing *Albert v. Postmates, Inc.*); see also Leader, *supra* note 13, at 120 (asserting that under parts A and B, Uber drivers would be classified as employees).

<sup>58</sup> See, e.g., Uber Techs., Inc. Registration Statement, Amend. 1 (Form S-1), at 35 (Apr. 26, 2019), <https://www.sec.gov/Archives/edgar/data/1543151/000119312519120759/d647752ds1a.htm> [<https://perma.cc/VSD5-UXY3>]. ("[R]eclassification [of our drivers from independent contractors to employees] would require us to fundamentally change our business model, and consequently have an adverse effect on our business and financial condition.").

California Constitutions' Equal Protection, Due Process, and Contract Clauses.<sup>59</sup> The District Court for the Central District of California denied the plaintiffs' request.<sup>60</sup> Meanwhile, Uber, Lyft, DoorDash, Postmates, and Instacart pooled \$110 million to successfully place Proposition 22 on California's November 2020 ballot, which would exempt their businesses from A.B. 5.<sup>61</sup>

On May 5, 2020, the State of California (along with the city attorneys for Los Angeles, San Diego, and San Francisco) sued Uber and Lyft, alleging that their misclassification of drivers as independent contractors constituted an unlawful and unfair business practice in violation of A.B. 5.<sup>62</sup> The Complaint contains detailed allegations of how Uber and Lyft fail to meet all three elements of the ABC Test.<sup>63</sup>

#### *A. Part A: Control*

The State of California's Complaint lists twenty-six allegations of how Uber and Lyft control and direct their drivers' services, such as:

- determining what drivers are eligible to provide ride-hailing services on their Apps and the ability to change their driver standards in their discretion;<sup>64</sup>
- dictating the types of cars their drivers may use on their Apps, the standards their drivers' vehicles must meet, and the discretion to change their vehicle standards;<sup>65</sup>

<sup>59</sup> *Olson v. California*, No. CV 19-10956-DMG (RAOx), 2020 U.S. Dist. LEXIS 34710, at \*8 (C.D. Cal. Feb. 10, 2020).

<sup>60</sup> *Id.* at \*46.

<sup>61</sup> Dara Kerr, *Uber, Lyft, DoorDash's Gig Worker Ballot Initiative Heads to Voters in November*, CNET (Feb. 27, 2020, 5:13 PM), <https://www.cnet.com/news/uber-lyft-doordashs-gig-worker-ballot-initiative-heads-to-voters-in-november/> [<https://perma.cc/56FT-D9TK>]. In July 2020, Uber announced plans to purchase Postmates. See Heather Haddon, *Uber to Buy Postmates for \$2.65 Billion in Stock*, WALL ST. J. (July 6, 2020, 5:24 PM), <https://www.wsj.com/articles/uber-to-buy-postmates-for-2-65-billion-in-stock-11594038727> [<https://perma.cc/QPC7-PB3K>].

<sup>62</sup> Complaint for Injunctive Relief at 3, *California v. Uber Techs., Inc.*, (Cal. Super. Ct. May 5, 2020) No. CGC-20-584402. On July 10, 2020, the Massachusetts Attorney General filed a similar complaint for injunctive relief against Uber and Lyft to stop allegedly violating that state's ABC Test. Complaint for Injunctive Relief at 16–17, *Massachusetts v. Uber Techs., Inc.* (Mass. Super. Ct. July 10, 2020). This article will limit its analysis to California's complaint for injunctive relief.

<sup>63</sup> Complaint for Injunctive Relief at 3–5, *California*, No. CGC-20-584402.

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Id.*

- retaining the right to terminate or pause a driver’s tenure at any time in accordance with terms, conditions, and policies they set in their discretion;<sup>66</sup>
- setting the fares that passengers pay for rides received through their Apps;<sup>67</sup>
- collecting fare payments directly from passengers;<sup>68</sup>
- setting the amount of compensation paid to drivers for providing ride-hailing services to passengers on their Apps;<sup>69</sup>
- handling invoicing, claim and fare reconciliation, and resolution of complaints that arise from their drivers and passengers;<sup>70</sup>
- not allowing drivers to choose their routes;<sup>71</sup>
- controlling the dispatch of individual passengers to individual drivers through their Apps;<sup>72</sup>
- drivers and passengers do not freely negotiate over the terms of an on-demand ride—instead, they are selectively steered to one another through the centralized direction of the Apps;<sup>73</sup>
- the Apps hide from passengers key information about drivers’ experience and vehicles, limiting drivers’ ability to differentiate themselves and increase their earnings in the way a true independent contractor or entrepreneur typically would;<sup>74</sup>
- using their Apps to constantly monitor and control their drivers’ behavior while their drivers are logged into their Apps, including the driver’s trip status at every key step of the on-demand ride: (1) acceptance of the passenger’s ride request, (2) arrival to the pick-up location of the passenger, (3) start of the trip, and (4) end of the trip;<sup>75</sup>
- specifying detailed rules for drivers to follow to create a uniform ride experience from which each Defendant derives its brand recognition, reputation, and value;<sup>76</sup>
- retaining the right to suspend or terminate their drivers, or to cease dispatching ride requests to their drivers through their Apps at any time if their drivers behave in a way they deem inappropriate or in violation

---

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

of a mandated rule or standard, such as canceling too many rides, not maintaining sufficiently high passenger satisfaction ratings, or taking trip routes deemed inefficient;<sup>77</sup>

- monitoring—and ultimately controlling—drivers through feedback solicited from passengers on every ride via a rating system used to assess their drivers’ performance;<sup>78</sup>
- defining on what basis passengers and drivers may provide feedback through their Apps;<sup>79</sup>
- using information from passenger ratings to make decisions about disciplining or terminating drivers—e.g., if the average rating of a driver falls below a certain threshold set by Uber or Lyft, they may suspend or terminate that driver from providing ride-hailing services on their respective App;<sup>80</sup>
- frequently experimenting with software features that directly impact their drivers, creating an environment in which drivers are subject to ever-shifting working conditions, all determined in Uber’s or Lyft’s discretion;<sup>81</sup> and
- exerting control over their Apps, and thereby over their drivers.<sup>82</sup>

Due to the more “traditional” employee-independent contractor classification tests’ focus on control,<sup>83</sup> most cases involving Uber, Lyft, and other platform-based businesses addressing misclassification have focused on the company’s control over the work performed. In two earlier cases coming out of the Northern District of California, the level of control exercised by Lyft and Uber over their respective drivers was analyzed in detail.<sup>84</sup> In both cases, the court found enough evidence of control to at least deny the company’s motions for summary judgment on the issue.<sup>85</sup>

<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 13.

<sup>83</sup> *See supra* notes 24–35 and accompanying text.

<sup>84</sup> *See Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

<sup>85</sup> *Cotter*, 60 F. Supp. 3d at 1080–81 (“Lyft’s motion for summary judgment must be denied. While the evidence is far from conclusive, there exists at the very least sufficient indicia of an employment relationship between the plaintiff drivers and Lyft such that a reasonable jury could find the existence of such a relationship.”) (internal quotation marks and alterations omitted); *O’Connor*, 82 F. Supp. 3d at 1153 (“[T]here are [many] disputed facts, including those pertaining to Uber’s level of control over the ‘manner and means’ of Plaintiffs’ performance. Viewing the current record in the light most favorable to Plaintiffs, the Court cannot conclude as a matter of law that Plaintiffs are Uber’s independent contractors

Applying its state’s version of the ABC Test (limited to Parts A and C),<sup>86</sup> the Pennsylvania Supreme Court has also extensively examined the degree of control Uber exercises over its drivers.<sup>87</sup> In *Lowman v. Unemployment Comp. Bd. of Review*, it concluded the appellee (an Uber driver) was an employee rather than an independent contractor because “Uber controlled and directed the performance of [appellee’s] services as a driver-for-hire.”<sup>88</sup> Indicia of control, identified as the most weighty and dispositive by the Pennsylvania Supreme Court, include: (1) Uber’s required application process; (2) the inability of drivers to use a substitute to provide services; (3) Uber’s monitoring, review, and supervision of drivers’ performance; and (4) Uber’s pay structure.<sup>89</sup> With respect to the provision of tools and equipment—a common factor in the control analysis<sup>90</sup>—it was not that drivers having to provide their own cars and cell phones weakened the control argument, but rather that Uber providing the “Driver App” strengthened it. In other words, Uber exercised control over the method and means by which the services were performed. Without the app, drivers could provide no service; “[i]t was the sole means by which [a driver] connected, met, or interfaced with a passenger.”<sup>91</sup>

Other court and administrative rulings have been decidedly mixed on the issue of control.<sup>92</sup>

### *B. Part B: Usual Course of Business*

The chief allegation of this part of the State of California’s Complaint is that Uber’s and Lyft’s drivers are engaged in work that is within the usual

rather than their employees. Consequently, Uber’s summary judgment motion must be denied.”).

<sup>86</sup> 43 PA. STAT. AND CONS. STAT. ANN. § 753(1)(2)(B) (West 2013).

<sup>87</sup> *Lowman v. Unemployment Comp. Bd. of Review*, No. 41 EAP 2018, 2020 WL 4250088 (Pa. July 24, 2020).

<sup>88</sup> *Id.* at \*20.

<sup>89</sup> *See id.* at \*18.

<sup>90</sup> *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (1958).

<sup>91</sup> *Lowman*, 2020 WL 4250088, at \*18.

<sup>92</sup> *See, e.g.*, *Matter of Vega*, 149 N.E.3d 401, 405 (N.Y. 2020) (finding sufficient evidence that Postmates exercised enough control over its couriers to render them employees rather than independent contractors operating their own businesses). *But see* *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1086 (N.D. Cal. 2018) (concluding Grubhub did not control the manner and means of restaurant delivery drivers’ work but instead only controlled the result of the work to ensure diners received their meals in a timely fashion); Memorandum from Jayme L. Sophir, Assoc. Gen. Counsel, NLRB, to Jill Coffman, Reg’l Dir. Region 20, NLRB 15, at \*6 (Apr. 16, 2019), <https://apps.nlr.gov/link/document.aspx/09031d4582bd1a2e> [<https://perma.cc/RTU6-NKJ7>] (concluding Uber drivers are independent contractors, for purposes of the National Labor Relations Act, because the drivers (1) “had virtually unfettered freedom to set their own work schedules[.]” (2) controlled their work locations rather than being restricted to assigned routes or neighborhoods, and (3) could work for competitors).

course of each company's business: the provision of on-demand rides.<sup>93</sup> The Complaint alleges that Uber and Lyft are transportation companies that sell on-demand rides to their customers (passengers) who book and pay for such rides through the companies' Apps.<sup>94</sup> Since drivers provide the on-demand rides, they are an integrated and essential part of each company's transportation business.<sup>95</sup> Uber and Lyft only generate income for their ride-hailing business if their drivers transport and provide rides to their passengers.<sup>96</sup> Without their drivers' labor to provide their service—the on-demand ride—each company's ride-hailing business would not exist.<sup>97</sup>

The Complaint further alleges that—far from being a mere technology company—each company is deeply enmeshed in the provision of transportation services:<sup>98</sup>

[Uber and Lyft] do not facilitate a marketplace or matchmaking service between independent Drivers and Passengers. Instead, they utilize their substantial resources and technology to shape every facet of the service they sell to Passengers—a branded, on-demand ride. To offer an on-demand ride, [Uber and Lyft] use their technology to choreograph the deployment of countless Drivers in a localized geographic area, and integrate themselves into every aspect of how those Drivers provide the service of getting Passengers to their destinations.<sup>99</sup>

Uber and Lyft assert that they are technology platform businesses, *not* transportation businesses;<sup>100</sup> therefore, their drivers are not engaged in activities within the usual course of Uber's and Lyft's businesses. Since Pennsylvania's ABC Test does not include a Part B analysis, this argument was addressed by the state's Supreme Court in relation to control: "Uber describes itself as 'a technology company' with a 'mobile app based marketplace that matches up transportation providers with individuals

---

<sup>93</sup> See Complaint for Injunctive Relief at 13, *California v. Uber Techs., Inc.*, (Cal. Super. Ct. May 5, 2020) No. CGC-20-584402.

<sup>94</sup> See *id.* at 13.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 13–14.

<sup>97</sup> *Id.* at 14.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., Press Release, Uber, *Update on AB5* (Sept. 12, 2019), <https://www.uber.com/newsroom/ab5-update/> [<https://perma.cc/3B2X-4KYL>]; *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (noting Lyft's argument that its "drivers perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect").

looking for rides. Translated into practice, Uber creates an inventory of passengers and it utilizes drivers . . . to service that inventory on demand.”<sup>101</sup>

California’s ABC Test does, of course, include Part B. The California Superior Court for the County of San Francisco’s Order enjoining Uber and Lyft from continuing to classify their drivers as independent contractors<sup>102</sup> highlights the radical approach California’s ABC Test presents for worker classification. With respect to Uber’s and Lyft’s alleged misclassification of their drivers as independent contractors, the Superior Court did not consider control (Part A), nor whether the drivers were engaged in an independently established trade, occupation, or business (Part C).<sup>103</sup> Instead, the court focused solely on whether the drivers engaged in work that was within the usual course of each company’s business, since failure to satisfy any one of the three parts of the ABC Test supports the presumption that a worker is an employee.<sup>104</sup>

With respect to Part B of California’s ABC Test,<sup>105</sup> the Superior Court noted that Uber and Lyft are regulated by the California Public Utilities Commission as transportation network companies that are “engaged in the transportation of persons by motor vehicle for compensation,”<sup>106</sup> despite the companies’ arguments that they are merely “multi-sided platforms” operating as “matchmakers” to facilitate transactions between drivers and passengers.<sup>107</sup> These arguments, the court stated, “cannot survive even cursory examination.”<sup>108</sup> Uber’s and Lyft’s “entire business is that of transporting passengers for compensation,” therefore the work of transporting customers for compensation is an “integral part” of their business.<sup>109</sup>

---

<sup>101</sup> Lowman v. Unemployment Comp. Bd. of Review, No. 41 EAP 2018, 2020 WL 4250088, at \*18 (Pa. July 24, 2020).

<sup>102</sup> Order on People’s Motion for Preliminary Injunction and Related Motions at 17, California v. Uber Techs., Inc., No. CGC-20-584402 (Cal. Super. Ct. Aug. 10, 2020) (concluding the People had shown an overwhelming likelihood of prevailing on its motion for preliminary injunction that Uber and Lyft in are violation of California’s ABC Test).

<sup>103</sup> *Id.* at 22.

<sup>104</sup> *Id.*

<sup>105</sup> CAL. LAB. CODE § 2750.3(a)(1)(B) (Deering 2020).

<sup>106</sup> See Order on People’s Motion for Preliminary Injunction and Related Motions at 22–23, California v. Uber Techs., Inc., No. CGC-20-584402.

<sup>107</sup> *Id.* at 23.

<sup>108</sup> *Id.* at 26.

<sup>109</sup> *Id.*



Similarly, in *Cunningham v. Lyft, Inc.*,<sup>110</sup> Lyft drivers focused on Part B of Massachusetts' ABC Test<sup>111</sup> to argue they were misclassified as independent contractors.<sup>112</sup> The U.S. District Court for the District of Massachusetts stated that determining whether the services provided are outside the employer's usual course of business for the purposes of Part B of the ABC Test involves two different inquiries—"establishing what services are performed by the worker, and establishing the usual course of business of the employer."<sup>113</sup> Starting with the latter inquiry, the court concluded that despite Lyft's self-labeling as a platform and not a transportation company, "the realities of Lyft's business—where riders pay Lyft for rides—encompasses the transportation of riders."<sup>114</sup> As for the former inquiry, the court recognized that drivers drive for Lyft—Lyft's revenue is directly contingent on how much drivers drive; therefore, drivers are clearly not incidental to Lyft's business.<sup>115</sup>

Other courts have likewise deemed the "intermediary" argument not credible.<sup>116</sup> However, outside the platform-based business model, some

<sup>110</sup> *Cunningham v. Lyft, Inc.*, No. 1:19-cv-11974-IT, 2020 WL 2616302 (Mass. Dist. Ct. May 22, 2020).

<sup>111</sup> MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(2) (West 2004).

<sup>112</sup> *Cunningham*, 2020 WL 2616302, at \*9.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at \*10 ("The 'realities' of Lyft's business are no more merely 'connecting' riders and drivers than a grocery store's business is merely connecting shoppers and food producers, or a car repair shop's business is merely connecting car owners and mechanics.")

<sup>115</sup> *See id.* at \*11.

<sup>116</sup> *See, e.g., Rogers v. Lyft, Inc.*, No. 20-cv-01938-VC, 2020 WL 1684151, at \*2 (N.D. Cal. Apr. 7, 2020) ("California's new A.B. 5 . . . makes clear that a company's workers must be classified as employees if the work they perform is not outside the usual course of the company's business. That test is obviously met here: Lyft drivers provide services that are squarely within the usual course of the company's business, and Lyft's argument to the contrary is frivolous."); *Manisnak v. Uber Techs., Inc.*, 444 F. Supp. 3d 1136, 1142–43 (N.D. Cal. 2020); *Albert v. Postmates Inc.*, No. 18-CV-07592-JCS, 2019 WL 1045785, at \*5 (N.D. Cal. Mar. 5, 2019) ("In light of the California Supreme Court's [*Dynamex*] decision that 'individuals whose services are provided within the usual course of the [employer's] business are employees, Albert's allegations are sufficient to support a plausible inference that Postmates' classification of him as an independent contractor . . . was a willful misclassification."); *Colopy v. Uber Techs. Inc.*, No. 19-cv-06462-EMC, 2019 WL 6841218, at \*5 (N.D. Cal. Dec. 16, 2019) (concluding plaintiff alleged sufficient facts to support a plausible claim that Uber will be unable to rebut the presumption of employee status under *Dynamex*, noting plaintiff's allegations that drivers perform Uber's transportation business); *Crawford v. Uber Techs., Inc.*, No. 17-cv-02664-RS, 2018 WL 1116725, at \*4 (N.D. Cal. Mar. 1, 2018) ("To say that Uber merely facilitates connections between 'both sides of the two-sided ridesharing market' obscures the fact that Uber arguably *created* a market for this type of transportation."); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one."); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015) ("Uber's self-definition as a mere 'technology company' focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually *does* (i.e., enable customers to book and receive rides) . . . Uber is no more a 'technology company' than Yellow Cab is a 'technology company'")

courts have concluded that workers who have provided services arranged by brokers are not performing work within the usual course of business of the broker.<sup>117</sup>

*C. Part C: Independently Established Trade, Occupation, or Business*

The State of California’s Complaint does not consider driving itself to be a distinct trade, occupation, or business.<sup>118</sup> The Complaint alleges that when driving for Uber or Lyft, drivers are not engaged in their own transportation business, but are instead driving passengers and generating income for the respective defendants.<sup>119</sup> The Complaint details factors that indicate that drivers for Uber and Lyft are restricted from acting as their own independent businesses, including:

- each company provides its drivers with a necessary tool and instrumentality to perform their on-demand, ride-hailing services—its App,<sup>120</sup>
- each company’s App is the exclusive means by which passengers and drivers can connect to, request, and provide each company’s on-demand rides,<sup>121</sup>

---

because it uses CB radios to dispatch taxi cabs, John Deere is a ‘technology company’ because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a ‘technology company’ because it uses modern irrigation techniques to grow its sugar cane.”) (footnote omitted).

<sup>117</sup> *See, e.g., Q.D.-A., Inc. v. Indiana Dep’t of Workforce Dev.*, 114 N.E.3d 840, 848 (Ind. 2019) (holding that drivers for a business that connected drivers with customers who needed too-large-to-tow vehicles driven to them performed services outside the business’s usual course of business; since the drivers provided the “drive-away” services, they would not be providing services within the employer’s usual course of business unless the employer itself also performed drive-away services); *State Dep’t of Emp’t, Training & Rehab., Emp’t Sec. Div. v. Reliable Health Care Servs. of S. Nev., Inc.*, 983 P.2d 414, 418 (Nev. 1999) (concluding that “the business of brokering health care workers does not translate into the business of treating patients for these purposes, and thus a temporary health care worker does not work in the usual course of an employment broker’s business within the purview of” part B of Nevada’s ABC test); *Trauma Nurses, Inc. v. Bd. of Review*, N.J. Dep’t of Labor, 576 A.2d 285, 291 (N.J. Super. Ct. App. Div. 1990) (“The service of supplying health care personnel does not translate into the business of caring for patients.”); *State of Neb., Dep’t of Pub. Welfare v. Saville*, 361 N.W.2d 215, 219–20 (Neb. 1985) (concluding workers who provided housecleaning, lawn work, and light transportation for welfare recipients were not employees of welfare agency because the services provided were outside the usual course of the welfare agency’s business, which was to pay for the services, not provide the services).

<sup>118</sup> Complaint for Injunctive Relief at 15, *California v. Uber Techs., Inc.*, (Cal. Super. Ct. May 5, 2020) No. CGC-20-584402.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 16.

- drivers only need a smartphone and a car to offer ride-hailing services on each company's App;<sup>122</sup>
- each company directly shapes its drivers' earnings, and thereby effectively prevents its drivers from attaining the profits and losses that would ordinarily be the hallmarks of running their own independent businesses;<sup>123</sup>
- each company, not its drivers, prescribes the key factors that determine its drivers' earnings—each company sets the prices charged to its passengers, and controls its drivers' rate of pay, its drivers' territory, the supply of its drivers on the overall App, and the marketing and advertising of each company's brand;<sup>124</sup>
- the limited economic levers that each company leaves to its drivers, such as whether to drive at busier times or for more hours, are not consistent with the level of decision-making normally exercised by entrepreneurs or those operating their own independent businesses;<sup>125</sup>
- each company limits its drivers' ability to freely decline and cancel rides that drivers think will be unprofitable;<sup>126</sup>
- each company limits its drivers' ability to see all ride requests in an area, and thus to gauge their potential earnings based on demand for their services;<sup>127</sup>
- each company limits its drivers' ability to share their accounts with other drivers, thereby curtailing its drivers' ability to individually expand their business offerings;<sup>128</sup>
- each company prohibits its drivers from soliciting passenger information, limiting the ability of its drivers to market themselves independently for repeat rides outside of each company's App;<sup>129</sup> and
- by selecting which drivers will be invited to participate in which financial incentives and on what individualized terms based on each company's own "opaque criteria" as implemented by the algorithmic decision-making engines in its App, each company, as the employer, not the driver as an "entrepreneur," determines the driver's earnings.<sup>130</sup>

---

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 16–17.

In its analysis of Part C of the ABC Test, the California Supreme Court noted that, “a business cannot unilaterally determine a worker’s status simply by assigning the worker the label ‘independent contractor’ or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor.”<sup>131</sup> As noted above, Charlotte Alexander’s empirical research has revealed that courts are more likely to rule that a plaintiff is properly classified as an independent contractor if there is a contract identifying the plaintiff as an independent contractor.<sup>132</sup> While this may demonstrate the courts’ reliance on written contracts to conclude the parties have defined their relationship themselves, Alexander warns that from a practical standpoint, these contracts are not always determinative of the true employment relationship, as workers often enter into them for fear of retaliation if they refuse.<sup>133</sup> Additionally, from a tax perspective, many gig workers do not consider themselves to be business owners and have never filed business-related tax returns, something they are required to do when they earn income from services outside of the traditional employee-employer relationship.<sup>134</sup>

Pennsylvania’s version of the ABC Test includes the requirement that workers must have an independently established trade, occupation, or business to be properly classified as an independent contractor.<sup>135</sup> In applying this portion of the state’s statute, the Pennsylvania Supreme Court determined that Uber drivers did not possess the usual indicia of an independent business—they could not subcontract their driving, they could obtain their passengers solely through Uber, and they could not set their own compensation for providing a ride service.<sup>136</sup> Courts that have addressed this part of the ABC Test—though not dealing with platform-based business models—have stressed that the worker’s “business” must be able to persist if the challenged relationship ended.<sup>137</sup> In other words, would an Uber or Lyft driver still be a transportation provider without Uber or Lyft?<sup>138</sup>

---

<sup>131</sup> *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 39 (Cal. 2018).

<sup>132</sup> See Alexander, *supra* note 32.

<sup>133</sup> *Id.* at 954.

<sup>134</sup> See Kathleen DeLaney Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. 1415, 1417–18 (2018).

<sup>135</sup> 43 PA. STAT. AND CONS. STAT. ANN. § 753(1)(2)(B) (West 2013).

<sup>136</sup> *Lowman v. Unemployment Comp. Bd. of Review*, No. 41 EAP 2018, 2020 WL 4250088, at \*20 (Pa. July 24, 2020).

<sup>137</sup> See, e.g., *Hargrove v. Sleepy’s, LLC*, 106 A.3d 449, 459 (N.J. 2015); see also *Carpet Remnant Warehouse, Inc. v. N.J. Dep’t of Labor*, 593 A.2d 1177, 1187 (N.J. 1991) (“[I]f the person providing services is dependent on the employer, and on termination of that relationship would join the ranks of the unemployed, the C standard is not satisfied.”).

<sup>138</sup> Cf. Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 416 (2019) (“Just as platform workers do not act like small

#### *D. Applying the ABC Classification Test to Airbnb Hosts*

There are many similarities between Uber and Lyft drivers and Airbnb hosts. Both drivers and hosts offer their own property for on-demand use by the public through an app-driven online platform that collects a fee for connecting the driver/host with a customer.<sup>139</sup> One principal distinction is that drivers actually drive customers rather than letting the customers take and use their personal property, whereas Airbnb hosts merely let customers use their real property. Below is a summary of similarities between drivers and hosts:<sup>140</sup>

ABC Test Part	Aspect of Platform-Based Business Model	Uber/Lyft	Airbnb
A	<b>Platform sets price of service</b> <sup>141</sup>	X	
A	<b>Platform exclusively sets terms of service</b> <sup>142</sup>	X	X
A	<b>Billing/invoicing handled exclusively by platform</b> <sup>143</sup>	X	X
A	<b>Customer disputes/refunds handled exclusively by platform</b> <sup>144</sup>	X	X
A	<b>Monitoring service provider's performance through customer ratings</b> <sup>145</sup>	X	X
A	<b>Allowing service provider to subcontract services</b> <sup>146</sup>	X	X
B	<b>Platform markets itself as a provider of the services</b>	X	X

---

businesses that connect directly to customers, the public does not perceive most gig workers as separate companies.”).

<sup>139</sup> See *How Uber Works for Drivers and Riders*, UBER, <https://www.uber.com/us/en/about/how-does-uber-work/> [https://perma.cc/SYZ7-PFCC] (last visited Sept. 16, 2020); *How Airbnb Works*, AIRBNB, <https://www.airbnb.com/d/howairbnbworks> [https://perma.cc/S4KJ-TPL2] (last visited Sept. 16, 2020).

<sup>140</sup> The comparison of aspects of the platform-based business model applies solely to U.S.-based services, providers, and hosts.

<sup>141</sup> See Complaint for Injunctive Relief at 10, *California v. Uber Techs., Inc.*, No. CGC-20-584402 (Cal. Super. Ct. May 5, 2020). See *Terms of Service*, AIRBNB ¶ 7.1.2, <https://www.airbnb.com/terms> [https://perma.cc/SVN8-T6BD] (last visited May 29, 2020).

<sup>142</sup> See Complaint for Injunctive Relief at 11, *California*, No. CGC-20-584402; *Terms of Service*, *supra* note 141, at ¶ 2.5, § 3.

<sup>143</sup> See Complaint for Injunctive Relief at 10, *California*, No. CGC-20-584402; *Payments Terms of Service*, AIRBNB, [https://www.airbnb.com/terms/payments\\_terms](https://www.airbnb.com/terms/payments_terms) [https://perma.cc/KGQ7-6QE4] (last visited May 29, 2020).

<sup>144</sup> See Complaint for Injunctive Relief at 10, *California*, No. CGC-20-584402; *Terms of Service*, *supra* note 141, at § 9.

<sup>145</sup> See Complaint for Injunctive Relief at 12, *California*, No. CGC-20-584402; *Terms of Service*, *supra* note 141, at § 10.

<sup>146</sup> See *PARTNER: Add Driver to My Account*, UBER, <https://help.uber.com/driving-and-delivering/article/partner-add-driver-to-my-account?nodeId=ecd7a74f-f819-4984-89af-ae2532fdde1b> [https://perma.cc/F3HD-NUST] (last visited May 29, 2020); *Terms of Service*, *supra* note 141, at § 7.4 (Co-Host provisions).

ABC Test Part	Aspect of Platform-Based Business Model	Uber/Lyft	Airbnb
	rendered <sup>147</sup>		
C	Only requirements to create “business” are platform app and property used <sup>148</sup>	X	X
C	Many service providers not in related “business” but for platform <sup>149</sup>	X	X
C	Platform prohibits customers from soliciting services outside of platform <sup>150</sup>	X	X
C	Platform uses algorithms to match customers with service provider <sup>151</sup>	X	X
C	Service providers’ revenues reported through Form 1099-K <sup>152</sup>	X	X

### 1. Part A: Airbnb’s Control

While Airbnb does exert some control over its hosts—such as monitoring their performance through ratings and handling all billing, dispute resolution, and refunds<sup>153</sup>—a comparison between Uber, Lyft, and Airbnb demonstrates that Airbnb’s exercise of control over its hosts is not nearly as extensive as that exercised over drivers by Uber and Lyft. While Airbnb does monitor host performance through ratings, it does not directly engage in selecting guests for hosts (and hosts for guests) the way Uber and Lyft select passengers for

<sup>147</sup> See Complaint for Injunctive Relief at 16, *California v. Uber Techs., Inc.*, (Cal. Super. Ct. May 5, 2020) No. CGC-20-584402; *Trust & Safety*, AIRBNB, <https://www.airbnb.com/trust> [<https://perma.cc/ZL87-Z26N>] (last visited May 29, 2020).

<sup>148</sup> See Complaint for Injunctive Relief at 16, *California*, No. CGC-20-584402; *Overview*, AIRBNB, <https://www.airbnb.com/host/homes> [<https://perma.cc/X79M-JVH3>] (last visited May 29, 2020).

<sup>149</sup> See Complaint for Injunctive Relief at 16, *California*, No. CGC-20-584402; *Overview*, *supra* note 148 (“Share any space without sign-up charges, from a shared living room to a second home and everything in-between.”).

<sup>150</sup> See Complaint for Injunctive Relief at 16, *California*, No. CGC-20-584402; *Terms of Service*, *supra* note 141, at § 14 (prohibiting hosts and guests from requesting, accepting, or making any payment for listing fees outside of the Airbnb Platform).

<sup>151</sup> See Complaint for Injunctive Relief at 16–17, *California*, No. CGC-20-584402; *What Factors Determine How My Listing Appears in Search Results?*, AIRBNB, <https://www.airbnb.com/help/article/39/what-factors-determine-how-my-listing-appears-in-search-results> [<https://perma.cc/7GJA-FQTG>] (last visited May 29, 2020).

<sup>152</sup> See *Your Tax Questions, Answered*, UBER, <https://www.uber.com/us/en/drive/tax-information/> [<https://perma.cc/9ZHJ-VCWJ>] (last visited May 29, 2020) (noting also that drivers who receive \$600 or more for “promotion, referral, and other miscellaneous payments for the year” will receive a Form 1099-MISC); *Should I Expect to Receive a Tax Form from Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/414/should-i-expect-to-receive-a-tax-form-from-airbnb> [<https://perma.cc/84SE-NAKC>] (last visited May 29, 2020).

<sup>153</sup> See *supra* notes 143–45 and accompanying text.

drivers (and drivers for passengers).<sup>154</sup> In addition, Airbnb does not set the price of the service, as Uber and Lyft allegedly do.<sup>155</sup> An argument could be made that Airbnb’s level of control is limited to what is necessary to achieve the result—a short-term rental satisfactory to both the host and the guest—versus the manner and means by which that result is achieved.<sup>156</sup> If an examination of Airbnb’s classification of hosts as independent contractors were limited to the “traditional” control-based classifications tests,<sup>157</sup> then Airbnb’s hosts would most likely be considered properly classified as independent contractors. However, under the ABC test, two additional elements must also be satisfied.

## 2. Part B: Airbnb’s Usual Course of Business

Under Part B of the ABC Test, workers are presumed to be employees if they do not perform work that is outside the usual course of the hiring party’s business. Another way to consider this issue is whether the workers in question are integral and essential to the hiring business.<sup>158</sup> Airbnb is an online platform-based business connecting hosts with guests, while Uber and Lyft are online platform-based businesses connecting drivers with passengers. As we have already seen above, courts have dismissed almost out of hand the argument that Uber and Lyft are mere technology companies and not transportation companies (meaning drivers are providing services within the companies’ usual course of business).<sup>159</sup>

Platform-based businesses argue they are merely a technological intermediary connecting someone seeking services (a ride or room) with someone providing that service (a driver or host).<sup>160</sup> In addressing whether Amazon.com can be held strictly liable for injuries arising from a defective product sold on its website by a third-party vendor, the Court of Appeals for the Fourth District of California rejected Amazon.com’s argument that it was merely a technological intermediary connecting a consumer with a third-party seller.<sup>161</sup> The court’s perspective is instructive: Amazon.com

---

<sup>154</sup> See *supra* note 72 and accompanying text (as alleged).

<sup>155</sup> See *supra* note 141 and accompanying text.

<sup>156</sup> See, e.g., *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1086 (N.D. Cal. 2018).

<sup>157</sup> See *supra* notes 24–36 and accompanying text.

<sup>158</sup> See *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 22 n.13 (Cal. 2018).

<sup>159</sup> See *supra* notes 101–16 and accompanying text.

<sup>160</sup> See *supra* Part II.B.

<sup>161</sup> *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 451–52 (Ct. App. 2020). See generally Robert Sprague, *It’s a Jungle Out There: Public Policy Considerations Arising from a Liability-Free Amazon.com*, 60 SANTA CLARA L. REV. 253, 276 (2020) (analyzing Amazon.com’s defense that it is not a “seller” of products sold by third-party vendors through its website).

constructed the website that marketed the product in question and accepted payment for the product from the consumer, then paid the vendor after deducting fees. In other words, it stood between and controlled the transaction between the consumer and vendor.<sup>162</sup> Similarly, Airbnb stands between and controls the transaction between the consumer and the host.

Are hosts an integrated and essential part of Airbnb's business? In other words, without hosts, would Airbnb exist?<sup>163</sup> To paraphrase the U.S. District Court for the District of Massachusetts (applying that state's ABC Test, Part B), the realities of Airbnb's business—where travelers pay Airbnb for short term rentals—encompasses the hosting of travelers.<sup>164</sup> The question appears to have been partially answered by the economic fallout of the COVID-19 pandemic. As a result of decreased booking and cancellations, Airbnb saw its revenues drop precipitously and laid off internal employees.<sup>165</sup> If Airbnb cannot survive without its hosts supplying accommodations to guests, hosts are arguably an integral part of Airbnb's business.

### 3. Part C: Airbnb Hosts' Independently Established Trade, Occupation, or Business

To be considered an independent contractor under Part C of the ABC test, the service provider (i.e., Uber driver or Airbnb host) must be customarily engaged in an independently established trade, occupation, or business in the same nature as the work involved.<sup>166</sup> As previously stated, to meet this requirement, courts have held that the worker's "business" must be able to persist if the relationship with the platform ended.<sup>167</sup>

Once again, the economic fallout of the COVID-19 pandemic may hold a potential answer to this issue. On one hand, many Airbnb hosts act like independent businesses, maintaining short-term rental properties at such a high caliber and frequency that they qualify for "Superhost" status.<sup>168</sup> Now, many Superhosts—who took out significant debt to purchase prime real

---

<sup>162</sup> See *Bolger*, 53 Cal. App. 5th at 453.

<sup>163</sup> See *supra* notes 95, 97 and accompanying text.

<sup>164</sup> Cf. *Cunningham v. Lyft, Inc.*, No. 1:19-cv-11974-IT, 2020 WL 2616302, at \*9 (D. Mass. May 22, 2020).

<sup>165</sup> See Nick Corbishley, *Airbnb Gets Disrupted. Hosts, "Super-Hosts" Try to Survive. Apartments in Prime Locations Suddenly Flood Rental Market*, WOLF ST. (May 12, 2020), <https://wolfstreet.com/2020/05/12/airbnb-gets-disrupted-hosts-super-hosts-scramble-to-survive-apartments-in-prime-locations-suddenly-flood-long-term-rental-market/> [https://perma.cc/BW89-FLTG].

<sup>166</sup> See CAL. LAB. CODE § 2750.3(a)(1)(C) (Deering 2020).

<sup>167</sup> See *supra* note 137 and accompanying text.

<sup>168</sup> See *Superhost: Recognizing the Best in Hospitality*, AIRBNB, <https://www.airbnb.com/superhost> [https://perma.cc/RH2E-U55N] (last visited May 29, 2020). Ironically, Airbnb exercises more control over Superhosts. See *id.*



estate to list on Airbnb—are suffering economically.<sup>169</sup> Fundamentally, the pain associated with the pandemic fallout is being felt by hosts as much as by Airbnb’s laid off employees.<sup>170</sup>

Will hosts who purchased properties be left in a similar state of financial ruin as an employee who loses his or her job?<sup>171</sup> Congress evidently thought so by including “Pandemic Unemployment Assistance” in the CARES Act.<sup>172</sup> One could argue that treating Airbnb hosts and Uber and Lyft drivers the same under the PUA would not necessarily mean they are all properly classified as self-employed independent contractors, but rather are misclassified entirely and need the same unemployment benefits as “traditional” employees.

### CONCLUSION

The economic fallout from the COVID-19 pandemic exposed many property owners who provide accommodations through Airbnb to extreme financial precarity, much like employees laid off by businesses shuttered due to the pandemic. Under more traditional tests used to determine the proper classification of workers (i.e., employees or independent contractors)—those that particularly rely on the degree of control exercised by the hiring party over the manner and means to accomplish the work to be performed—Airbnb hosts appear to squarely fall into the independent contractor classification.

While the ABC Test performs the same role as other classification tests—determining whether a worker, in reality, is an employee or an independent contractor—it does so in a radically different way. While control is still a factor in the ABC Test, its existence is less messy and ambiguous,<sup>173</sup> precisely because it is only one of three factors that, if not satisfied, leads to a worker classification of employee. Regardless of the degree of control exercised by the employer—whether over the details of the work or merely its result<sup>174</sup>—if either of the remaining two factors are not met, control is essentially irrelevant.<sup>175</sup>

---

<sup>169</sup> Corbishley, *supra* note 165.

<sup>170</sup> See Erin Griffith, *How Your Airbnb Host Is Feeling the Pain of the Coronavirus*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/technology/airbnb-hosts-coronavirus.html> [<https://perma.cc/manage/create?folder=82568-82687-82690-103140>].

<sup>171</sup> See, e.g., *Carpet Remnant Warehouse, Inc. v. N.J. Dep’t of Labor*, 593 A.2d 1177, 1187 (N.J. 1991).

<sup>172</sup> See *supra* notes 1–3 and accompanying text.

<sup>173</sup> See *supra* notes 47–48 and accompanying text.

<sup>174</sup> Cf. *supra* note 54 and accompanying text.

<sup>175</sup> See *supra* notes 53–54 and accompanying text.

Therefore, while Airbnb hosts would probably not be reclassified as employees under a “traditional” control-based test, they could very well be reclassified under the ABC Test. Airbnb hosts might actually be considered employees because they are both integral to Airbnb’s business (i.e., Part B is not met) and not necessarily independent businesses themselves (i.e., Part C is not met).

The battle is raging in California courts and the ballot box as to whether Uber and Lyft drivers should be reclassified as employees under the ABC Test,<sup>176</sup> but it is also—to a large extent—being fought in the platform-based business environment beyond just Uber and Lyft. Were Airbnb hosts intended to be part of that battle? It turns out that in times of economic stress, Airbnb hosts need as much unemployment assistance as “traditional” employees—perhaps opening the door to the argument that those hosts are actually employees rather than self-employed independent contractors.

---

<sup>176</sup> Uber and Lyft threatened to leave the California market if they had to comply with the California Superior Court’s preliminary injunction, at least until the California Appeals Court temporarily stayed the order. See Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/technology/uber-lyft-california-shutdown.html> [<https://perma.cc/Y59J-6Q26>]; *supra* note 11 and accompanying text.