WHAT IS AN EMPLOYEE? CRAFTING A MORE EFFECTIVE TEST FOR THE MODERN WORKFORCE

SARAH F. CARTER*

ABSTRACT

The rise of the gig economy has led to the misclassification of many workers as independent contractors. When employers misclassify workers as independent contractors, they lose out on many important rights and benefits. An effective means of differentiating between the two has never been more important, but the many tests in use at present often yield unpredictable results, leading to confusion on the part of both employers and workers. Recently, California joined a long list of other states in adopting the "ABC test" to make this important distinction. This Note rejects the growing call for widespread adoption of the ABC test, examining potentially overlooked problems with the test. It proposes eliminating the extent of control factor and replacing it with the nationwide adoption of a simple three factor model composed of the ABC's test presumption of employee status, coupled with factors from the common law test, and an education or skills training requirement. This novel, hybrid approach minimizes self-serving behavior by employers while avoiding many of the pitfalls of the ABC and other tests.

* Special thanks to Professor Mary Ziegler for her invaluable comments and feedback, without which this Note would not exist. This note is dedicated in loving memory of my father, David Frasier.

I. INTRODUCTION

The rise of the gig economy has revolutionized the lives of everyday Americans, creating thousands of new jobs.[1] However, this economic transformation has also led to the misclassification of many workers as independent contractors.[2] When this misclassification occurs, workers lose out on many important rights, such as worker's compensation benefits, time off for medical emergencies, the right to earn minimum wage, and the right to extra pay for overtime hours. High-profile suits against ride-share companies like Uber and Lyft have brought the perennial issue of the distinction between independent contractors and employees to the forefront of the public's attention. An effective means of differentiating between the two has never been more important, yet, the many tests in use in the United States today often yield unpredictable results, leading to confusion on the part of both employers and workers.[3]

Recently, California joined a long list of other states in adopting the so-called "ABC test" to make this important distinction.[4] This test has three prongs. The first prong asks whether a worker is free from the control and direction of the employer; the second asks whether the worker performs work outside of the usual course of the employer's business; and the third asks whether the worker is in an independently established trade or occupation.[5] Many believe that the ABC test is the most promising rule for properly classifying workers, given its relative simplicity.[6] This Note breaks new ground

1. *See infra* Part 4.A.iv.

2. *See infra* Part 4.B.

3. *See, e.g.*, McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 221 (Fla. 3d DCA 2017); O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015); 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, 14–15 (2018).

4. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 7 (Cal. 2018).

5. *Id.* at 35.

6. *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, 65 (2015); Jennifer Pinsof, Note, *A New Take On An Old Problem:*

by rejecting the growing call for widespread adoption of the ABC test, examining potentially overlooked problems with the test. It proposes eliminating the extent of control factor so prominent in other tests and replacing it with the nationwide adoption of a simple three factor model composed of the ABC's test presumption of employee status coupled with factors from the common law test and an education or skills training requirement. This novel, hybrid approach minimizes self-serving behavior by employers while avoiding many of the pitfalls of the ABC and other tests.

Part I of this note will review the history of the employee/ independent contractor distinction. Focusing on the gig economy, this Part examines how new economic developments have forced the courts to redefine their definitions of an employee. Part II will examine various tests used to determine this distinction in the United States, including the common law approach, the IRS 20 factor test, and the economic realities test. This Part explores the advantages and disadvantages of these approaches. Part III carefully examines each prong of the ABC test, as well as the adoption of the ABC test by many states, and uses case studies to identify unappreciated problems with the rule. Part IV proposes that the ABC test is not the best solution to the nation's misclassification problem. Instead, eliminating the extent of control factor and utilizing a set of three factors gleaned from the common law and ABC test, implemented nationally, is the most effective option. Part V briefly concludes.

II. WHAT IS AT STAKE FOR MISCLASSIFIED WORKERS?

Worker misclassification has become a hot-button political issue, affecting some of the nation's most important companies and potentially reshaping the rights and responsibilities of many workers. This Part begins by tracing the history of worker rights and protections that the Federal government has designated only to employees, indicating why employers might seek to treat their workers as independent contractors. Next, once the possible motivations of employers have been examined, this Part establishes the stakes and economic impact of worker misclassification.

A. History of Worker Misclassification

The distinction between employee and independent contractor, which initially arose from the common law concepts of master and servant,[7] has long been problematic. In 1944, Justice Wiley

Employee Misclassification in the Modern Gig Economy, 22 MICH. TELECOMM. TECH. L. REV. 341, 341, 369 (2016); Pearce & Silva, *supra* note 3, at 27-29.

7. Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes that Target the Construction Industry*, 39 J. LEGIS. 295, 296 (2012).

Rutledge observed that, "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[8]

Before the late nineteenth century, only a very small number of workers qualified as employees, as most people farmed or otherwise worked for themselves.[9] In the early twentieth century, the distinction often arose in the context of vicarious liability, to determine whether an employer was liable for the actions of its worker.[10] In these cases, the general rule was that an employer, or master, was liable for the negligence of his employee, or servant, and that this relationship existed if the employer controlled both what tasks a worker performed and how these tasks were accomplished.[11] While employers have long had incentive to treat workers as independent contractors, economic changes over the course of the last century have put pressure on existing laws, forcing courts, legislators, and regulators to rethink the distinction between employees and independent contractors.[12] Moreover, employers have sought out new workplace arrangements, in an attempt to circumvent rules and protections that apply only to employees.[13] By understanding this history, one can get a better sense of how a contingent workforce and the gig economy has forced society to reconsider existing rules and factors traditionally used to distinguish types of workers, including those utilized in the ABC test.

1. New Deal Era

The New Deal Era ushered in a variety of new rights and protections for workers. The popularity of this protective legislation was bolstered by the economic plight of many Americans during the

---

8. NLRB v. Hearst Publ'ns., 322 U.S. 111, 121 (1944). Justice Rutledge continues, "This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction." *Id.*

9. Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 19–20 (2000).

10. *See, e.g.*, Standard Oil v. Anderson, 212 U.S. 215, 218, 220-25 (1909); Guy v. Donald, 203 U.S. 399, 406–07 (1906); Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523–24 (1889); Phila. & R.R. Co. v. Derby, 55 U.S. 468, 486–87 (1853).

11. *Singer*, 132 U.S. at 522–23 (citations omitted) ("A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.")

12. *See infra* Part 3.

13. See *infra* Part 2.A.ii–iv.

1930s.[14] While these protections initially applied broadly, they were eventually held to exclude those who were independent contractors, incentivizing employers to misclassify workers in order to avoid providing statutorily recognized protections.

By the 1930s, many workers still lacked basic workplace protections. The Supreme Court had previously struck down attempts to regulate child labor and institute a minimum wage as unconstitutional.[15] As the Great Depression wrought economic turmoil throughout the country, President Franklin D. Roosevelt sought to blunt its impact by introducing his New Deal.[16] In 1933, Congress passed the National Industrial Recovery Act (NRA).[17] As part of the NRA, the President's Reemployment Agreement was introduced. More than 2.3 million employers signed versions of these agreements, which entailed agreeing to not use child labor, having a thirty-five to forty-hour work week, and paying a minimum wage.[18] However, the Supreme Court dealt blow after blow to the NRA, issuing rulings finding its provisions invalid.[19] This changed dramatically in 1937, shortly after Roosevelt's failed court packing scheme, when the Court indicated its willingness to accept President Roosevelt's New Deal programs as constitutional.[20]

Two of the most important pieces of legislation passed during the New Deal Era were the National Labor Relations Act of 1935 (NLRA) and the Fair Labor Standards Act of 1938 (FLSA). The NLRA provided employees with the ability to unionize and collectively bargain with their employers.[21] FLSA provided employees with a minimum wage and overtime pay.[22] It also barred child labor.[23] Many courts initially interpreted the definition of employee under both the NLRA and the

14. *See* RONALD EDSFORTH, THE NEW DEAL: AMERICA'S RESPONSE TO THE GREAT DEPRESSION 1–3 (2000) (providing an in-depth look at attitudes toward New Deal legislation during the Great Depression).

15. *See* Adkins v. Children's Hosp., 261 U.S. 525, 558, 562 (1923); Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918).

16. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22. (1978).

17. *Id.*

18. *Id.* at 22–23.

19. *See, e.g.*, Morehead v. Tipaldo, 298 U.S. 587, 588 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 519, 551 (1935).

20. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937); Grossman, *supra* note 16, at 23–24.

21. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

22. Fair Labor Standards Act, 29 U.S.C. §§ 206-207 (2012).

23. *Id.* § 212.

FLSA broadly.[24] However, these definitions have since been narrowed. In 1947, Congress passed the Taft-Hartley Act, an amendment to the NLRA meant to curtail the power of labor unions.[25] The Act also explicitly excluded independent contractors from NLRA protections.[26] That same year, the Supreme Court issued two opinions indicating that it was necessary to determine whether a worker qualified as an employee before determining if an employer had violated the FLSA.[27] Subsequent worker protection amendments and laws, such as the Family Medical Leave Act (FMLA) and the Age Discrimination in Employment Act (ADEA), also exclude independent contractors.[28]

As the consequences of being an employee got higher, it fell to the courts to attempt to distinguish between employees and independent contractors, as the word "employee" had not been given a definite meaning by Congress.[29] As mentioned above, "employee" was initially interpreted broadly, with the courts refusing to adopt the common-law master-servant level of control distinction traditionally used in tort liability cases.[30] Instead, the courts believed that Congress's intent was for these new protections to apply to all workers who were genuinely in need of the protections provided by New Deal legislation.[31]

Despite this broad protective intent, Congress excluded agricultural and domestic workers from its definition of employee in New Deal legislation.[32] Scholars have debated Congress's reasoning for these exclusions for many years.[33] While there is not broad consensus on the issue, two prominent theories are as follows: (1) Congress excluded agricultural and domestic workers (occupations largely held by African-Americans) in order to secure Southern

---

24. *See* NLRB v. Hearst Publs., 322 U.S. 111, 123–24 (1944) (finding that news boys could collectively bargain with newspaper publishers); Walling v. Am. Needlecrafts, Inc., 139 F.2d 60, 64 (6th Cir. 1943) (finding that it was of no consequence whether needle workers were independent contractors).

25. National Labor Relations Act § 151.

26. *Id.* § 152.

27. *See* U.S. v. Silk, 331 U.S. 704, 705 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (finding that the same test used to distinguish between employee and contractor for purposes of NLRA should also be applied for FLSA).

28. *Thresholds for Coverage under Employment-Related Laws*, TEX. WORKFORCE COMM'N, https://twc.texas.gov/news/efte/thresholds_for_coverage.html (last visited Mar. 6, 2020); *Age Discrimination Fact Sheet*, AARP (Apr. 2014), https://www.aarp.org/work/employee-rights/info-02-2009/age_discrimination_fact_sheet.html.

29. *NLRB*, 322 U.S at 124.

30. *Id.* at 128–29.

31. *Id.* at 128–30.

32. *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49 (2010); *U.S. Labor Laws for Farmworkers*, FARMWORKER JUST., https://www.farmworkerjustice.org/advocacy-and-programs/us-labor-law-farmworkers (last visited Dec. 15, 2018).

33. *See* DeWitt, *supra* note 32 (chronicling scholarly debate on this issue).

support for the legislation;[34] and (2) An extreme reluctance on the part of powerful agricultural and domestic employers to pay taxes for their workers, and administrative difficulties related to collecting these taxes led to the exclusion.[35] Whatever Congress's initial reasoning, New Deal protective legislation, written only to cover the traditional employee, has proven unable to keep up with a changing workforce, where new norms have meant that not every worker fits neatly into the box of employee or contractor.

2. Rise of Temp Agencies

This difficulty can be seen clearly beginning in the 1950s, when the rise of temporary employment agencies (temp agencies) challenged the traditional common law test for distinguishing employees from individual contractors. Temporary labor was initially advertised as a way for married women to work part-time.[36] Temp agencies grew rapidly. By 1967, Manpower, one of the major temp agencies, employed more people than Standard Oil or U.S. Steel, both extremely large employers in the United States.[37] In the 1970s, temp agencies began advertising their workers as "Never-Never Girls," girls who never went on vacation, cost tax money, or required a raise.[38]

Today, more than fifteen million American workers are hired each year on a temporary basis.[39] These workers are, on average, paid less than permanent employees.[40] Temporary workers are technically considered employees of the temp agency, and therefore, are covered under the FLSA.[41] However, protections under the FLSA, as well as other Federal statutes, are far from guaranteed, as temporary workers must attempt to navigate a confusing situation, wherein they physically work for one company while being employed by another.[42]

---

34. *Id.* at 50.

35. *Id.* at 52–61.

36. Erin Hatton, *The Rise of the Permanent Temp Economy*, N.Y. TIMES: OPINIONATOR (Jan. 26, 2013, 3:41 PM), https://opinionator.blogs.nytimes.com/2013/01/26/the-rise-of-the-permanent-temp-economy/.

37. *Id.*

38. *Id.*

39. *Staffing Industry Statistics*, AM. STAFFING ASS'N, https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/ (last visited Sept. 23, 2018).

40. Steven Hipple & Jay Stewart, *Earnings and Benefits of Contingent and Noncontingent Workers*, MONTHLY LAB. REV. 22, 22 (1966).

41. *FLSA & Temporary (Contract) Employees*, FLSA, http://www.flsa.com/temp.html (last visited Sept. 23, 2018).

42. See 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, 256–60 (2006) for an overview of the application of Federal protections to temporary workers.

Most temporary workers go without the statutory protections granted to employees, as they lack the power and means to contend with temporary employment agencies that often fail to offer most of the statutorily prescribed benefits of being an employee.[43]

3. Contingent Workers

In recent decades, the definition of an "employee" has become even more complicated. In 1985, economist Audrey Freeman coined the term "contingent workforce" to refer to workers who lacked a full-time, permanent position with an employer.[44] Temporary workers fit under the umbrella of this term; however, different types of contingent workers also emerged, including part-time and seasonal workers.[45] Contingent workers became more common as the economy shifted from industrial to service jobs and as globalization and rapid technological gains intensified competition for secure positions.[46] In 1980, there were 400,000 temporary workers and 16.3 million part-time workers in the United States.[47] As of October 2019, there are over 1.4 million temporary workers[48] and 25.987 million part-time workers.[49] 4.438 million part-time workers do not hold full time employment due to economic reasons (defined as "slack work or unfavorable business conditions, inability to find full-time work, or seasonal declines in demand.").[50]

Contingent workers place pressure on the traditional definition of an employee, as they may work for multiple companies or not meet the hourly threshold required to receive many benefits reserved for traditional employees.[51] As seen above, legislators drafted the statutes containing many workplace protections at a time where full-time employment was the norm, and these types of workers simply did not

43. *See id.*

44. Ann Bookman, Symposium, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH & LEE L. REV. 799, 802 (1995).

45. Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 79–80 (1998).

46. Bookman, *supra* note 44, at 803.

47. Richard S. Belous, Symposium, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH & LEE L. REV. 863, 867 (1995).

48. Bureau of Labor Statistics, *Contingent and Alternative Labor Arrangements—May 2017*, DEP'T LAB. (2018), https://www.bls.gov/news.release/pdf/conemp.pdf.

49. Bureau of Labor Statistics, *Economic News Release*, DEP'T OF LAB. (last modified Jan. 10, 2020), https://www.bls.gov/news.release/empsit.t08.htm.

50. *Id.*

51. Bookman, *supra* note 44, at 808.

exist at such a large scale. This has become even more of an issue in recent years with the rise of yet another new type of contingent worker, those who work in the Gig Economy.[52]

4. The Gig Economy

Widespread use of the internet and smart phones has resulted in a new type of worker. Gig work first rose to prominence in the early 2000s, when Amazon launched its Mechanical Turk platform.[53] The gig, or sharing, economy generally involves an online platform or phone app which potential clients use to request services and workers interact with in order to attain short-term "gigs" at the time of their choosing.[54] Examples of companies that use the gig economy include Uber and Lyft (ridesharing), TaskRabbit and Rover (odd jobs), and Airbnb and HomeAway (room or home rentals).[55] These companies are known as non-employer establishments,[56] meaning that the workers who use these apps or websites to find work are technically self-employed, independent contractors.[57]

In recent years, more and more people have turned to the gig economy as a means of supporting their families or supplementing their incomes.[58] However, the U.S. Government has admitted it has had difficulty determining exactly how many gig workers there are.[59] A study by the McKinsey Global Institute estimated that there are anywhere from fifty-four to sixty-eight million independent workers (defined as "someone who chooses how much to work and when to work, who can move between jobs fluidly and who has multiple employers or clients over the course of the year") in the United

---

52. *See* Alex Kirven, Note, *Whose Gig is it Anyway? Technological Change, Workplace Control and Supervision, and Worker's Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 257–58 (2018).

53. Molly Tran & Rosemary K. Sokas, *The Gig Economy and Contingent Work: An Occupational Health Assessment*, 59(4) J. OCCUPATIONAL & ENVTL. MED. e63, e63 (2017).

54. SARAH A. DONOVAN ET AL., CONG. RESEARCH SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? 1–2 (2016).

55. Erik Sherman, *Uber, TaskRabbit and Sharing Economy Giveth to Workers, But Also Taketh Away*, FORBES (Aug. 4, 2015, 6:00 AM), https://www.forbes.com/sites/eriksherman/2015/08/04/the-sharing-economy-giveth-to-workers-but-boy-can-it-taketh-away/#2d7987433ead.

56. Tran & Sokas, *supra* note 53, at e64; *see also* DONOVAN, ET AL., *supra* note 54, at 1 n.1.

57. DONOVAN, ET AL., *supra* note 54, at 2; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, WORKFORCE TRAINING: DOL CAN BETTER SHARE INFORMATION ON SERVICES FOR ON-DEMAND, OR GIG, WORKERS 2 (2017).

58. *See* Kirven, *supra* note 52, at 257.

59. Elka Torpey & Andrew Hogan, *Working in a Gig Economy,* BUREAU OF LABOR STATISTICS (May 2016), https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.

States.[60] Approximately fifteen percent of these independent workers "have used a digital platform to find work."[61] However, the report acknowledged that this area is growing rapidly.[62]

Because workers in the gig economy are usually considered independent contractors, they are not covered under FLSA or NLRA and must withhold their own taxes.[63] However, because companies such as Uber take a part of its workers' earnings and have set pricing models that workers must follow, the question of how workers in the gig economy should be classified is far from settled.[64] The need for an effective test to separate employees from independent contractors has never been more pressing.

B. Impact of Worker Misclassification

The stakes are high for workers wrongly classified as independent contractors. Under federal and some state laws, independent contractors are not entitled to basic worker protections such as a minimum wage, overtime pay, time off for pregnancy or medical emergencies, workers' compensation benefits, or re-employment assistance.[65] When things go wrong, independent contractors have little recourse against those that employ them.[66] Due to this lack of fundamental protections, contractors are often left more vulnerable to poverty and exploitation.[67]

Employers generally have every incentive to classify workers as independent contractors. Companies do not have to provide benefits like health insurance or contribute to Medicare and Social Security taxes on behalf of independent contractors.[68] Instead, independent

---

60. Andrew Soergel, *1 in 3 Workers Employed in Gig Economy, But Not All by Choice*, U.S. NEWS & WORLD REP. (Oct. 11, 2016 1:00 PM), https://www.usnews.com/news/articles/2016-10-11/1-in-3-workers-employed-in-gig-economy-but-not-all-by-choice.

61. James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy 4,* MCKINSEY GLOBAL INSTITUTE 1 (Oct 2016), https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy.

62. *Id.*

63. Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1552, 1574 (2018).

64. *Id.* at 1575, 1577.

65. *See* Taft-Hartley Act, 29 U.S.C. § 152 (2012); *see also* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2012); Occupation Safety and Health Act, 29 U.S.C. §§ 651-672 (2012); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611-2619 (2012).

66. Pinsof, *supra* note 6, at 346-47.

67. Annette Bernhardt, *Labor Standards and Reorganization of Work: Gaps in Data and Research* 6, 7 (Inst. for Res. on Lab. & Emp., Working Paper No. 100-14, 2014), http://irle.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Work.pdf.

68. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS 1–2 (2013); Robert W. Wood, *Do You Want a 1099 or a W-2?*, FORBES (Nov. 21, 2013 1:42 AM),

contractors are required to fill out a Form 1099 and pay these taxes on their own behalf.[69] In addition to this tax savings, employers are, for the most part, free to treat independent contractors however they like, without the burdens of providing a living wage, reasonable hours, time off, or unemployment wages. Because state departments of labor generally only audit approximately two percent of employers per year,[70] the risk of getting caught misclassifying is minimal compared to the rewards that come with it. In 2016, referrals from the IRS to state departments of labor resulted in just $232,000 in tax assessments.[71]

Consequently, misclassification is a massive problem that affects millions of workers.[72] In 1984, the IRS assessed the impact of misclassification in the United States.[73] This study found that approximately 3.4 million workers were misclassified, leading to a loss of $1.6 billion in taxes.[74]

III. CURRENT TESTS

There are many different tests in use throughout the United States to determine who qualifies as an employee. The federal government uses both the common law and economic realities tests depending on what law is at issue.[75] At a local level, states often utilize different tests, again, depending on what law is at issue.[76] To make the question more confusing, states often develop their own variations of more widely known tests.[77] Many of the tests in use today involve a variety of factors that need to be considered, none of which are

---

https://www.forbes.com/sites/robertwood/2013/11/21/do-you-want-a-1099-or-a-w-2/#5b95cc237463.

69. Wood, s*upra* note 68.

70. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 12 (2009).

71. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2018-IE-R002, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS 10 (2018).

72. *Id.* at 1.

73. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS 1 (2013).

74. *Id.*

75. *See, e.g.*, McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 223 (Fla. 3d DCA 2017); O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1139 (N.D. Cal. 2015).

76. *See* Deknatel & Hoff-Downing, *supra* note 6, at 64.

77. *See id.* at 58–59.

dispositive. The lack of a clear, universal standard for distinguishing employees can lead to confusing, inconsistent results for both workers and employers.[78]

This Part begins by examining some of the dominant approaches to distinguishing between employees and independent contractors, including the common law test, the IRS test, and the economic realities test. This Part also addresses problems with courts' application of these tests.

A. Common Law Right to Control Test

The common law test for the employee/independent contractor distinction was first articulated in the Second Restatement of Agency, Tort of Services.[79] The test, as set out in the Restatement, has ten elements. These elements are: (1) the extent of control that a master can exercise over the details of the work; (2) whether a worker is engaged in a distinct occupation or business; (3) the type of occupation, with reference to its locality and whether the work is usually done under the direction of the employer; (4) the skill by the occupation; (5) whether the employer or the workman supplies his own tools and place of work; (6) the length of the person is employed; (7) the method of payment; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating an employment relationship; and (10) whether the principal is or is not in business.[80]

The Supreme Court uses the common law test as a gap filler when another rule does not clearly apply.[81] It is also still used in many states.[82] Some states, such as Florida, use the test essentially as it was first set out in the Restatement sixty years ago.[83] Others such as Missouri, use modified versions of the test.[84] There are several problems that arise with the use of the common law test. Because the test has so many elements and the weight given to these

78. *See, e.g.*, *McGillis,* 210 So. 3d at 221; *O'Connor*, 82 F. Supp. at 1135; Pearce & Silva, *supra* note 3, at 14–15.

79. Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 107–08 (2009-2010).

80. RESTATEMENT (SECOND) OF AGENCY: DEFINITION OF SERVANT §220 (AM. LAW INST. 1958).

81. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992).

82. Amato Moran, *supra* note 79, at 107–08.

83. *McGillis*, 210 So. 3d at 224.

84. *See infra* Part IV.

factors can differ, case outcomes can be unpredictable.[85] In practice, the first element, extent of control, has generally been held to be the most important factor by most courts.[86]

A 2017 Florida case, *McGillis v. Department of Economic Opportunity*, illustrates some of the common problems that occur when using the common law test. In *McGillis*, the court was asked to determine whether Darrin McGillis, an Uber driver, qualified as an employee for the purpose of entitlement to reemployment assistance.[87] Uber banned Mr. McGillis from using its application after he allegedly violated its privacy policy.[88] Mr. McGillis applied for reemployment assistance from the State of Florida.[89] After the Department of Revenue held that Mr. McGillis was an employee, Uber appealed to the Department of Economic Activity.[90] The Department of Economic Activity reversed this decision, depriving Mr. McGillis of his ability to collect unemployment benefits.[91]

The court applied Florida's common law test, noting that extent of control is the most important factor in the state.[92] The court also noted that Uber drivers decide on their own when to be available for work, are not under direct supervision from Uber, and are not prohibited from working for Uber's competitors.[93] It reasoned that, while Uber's ability to deactivate its workers' accounts should be considered and may tend to indicate a worker's status as an employee, it was not dispositive.[94] However, the court gave little reasoning as to why this factor was given so little weight in this case.[95]

The court also seems to have applied factors not found in the common law test. Because of the large number of factors at issue in common law, it is easy for courts to become confused or simply manipulate the test in order to consider factors that are not in the test.[96] The court considered the agreement between Uber and its

85. Walter H. Nunnallee, *Why Congress Needs to Fix the Employee/Independent Contractor Tax Rules: Principles, Perceptions, Problems, and Proposals*, 20 N.C. CENT. L.J. 93, 106–07 (1992).

86. David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 151–52 (2015).

87. *See McGillis*, 210 So. 3d. at 221.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 222.

92. *Id.* at 224–25.

93. *Id.* at 226.

94. *Id.*

95. *Id.*

96. Pearce & Silva, *supra* note 3, at 15.

drivers, which expressly disclaimed any employment relationship.[97] It also noted Uber's practice of providing its contractors with Form 1099, the IRS form for independent contractors, as evidence that Uber drivers are not employees.[98]

This reasoning is not only conclusory, but also extremely worrying. Uber has every reason to provide its workers with the tax forms for independent contractors.[99] To consider this when making a determination as to whether a worker is an employee is not only completely ineffectual, given the massive problem of worker misclassification in the United States,[100] but is also not a factor in the common law test, either in the restatement or under Florida law.[101]

The inconsistent outcomes that can result from applying the common-law test are clearly shown by comparing the holding in *McGillis* with the holding of the United States District Court for the Northern District of California in *Cotter v. Lyft, Inc*. In *Cotter*, former Lyft drivers sued the company, alleging that they were employees; and, as such, Lyft owed them back pay because they had not earned the minimum wage for their hours worked.[102] The court first noted that Lyft drivers do not look much like employees or independent contractors.[103] It applied California's test for determining if a worker is an employee (which has now changed),[104] in which the extent of control was the primary consideration.[105] The test also considered nine other "secondary indicia of the nature of a service relationship,"[106] that generally followed the factors set forth in the restatement, and an additional six factors used by other jurisdictions that was "logically pertinent to the inherently difficult determination."[107]

---

97. *McGillis*, 210 So. 3d at 225.

98. *Id.* at 226.

99. *See infra* Part I.

100. *See infra* Section IA. .

101. RESTATEMENT (SECOND) OF AGENCY: DEFINITION OF SERVANT §220 (AM. LAW INST. 1958); FLA. STAT. § 443.1216 (2018).

102. Cotter v. Lyft, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015). An important difference between Florida and California law is that California has a presumption in favor of a worker being an employee. *Id.* at 1077.

103. *Id*. at 1070.

104. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018) (transitioning worker's compensation claims, and in all probability, all claims, in California to the ABC test.).

105. *Cotter*, 60 F. Supp. 3d at 1076.

106. *Id.* (quoting S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 299, 404 (Cal. 1989)).

107. *Id*. (quoting *Borello*, 769 P.2d at 404). These six factors were the extent of control and

The court looked to the fact that Lyft had a set of rules governing driver conduct as proof that the company retained "a good deal of control" over its workers.[108] Tellingly, while the court in *McGillis* skimmed over Uber's power to terminate a driver's account, the court in *Cotter* placed great emphasis on Lyft's ability to do the same, noting that it is "[p]erhaps the strongest evidence of the right to control."[109] The court in *Cotter* ultimately held that, while other factors, such as a worker's ability to choose his or her own hours, cut toward Lyft's drivers being independent contractors, summary judgment could not properly be awarded when the most important factor (extent of control) tends to "cut the other way."[110]

B. IRS Right to Control Test

The IRS has developed its own variant of the common law test, known as the "right-to-control test."[111] This test is massively important, as it is used to determine who qualifies as an employee for tax purposes.[112] As previously discussed, employers are required to pay portions of their employees' Medicare and social security taxes.[113] The IRS's test has twenty factors that include: (1) A company's level of instruction for its employees; (2) Amount of training; (3) Degree of business integration; (4) The extent of personal services; (5) The control of assistants; (6) The continuity of relationship; (7) Flexibility of schedule; (8) Demands for full-time work; (9) Need for on-site services; (10) Sequence of work; (11) Requirements for reports; (12) Method of payment; (13) Payment of business or travel expenses; (14) Provision of tools and materials; (15) Investment in facilities; (16)

> (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

Borello, 769 P.2d at 407.

108. *Cotter*, 60 F. Supp. 3d at 1078–79.

109. *Id.* at 1079 (quoting Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014)).

110. *Id.* at 1079.

111. OR. DEP'T OF AGRIC., IRS 20 FACTOR TEST - INDEPENDENT CONTRACTOR OF EMPLOYER? 1, https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/20FactorTestforIndependentContractors.pdf (last visited Sept. 20, 2019).

112. *Id.* at 1–3.

113. IRS, *Topic No. 751, Social Security and Medicare Withholding Rates* (last updated Aug. 23, 2019), https://www.irs.gov/taxtopics/tc751.

Realization of profit or loss; (17) Work for multiple companies; (18) Availability to public; (19) Control over discharge; and (20) Right of termination.[114] None of these factors are dispositive.[115]

This variant of the common law test is potentially more problematic than the original test. Companies can file Form SS-8 with the IRS to receive an official determination as to whether a worker is an employee.[116] However, many companies refrain from doing so, as the IRS generally classifies workers as employees if there is room for debate on the issue.[117] Additionally, once a company receives official IRS clarification on its workers' status, it loses protections against liability in the event of worker misclassification. [118] Cases of worker misclassification are unlikely to be detected by the IRS and, even when detected, often do not lead to any sort of meaningful penalty.

When courts use the IRS test, the results are often unpredictable and malleable, just as with the common-law test.[119] This is illustrated by the courts' analysis of whether FedEx drivers are independent contractors. In 2014, the Supreme Court of Kansas applied the twenty-factor test and held that FedEx drivers were employees under the Kansas Wage Payment Act.[120] However, just a few years earlier, the United States District Court for the Northern District of Indiana applied the same test and determined that FedEx drivers were independent contractors.[121]

Many jurisdictions have turned away from the common law extent of control method due to persistent issues with applying the test's many factors consistently.[122] The search for a clear-cut method for differentiating employees and independent contractors led to the development of many other tests, including the economic reality and the ABC tests.[123]

---

114. OR. DEP'T OF AGRIC., *supra* note 111, at 1–3.

115. *Id.* at 1.

116. I.R.S., FORM SS-8, DETERMINATION OF WORKER STATUS FOR PURPOSES OF FEDERAL EMPLOYMENT TAXES AND INCOME TAX WITHHOLDING (2014).

117. OR. DEP'T OF AGRIC., *supra* note 111, at 1.

118. *Id.*

119. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, *supra* note 70, at 16; TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2018-IE-R002, *supra* note 71, at 15.

120. Craig v. FedEx Ground Package Sys., 335 P.3d 66, 92 (Kan. 2014).

121. In re FedEx Ground Package Sys., 734 F. Supp.2d 557, 559–60 (N.D. Ind. 2010) *reversed*, 792 F.3d 818 (7th Cir. 2015).

122. *See, e.g.*, Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 33 (Cal. 2018).

123. Pearce & Silva, *supra* note 3, at 9–10.

C. Economic Realities Test

The Department of Labor uses the economic realities test to determine if a worker is an employee.[124] Additionally, many states use the economic realities test to determine worker status for the purpose of worker's compensation laws.[125] Unlike the common law test, the economic realities test purports to be guided by the reality of the situation as opposed to technical concepts such as the master-servant relationship.[126] The economic realities test has six factors: (1) The extent to which the worker's service are an integral part of the employer's business; (2) The permanency of the employment relationship; (3) The amount of the worker's investment in facilities and equipment; (4) The nature and degree of control by the employer; (5) The worker's opportunity for profit and loss; and (6) The level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.[127] None of these factors are dispositive.[128]

The economic realities test suffers from many of the same problems as the common law right to control test in that the results of the test are often unpredictable. This can be especially so when courts attempt to use the test to classify workers who do not meet traditional societal working norms, such as those who operate in the gig economy.[129] For example, in *O'Connor v. Uber Technologies, Inc.*, the United States District Court for the Northern District of California applied the economic realities test and determined that Uber drivers were presumptively employees under California's Labor Code.[130] However, the United States District Court for the Eastern District of Pennsylvania recently applied the same test, to essentially the same group of workers, and granted summary judgment to Uber,

---

124. *See* Susan N. Houseman, *Flexible Staffing Arrangements: A Report on Temporary Help, On-Call, Direct-Hire Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States*, U.S. DEP'T OF LABOR 41 (Aug. 1999), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.210.2977&rep=rep1&type=pdf.

125. *Id.*

126. *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S DEP'T OF LABOR, WAGE & HOUR DIV. 1 (2008), https://www.dol.gov/whd/regs/compliance/whdfs13.pdf.

127. U.S. DEP'T OF LABOR, *Fair Labor Standards Act Advisor: Independent Contractors*, ELAWS, https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp (last visited Nov. 1, 2018).

128. *Id.*

129. *See* Kirven, *supra* note 52, at 52.

130. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

on the basis that its workers were independent contractors for the purposes of the FLSA and corresponding Pennsylvania laws.[131]

The unpredictability arising from applying the economic realities test has real consequences for both workers and businesses. Without a clear answer as to what protections they should be afforded, workers are unable to negotiate and fight for necessary workplace protections.[132] Similarly, without a predictable means of determining whether a worker is an employee or independent contractor, businesses are left to guess as to how a court will apply the law. [133] States have taken notice of these major problems with the common law and economic realities tests and have begun looking for solutions.[134] A test traditionally used in worker's compensation law, known as the ABC test, has emerged as one of the most popular solutions to the problem of predictably distinguishing employees from independent contractors.[135]

IV. THE ABC TEST

First originating in Maine in 1935,[136] the ABC test has been rapidly adopted by states as an ideal solution to the problems caused by the overcomplicated common law and economic realities tests.[137] In fact, more than seventeen states have adopted some form of the ABC test in the past decade.[138] The ABC test has historically been used to determine worker status for unemployment compensation.[139] It has three prongs: (1) Whether an individual is free from the control and direction of the employer; (2) whether the service is outside of the usual course of the employer's business; and (3) whether the worker is engaged in an independently established trade, or occupation that is of the same nature as the service being performed.[140] Most states

131. Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230, at *2–3 (E.D. Pa. Apr. 11, 2018).

132. *See* Pearce & Silva, *supra* note 3, at 15–20.

133. *Id.* at 16–20.

134. Deknatel & Hoff-Downing, *supra* note 6, at 57–61.

135. Christopher J. Cotnoir, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"*, 46 ME. L. REV. 325, 347 (1994).

136. *Id.* at 332.

137. *See id.*

138. *See id.* at 347; *see also* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 7 (Cal. 2018).

139. Cotnoir, *supra* note 135, at 347.

140. Pearce & Silva, *supra* note 3, at 27.

couple the three prongs of the test with the presumption that a worker is an employee.[141] If all three prongs of the test are satisfied, the worker loses his or her presumption of employee status.[142]

While the ABC test appears to be relatively simple, in practice, its prongs can be deceptively complicated.[143] The A prong is essentially the same as the common law right to control test in that it looks at the extent of control over the worker.[144] The definition of "usual course of business" as used in the B prong is especially susceptible to manipulation.[145] The C prong may be the most problematic of all, as the application of it by the states varies greatly.[146] The next section will examine these issues in depth by looking to case outcomes that exemplify them.

A. The A Prong

The A prong of the ABC test asks whether a worker is free from the control and direction of the employer.[147] Some states claim that this prong has a broader reach than the common law right to control test, arguing that the A prong looks to the extent of possible control, rather than actual control.[148] However, the prong is, in practice, essentially the same as the common law test.[149] As seen previously, the common law test entails the use of ten or even twenty factors to determine if a worker is an employee and is plagued with problems related to the implementation of many, non-dispositive factors leading to unpredictable results.[150] The case below exemplifies the major problems with the ABC test. While the ABC test may appear simpler and more straightforward than other tests, it actually has the potential to be even more complex.

In *Great Northern Construction, Inc. v. Department of Labor*, Vermont's Supreme Court applied the ABC test to determine whether

---

141. Deknatel & Hoff-Downing, *supra* note 6, at 71.

142. *Dynamex Operations W.*, 416 P.3d at 40.

143. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 129 (2009).

144. *Id.*

145. *See* Bradford Hughes, *Post-Dynamex: A Narrow Road Ahead for Calif. Trucking Cos.*, LAW360 (May 21, 2018, 11:49 AM), https://www.law360.com/articles/1043986 (noting that some trucking companies may have an easier time getting around the B prong by re-classifying themselves as brokers); Deknatel & Hoff-Downing, *supra* note 6, at 97–98.

146. *See* Deknatel & Hoff-Downing, *supra* note 6, at 67.

147. *Dynamex Operations W.*, , 416 P.3d at 36.

148. *See id;* Great N. Constr., Inc. v. Dep't of Labor, 161 A.3d 1207, 1210 (Vt. 2016); Sinclair Builders, Inc. v. Unemployment Ins. Comm'n, 73 A.3d 1061, 1066–67 (Me. 2013); *cf.* Beare Co. v. State, 814 S.W.2d 715, 719 (Tenn. 1991) (rejecting this approach).

149. *See infra* Part II(a)–(b); Carpet Remnant Warehouse, Inc., v. N.J. Dep't of Labor, 593 A.2d 1177, 1185 (N.J. 1991).

150. *Carpet Remnant Warehouse*, 593 A.2d at 1185.

a construction company had misclassified two of its workers under the state's unemployment compensation law.[151] Vermont's Department of Labor had audited the company and determined that the two workers, O'Connor and LaPointe, who both specialized in restoration and had refused offers of employment by the construction company,[152] were employees.[153] The department charged the construction company with three years of back taxes.[154] An administrative law judge affirmed the Department of Labor's finding.[155] Vermont's Supreme Court examined the relationship between the construction company and its two workers and determined that the major difference between them was that the company paid LaPointe a pre-negotiated hourly rate, while it paid O'Connor "by the project according to his bid."[156]

The court conducted a detailed analysis of each prong of the ABC test as it pertained to O'Connor (analyzing LaPointe only as his work pertained to prong C).[157] While the court noted some differentiation between prong A and the common-law test,[158] it then proceeded to list five factors used in the common law test as being relevant to its determination of whether O'Connor was an employee.[159] These factors included the employer's level of supervision and oversight, whether the worker supplies his own tools or materials, whether a worker can accept or decline work without negative repercussions, and whether the work must complete some sort of specific training.[160] The court ultimately found that both men met the A prong for being independent contractors, but LaPointe failed the C prong, rendering him an employee.[161]

The use of factors borrowed from the common law test to determine a worker's status under prong A of the ABC test is not isolated to Vermont.[162] A number of other states, including Connecticut, Maine,

---

151. 161 A.3d at 1210.

152. *Id.* at 1211–12.

153. *Id.* at 1210.

154. *Id.*

155. *Id.*

156. *Id.* at 1212.

157. *Id.* at 1213–18.

158. *Id.* at 1214. "This Court liberally construes part A of the ABC test," (quoting Fleece on Earth v. Dep't of Employment & Training, 2007 VT 29, 11, 16, 181 Vt. 458, 923 A.2d 594), which, like the ABC test overall, is broader in sweep than the common law master-servant relationship. In particular, part A contemplates only the right of control over a worker's performance, not the actual exercise of control.

159. *Id.*

160. *Id.* (citing *Fleece on Earth*, 923 A.2d at 601).).

161. *Id.* at 1219.

162. *See* Standard Oil of Conn., Inc. v. Adm'r, Unemployment Comp. Act, 134 A.3d 581, 591–99 (Conn. 2016); Sinclair Builders, Inc. v. Unemployment Ins. Comm'n, 73 A.3d 1061, 1069–72 (Me. 2013).

and Tennessee, also utilize a similar set of common law factors,[163] a fact noted by the Supreme Court of Vermont in its decision.[164] The use of common law factors in the A prong defeats one of the major talking points for proponents of the ABC test—its simplicity.[165] In reality, the ABC test is nothing more than a more complex version of the common law test, making it far from the most efficient means of solving the employee/independent contractor dilemma.

B. The B Prong

The B prong of the ABC test asks whether the service a worker provides is outside of a company's "usual course of business."[166] Problems with this prong of the ABC test mainly revolve around the courts' interpretation of the meaning of "usual course of business" and additions to the prong added by individual states.[167] State courts interpret "usual course of business" in a number of ways.[168] This can cause confusion for businesses that conduct operations in a number of different states.[169] For example, while courts in Massachusetts look to how a company defines its business,[170] courts in Arkansas ask whether a business can make money apart from the services of a worker.[171] While courts in Illinois look at whether a worker's activities are necessary to the business,[172] California has recently adopted a standard that defines "usual course of business" as that which others

163. *E.g.*, *Standard Oil of Conn., Inc.*, 134 A.3d at 591-99; *Sinclair Builders, Inc.*, 73 A.3d at 1069–72; HRP of Tenn., Inc. v. State, No. E2005-01176-COA-R3-CV, 2006 WL 1763673 *1, *3–4 (Tenn. Ct. App. June 28, 2006).

164. *Great N. Constr., Inc.*, 161 A.3d at 1214.

165. *See* Catherine K. Ruckelhaus & Sarah Leberstein, *NELP Summary of Independent Contractor Reforms: New Federal and State Activity*, NELP 5 (Nov. 2011), https://www.nelp.org/wp-content/uploads/2015/03/2011IndependentContractorReformUpdate.pdf; Pearce & Silva, *supra* note 3, at 32; Pinsof, *supra* note 6, at 370.

166. Pearce & Silva, *supra* note 3, at 27.

167. *See* Deknatel & Hoff-Downing, *supra* note 6, at 69–70.

168. *Id.*

169. *See* Pearce & Silva, *supra* note 3, at 14-18, 26–27 (noting the confusing plethora of tests and laws facing employers but advocating for the ABC test as the most promising solution).

170. *See, e.g.*, Althol Daily News v. Bd. of Review of the Div. of Emp't & Training, 786 N.E.2d 365, 372 (Mass. 2003).

171. *See, e.g.*, Mamo Transp., Inc. v. Dir., Dep't of Workforce Servs., 270 S.W.3d 379, 383 (Ark. Ct. App. 2007), *aff'd on other grounds*, 289 S.W.3d 79 (Ark. 2008).

172. *See, e.g.*, Carpetland U.S.A. v. Ill. Dep't of Emp't Sec., 776 N.E.2d 166, 186 (Ill. 2002).

would ordinarily view as being part of a company's business.[173] Obviously, this inconsistency can lead to unpredictability for both businesses and workers.[174]

Further, some companies have gone so far as to attempt to reclassify themselves as a different kind of business in order to avoid the B prong of the ABC test.[175] For example, strip clubs have classified themselves as drinking establishments for this purpose,[176] and some have suggested that trucking companies reclassify themselves as brokers to avoid having their drivers being classified as employees.[177] While these attempts have so far been mostly unsuccessful,[178] there is always the possibility that this strategy will have success in the future.

Additionally, some states have added to this prong or interpreted it to require that activity by a worker take place in a physical location used by a company, in order for that worker to be classified as an employee.[179] Courts in Nebraska, New Jersey, Maryland, and Washington have found that work performed outside a company's physical locations is enough to show that a worker is an independent contractor.[180] This has potentially massive repercussions for workers in the modern gig economy, who usually operate outside of a traditional workplace.[181] Finally, some states have eliminated the B prong of the ABC test all together, replacing it with a requirement for a written contract or license.[182] To make the state of the law even more confusing, statutes that do this are generally industry specific.[183] When coupled with the A prong, it becomes clear the B prong muddles the water even more, creating an incredibly confusing situation for businesses and their workers. The C prong does little to remedy the situation, instead making it even more complex and unpredictable.

---

173. Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 37 (Cal. 2018).

174. *See* Pearce & Silva, *supra* note 3, at 14–20 (describing how the inconsistent application of other tests can lead to confusion).

175. Deknatel & Hoff-Downing, *supra* note 6, at 99–100.

176. *Id.*

177. Hughes, *supra* note 145.

178. *See* Deknatel & Hoff-Downing, *supra* note 6, at 99–100.

179. *Id.* at 69.

180. *Id.*

181. *See infra* Part I.

182. Deknatel & Hoff-Downing, *supra* note 6, at 69.

183. *See, e.g.*, 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(a)(1) (West 2019); N.M. STAT. ANN. § 60-13-3.1(A)(2) (West 2019); OR. REV. STAT. ANN. § 670.600(2)(c) (West 2018).

C. The C Prong

The C prong of the ABC test is perhaps the most problematic for both workers and businesses.[184] This prong asks whether the worker "engaged in an independently established trade, occupation, profession or business"[185] The main problems with this prong revolve around what constitutes an independently established trade.[186] Similarly to the B prong, many states have altered this prong or changed it completely.[187]

To combat the subjective nature of determining whether something is independent, many states have codified specific requirements that must be met when making a determination as to whether this prong is met.[188] These requirements often look remarkably like the factors found in the common law test.[189] For instance, Maine looks at who owns the tools used to complete work, as well as the method of payment to determine if an operation is independent.[190]

The ABC test seems incapable of escaping the bounds of its common law predecessor—to its detriment. While the common law test has been used for hundreds of years and is still in widespread use on both a federal and state level,[191] it was crafted using workplace norms that are now outdated. While the cry to move to a standardized ABC test is well-intentioned, it is not the best solution. It is essential to move to a test that reflects modern trends in employment, ensuring that all workers are treated fairly. A new test is the best means of accomplishing this goal.

V. A NEW APPROACH

Employee misclassification is clearly a massive problem. Various sets of non-dispositive factors have failed to make a significant impact

---

184. *See* Tamara M. Kurtzman, *Deconstructing* Dynamex, 41 L.A. LAW. 28, 33 (2018); Gregory M. Feary, *Independent Contractor Employment Classification: A Survey of State and Federal Laws in the Motor Carrier Industry*, 35 TRANSP. L.J. 139, 152 (2008); Deknatel & Hoff-Downing, *supra* note 6, at 70.

185. Pearce & Silva, *supra* note 3, at 279.

186. *See* Deknatel & Hoff-Downing, *supra* note 6, at 70–71 (describing various interpretations of the phrase and variations of the C prong).

187. *See* Carol Louise Williamson, *Poached Eggs: The Misclassification of Egg Donors as Independent Contractors and How Egg Donors Can Contribute to the Argument for a New Category of Worker—the Dependent Contractor*, 51 GA. L. REV. 327, 338 (2016); *id.* at 71.

188. Dekantel & Hoff-Downing, *supra* note 6, at 71.

189. *See* RESTATEMENT (SECOND) OF AGENCY: DEFINITION OF SERVANT § 220 (AM. LAW INST. 1958); ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (2019); N.M. STAT. ANN. § 60-13-3.1(A) (West 2019); OR. REV. STAT. ANN. § 670.600(3) (West 2018); 43 PA. STAT. ANN. AND CONS. STAT. ANN. § 933.3(b) (West 2019).

190. ME. REV. STAT. ANN. tit. 26, § 1043(11)(E) (2018).

191. *See infra*, Part II(A).

in solving this crisis.[192] On some level, blame should rightly be placed on the federal government and states for failing to enforce worker classification laws. Until significant penalties are put in place to stop the practice, businesses will continue to evade their responsibilities to their workers by classifying them as independent contractors. However, there is certainly room for improvement when it comes to the tests that courts use to make this important distinction. A clear, nationally implemented test, coupled with similarly clear guidance for companies, and strict penalties if companies continue to misclassify workers is the only way to close the massive tax gap our nation faces. This Part proposes eliminating extent of control as a factor and borrowing from the ABC and common law tests in order to create a novel, new test that will allow courts to make consistent decisions as to whether a worker is an employee or independent contractor.

A. Presumption of Employee Status

The first part of this new test is a presumption of employee status. A presumption of employee status means that a worker is presumed to be an employee until certain criteria are met.[193] This presumption is part of the ABC test as currently used by all states except Kansas and Maine.[194] Because of the widespread issue of worker misclassification in the United States,[195] this presumption is essential to any fair test for distinguishing between worker types.

B. Eliminating the Extent of Control Problem

As seen above,[196] courts struggle with implementing the common law test. Determining the extent of control an employer has exercised or may exercise in the future over a worker has proved to be unworkable. The ABC and economic ealities tests have been unable to shed this vestige from another time, and are thus plagued by the same problems as those facing the common law test—courts manipulating the right to control to suit its particular tendencies, resulting in unpredictable, inconsistent rulings that are confusing to workers and businesses.[197] This inconsistency also gives businesses the opportunity to feign ignorance of the law in an attempt to continue misclassifying workers.[198]

---

192. *See infra*, Part II.

193. Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 17 n.11 (Cal. 2018).

194. Deknatel & Hoff-Downing, *supra* note 6, at 71.

195. *See infra*, Part I.

196. *See infra*, Part II(A).

197. *See infra*, Parts II(C) & III.

198. Bauer, *supra* note 86, at 141–42.

In order to solve the employee/independent contractor problem, the extent of control factor must be eliminated. While the court's goal in making a determination should ultimately be to determine if a business has control over its worker, there is no need for this determination to be part of a multi-factor test. Instead, a multi-factor test should be used in order to determine a business has control over its worker. This makes it much more unlikely that courts will be able to manipulate the extent of control factor to their whims.

The new test would pair this presumption of employee status with a set of practical factors that will effectively delineate between independent contractors and employees. These factors are as follows: (1) the right to discharge; (2) whether the work is the regular business of the employer; (3) whether the service provided requires more than one year of training or education in order to perform.

Because extent of control has been the most important factor in most of the tests we have seen thus far,[199] these practical, real world factors of the common law test are often overlooked by jurisdictions intent on making a determination on whether a business has or has not exercised control over a worker.[200] Indeed, factors such as the right to discharge can be even more telling of a worker's status, as seen in cases such as *McGillis* and *Cotter*, examined earlier in this Note.[201] Importantly, eliminating the extent of control factor also eliminates the split between states and tests as to whether extent of control refers to the control that a business has retained or actually exercised over its workers.[202]

C. Education Requirement

When workplace protection statutes were initially drafted in the 1930s, independent contractors were generally highly skilled professionals.[203] Because of these skills, independent contractors often had some power over companies they worked for, making it less likely that they needed a minimum wage or overtime pay.[204] These workers also tended to make more money than those who worked full-time for a single business.[205] This is no longer the case. As seen earlier, contingent workers and those in the gig economy are generally not highly

199. *See infra* Part II.

200. *See In re* FedEx Ground Sys., 273 F.R.D. 516, 530 (N.D. Ind. 2010); *e.g.*, McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 224–26 (Fla. 3d DCA 2017).

201. *See McGillis*, 210 So. 3d at 226; Cotter v. Lyft, 60 F. Supp. 3d 1067, 1079 (N.D. Cal. 2015).

202. *See, e.g.*, *In re FedEx Ground Sys.*, 273 F.R.D. at 529–31; Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 36 (Cal. 2018).

203. Pearce & Silva, *supra* note 3, at 12–13.

204. *See id.*

205. *Id.*

skilled.[206] Because there is no shortage of people able to perform these services, these workers have no sway over the companies that employee them.[207] These workers are often in a vulnerable economic position and in dire need of workplace protections.[208] A requirement that independent contractors perform a service that requires at least one year of training or education effectively ensures that vulnerable workers are not denied the benefits that they need.

D. Dispositive Factors

Two major problems courts have in applying the common law, IRS, and economic realities tests are how to weigh factors and which to make dispositive.[209] In order to overcome the employee presumption in the ABC test, a business has the burden to prove that a worker does not meet all three prongs of the test.[210] This new test would employ the same rule. If an employer successfully rebuts employee status, the burden would then shift to the worker to present evidence as to why these factors are actually met. This will present courts with a clear procedure for dealing with employee/independent contractor claims.

E. How Does it Work in Practice?

To recap, this new test would be implemented on a nationwide level in order to be most effective. Workers would be presumed to be employees, and the test would consist of three factors. These factors are: (1) the right to discharge; (2) whether the work is the regular business of the employer; (3) whether the service provided requires more than one year of training or education in order to perform. In order to rebut the presumption of employee status, a business would need to show that it meets all three of the above criteria. If a business meets its burden of proof, the burden shifts to the worker to prove he or she does meet the criteria.

Applying the test to a set of real world factors illustrates how it would be effective in practice. This note will use the fact pattern from *McGillis* as an example. In that case, Uber banned Mr. McGillis, one of its drivers, from its application.[211] Mr. McGillis used his own vehicle and switched between using Uber and Lyft to pick up passengers.[212]

---

206. *E.g.*, Bookman, *supra* note 444, at 805–06.

207. *See* Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Marker Intermediaries in High Mobility Labor Markets*, 13 EMP. RTS. & EMP. POL'Y 285, 344–45 (2009).

208. *See, e.g.*, Bookman, *supra* note 44, at 805–06.

209. *See infra* Part II.

210. *See, e.g.*, Great N. Constr., Inc. v. Dep't of Labor, 161 A.3d 1207, 1218–19 (Vt. 2016).

211. McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 221 (Fla. 3d DCA 2017).

212. *Id.* at 223.

Presumably, Mr. McGillis found riders and received payments through the Uber application.[213] Uber retained the right to ban Mr. McGillis from using its application (a form of control), and it ultimately exercised this control.[214] Uber also controlled who was able to use its application by requiring drivers to register and submit to a background check.[215]

Under the new test, Mr. McGillis would presumptively have employee status. Uber clearly had the right to discharge Mr. McGillis, satisfying factor one. Contracting with drivers to pick up members of the public is clearly part of Uber's regular business. Uber would have an extremely hard time arguing that this is not the case, so we will assume that Mr. McGillis meets factor two. While some states require that a person receives training before acquiring a driver's license, none of these required training programs last for more than one year.[216] Therefore, Mr. McGillis would meet factor three. Because Mr. McGillis meets all the factors of the test, he would be classified as an employee.

F. Counter-Arguments

While this new test solves many of the problems that courts face today with regard to the independent contractor/employee distinction, there are certainly potential criticisms of the test that should be addressed. One argument against this approach is that a new test will be hard to implement, especially on a national level. The opponents of a new test may argue that courts are used to implementing the common law test and other nationally recognized tests, if with varying levels of success, and have been for many years.[217] Switching to a new approach that has traditionally been used only in the context of unemployment insurance has the potential to be confusing and difficult, leading to a dizzying array of variations on such a supposedly simple test.[218]

While implementing any test on a nationwide level will be difficult, implementing this new approach would not be substantially more so than implementing any other test nationally. At present, no test is used on a national basis for every purpose. Further, the common law, economic realities, and ABC tests have proven to be confusing and

---

213. *Introducing the New Driver App, Your Partner on the Road*, UBER, https://www.uber.com/drive/driver-app/ (last visited Sept. 20, 2019).

214. *McGillis*, 220 So. 3d at 221–223.

215. *Id.* at 222.

216. *State-By-State Overview: Driver Education Requirements, Online DE Authorization, Requirements Post-18*, http://leg.wa.gov/JTC/Documents/Studies/Driver%20Education_Beth/SummaryStateTable.pdf (last visited Sept. 20, 2019).

217. *See* Deknatel & Hoff-Downing, *supra* note 6 (detailing the various approaches that states and courts have used to utilize the ABC test).

218. *Id.*

hard to implement consistently.[219] Despite its many advocates, the ABC test, traditionally used only for worker's compensation claims, would be similarly difficult to implement on a national level. However, some action must be taken in order to standardize the distinction between employee and independent contractor on a national level. This new approach will be the most effective means of making that distinction.

Another potential criticism of this new test is that it is too similar to the ABC test. At first glance, this has merit. Both tests contain a presumption of employee status and three factors. Additionally, each test requires that a worker meet at least two factors in order to be classified as an employee. However, the similarities end there. The ABC test includes the ever problematic extent of control factor, which we have seen to be hard to interpret and a vestige of the outdated common law test. Further, the new test has an education or training requirement, ensuring that only workers with marketable skills will be classified as independent contractors and lessening the chance of worker exploitation. On the whole, the content of this new test improves greatly on that of the ABC test while also maintaining one of its greatest strengths – its simplicity.

Finally, a third criticism may be that this new test is too narrow and would lead to many more people being classified as employees, causing economic difficulty for businesses and ultimately the economy as a whole. It is certainly foreseeable that many more workers would qualify as employees under this new test. However, this would not necessarily cause economic damage to businesses. Some companies may save significantly on legal fees, as a more predictable test would eliminate the uncertainty that employers today face when classifying their employees.[220] Additionally, this new approach would lead to a more efficient collection of worker taxes, helping to close our country's enormous tax gap and ultimately benefiting the economy. While every method of distinguishing independent contractors and employees has its flaws, this new test is simple and predictable. If implemented nationally, it is not only best for America's workers, but also for its economy.

VI. CONCLUSION

Clearly, distinguishing between independent contractors and employees is not an easy task. The extent of control factor, while in use for many years, is no longer the best means of determining a worker's status. It should, therefore, be eliminated and replaced with a test utilizing a presumption of employee status that implements the

219. *See infra* Parts II, III.

220. *See* Pearce & Silva, *supra* note 3, at 14-15.

three factors discussed above. If implemented on a national level, this new test would allow courts to make consistent rulings, provide accountability and clarity for employers, and benefit the United States' economy.