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# THE MISCLASSIFICATION TREND: HOW INDEPENDENT CONTRACTOR STATUS COULD AFFECT CONSUMERS

Kyla Miller\*

## I. INTRODUCTION

Employers are required to classify their workers in one of two categories: “employee” or “independent contractor.” On its face, this may seem like an unimportant distinction to make; however, one of the two is unable to receive some of the most fundamental benefits workers typically are entitled to in the United States. Broadly speaking, what is the difference between an employee and an independent contractor? An employee is defined as “anyone who performs services for you, *if you can control what will be done and how it will be done.*”<sup>1</sup> In contrast, an independent contractor under common law rules is anyone who performs services for you, if they can control or direct only the *result* of the work, and not what will be done or how it will be done.<sup>2</sup> Therefore, workers are workers no matter how they are classified—both categories include any individual who is performing a service for someone in exchange for compensation.

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<sup>1</sup> See *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Employee-Common-Law-Employee> (last updated Nov. 2, 2015) (emphasis added).

<sup>2</sup> See *id.*

However, the level of control that an employer has over the way the work is completed is where the line is drawn. In practice, this classification is subject to many various tests and analyses, with "control" being a common theme among them.

Why do we care about this classification? Most basically, employees are covered under the thousands of employment laws and regulations which the common law and statutes have been constructed for.<sup>3</sup> Independent contractors, in contrast, are not covered under these provisions.<sup>4</sup> This means that independent contractors typically are not entitled to workers' compensation, unemployment insurance, or general liability insurance, nor are they generally subject to payroll taxes.<sup>5</sup> Additionally, employers who classify their workers as independent contractors often do not need to comply with many basic labor laws, including paid sick leave and vacation time, which can save them thousands of dollars a year, or even millions if the company is large enough.<sup>6</sup> The differences are almost always employer-friendly, and this helps explain the trend toward more frequent employer misclassification of employees. While employers could get away with this more easily in the past, the increased publicity of major corporations such as FedEx and Uber's classifications of their workers as independent contractors has led to increased awareness of this loophole.<sup>7</sup> Improving technology has also allowed workers to complete tasks remotely and independently, further contributing to this

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<sup>3</sup> See Robert W. Wood, *Independent Contractor or Employee? The Multiple Issues Involved in Independent Contractor Status*, N.Y. ST. B. ASSOC. J., June 2008, at 28.

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

<sup>5</sup> Richard Reibstein, *The Costs of Worker Misclassification: Part 1*, LAW360 (July 7, 2015, 12:04 P.M.), <http://www.law360.com/employment/articles/672242/the-costs-of-worker-misclassification-part-1>.

<sup>6</sup> See *id.*

<sup>7</sup> See Richard Reibstein, *Is Your Company on the Independent Contractor Hit List?*, FORBES (June 16, 2015, 7:24 AM), <http://www.forbes.com/sites/danielfisher/2015/06/16/independent-contractor-hit-list/#28f107aa58d5>.

trend.<sup>8</sup> Many employers will eventually realize that courts are beginning to crack down on this trend, which can cost companies like FedEx millions of dollars in back-pay owed to workers that were improperly classified as independent contractors.

Not only does this classification affect the employer/employee relationship, it can greatly affect consumers as well. Although this classification can lower costs, expand services, and give greater weight to consumer feedback, it can also lead to an unregulated, unsafe market, where workers are without insurance and without protection, putting the consumer at an increased risk if liability were to arise.<sup>9</sup> This article will examine this fine distinction, which has become an exponentially greater problem in recent years. Beyond the classification hurdle, this article will examine several case studies, including the Uber class action lawsuit, and the potential consequences of particular outcomes. This information will culminate in an examination of how this trend toward classifying employees as independent contractors may appear to aid consumers on its face, but in reality creates an environment where the risks greatly outweigh the benefits.

## II. THE CLASSIFICATION HURDLE

One of the most difficult tasks for an employer is to determine whether their worker is an employee or an independent contractor. If the worker is an employee, that means the employer likely can control the individual, making them do what they want to further their business goals.<sup>10</sup> An independent contractor is typically a one-time worker who will complete the job for a certain

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<sup>8</sup> Tad Milbourn, *In The Future, Employees Won't Exist*, TECHCRUNCH (June 13, 2015), <http://techcrunch.com/2015/06/13/in-the-future-employees-wont-exist/>.

<sup>9</sup> Adam Cecil, *The Insurance Secret That Uber Doesn't Want You to Know*, POLICY GENIUS (October 8, 2014), <https://www.policygenius.com/blog/insurance-secret-uber-doesnt-want-know/>.

<sup>10</sup> Wood, *supra* note 3.

fixed price, and may work for multiple businesses at once.<sup>11</sup> The common law and the Internal Revenue Service (IRS) provide rough guidelines for making this classification.<sup>12</sup> Under the common law, control is the central element in determining whether a worker is an employee or independent contractor.<sup>13</sup> The determination is relatively open and very fact-intensive. Courts will consider various indicia of control to determine what type of relationship exists.<sup>14</sup>

Under common law principles, there are ten factors courts generally consider when determining whether someone is an independent contractor.<sup>15</sup> These factors are: "(1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business."<sup>16</sup> No one factor is determinative of whether or not a worker is an employee or independent contractor; rather, all factors must be considered together to determine what type of relationship exists.<sup>17</sup>

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

<sup>12</sup> David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 178 (2015).

<sup>13</sup> *Id.* at 152.

<sup>14</sup> 41 Am. Jur. 2d *Independent Contractors* § 5 (2016).

<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.*

According to the IRS, reference should be made to the common law rules to determine if a worker is an independent contractor or employee for federal employment tax purposes as well.<sup>18</sup> The IRS has determined that although control is generally an element under common law principles, it can be simplified even further by dividing control into three separate categories: behavioral control, financial control, and relationship of the parties.<sup>19</sup> For behavioral control, facts should be focused on whether the employer has a right to direct and control how the work is completed by methods such as instructions, training, or any other means.<sup>20</sup> Under the financial control consideration, businesses should consider whether they have a right to control the fiscal and business aspects of the job.<sup>21</sup> The IRS gives several examples of this type of control, including whether the worker has unreimbursed business expenses, the extent of the worker's investment in the facilities or tools in performing their services, the extent to which the worker makes their services available to that particular market, how the employer pays their worker, and the extent that the worker can gain profit or incur losses.<sup>22</sup> Finally, the relationship consideration looks at facts that illustrate the formality and type of relationship, such as whether there was a contract that describes the relationship the parties intended, whether there are employee-type benefits such as insurance, pension plans, vacations, etc., the permanency of the relationship, and the extent that the services performed are a key part of the employer's business.<sup>23</sup>

The IRS has also provided a much more extensive twenty-factor test to determine whether someone is an

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<sup>18</sup> *Topic 762 - Independent Contractor vs. Employee*, IRS, <https://www.irs.gov/taxtopics/tc762.html> (last updated Dec. 30, 2015).

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.*; see Internal Revenue Serv., Pub. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 5 (2015) [hereinafter IRS Publication 15-A].

employee or independent contractor.<sup>24</sup> Like the other tests, control is always the central consideration, and the presence of one indicia of a particular relationship is not conclusive of an employer-employee relationship.<sup>25</sup> These factors include: instructions; training; integration; services rendered personally; hiring, supervising, and paying assistants; continuing relationships; set hours of work; full-time required; doing work on employers' premises; order or sequences set; payment by hour, week, or month; payment of business and/or traveling expenses; furnishing tools and materials; significant investments in facilities that are not typically maintained by employees; realization of profits or losses of the business; working for more than one firm at a time; making services available to the general public; right to discharge; and right to terminate.<sup>26</sup>

Even if a worker is classified as an independent contractor under the common law rules or the IRS' tests, workers may nevertheless be considered employees by statute.<sup>27</sup> They are referred to as "statutory employees."<sup>28</sup> There are four situations where a worker is considered a statutory employee: (1) a driver that distributes beverages or food, or who picks up and delivers laundry, if the driver is the employer's agent or is paid on commission; (2) a life insurance sales agent for a life insurance company; (3) an at-home worker who provides materials or goods for the employer, if the employer also provides specifications for how the work is to be completed; and (4) a full time or traveling salesperson, who turns in or-

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<sup>24</sup> Small Bus. Dev. Ctr, Angelo State University, IRS 20-Factor Test: Independent Contractor or Employee Basic Question: Who Has Control Over the Work Being Done?, available at [https://www.angelo.edu/services/sbdc/documents/library\\_resource/s/IRS%2020%20Factor%20Test.pdf](https://www.angelo.edu/services/sbdc/documents/library_resource/s/IRS%2020%20Factor%20Test.pdf) (last visited April 18, 2016) [hereinafter SBDC].

<sup>25</sup> *Id.*

<sup>26</sup> *See id.*

<sup>27</sup> IRS Publication 15-A, *supra* note 23 (providing guidance for businesses to properly classify their workers as either an independent contractor or employee).

<sup>28</sup> *Id.*

ders for the employer from retailers, contractors, or similar establishments.<sup>29</sup>

Just as there are statutory employees, there are statutory nonemployees as well.<sup>30</sup> There are three categories of statutory nonemployees: direct sellers, licensed real estate agents, and certain companion sitters.<sup>31</sup> Direct selling includes trying to increase direct sales activities and employers earn income based on the productivity of their direct sellers.<sup>32</sup> Real estate agents must earn income based on their sales or other output to fall within this statutory exception. Finally, companion sitters are individuals who furnish care for children, the elderly, or disabled.<sup>33</sup> They are also treated as self-employed for all federal tax purposes.<sup>34</sup>

### III. THE MISCLASSIFICATION TREND

In recent years, businesses have begun to use independent contractors for a variety of reasons. Some businesses need independent contractors to carry out an essential part of their business.<sup>35</sup> Meanwhile, other businesses have begun to utilize independent contractors as a way to connect consumers with a particular service.<sup>36</sup> This type of use is at the heart of the on-demand sharing

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<sup>29</sup> IRS Publication 15-A, *supra* note 23, at 6. The IRS says workers must fall within any of the four categories and also meet the three conditions relating to social security and Medicare taxes: (1) the service contract states or implies that substantially all services are to be performed by them; (2) there is no substantial investment in equipment and property used to perform services; and (3) the services are performed on a continuing basis for the same payer. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* ("Such activities include providing motivation and encouragement; imparting skills, knowledge, or experience; and recruiting.").

<sup>33</sup> *Id.* An employer will not be treated as an employer of the companion sitter if he does not receive or pay the salary/wages of his sitter, and the sitter is compensated on a fee basis.

<sup>34</sup> *Id.*

<sup>35</sup> Reibstein, *supra* note 5.

<sup>36</sup> *Id.*



economy.<sup>37</sup> Companies such as Uber are a prime example of this type of usage. They hire independent contractors and connect them with consumers who need transportation.<sup>38</sup> Although there are valid reasons to utilize an independent contractor, businesses have recently begun to recognize the financial and administrative advantages of hiring independent contractors, and often have tried to cut corners in an attempt to save on taxes and typical employee benefit compensation plans.<sup>39</sup>

Since mid-2007, federal and state regulators have become increasingly strict with independent contractor misclassification.<sup>40</sup> There are numerous justifications for this. First, the government loses tax revenue when employers improperly classify their workers as independent contractors.<sup>41</sup> Second, a whole body of law exists to protect workers, and this cannot apply to independent contractors.<sup>42</sup> However, this misclassification does more than undermine the worker's individual rights—it also generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well to state unemployment insurance and workers' compensation funds.<sup>43</sup> This not only hurts the economy, but taxpayers as well.<sup>44</sup> Unemployment compensation programs are also hurt because employers only have to pay federal and state unemployment taxes on behalf of their employees.<sup>45</sup> As if that was not enough, health pro-

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<sup>37</sup> *Id.*

<sup>38</sup> Matthew Hughes, *What is Uber and Why is it Threatening Traditional Taxi Services?*, MAKEUSEOF.COM (Jul. 4, 2014), <http://www.makeuseof.com/tag/uber-threatening-traditional-taxi-services/>.

<sup>39</sup> See Henry W. Sledz, Jr. & John J. Lynch, *The Legal Ramifications of Using Independent Contractors Temporary Agency Employees Leased Workers*, 9 CBA REC., at 20 (Nov. 1995).

<sup>40</sup> Reibstein, *supra* note 5.

<sup>41</sup> *Id.*

<sup>42</sup> Wood, *supra* note 3.

<sup>43</sup> *Misclassification of Employees as Independent Contractors*, Wage and Hour Division (WHD), UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/whd/workers/misclassification/> (last visited Jan. 4, 2016) [hereinafter DEP'T OF LABOR].

<sup>44</sup> *Id.*

<sup>45</sup> Bauer, *supra* note 12, at 145.

grams are affected as well. Employers avoiding paying health insurance for their independent contractors is a major contributor to the country's public health problems.<sup>46</sup>

The Wage and Hour Division is working with the IRS and numerous states to decrease employee misclassification and make sure that workers get the wages, benefits, and protections that they are entitled to under the law.<sup>47</sup> Due to a lack of records, it is difficult to determine exactly how many individuals are incorrectly classified as independent contractors.<sup>48</sup> However, recent investigations give a bit of insight into how expansive this misclassification problem has become.<sup>49</sup> In 2014 alone, the Wage and Hour Division investigations resulted in more than 109,000 workers receiving more than \$79 million in back wages.<sup>50</sup> These workers were primarily in industries such as janitorial work, temporary help, food service, day care, and hospitality.<sup>51</sup> Compare this to 1984, when the IRS estimated that 3.4 million workers were misclassified as independent contractors.<sup>52</sup> Although the 2014 back wages give some scope to the magnitude of this problem, it's important to note that those figures only represent those who have been chosen for investigation.<sup>53</sup> It would be impractical and nearly impossible to investigate every business for proper classification of their employees, so it's very likely that these numbers are much larger than what is estimated or what is awarded in back pay for any given year.

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<sup>46</sup> *Id.* at 146.

<sup>47</sup> DEP'T OF LABOR, *supra* note 43.

<sup>48</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006).

<sup>49</sup> DEP'T OF LABOR, *supra* note 43.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 1 (2009).

<sup>53</sup> *See id.*

## IV. ATTEMPTED REMEDIES

Recognizing this large-scale problem, various agencies have attempted to reduce the number of misclassifications.<sup>54</sup> To address this increasing problem, several bills have been introduced to Congress, but have failed.<sup>55</sup> However, in the 113th session of Congress, one bill has been introduced that could effectively address this misclassification problem.<sup>56</sup> The Payroll Fraud Prevention Act of 2014<sup>57</sup> would be an amendment to the Fair Labor Standards Act of 1938.<sup>58</sup> This bill would place recording requirements on businesses, and would make misclassification a violation of federal labor law that would carry a fine per worker misclassification, increasing with repeated misclassification.<sup>59</sup> Additionally, the bill would require that workers be given written notice of their classification.<sup>60</sup> It also would create the rebuttable presumption that, in the absence of written notice of classification to any worker, they are considered an employee.<sup>61</sup>

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<sup>54</sup> Jenna A. Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 125 (2009) (detailing the United State Department of Labor effort to reduce the number of misclassifications).

<sup>55</sup> See, e.g., Independent Contractor Proper Classification Act of 2007, S. 2044, 110th Cong. § 2 (2007) (bill was intended to give more precise guidelines for classifying workers, however, the bill died in committee).

<sup>56</sup> Richard Reibstein et al., *With No Fanfare, Congress Re-Introduces the Payroll Fraud Prevention Act of 2014 to Crack Down on Independent Contractor Misclassification*, INDEPENDENT CONTRACTOR COMPLIANCE (May 20, 2014), <http://independentcontractorcompliance.com/2014/05/20/with-no-fanfarecongress-re-introduces-the-payroll-fraud-prevention-act-of-2014-to-crack-downon-independent-contractor-misclassification/>.

<sup>57</sup> H.R. 4611, 113th Cong. (2014).

<sup>58</sup> 29 U.S.C. §§ 201-19 (2012).

<sup>59</sup> H.R. 4611 § 2(d).

<sup>60</sup> H.R. 4611 § 2(a).

<sup>61</sup> H.R. 4611 § 2(c).

## V. THE EFFECT OF CLASSIFICATION AS AN INDEPENDENT CONTRACTOR

After utilizing the various tests, the courts will determine whether someone is an independent contractor or employee. What exactly does this conclusion mean? A determination that the individual is an employee introduces several burdens, such as requiring the employer to pay his or her wages, withhold taxes, provide employee benefits, be liable for any type of negligent act he or she does within the scope of their employment, and be subjected to federal and state law provisions regarding discrimination, termination, and discipline.<sup>62</sup> In contrast, independent contractors cannot be controlled to the extent an employee could be—they are in charge of providing their service to the company on their own terms.<sup>63</sup> Moreover, they generally cannot bring tort, contract, or tax liability actions against the company.<sup>64</sup>

Many reasons for using independent contractors are easily comprehended as advantageous for businesses. More specifically, these business advantages can include not having to pay independent contractors minimum wage or over time pay, lack of employee benefit plans, no representation by labor unions, and no requirement to withhold taxes, make social security and Medicare contributions on fees for independent contractors, pay unemployment taxes, or provide workers' compensation insurance.<sup>65</sup>

### A. Taxes

The variation in tax obligations related to independent contractors versus employees is one of the most substantial differences between the two groups. When a worker is classified as an independent contractor, the employer simply pays their gross wage with no withhold-

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<sup>62</sup> Wood, *supra* note 3.

<sup>63</sup> *Id.*

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

<sup>65</sup> Reibstein, *supra* note 5.

ing.<sup>66</sup> In contrast, an employer with workers classified as employees is required to withhold federal, state, and occasionally local taxes—those taxes are then sent to the proper authorities.<sup>67</sup> Therefore, if an employer improperly classifies their worker as an independent contractor rather than an employee, they may be on the hook for the taxes that should have been withheld, all future taxes, and other penalties.<sup>68</sup> If a person is considered an independent contractor, that doesn't mean they will not need to pay taxes at all; rather, they are required individually to pay their own taxes—the employer is not responsible for it.<sup>69</sup> Essentially, such a worker is treated as a self-employed individual, and must pay income taxes and self-employment taxes themselves.<sup>70</sup> Self-employment taxes are paid in addition to regular income taxes—they are made up of social security and Medicare taxes.<sup>71</sup> Therefore, the employer-independent contractor classification for tax purposes largely determines whether the employer will bear the burden of taxation, or whether the individual will.

Underreporting, underpayment, and non-filing of taxes have always been problems in the United States. The IRS estimated in 2005 that these problems accounted for approximately \$345 billion in lost tax revenue.<sup>72</sup> In 1984, the IRS estimated that misclassification of independent contractors contributed to a federal tax income

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<sup>66</sup> Wood, *supra* note 3, at 28-9.

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

<sup>68</sup> Richard L. Doernberg, *The Case Against Withholding*, 61 TEX. L. REV. 595, 596 (1982).

<sup>69</sup> *Income Taxes for Self-Employed Business Owners and Independent Contractors*, EFILE.COM, <http://www.efile.com/self-employed-independent-contractor-income-estimated-taxes/> (last visited January 4, 2016).

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

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

<sup>72</sup> U.S. DEP'T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 2-3 (July 8, 2009), *available at* [http://www.irs.gov/pub/newsroom/tax\\_gap\\_report-final\\_version.pdf](http://www.irs.gov/pub/newsroom/tax_gap_report-final_version.pdf).

loss of approximately \$1.6 billion.<sup>73</sup> This misclassification accounted for more than 60% of the total revenue loss.<sup>74</sup> Taking into account inflation and the increased misrepresentation in recent years, that number is likely much greater now.

### *B. Lack of Liability*

For purposes of this article, this may be the most important distinction between independent contractors and employees. In general, one who employs an independent contractor is immune from liability in damages to third parties caused by that contractor or his employees in the course of his contracted work.<sup>75</sup> The policy behind this rule is again based upon the theory of control.<sup>76</sup> If the employer does not have control over the manner in which they are doing the job, then the employer shouldn't have any liability for injuries arising from the manner in which the work was being done.<sup>77</sup> This rule does have several exceptions.<sup>78</sup> First, if the negligence was not due to the independent contractor's work, but rather the employer's own negligence, the employer will still be liable.<sup>79</sup> Additionally, if the negligence of the employer happens in concurrence with the negligence of his independent contractor, and a third party is injured, the fact that the employer hired an independent contractor won't rid him of liability—both will be held liable.<sup>80</sup> Another way an employer could be held liable is if a plaintiff were able to prove that the employer was negligent in hiring that individual.<sup>81</sup> If the employer knew or should have known that the independent contractor was unqual-

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<sup>73</sup> GAO-09-717, *supra* note 52.

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

<sup>75</sup> Timothy G. Richard, *Master and Servant-Liability for Injuries to Third Parties: Employers' Vicarious Liability to Employees of an Independent Contractor*, 72 N.D. L. Rev. 181, 183 (1996).

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

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

<sup>78</sup> *Id.* at 184.

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

<sup>80</sup> *Id.* at 187.

<sup>81</sup> *Id.* at 185.

ified to undertake the work they were employed to complete, they may be liable.<sup>82</sup> This may be demonstrated through the employer's knowledge of their incompetence, their general reputation, or lack of previous experience.<sup>83</sup> The Restatement also provides useful guidelines for determining when an employer will be held liable for negligent hiring of an independent contractor.<sup>84</sup> The Restatement (Second) of Torts states that an independent contractor will be liable for torts resulting in bodily harm if the employer did not "exercise reasonable care to employ a careful and competent contractor."<sup>85</sup> According to the Restatement, liability is limited to situations where the independent contractor is regularly engaged in work that could involve a risk of bodily harm if not performed with care, or where the contractor is employed to fulfill an obligation to third persons.<sup>86</sup> Practically speaking, if a third party is injured by an independent contractor, and no exceptions apply, they may find it more difficult to recover.<sup>87</sup> This is because an employer likely has a greater financial capability for providing compensation for injuries than an individual would.<sup>88</sup>

The potential liability of an independent contractor could extend for quite some time; therefore, states have placed limits on their potential liability.<sup>89</sup> For example, in New Jersey and many other states, a limit may be

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

<sup>83</sup> *Id.*

<sup>84</sup> Restatement (Second) of Torts § 411 (1965). "The rule has been widely adopted that an employer of an independent contractor may be liable to one injured as a result of the contractor's fault where it is shown that the employer was negligent in selecting a careless or incompetent person with whom to contract." *W. Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 578 P.2d 1045, 1048 (1978).

<sup>85</sup> See, e.g., *Suarez v. Gonzalez*, 820 So. 2d 342, 347 (Fla. Dist. Ct. App. 2002); see also Restatement (Second) of Torts § 411 (1965).

<sup>86</sup> *Id.*

<sup>87</sup> Michael Roberts, *Is that Taxi Driver Really an "Independent Contractor"?*, THE LEGAL EXAMINER (May 19, 2011, 11:03 AM), <http://gadsden.legalexaminer.com/mass-transit-airline-cruise-ship-train-bus/is-that-taxi-driver-really-an-independent-contractor/>.

<sup>88</sup> *Id.*

<sup>89</sup> 10 N.J. Pl. & Pr. Forms § 82:4.

placed on the time within which certain suits may be brought.<sup>90</sup> In New Jersey, no action in contract, tort, or otherwise will be proper after ten years if it falls within certain categories.<sup>91</sup> This include damages for “deficiencies in design, planning, surveying, supervision, or construction of an improvement to real property, or for any injury to real or personal property, for any injury to the person, or for bodily injury or wrongful death arising out of the defective and unsafe condition of an improvement of real property.”<sup>92</sup> Unlike a statute of limitations, this is a statute of repose.<sup>93</sup> The statute eliminates liability ten years after the performance of the services that would have led to liability but for the statute.<sup>94</sup> This is despite the fact that the intended use may have been for much longer than ten years.<sup>95</sup>

Even without the liability that may result from the application of the above mentioned rules, an independent contractor can agree to indemnify his or her employer or be responsible for certain liability that is incurred by the employer as a result of the work performed by the independent contractor.<sup>96</sup> If that is the case, courts will look to the terms of their specific agreement.<sup>97</sup> These agreements could cover negligence solely by the independent contractor, or joint negligence of the independent contractor and the employer.<sup>98</sup>

## VI.CASE STUDIES: IMPROPER CLASSIFICATION

In every facet of employment, there are controversies over whether a worker is an employee or independ-

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<sup>90</sup> N.J. Rev. Stat. § 2A:14-1.1 (2016).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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

<sup>96</sup> *Id.*

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

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



ent contractor. However, several major companies have gained nation-wide attention for their classification of workers as independent contractors.<sup>99</sup> One trend has emerged regarding drivers: whether they are associated with FedEx or Uber, they carry with them similarities in work arrangements and agreements that make their classification a close call, and place them at the center of this ever-emerging debate.

### A. FedEx

FedEx has been subject to numerous lawsuits over the past decade that pose important questions for this debate.<sup>100</sup> It began in 2007, when a California appellate court held that single-route FedEx Ground delivery drivers were misclassified as independent contractors, when they should have been given employee status.<sup>101</sup> However, in 2009<sup>102</sup> and 2010<sup>103</sup> the corporation won major victories holding that their drivers were independent contractors.<sup>104</sup> That decision granted summary judgment for FedEx in 42 lawsuits, resulting in drivers in 27 states being held as independent contractors rather than employees.<sup>105</sup> Then in 2014, FedEx drivers' status was reevaluated by the 9<sup>th</sup> circuit. That court reversed the earlier decision, and thus revitalized the controversy.<sup>106</sup> The most recent notable case took place in the 11<sup>th</sup> Circuit.<sup>107</sup>

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<sup>99</sup> See, e.g., *Estrada v. FedEx Ground Package System, Inc.*, 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007).

<sup>100</sup> See, e.g., *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492 (D.C. Cir. 2009) (a review of whether FedEx committed an unfair labor practice by refusing to bargain with the union representative of its drivers, finding the drivers to be independent contractors and not employees).

<sup>101</sup> *Estrada*, 64 Cal. Rptr. at 348.

<sup>102</sup> *FedEx Home Delivery*, 563 F.3d at 518.

<sup>103</sup> In re FedEx Ground Package System, Inc. Employment Practices Litigation, 273 F.R.D. 424 (N.D. Ind. 2010), reconsideration of 2008 WL 2756381 (N.D. Ind. 2008).

<sup>104</sup> 20 No. 2 FLSA Emp. Exemption Handbook Newsl. 3.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *Carlson v. FedEx Ground Package Systems, Inc.*, 787 F.3d 1313 (11th Cir. 2015).

This case in particular provides a great example for the way courts analyze a worker's status, and how, despite the numerous factors and tests, these types of cases still can be a close call such that a reasonable jury could hold either way.

In *Carlson*, drivers brought a class action against the package delivery company seeking a holding that they were employees, not independent contractors, and therefore were entitled to reimbursement for business expenses and back pay for overtime.<sup>108</sup> The court looked at ten factors: (1) the extent of control the employer exercises over the details of the work; (2) whether the worker is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether the work is usually done in the locality under the direction of an employer or by a specialist without supervision; (4) the skills required; (5) whether the worker supplies the instrumentalities, tools and place of work; (6) the length of employment; (7) the method of payment, either by the hour or by the job completed; (8) whether the work is part of the regular business of the employer; (9) the parties' intentions; and (10) whether the employer is a business.<sup>109</sup>

Matching the facts to this multi-factor analysis, several important aspects are of note. First, FedEx has the right to control the appearance of their drivers, and they do in fact take advantage of that.<sup>110</sup> FedEx also can control its drivers' vehicles.<sup>111</sup> They can also control the driver's work schedule; essentially their operating agreement requires them to work between nine and a half and eleven hours a day.<sup>112</sup> FedEx also can control

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<sup>108</sup> *Id.* at 1328.

<sup>109</sup> *Id.* at 1318. These factors are found in Restatement (Second) of Agency § 220(2).

<sup>110</sup> 20 No. 2 FLSA Emp. Exemption Handbook Newsl. 3.

<sup>111</sup> *Id.* This control includes: the color of paint the vehicles must be, that they must display FedEx logo, the vehicles must be clean and presentable. *Id.*

<sup>112</sup> *Id.* Drivers must also leave the terminals and return at specific times, and FedEx managers have the right to ensure that drivers

when and how the package delivery occurs.<sup>113</sup> Finally, FedEx requires drivers to comply with their standards of service.<sup>114</sup> This includes upholding their professional image and good reputation.<sup>115</sup> After evaluating these aspects, the Eleventh Circuit, like the Ninth Circuit's reversal, determined that FedEx was not entitled to summary judgment as a matter of law.<sup>116</sup>

### B. Uber

If FedEx weren't drawing enough attention to this growing problem, companies like Uber are now under the spotlight for their growing number of lawsuits regarding worker status as an independent contractor.<sup>117</sup> Although FedEx and Uber are similar in that their workers' primary duty is to drive on behalf of the company, Uber presents a new problem in that it attacks the sharing-economy that has grown so popular in recent years.<sup>118</sup> This presents another example of how technology may continue to challenge our traditional notions of employees and independent contractors. In May 2015, one California federal court considered a class action by Uber drivers seeking employee status and the host of benefits that go along with that.<sup>119</sup> Not surprisingly, Uber took the posi-

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work no more or less than the specified hours. *Id.*

<sup>113</sup> *Id.* Each driver is assigned a specific area in which it can reconfigure; however, they are directed what packages they need to deliver and when by working directly with their customers. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Carlson*, 787 F.3d at 1328.

<sup>117</sup> See Tom Risen, *Employee or Contractor? Uber Ruling Could Affect Other Companies*, U.S. NEWS & WORLD REPORT (June 18, 2015, 6:59 PM), <http://www.usnews.com/news/articles/2015/06/18/employee-or-contractor-uber-ruling-could-affect-other-companies> (discussing the potential impacts on the pending class action lawsuit in California regarding workers' statuses as independent contractors, and how that may change the trend towards a sharing economy).

<sup>118</sup> 20 No. 9 Me. Emp. L. Letter 2 (detailing how the sharing economy, particularly Uber, will continue to present problems for courts in their traditional ideas of what an "employee" really means).

<sup>119</sup> *O'Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

tion that its drivers were independent contractors, and also stated that it is not a transportation company.<sup>120</sup> Rather, Uber argued that it is a “lead generation” platform—that it has no control over how the drivers provide their driving service.<sup>121</sup> To contradict those notions, drivers demonstrated that they have no leeway in what to charge riders, or the fact that they are paid 80% of the amount Uber receives from the riders.<sup>122</sup> Beyond that, drivers cannot reach out to the customers and bargain themselves.<sup>123</sup> Uber also conducts background checks, interviews, and preengagement tests of their knowledge, and allows riders to rate the drivers following their ride with them.<sup>124</sup> To sum it up, the drivers argued that those are examples of the level of control Uber has over them, and that they thus should be classified as employees under the law.<sup>125</sup>

Drivers presented enough evidence of their employee status to allow the case to reach trial.<sup>126</sup> After the drivers had presented sufficient evidence to show that they may have been considered employees, the burden shifted to Uber to demonstrate that they were independent contractors.<sup>127</sup> The court held that the case was not so clear as to warrant a summary judgment, and therefore would be allowed to go to the jury.<sup>128</sup> In making that determination, the court noted that there are numerous potential tests, but that the relevant factors were: nature of occupation, skill needed, whether the drivers supplied their own tools, how central the drivers work was to Uber’s business, and whether the drivers had an opportunity to make a profit or loss based on their own skill.<sup>129</sup>

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<sup>120</sup> *Id.* at 1137.

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

<sup>122</sup> *Id.* at 1144.

<sup>123</sup> *Id.* at 1136.

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

<sup>125</sup> *Id.* at 1137-38.

<sup>126</sup> *Id.* at 1135.

<sup>127</sup> *Id.* at 1145.

<sup>128</sup> *Id.* at 1152.

<sup>129</sup> *Id.* at 1148-52.

Among Uber's most notable arguments was that the drivers were actually its customers rather than its employees.<sup>130</sup> It argued that, because it believes it is a technology company, not a transportation company, the drivers were utilizing its company to purchase leads or dispatches.<sup>131</sup> The court denied this argument in its entirety.<sup>132</sup> The court also concluded that "Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs."<sup>133</sup> Therefore, the drivers' jobs were found to be central to Uber's business, which was one of the main reasons the motion for summary judgment was denied.<sup>134</sup>

## VII. WHAT DOES THIS MEAN FOR CONSUMERS?

### A. *The Benefits*

Companies that utilize independent contractors and emerging technology in the way that Uber does present unique benefits to consumers looking for a responsive market and lower costs. Uber's unique business model places it with other sharing-economy firms. Consequently, Uber may have a more efficient use of profits, which can increase welfare for consumers by putting profits back into the business allowing lower prices for consumers. Some also argue that the low cost of Uber decreases their incentive to purchase their own automobiles, thus helping the environment.<sup>135</sup> Another benefit is that, under this independent contractor model, Uber drivers have the ability to flood the market with part-time drivers during downtimes, thus cutting off competi-

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<sup>130</sup> *Id.* at 1141.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1142.

<sup>133</sup> *Id.* at 1141.

<sup>134</sup> *Id.* at 1152.

<sup>135</sup> Christian Fritz, *Mobility-As-a-Service: Turning Transportation into a Software Industry*, VENTURE BEAT (Dec. 13, 2014, 10:41 AM), <http://venturebeat.com/2014/12/13/mobility-as-a-service-turning-transportation-into-a-software-industry/>.

tion with taxi drivers.<sup>136</sup> In fact, surge pricing has encouraged the number of taxis on the road to fluctuate with demand, with the number of taxis on the road getting bigger when they are in the highest demand.<sup>137</sup> The most noteworthy benefit, however, is the lower cost compared to taxi fares. Uber places itself at a competitive advantage by hiring independent contractors rather than employees. Considering Uber saves millions of dollars every year on employee benefits, insurance, overtime pay, and more, it is financially able to provide consumers with a similar service as taxi drivers at a much lower cost. Some may call this an unfair competitive advantage. Others believe it is a result of the natural shift in technology and market demand. Either way, one thing is certain: consumers benefit from and respond to the lower prices Uber offers.

### B. The Dangers

At first glance, it may appear that this sharing economy and trend towards hiring independent contractors can only hurt workers. As one man put it, “‘sharing economy’ companies like Uber shift risk from corporations to workers, weaken labor protections, and drive down wages.”<sup>138</sup> However, that really is only half the problem. What about the consumer? Certainly having workers who are uninsured and unregulated could pose some sort of risk, namely safety concerns. Although these safety concerns could arise in any variety of contexts, the most concerning is with companies that provide driving services such as Uber. There is certainly an insurance gap that exists between independent contractors, Uber, and third parties.<sup>139</sup> In general, Uber drivers are covered

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<sup>136</sup> *Pricing the Surge: The Microeconomics of Uber's Attempt to Revolutionize Taxi Markets*, THE ECONOMIST (Mar. 29, 2014), <http://www.economist.com/news/finance-and-economics/21599766-microeconomics-ubers-attempt-revolutionise-taxi-markets-pricing-surge>.

<sup>137</sup> *Id.*

<sup>138</sup> Avi Asher-Schapiro, *Against Sharing*, JACOBIN (Sept 19, 2014), <https://www.jacobinmag.com/2014/09/against-sharing/>.

<sup>139</sup> Cecil, *supra* note 9. More recently, insurance has responded to

by Uber's insurance policy during the time in which they are carrying a passenger, or customer.<sup>140</sup> However, while they are using the app to pick up a customer or accept a ride, they are not.<sup>141</sup> That poses major problems for third parties, who are out on the road with distracted Uber drivers who are uninsured. This gap is unique to market-sharing firms like Uber, where Uber claims it is simply matching consumers with drivers. It's a more hands-off approach, which may seem beneficial at first, but can certainly pose major safety risks later.

This issue was posed in a San Francisco lawsuit.<sup>142</sup> In 2013, a six-year-old girl died when she was hit by an Uber driver who did not have any passengers in his vehicle, but had his Uber application running.<sup>143</sup> This dispute resulted in the Uber driver's insurance company, Uber, and the injured third party all debating who would be responsible for the insurance pay out. Although this case was silently settled, it poses an example of the insurance gap that still poses a risk to third party vehicles and Uber drivers when an accident occurs.

Who is liable when an Uber driver gets into an accident? If the driver is simply in the process of finding the consumer, such as when they have the Uber application running and are actively searching for passengers, they are uninsured.<sup>144</sup> Often times, however, not only are they uninsured by Uber, but by their own personal insurance policy, because they are considered "at work".<sup>145</sup> This puts much of the insurance burden on the drivers,

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this gap and has made several policies available. However, there is still a notable gap for many drivers.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Complaint for Damages and Demand for Trial by Jury at ¶ 22, *Ang Jian Liu v. Uber Technologies, Inc.*, No. CGC-14-536979 (Sup. Ct. Cal. 2014).

<sup>143</sup> *Id.* at ¶ 25.

<sup>144</sup> Cecil, *supra* note 9.

<sup>145</sup> *Id.* This is typically because they are considered to be "conducting business." Therefore, personal auto insurance policies may not be covered.

as well as the third party who was in the accident. In the case of grossly negligent driving or a serious injury, it is essential to the third party's ability to recover that they be able to name Uber as a defendant in addition to the driver individually. Arguably, they are working within the scope of their employment and therefore should be covered by Uber's policy, which is likely much greater than the individual driver's policy on its own. By calling itself a "technology company," Uber is able to create this insurance gap and rid itself of thousands of potential claims against it for drivers on their way to pick up passengers. Additionally, having Uber's "independent contractors" driving around the city trying to use an app to pick up passengers increases the chance of an accident. Uber and insurance companies have begun to address this liability problem, but for now, it certainly does pose a great risk to consumers who are likely unaware of this loophole in the system.

## VIII. CONCLUSION

Certainly, the misclassification problem has grown in scope over the last decade.<sup>146</sup> With dozens of tests and no clear-cut guiding principle, various courts and juries could hold either way on many of the worker status cases. Moreover, improved technology and the increase in "sharing economy" firms have complicated the issue even further. Although the disadvantages of independent contractor status are well understood for the workers themselves, it is less clear how these changes have begun to affect consumers. Although consumers benefit from lower prices and a more responsive market, they are often unaware of the insurance and safety concerns that companies like Uber have been able to leverage to gain a competitive advantage in the marketplace. With more attention being drawn to the independent contractor debate by publicized lawsuits such as FedEx

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<sup>146</sup> DEP'T OF LABOR, *supra* note 43.