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Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?

Robert Sprague

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by

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Abstract

In light of California's recent adoption of the ABC employee/independent contractor classification test, this article provides a comprehensive analysis of the ABC test's application in the platform-based (gig) economy. After first reviewing the current state of precarious work arrangements, particularly through gig work, and reviewing more traditional classification tests (the common law control test, the economic realities test, and the IRS test) as well as more recent Market Platform legislation, this article provides a thorough examination of the factors necessary to satisfy the three parts of the ABC test. While no reported decisions have applied the ABC test to platform-based (i.e., gig) work arrangements, this article applies its ABC test analysis to consider possible outcomes in future employee/independent contractor classification determinations for platform-based workers under the ABC test. It is hoped courts will not confuse the precarity of modern working relationships with independence.

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I. Introduction

The adoption of the ABC worker classification test by California through the *Dynamex* decision[1] and the subsequent passage of Assembly Bill 5 (AB 5)[2] have reinvigorated the discussion of platform-based businesses[3] classifying their workers as independent contractors instead of employees.[4] This article considers the application of the ABC test to modern, platform-based business models and the current state of working arrangements.

Part II reviews the current state of precarious working arrangements, where more and more, individuals are finding work opportunities to be based on a gig or freelance arrangement. Part III briefly summarizes not only more traditional worker classification tests—the common law control test (Part III.A), the economic realities test (Part III.B), and the IRS test (Part III.C)—but also emerging Market Platform legislation (Part III.D). This article then reviews the basic elements of the ABC test (Parts IV.A–C), with particular emphasis on whether the services are performed within the usual course of the hiring party's business (Part IV.B) since this is one of the main arguments Uber is now making as to why its drivers are not employees.[5] Finally, this article examines in Part V the challenges workers and platform-based businesses may face when trying to determine worker classification under the ABC test.

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[1] Dynamex Operations W. v. Superior Court, 416 P.3d 1, 36 (Cal. 2018) (adopting the ABC classification test for certain wage order cases); *see infra* Part IV.D for a discussion of the *Dynamex* decision; *infra* Part IV for a description of the ABC classification test.

[2] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020); *see infra* Part IV.D for a discussion of the new law.

[3] Platform-based businesses are intermediaries that offer an online, app-based platform to connect workers or sellers with customers. *See* DIANA FARRELL & FIONA GREIG, PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 5 (2016), https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf (noting that "[l]abor platforms, such as Uber or TaskRabbit, connect customers with freelance or contingent workers who perform discrete projects or assignments"); *id.* at 20 (noting that the labor platforms are also commonly referred to as the gig economy).

[4] *See, e.g.*, Aaron H. Cole, *How Much Will AB 5 Really Change California Law?*, OGLETREE DEAKINS (Sept. 16, 2019), https://ogletree.com/insights/2019-09-16/how-much-will-ab-5-really-change-california-law/ (referring to *Dynamex* as a "sea change"); Shirin Ghaffary, *Uber's Baffling Claim that Its Drivers Aren't Core to Its Business, Explained*, VOX (Sept. 16, 2019, 4:40 PM), https://www.vox.com/recode/2019/9/16/20868916/uber-ab5-argument-legal-experts-california (noting that passage of AB 5 was expected to upend the business models of platform-based companies); Andrew J. Hawkins, *Uber and Lyft Face an Existential Threat in California—and They're Losing*, THE VERGE (Sept. 2, 2019, 9:38 AM), https://www.theverge.com/2019/9/2/20841070/uber-lyft-ab5-california-bill-drivers-labor; Aarian Marshall, *In California, Gig Workers Are About to Become Employees*, WIRED (Sept. 11, 2019, 2:29 PM), https://www.wired.com/story/california-gig-workers-become-employees/ (stating that AB 5 could put guardrails on the gig economy and its reliance on independent contractors).

[5] Press Release, Uber, Update on AB5 (Sept. 12, 2019) [hereinafter Uber Press Release], https://www.uber.com/newsroom/ab5-update/

II. Precarious Work Arrangements

The so-called "standard work arrangement," involving stable, full-time employment with benefits and a living wage, is under attack in the United States and many western economies.[6] There has been a substantial decline in long-term employment opportunities leading to a reduction in job security in the private sector,[7] in part, it is argued, because firms cannot resist the substantial cost savings associated with a peripheral workforce.[8]

Many commentators have focused on recent operational trends of on-demand work colloquially referred to as the "gig economy;" "a new age of *non-employee* workforce management, one that is founded on the progression of social and business networks, enterprise technology, and an overall shift in how today's enterprises approach their talent engagement strategies."[9] In contrast, commentators have argued that the gig economy represents a new race to the bottom for exploited workers.[10] While the current and prospective number of gig workers may be subject to some debate,[11] it is clear that having a workforce comprised of independent

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[6] *See* Steven Vallas, *Accounting for Precarity: Recent Studies of Labor Market Uncertainty*, 44 CONTEMP. SOC. 463, 463 (2015) (discussing fears of "precarity"—"an enduring condition of economic liminality").

[7] Henry S. Farber, *Short(er) Shrift: The Decline in Worker-Firm Attachment in the United States, in* LAID OFF, LAID LOW: POLITICAL AND ECONOMIC CONSEQUENCES OF EMPLOYMENT INSECURITY 10, 30 (Katherine S. Newman ed., 2008); *see also* Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 6–8 (2009) (noting that since the 1970s there has been a general decline in the average length of time people remain employed with a particular employer, an increase in long-term unemployment, growth in perceived job insecurity, growth of nonstandard work arrangements and contingent work, and an increase in risk-shifting from employer to employee).

[8] *See* James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1015 (1941) ("As the financial burdens imposed on the employer grow heavier, there is a temptation to avoid them by fashioning contracts transforming employer-employee relationships by legal guises into those of vendor-vendee, lessor-lessee, or independent contractor.") (footnotes omitted).

[9] CHRISTOPHER J. DWYER, THE STATE OF CONTINGENT WORKFORCE MANAGEMENT 2016–2017: ADAPTING TO A NEW WORLD OF WORK 5 (2016), https://www.fieldglass.com/sites/default/files/2017-11/state-of-contingent-workforce-management-2016-2017-Ardent-SAP-Fieldglass.pdf (emphasis added). This business model has also been referred to as the "platform economy" with business providing an online platform (an app) through which people needing a service are connecting with individuals willing to provide that service, with the platform collecting a fee. *Cf.* Laurie E. Leader, *Whose Time Is It Anyway: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. no. 2, 2019, at 96, 97 (describing the platform as the "hiring party" providing a platform for work rather than work itself).

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

[11] For example, a May 2017 Bureau of Labor Statistics (BLS) survey reported that contingent workers comprised 3.8% of the U.S. workforce, with independent contractors making up 6.9% of the U.S. workforce. TED: The Economics Daily, *3.8 Percent of Workers Were Contingent in May 2017*, BLS (June 14, 2018) https://www.bls.gov/opub/ted/2018/3-point-8-percent-of-workers-were-contingent-in-may-2017.htm; TED: The Economics Daily, *Independent Contractors Made up 6.9 Percent of Employment in May 2017*, BLS (June 21, 2018), https://www.bls.gov/opub/ted/2018/independent-contractors-made-up-6-point-9-percent-of-employment-in-may-2017.htm. The estimate of contingent workers (Estimate 3) most commonly used in BLS analyses includes wage and salary workers who do not expect their job to last (even if they have held their current job for more than 1 year and expect to continue at their job for longer than 1 year), as well as self-employed workers and independent contractors who have been self-employed for 1 year or less and do not expect to be self-employed for another year

contractors, versus employees, offers a number of advantages for employers. Laws promulgated to protect employees,[12] on the flip side, represent managerial burdens and potential liabilities to employers.[13] Since these laws apply only to employees and not independent contractors,[14] employers have strong incentives to classify workers as independent contractors instead of as employees.[15]

For the worker, the promise of contingent work is compelling: individuals would be working on projects of their choosing, during the hours they wanted; they would no longer be working for a boss, but for their own tiny business; it would be the end of unemployment, the end of drudgery.[16] Yet the reality is often much different: income insecurity; lack of stability; diminishing workers' rights.[17] A large percentage of gig workers are temporarily substituting gig work while seeking full time employment or supplementing part time employment.[18] There is no

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or more. *See Frequently Asked Questions About Data on Contingent and Alternative Employment Arrangements*, BLS, https://www.bls.gov/cps/contingent-and-alternative-arrangements-faqs.htm (last modified Aug. 7, 2018).

[12] *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301 (2001) ("The classification of individual workers as employees and non-employees seems to have mattered very little before lawmakers sought extensively to protect workers with collective bargaining laws, social security benefits, minimum wage regulations, and anti-discrimination rules.").

[13] *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, 253 (2006) (noting that businesses can avoid employee-related liabilities and tax and benefit contribution requirements by misclassifying workers as independent contractors).

[14] *See* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55 (2015) ("Employees are shielded by antidiscrimination laws, wage and hour laws, and family and medical leave protections; independent contractors are not. Employees can access federal and state programs, including unemployment insurance and workers' compensation; independent contractors cannot. In turn, employers are subject to liability and tax and benefit contribution requirements under these laws only for their employees.") (footnotes omitted); Stone, *supra* note 13, at 254–55 (noting that labor and employment laws do not provide full protection to temporary workers and independent contractors).

[15] Deknatel & Hoff-Downing, *supra* note 14, at 54–55; *see also* SARAH KESSLER, GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK 225 (2018)

[16] *See* KESSLER, *supra* note 15, at x ("Long before the gig economy, large companies outside of Silicon Valley had stared moving away from direct employment relationships. Startups like Uber demonstrated new strategies and technologies that could make this process more efficient. They broke work into parcels, automatically coordinated workers, and established practices for using apps as management. These were all developments that non-startups would emulate.").

[17] *See id.* at xiii.

[18] *See* MIRIAM LUECK AVERY ET AL., VOICES OF WORKABLE FUTURES: PEOPLE TRANSFORMING WORK IN THE PLATFORM ECONOMY 7–30 (2015), http://www.iftf.org/fileadmin/user_upload/downloads/wfi/IFTF_WFI_Voices_of_Workable_Futures_2016.pdf (reporting the variety of gig workers: part-time workers supplementing "traditional" low-paying jobs; highly-skilled educated workers finding numerous consulting opportunities; freelancers who can work when they want to; full-time gig workers who, for whatever reason (recent move; laid-off), are unable to find or hold a "traditional" full-time job; workers who are attempting to re-enter the workforce; workers who leverage entrepreneurial skills to maximize gig opportunities; and workers who thrive at working multiple gig opportunities); Elaine Pofeldt, *How Happy Is Your Uber Driver? Survey Offers Candid Glimpse Of Gig-Economy Workers*, FORBES (Feb. 7, 2016, 6:26 PM), http://www.forbes.com/sites/elainepofeldt/2016/02/07/how-happy-is-your-uber-driver-survey-offers-candid-glimpse-of-gig-economy-workers (reporting on an Intuit survey breaking on-demand workers into five categories:

question, though, that classification of workers as independent contractors is vital to platform-based businesses. For example, when making a public offering of their shares, both Uber and Lyft stated that reclassification of their drivers as employees would adversely affect their business.[19] While the uncertainty of whether to classify workers as employees or independent contractors has a long history,[20] it clearly remains a critical employment issue. Unfortunately, definitively classifying a worker as an independent contractor as opposed to an employee remains an elusive endeavor.

III. Independent Contractor Classification Tests

Determining whether an employee has been misclassified as independent contractor fundamentally depends on which employment-related law the worker is seeking to enforce (e.g., a state employment law, Fair Labor Standards Act, or federal anti-discrimination law). As a result, there are numerous independent contractor classification tests. The principal classification tests are summarized below.

A. Common Law "Right to Control" Test

Statutes rarely provide a clear definition of employee.[21] When the definition of employee is not clear, courts usually default to the common law of agency multi-factor definition of

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"career freelancers" (20% of respondents) who are building a career through freelancing; "business builders" (22% of respondents) who want to work for themselves and not hold a traditional job; "side giggers" (26% of respondents) who are seeking financial stability by moonlighting; "passionistas" (14% of respondents) who are well-educated workers that are more interested in flexibility and the nature of the work rather than the money; and "substituters" (18% of respondents) who are replacing a traditional job they lost or they cannot find one).

[19] *See* Uber Techs., Inc. Form S-1 Registration Statement, Amend. 1, 35 (Apr. 26, 2019), https://www.sec.gov/Archives/edgar/data/1543151/000119312519120759/d647752ds1a.htm ("[A]ny such reclassification would require us to fundamentally change our business model, and consequently have an adverse effect on our business and financial condition."); Lyft, Inc., Form S-1 Registration Statement, Amend. 2, 28 (Mar. 27, 2019), https://www.sec.gov/Archives/edgar/data/1759509/000119312519088569/d721841ds1a.htm ("A determination . . . that classifies a driver of a ridesharing platform as an employee[] could harm our business, financial condition and results of operations. . . .").

[20] *See, e.g.*, NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944) ("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."); Edwin R. Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 153 (1949) ("Many [employment] relationships are like the swoose, which had unmistakable characteristics of both the swan and the goose. Neither the courts nor the legislatures have yet devised a yardstick equal to the task of unerringly separating the swans from the geese and at the same time cataloguing their hybrid offspring with any degree of uniformity."; addressing the difficulty of distinguishing between employees and independent contractors); Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016) ("For over 100 years, America has classified workers into these two categories [independent contractor or employee], yet the law continuously fails to do so in a uniform, predictable, and purposeful way.").

[21] The Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) (2016), Family and Medical Leave Act, *id.* § 2611(2)(A), Title VII, 42 U.S.C. § 2000e(f) (2016), and Americans with Disabilities Act, *id.* § 12111(4), define "employee" as an individual employed by an employer. *See also* National Labor Relations Act, 29 U.S.C. § 152(3) (2016) (covered employees "include any employee . . . but shall not include . . . any individual having the status of an independent contractor."); CAL. LAB. CODE § 3351 (2011) ("'Employee' means every person in the service of an employer. . . .";

master-servant,[22] based on agency law's *respondeat superior* doctrine.[23] While courts agree that no single factor in the so-called "right to control" test is determinative of classification, it is widely agreed that the "hiring party's right to control the manner and means by which the product is accomplished" carries the greatest weight.[24] For example, the New York Supreme Court recently determined that couriers who performed on-demand pick-up and delivery services from local restaurants or stores for Postmates are independent contractors.[25] The court determined that Postmates lacked the requisite indicia of supervision, direction and control necessary to establish an employer-employee relationship,[26] primarily because the delivery

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with reference to workers' compensation and insurance); Carlson, *supra* note 12, at 295 ("Employment laws . . . are frequently baffling in defining who is an 'employee' or what constitutes 'employment.'").

[22] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989) ("[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."), *quoted with approval by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992); John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 17 (2018) ("The right-to-control test is the predominant analysis applied when classifying workers."); RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958) ("[I]n determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) 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; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.").

[23] *See* Standard Oil Co. v. Anderson, 212 U.S. 215, 221 (1909) ("[T]he master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant, in his negligent conduct, represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. . . . If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it."); Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889) ("[T]he 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.'").

[24] *See Reid*, 490 U.S. at 751; *Darden*, 503 U.S. at 323; O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1148–49 (N.D. Cal. 2015) ([T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.") (internal quotation marks omitted); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1075 (2015) ("[T]he 'principal' question is whether the person or company to whom service is rendered has the right to control the manner and means of accomplishing the result desired.") (internal quotation marks omitted) (alterations omitted); Lawson v. Grubhub, 302 F. Supp. 3d 1071, 1083 (N.D. Cal. 2018) ("Grubhub's right to control work details is the *most important or most significant* consideration. That is, its right to control the manner and means of accomplishing the result desired.") (internal quotation marks omitted) (citations omitted); Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 N.E. U. L.J. 311, 319 (2014) ("[W]hile other factors. . . might be considered in some tests, the hiring party's control over the manner of work is still typically a significant, perhaps the most important, factor."); Carlson, *supra* note 12, at 344 ("[C]ourts have frequently looked to other factors beyond control to expand their search for evidence of employee status. Unfortunately, any of the additional factors courts have listed as evidence of employee status are, in reality, additional aspects of control, or they present the same problems as the control factor.").

[25] Vega v. Postmates, Inc., 78 N.Y.S.3d 810 (N.Y. App. Div. 2018).

[26] *See id.* at 813.

workers: did not report to any supervisor; retained unfettered discretion whether to log into the Postmates platform; set their own work schedule; were free to accept, reject or ignore any delivery request, without penalty; could simultaneously work for other companies, including Postmates' direct competitors; were not required to wear a uniform; and could choose their own mode of transportation.[27] In contrast, the court concluded the incidental control Postmates exercised over its delivery workers, such as determining the fee to be charged customers and the rate to be paid to delivery workers, tracking deliveries in real time, and handling customer complaints, did not constitute substantial evidence of an employer-employee relationship.[28]

B. Economic Realities Test

In 1944, when interpreting the meaning of "employee" under the National Labor Relations Act,[29] the U.S. Supreme Court noted that Congress had sought to eliminate the causes of labor disputes and industrial strife, creating a balance of forces in certain types of economic relationships.[30] As a result, the Court rejected a technical application of agency law (with its focus on liabilities to third parties) and focused more on the economic relationship between the employer and the worker.[31] The Supreme Court later applied *Hearst Publications*' focus on the economic realities in defining employee under the Social Security Act,[32] enumerating five factors to consider: "[1] degrees of control, [2] opportunities for profit or loss, [3] investment in facilities, [4] permanency of [the] relation[ship] and [5] skill required in the claimed independent operation . . . ."[33] Although the Supreme Court later characterized the economic realities test as applied in *Hearst Publications* and *Silk* as "feeble precedents for unmooring the term [employee] from the common law[,]"[34] the economic realities test is used in employee classification challenges under the Fair Labor Standards Act[35] (FLSA), particularly in the Fifth Circuit Court of Appeals. Fundamentally, the aim of the economic realities test is to determine if workers, as a

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[27] *See id.* at 812; *accord In re* Walsh, 92 N.Y.S.3d 750, 752 (N.Y. App. Div. 2019) (concluding TaskRabbit service provider (a "tasker") was an independent contractor because the only control exercised by the company was "over the platform that taskers used to get jobs, not over any aspects of the jobs themselves").

[28] *See Vega*, 78 N.Y.S.3d at 812. *But see id.* at 814 (Lynch, J., dissenting) (arguing there was sufficient evidence of an employee-employer relationship because Postmates sets the fees, sometimes provides financing for the transaction through a reloadable PEX credit card (when a delivery person has to initially purchase the delivered item that is subsequently paid for by the customer), handles customer complaints, bears liability for defective deliveries, and tracks deliveries).

[29] Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2016)).

[30] NLRB v. Hearst Publ'ns, Inc. 322 U.S. 111, 128–29 (1944), *abrogation recognized by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992).

[31] *See id.* at 129. Throughout this article the hiring party will be referred to as an "employer," regardless of whether the workers in question are employees or independent contractors.

[32] U.S. v. Silk, 331 U.S. 704, 713–14 (1947), *abrogation recognized by Darden*, 503 U.S. at 324–25.

[33] *Id.* at 716.

[34] *Darden*, 503 U.S. at 324.

[35] Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2016); *See* Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33 (1961); Tony and Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290, 301 (1985); Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369, 379 (5th Cir. 2019).

matter of economic reality, are in business for themselves,[36] measured by the "economic dependence" of the putative employees on the employer.[37] When considering a worker's classification for purposes of the FLSA, the key is whether the totality of the circumstances, measured by the economic realities test, indicate the worker is so dependent on the employer to deserve protection by the FLSA.[38] In contrast, the more the worker exerts significant control over meaningful aspects of the services performed, the more the worker is likely to be an independent business.[39]

For purposes of federal anti-discrimination statutes, most, but not all, courts use a hybrid of the common law control test and the economic realities test, with right to control the most important factor.[40] California, until 2018, also used the common law control test supplemented by the economic realities test.[41]

Although the National Labor Relations Board (NLRB or Board) has traditionally followed the common law right to control test,[42] in 2014, the Board arguably adopted the economic realities test by evaluating whether a putative independent contractor's entrepreneurial opportunity for gain or loss "tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business."[43] However, in 2019, the NLRB overruled this approach, stating that it "significantly limited the importance of entrepreneurial opportunity by creating a new factor ('rendering services as part of an independent business') and then making entrepreneurial opportunity merely 'one aspect' of that factor."[44] In overruling the 2014 decision, the Board concluded that the prior decision "'fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of "right to control" factors relevant to perceived economic dependency.'"[45]

Richard Carlson argues that both the common law control test and the economic realities test have control and domination as their central concern.[46] Marc Lindert has criticized courts'

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[36] *See* Carrell v. Sunland Constr., Inc. 998 F.2d 330, 334 (5th Cir. 1993).

[37] *See* Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987).

[38] *See* Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311–12 (1976).

[39] *See id.* at 1312–13.

[40] *See, e.g.*, Goudeau v. Dental Health Servs., Inc., 901 F. Supp. 1139, 1142 (M.D. La. 1995); Norman v. Levy, 767 F. Supp. 1441, 1443–44 (N.D. Ill. 1991). *But see* Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 6 (1st Cir. 2004) (applying common law control test); Bradley v. City of Lynn, 403 F. Supp. 2d 161, 166–67 (D. Mass. 2005) (same).

[41] *See infra* notes 100–102 and accompanying text.

[42] *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 2019 WL 342288, at *2 (2019).

[43] FedEx Home Delivery, 361 N.L.R.B. No. 55, 2014 WL 4926198, at *1 (2014).

[44] *SuperShuttle DFW, Inc*., 2019 WL 342288, at *1.

[45] *Id.* at *11 (quoting *FedEx Home Delivery*, 2014 WL 4926198, at *26 (Member Johnson, dissenting)).

[46] Carlson, *supra* note 12, at 314 ("[T]he former [control test] purporting to focus on control over the worker's performance of services for the employer as a matter of contractual right, and the latter [economic realities test] purporting to look at an employer's sources of power that give it true, if not contractually specified, control.").

use of the economic realities test, arguing they "unimaginatively check off" the test's factors without embedding the test in the applicable FLSA's purpose.[47]

C. IRS Test

The Internal Revenue Service has issued guidance to help determine whether a worker is an employee or independent contractor for federal employment tax purposes.[48] This test, like the others, emphasizes control:

> [G]enerally[,] the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.[49]

And, as with the other tests, the employer does not have to actually control the manner in which the work done; what is critical is that it has the right to do so.[50] The IRS test incorporates twenty additional, secondary factors used to measure the level of control in order to determine proper classification.[51] As noted by Deknatel and Hoff-Downing, the IRS pushes more for

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[47] Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 208 (1999) (stating further the economic realities test has "degenerated into a disembodied laundry list of factors"); *see also* Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27 (Table), 1998 WL 598778, at *5 (6th Cir. 1998) (unpublished decision) (characterizing all the economic realities test factors as "far too easy to manipulate and mold during application to suit a preconceived result").

[48] Rev. Rul. 87-41 (IRS RRU), 1987-1 C.B. 296, 1987 WL 419174 (Jan. 1, 1987).

[49] *Id.* at *4.

[50] *See id.*

[51] The twenty factors relate to whether: the worker is required to comply with instructions; the worker must be trained; the degree the worker's services are integrated into the employer's business operations; the services must be performed personally; the worker can hire, supervises and pays assistants to perform the services; there is a continuing relationship between the worker and employer; the work must be performed during set hours; the worker must devote substantially full time to the work; the work is performed on the employer's premises; the worker must perform the services in the order or sequence set by the employer; the worker must submit regular reports to the employer; the worker is paid by the hour, week or month, or by the job; the employer ordinarily pays the worker's business and/or traveling expenses; the worker or the employer furnishes significant tools, materials and other equipment; the worker invests in facilities used by the worker in performing the services; the worker can realize a profit or suffer a loss as a result of the worker's services; the worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time; the worker makes his or her services available to the general public on a regular and consistent basis; the employer has a right to discharge the worker; and the worker has the right to end his or her relationship with the employer at any time he or she wishes without incurring liability. *See id.* At * 4–7; 303 West 42nd St. Enters., Inc. v. IRS, 916 F. Supp. 349, 361–62 (S.D.N.Y. 1996), *rev'd on other grounds*, 181 F.3d 272 (2nd Cir. 1999) (examining the test's twenty factors to determine performers were employees; concluding, in particular, the employer's "substantial control" over its performers by preventing the them from leaving the premises during their shifts, preventing the use of alcohol, and periodically monitoring the performers by audio devices).

incentives to reclassify independent contractors as employees rather than to punish employers for misclassification.[52]

At least four states (Michigan, Oklahoma, Tennessee, and Virginia) have recently codified the twenty-factor IRS test for defining an employee.[53]

D. Marketplace Platform Statutes

To date, seven states (Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee, and Utah) have enacted "Marketplace Contractor" statutes.[54] In addition, the Texas Workforce Commission has adopted the marketplace contractor definitions for purposes of regulating unemployment compensation.[55] Common features of these statutes are the definition of a marketplace platform, market contractor, and exemptions. Marketplace platforms are defined as entities that (A) operate an Internet web site or smartphone application that facilitates the provision of services by marketplace contractors to individuals or entities seeking the services; (B) accept service requests from the public only through the organization's Internet web site or smartphone application and does not accept service requests by telephone, facsimile, or in person at a retail location; and (C) do not perform services at or from a physical location in the state.[56] A market contractor is defined as a person or entity that enters into an agreement with a marketplace platform to provide services to third parties.[57]

Importantly, marketplace contractor statutes prescribe that the contractor is an independent contractor, as long as there is a written agreement providing: the worker is an independent contractor, all or substantially all of the payments paid to the marketplace contractor are based on the performance of services or other output by the contractor, the contractor may

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[52] *See* Deknatel & Hoff-Downing, *supra* note 14, at 62.

[53] MICH. COMP. LAWS ANN. § 421.42(5) (West 2014) (defining employment under the Michigan Employment Security Act); MICH. COMP. LAWS ANN. § 421.161(n) (West 2012) (defining employment under the state's Worker's Disability Compensation Act of 1969); OKLA. STAT. ANN. tit. 40, § 1-210(14) (West 2020) (defining employment for purposes of the state's Employment Security Act of 1980); TENN. CODE ANN. § 50-2-111(a) (West 2020) (defining employee for purposes of the state's Wage Regulations); TENN. CODE ANN. § 50-7-207(b)(2)(B) (West 2020) (defining employee for purposes of the Tennessee Employment Security Law); VA. CODE ANN. § 60.2-212(C) (West 2005) (defining employment for purposes of unemployment compensation).

[54] Ariz. REV. STAT. ANN. §§ 23-1601–1604 (2016); FLA. STAT. ANN. §§ 451.01–.02 (West 2018); IND. CODE ANN. §§ 22-1-6-1–3 (West 2018); IOWA CODE ANN. §§ 93.1–.2 (West 2018); KY. REV. STAT. ANN. § 336.137 (West 2018); TENN. CODE ANN. §50-8-101–103 (West 2018); UTAH CODE ANN. §§ 34-53-101–102, 201 (West 2018) (limited to just building services (cleaning and janitorial; furniture delivery, assembly, moving, or installation; landscaping; home repair; or similar)).

[55] 40 TEX. ADMIN. CODE § 815.134 (2019).

[56] *See* Ariz. REV. STAT. ANN. § 23-1603(E); IND. CODE. ANN. § 22-1-6-2(2); FLA. STAT. ANN. § 451.01 (limited though to temporary household services); KY. REV. STAT. ANN. § 336.137(1)(b). Most of the definitions exclude services performed in the employment of the state or political subdivision or Indian tribe, as well as any religious, charitable, or educational organization. They also generally exclude from the definition any digital website or smartphone application where the services facilitated consist of transporting freight, sealed and closed envelopes, boxes or parcels or other sealed and closed containers for compensation. Indiana excludes passenger transport services provided in connection with technology offered by a transportation network company. IND. CODE. ANN. § 22-1-6-1(3). A transportation network company (TNC) uses a digital network to connect TNC riders to TNC drivers to request prearranged rides. *See id.* § 8-2.1-17-18.

[57] *See* IND. CODE. ANN. § 22-1-6-2(1); IOWA CODE ANN. § 93.1; KY. REV. STAT. ANN. § 336.137(1)(a).

work any hours or schedules the contractor chooses, the contractor may perform services for other parties without restriction, and the contractor bears responsibility for all or substantially all of the expenses that the contractor pays or incurs in performing the services, without the right to obtain reimbursement from the marketplace platform for the expenses.[58]

IV. The ABC Test

Seventeen states (and two territories) have taken a more simplified approach to employee/independent contractor classification through what is commonly referred to as the ABC test.[59] Under the ABC test, exemplified by California's recently enacted version, a worker is *presumed* to be an employee unless three conditions are met:

A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*

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[58] *See* Ariz. REV. STAT. ANN. § 23-1603(A) (containing additional provisions); IND. CODE. ANN. § 22-1-6-3; FLA. STAT. ANN. § 451.02(1); IOWA CODE ANN. § 93.2; KY. REV. STAT. ANN. § 336.137(2); *see also* Ariz. REV. STAT. ANN. § 23-1601 (containing additional multiple factors required to support a declaration of independent business status by the worker).

[59] *See* ALASKA STAT. ANN. § 23.20.525(a)(8) (West 2009); Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020); CONN. GEN. STAT. ANN. § 31-222(a)(B)(ii) (West 2017); DEL. CODE ANN. tit. 19, § 3302(10)(k) (West 2019); HAW. REV. STAT. ANN. § 383-6 (West 1984); 820 ILL. COMP. STAT. ANN. 185/2 (West 2015); IND. CODE ANN. § 22-4-8-1(b) (West 2006); LA. STAT. ANN. § 23:1472(12)(E) (2014); MASS. GEN. LAWS ANN. ch. 149, § 148B(a) (2004) (applicable also to minimum wage and overtime actions); NEB. REV. STAT. ANN. § 48-604(5) (West 2018); NEV. REV. STAT. ANN. § 612.085 (West 1993); N.H. REV. STAT. ANN. § 282-A:9(III) (West 2011); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2017); N.M. STAT. ANN. § 51-1-42(F)(5) (West 2015); P.R. LAWS ANN. tit. 11, § 202(j)(5) (1995); VT. STAT. ANN. tit. 21, § 1301(6)(B) (West 2014); V.I. CODE ANN. tit. 24, § 302(k)(5) (2009); WASH. REV. CODE ANN. § 50.04.140(1) (West 1991); W. VA. CODE ANN. § 21A-1A-16(7) (West 1997). These statutes predominantly apply to unemployment compensation claims. Illinois and Nevada have additional ABC tests that apply solely to the construction industry, while the District of Columbia, Maryland, and New York have also adopted the ABC test but limit it strictly to the construction industry. *See* D.C. CODE ANN. §§ 32-1331.02, 32-1331.04(c)(2) (West 2013); 820 ILL. COMP. STAT. ANN. 185/5, 185/10(b) (West 2008); MD. CODE ANN., LAB. & EMPL. §§ 3-902, 3-903(c) (West 2012); NEV. REV. STAT. ANN. 608.0155(2) (2019); N.Y. LAB. LAW § 861-c(1) (McKenney 2010). Finally, four additional states have adopted only Parts A and C of the ABC test. *See* COLO. REV. STAT. ANN. § 8-70-115(1)(b) (West 2016); IDAHO CODE ANN. § 72-1316(4) (West 2008); S.D. CODIFIED LAWS § 61-1-11 (2011); UTAH CODE ANN. § 35A-4-204(3) (West 2006) (applicable to unemployment insurance claims); *see also* GA. CODE ANN. § 34-8-35(f) (West 2012) (adopting parts A and C, but adding an alternative element to satisfy part C: the worker is subject to an IRS determination against employee status); MONT. CODE ANN. § 39-71-417(4)(a) (West 2011) (using only Parts A and C but applicable only for obtaining an independent contractor certification); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(a) (West 2011) (adding an additional requirement to parts A and C: a written contract to perform the services in question; applicable only to the construction industry); WYO. STAT. ANN. § 27-3-104(b) (West 2014) (for unemployment insurance purposes, "An individual who performs service for wages is an employee for purposes of this act unless it is shown that the individual: (i) Is free from control or direction over the details of the performance of services by contract and by fact; . . . (v) Represents his services to the public as a self-employed individual or an independent contractor; and (vi) May substitute another individual to perform his services"; subsections (ii)–(iv) repealed); WYO. STAT. ANN. § 27-14-102(a)(xxiii) (West 2018) (same definition applicable to workers' compensation claims). *See generally* Deknatel & Hoff-Downing, *supra* note 14 (providing a detailed discussion of the evolution of the ABC test).

B. The person performs work that is outside the usual course of the hiring entity's business;[60] *and*,
C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[61]

Evident from the ABC test's language, the employer has the burden of establishing all three parts of the test; failure to establish any one of the three will result in the worker being legally classified as an employee.[62]

A. Part A: Control

The control element is diminished under the ABC test because if either part B or C is not established, the worker will be classified as an employee regardless of the amount of control (or lack thereof) exercised over the work to be performed.[63] To satisfy part A of the ABC test, "the

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[60] Thirteen of the states (as well as Puerto Rico and the Virgin Islands) add a second element to part B: or the service is performed outside of all the places of business of the enterprise for which the service is performed. *See* ALASKA STAT. ANN. § 23.20.525(a)(8)(B); CONN. GEN. STAT. ANN. § 31-222(a)(B)(ii)(II); DEL. CODE ANN. tit. 19, § 3302(10)(k)(ii); HAW. REV. STAT. ANN. § 383-6(2); LA. STAT. ANN. § 23:1472(12)(E)(II); NEB. REV. STAT. ANN. § 48-604(5)(b); NEV. REV. STAT. ANN. § 612.085(2); N.H. REV. STAT. ANN. § 282-A:9(III)(b); N.J. STAT. ANN. § 43:21-19(i)(6)(B); N.M. STAT. ANN. § 51-1-42(F)(5)(b); P.R. LAWS ANN. tit. 11, §202(j)(5)(B); VT. STAT. ANN. tit. 21, §1301(6)(B)(ii); V.I. CODE ANN. tit. 24, § 302(k)(5)(B); WASH. REV. CODE ANN. § 50.04.140(1)(b); W. VA. CODE ANN. § 21A-1A-16(7)(B). Washington provides an alternative means to satisfy part B if the worker is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed. WASH. REV. CODE ANN. § 50.04.140(2)(b). Illinois exempts employers in the business of contracting with third parties for the placement of employees. 820 ILL. COMP. STAT. ANN. 185/2(b). Generally, courts consider the employer's place of business to include anywhere it performs its activities on a regular or continuous basis, and is not limited to just the location of its home or central office. *See, e.g.,* Mattatuck Museum-Mattatuck Historical Soc. v. Adm'r, Unemployment Comp. Act, 679 A.2d 347, 351 (Conn. 1996); McPherson Timberlands, Inc. v. Unemployment Ins. Comm'n., 714 A.2d 818, 823 (Me. 1998); Vt. Inst. of Cmty. Involvement, Inc. v. Dep't of Emp't Sec., 436 A.2d 765, 767 (Vt. 1981) ("An employer's place of business includes not only the location of its offices, but also the entire area in which it conducts the business, in this instance the educating of students."). *But see* Sinclair Builders, Inc. v. Unemployment Ins. Comm'n, 73 A.3d 1061, 1072–73 (Me. 2013) (rejecting argument that each construction site constitutes a place of business for a construction contracting business).

[61] Eleven of the states do not require that the independently establish trade be of the same nature as that involved in the work performed. *See* GA. CODE ANN. § 34-8-35(f)(1)(B); IDAHO CODE ANN. § 72-1316(4)(b); LA. STAT. ANN. § 23:1472(12)(E)(III); MONT. CODE ANN. § 39-71-417(4)(a)(ii) (applicable only for obtaining an independent contractor certification); NEB. REV. STAT. ANN. § 48-604(5)(c); N.H. REV. STAT. ANN. § 282-A:9(III)(c); N.J. STAT. ANN. § 43:21-19(i)(6)(C); 43 PA. STAT. AND CONS. STAT. ANN. § 933.3(a)(3) (applicable only to construction industry); S.D. CODIFIED LAWS § 61-1-11(2); VT. STAT. ANN. tit. 21, §1301(6)(B)(iii); W. VA. CODE ANN. § 21A-1A-16(7)(C). Washington, while requiring that the independently established trade be of the same nature as that involved in the service performed, provides an alternative means to satisfy part C if the worker has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes. WASH. REV. CODE ANN. § 50.04.140(2)(c).

[62] *See, e.g.*, Athol Daily News v. Bd. of Div. of Emp't and Training, 786 N.E.2d 365, 369–70 (Mass 2003) ("The employer bears the burden of proof, and, because the conditions are conjunctive, its failure to demonstrate any one of the criteria set forth in subsections [A, B, or C], suffices to establish that the services in question constitute 'employment. . . .'").

[63] *See, e.g.,* Kirby of Norwich v. Adm'r, Unemployment Comp. Act, 176 A.3d 1180, 1186 (Conn. 2018) ("Because this statutory provision is in the conjunctive, unless the party claiming the exception to the rule that service is

employer must show that it neither exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work."[64] "[I]t is not necessary that the employer control every aspect of the worker's trade; rather, some level of control may be sufficient."[65] For example, in *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor*, the Supreme Court of New Jersey concluded carpet installers were sufficiently free from control and direction to satisfy part A of the ABC test: the installers were free to accept or reject any job posted on the employer's scheduling board and could work as little or as much as they wished; they were free to work for any number of the employer's competitors, and did so; and they controlled the manner and means of installation, guaranteeing only results.[66] Although it has been suggested part A is merely an adoption of the control factor in the common law test,[67] at least two state supreme courts have concluded that part A should not be read as an exact equivalent to the control element in the common law control test.[68]

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employment shows that all three prongs of the test have been met, an employment relationship will be found.") (internal quotation marks omitted); Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 593 A.2d 1177, 1185 (N.J. 1991) ("[F]ailure to satisfy any one of the three criteria results in an 'employment' classification.").

[64] Hargrove v. Sleepy's, LLC, 106 A.3d 449, 459 (N.J. 2015); *see also Carpet Remnant Warehouse*, 593 A.2d at 1185 ("The person must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance."); Great N. Constr., Inc. v. Dep't of Labor, 161 A.3d 1207, 1214 (Vt. 2016) ("[P]art A contemplates only the right of control over a worker's performance, not the actual exercise of control.").

[65] *Hargrove*, 106 A.3d at 459; *see also* Dynamex Operations W. v. Superior Court, 416 P.3d 1, 36 (Cal. 2018) ("[D]epending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor."); *Great N. Constr.*, 161 A.3d at 1214 ("Other factors relevant to part A of the test include: the degree of oversight and supervision that a purported employer exercises; whether the purported employer or worker supplies tools and materials; the understanding and intentions of the parties; whether a purported worker may accept or decline work from the purported employer or others without suffering adverse consequence; and whether the purported employer requires the worker to complete specific training.").

[66] 593 A.2d at 1189; *see also* Q.D.–A., Inc. v. Ind. Dep't of Workforce Dev., 114 N.E.3d 840, 845–47 (Ind. 2019) (concluding lack of control by the employer because the claimant: had the right to negotiate his compensation for each job he agreed to undertake; had the right to decline work; had complete control over the routes and performance of his jobs; was free from supervision and evaluation by the employer or any of its employees; had the right to hire people to perform the jobs for him; and had the right to simultaneously work for employer and its competitors.). *But see* Valadez v. CSX Intermodal Terminals, Inc., No. 15-cv-05433-EDL, 2019 WL 1975460, at *10 (N.D. Cal. Mar. 15, 2019) (denying workers' motion for summary judgment because jurors could reasonably disagree as to whether the employer's inability to discipline the workers based on performance in any meaningful way short of termination evinced a lack of necessary control).

[67] Comment, *Interpretation of Employment Relationship Under Unemployment Compensation Statutes*, 36 ILL. L. REV. 873, 873 (1942); *see* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a), (h) (AM. LAW INST. 1958).

[68] *See* Fleece on Earth v. Dep't of Emp't and Training, 923 A.2d 594, 598 (Vt. 2007) ("This Court has consistently held that the statutory scheme at issue here [part A of the ABC test] is broader than the common law master-servant relation, and it draws into its sweep workers who might be independent contractors under the common law."); Athol Daily News v. Bd. of Review of Div. of Emp't and Training, 786 N.E.2d 365, 371 (Mass. 2003) ("The essence of the distinction under common law has always been the right to control the details of the performance, and the freedom from supervision 'not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work.' . . . [Part A of the ABC test] is not so narrow as to require that a worker be entirely 'free from direction and control from outside forces.'") (citations omitted).

B. Part B: Outside the Usual Course of Business

Under part B of the ABC test, a worker cannot properly be classified as an independent contractor unless the service in question is performed outside the usual course of the business of the employer or (in many versions of part B) outside the employer's places of business. Part B transforms what was merely a consideration under the common law[69] into a requirement.[70] At least one court has noted the meaning of this requirement is "elusive."[71] The focus is on the "usual course" of the employer's business, not that of the worker.[72] Factors to determine this part of the ABC test are similar to some of the common law control test factors: whether the worker's business is a "key component" of the putative employer's business; how the purported employer defines its own business; which of the parties supplies equipment and materials; and whether the service the worker provides is necessary to the business of the putative employer or is merely incidental.[73] Regarding this last factor, one court has explained that this simply means the activity is performed by the enterprise on a regular or continuous basis.[74]

Companies have long tried to avoid hiring "employees" to carry out services central to their business. Over 100 years ago, Judge Learned Hand rejected a coal company's argument that it was "not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors."[75] In his majority opinion, Judge Hand characterized the argument as "absurd," as the miners carried on the company's only business.[76] Nearly a century later, FedEx argued that its package pick-up and delivery drivers performed services outside its usual course of business because FedEx was not in the package delivery business, but rather, its real business is logistics—specifically, operating "'a sophisticated information and distribution network *for* the pickup and delivery of small

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[69] RESTATEMENT (SECOND) OF AGENCY § 220(2)(e), (h) (AM. LAW INST. 1958); *see* Note, *Statutory Construction—Unemployment Compensation Act—Derogation Rule*, 1941 WIS. L. REV. 269, 273 ("At common law this was a consideration in distinguishing an employee from an independent contractor but was not (strictly) necessary to establish the independent contractor status.").

[70] Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 593 A.2d 1177, 1186 (N.J. 1991).

[71] *See id.*; see also Comment, *Interpretation of Employment Relationship Under Unemployment Compensation Statutes*, *supra* note 67, at 877 (asserting "the usual course of business" is "confusingly vague").

[72] *See* Great N. Constr., Inc. v. Dep't of Labor, 161 A.3d 1207, 1215–16 (Vt. 2016).

[73] *Id.* at 1216; *see also* Q.D.–A., Inc. v. Ind. Dep't of Workforce Dev., 96 N.E.3d 620, 627 (Ind. Ct. App. 2018) (concluding that where the company functioned as an intermediary or middleman by employing people to pair its customers with individuals (drivers) who were properly licensed to do the work, the company's business and the drivers', while complimentary, were distinct).

[74] Mattatuck Museum-Mattatuck Historical Soc. v. Adm'r, Unemployment Comp. Act, 679 A.2d 347, 351 (Conn. 1996); *see also* Vogue v. Adm'r, Unemployment Comp. Act, No. KNLCV175015384, 2019 WL 1938071, at *6–7 (Conn. Super. Ct. Apr. 4, 2019) (holding tattoo artist was employee of business offering tattoo services; rejecting employer's argument that tattoo services were not a continuous business because tattoos only occurred when worker was physically present); Spar Mktg. Servs., Inc. v. Dep't of Labor and Indus. Relations, Emp't Sec. Appeals Referees' Office, 436 P.3d 1205, 1211 (Haw. Ct. App. 2019) (holding worker who restocked and maintained employer's DVD rental kiosks provided services in the usual course of employer's business).

[75] Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552 (2nd Cir. 1914).

[76] *Id.* at 553; *see also* McPherson Timberlands, Inc. v. Unemployment Ins. Comm'n, 714 A.2d 818, 822 (Me. 1998) (concluding woodcutter was plaintiff's employee where plaintiff entered agreements with landowners to fell and haul their timber and deliver it to mills; applying part B of Maine's ABC test at the time).

packages.'"[77] The District Court for the District of Massachusetts found FedEx's argument unpersuasive and that it was "beyond cavil" that the pick-up and delivery drivers are essential to FedEx's business.[78] This argument has also failed in other driver cases.[79]

Courts still find workers performing services within the usual course of the employer's business even when the work and the business are not so closely intertwined as, for example, a driver for a delivery service or a tattoo artist for a tattoo parlor. The key is how incidental the work is to the principal business of the employer. Courts have found, for example, that musicians

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[77] Schwann v. FedEx Ground Package Sys., Inc., No. 11–11094–RGS, 2013 WL 3353776, at *4 (D. Mass. July 3, 2013).

[78] *Id.* at *5 (applying part B; concluding further that FedEx could not assert that it does not provide delivery services by simply refusing to recognize its delivery drivers as employees—"Without the drivers, there would be no one to pick up or deliver packages and FedEx's 'distribution network,' while it would likely attract a buyer, would be of so diminished a value that the prospect of shareholder approval of the sale would be next to zero."). In *Schwann v. FedEx Ground Package System, Inc*., 813 F.3d 429 (1st Cir. 2016), the First Circuit Court of Appeals ruled that considering whether pick-up and delivery drivers perform services in the usual course of FedEx's business was sufficiently related to the service of a motor carrier with respect to the transportation of property to be preempted by Federal Aviation Administration Authorization Act (FAAAA). *Id.* at 437, citing 49 U.S.C. § 14501(c)(1) (2016) (prohibiting states from enacting or enforcing laws or regulations related to a price, route, or service of any motor carrier). The court then ruled that part B of Massachusetts's ABC test could be severed when applied to misclassification of motor carrier drivers, while retaining parts A and C. *Id.* at 441 (assuming the Massachusetts legislature would favor "two-thirds of this loaf over no loaf at all as applied to motor carriers with respect to the transportation of property"); *see also* Valadez v. CSX Intermodal Terminals, Inc., No.15-cv-05433-EDL, 2019 WL 1975460, at *9 (N.D. Cal. Mar. 15, 2019) (holding same, applying the *Dynamex* ABC test). *But see* Calif. Trucking Ass'n v. Su, 903 F.3d 953 (9th Cir. 2018) (holding FAAAA does not preempt California's *Borello* misclassification test). *See infra* notes 100–102 and accompanying text (describing California's *Borello* misclassification test). The Third Circuit Court of Appeals has concluded that New Jersey's ABC test "is not preempted by the FAAAA as it has neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services." Bedoya v. Am. Eagle Express, Inc. 914 F.3d 812, 824 (3rd Cir. 2019); *see also* Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir. 2016) (holding same, applying Illinois's ABC test). Additional courts have held that various non-ABC misclassification tests also are not preempted by the FAAAA. *See, e.g.*, Huddleston v. John Christner Trucking, LLC, No. 17-CV-549-GKF-FHM, 2018 WL 6259220 (N.D. Okla. Nov. 30, 2018). Venegas v. Global Aircraft Serv., Inc., No. 2:14-cv-249-NT, 2016 WL 5349723 (D. Me. Sept. 23, 2016); *cf.* Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127 (3rd Cir. 2018).

[79] *See, e.g.*, *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., No. MDL–1700, 2010 WL 2243246, at *4 (N.D. Ind. March 28, 2010) (concluding it was undisputed that the driver's work was performed within the usual course of FedEx's business; applying part B of Illinois's ABC test); Oliveira v. Advanced Delivery Sys., Inc., No. 091311, 2010 WL 4071360, at *6 (Mass. Super. Ct. July 16, 2010) ("[T]he managing and performing functions of furniture delivery result in a symbiotic relationship. Without providing physical delivery of furniture, which is essential to its business, [the plaintiff's] business would not exist."); Rainbow Dev., LLC v. Com., Dep't of Indus. Accidents, No. SUCV2005-00435, 2005 WL 3543770, at *3 (Mass. Super. Ct. Nov. 17, 2005); Martins v. 3PD, Inc., No. 11–11313–DPW, 2013 WL 1320454, at *14 (D. Mass. Mar. 28, 2013); Penick v. Emp't Sec. Dep't, 917 P.2d 136, 144 (Wash. Ct. App. 1996) (holding contract drivers were performing services within the employer's usual course of business, particularly where employer owned the trucks used by the contract drivers and paid for the gas, oil, repairs, maintenance and insurance of those trucks); Cotter v. Lyft, 60 F. Supp. 3d 1067, 1078 (N.D. Calif. 2015) (describing Lyft's argument that it is merely furnishing a platform that allows drivers and riders to connect as tepid and "obviously wrong. Lyft concerns itself with far more than simply connecting random users of its platform. It markets itself to customers as an on-demand ride service, and it actively seeks out those customers."; applying California's *Borello* classification test); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1144 (N.D. Cal. 2015) (characterizing Uber's claim that it is merely a technological intermediary between potential riders and potential drivers as "fatally flawed in numerous respects"; applying California's *Borello* classification test).

hired by a resort were employees,[80] as was a bookkeeper hired by a construction contractor,[81] as well as carpenters and painters hired by a home builder.[82]

Employers have found success in arguing their workers' services fall outside their usual course of business when courts agreed the employer was a broker of services. For example, the Indiana Supreme Court found that drivers for a business that connected drivers with customers who needed too-large-to-tow vehicles driven to them performed services outside the business's usual course of business.[83] According to the court, since the drivers provided the "drive-away" services, they would not be providing services within the employer's usual course of business unless the employer itself also performed drive-away services; since it did not, the drivers then were not performing services in the usual course of the employer's business.[84] Courts have reached similar conclusions with health-related brokers,[85] as well as insurance companies.[86]

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[80] *See, e.g.*, Appeal of Niadni, Inc., 93 A.3d 728, 732 (N.H. 2014) (holding musical entertainer's "services—and, more generally, live entertainment—were within [a] resort's usual course of business because they were regularly and continuously provided at the resort"); *see also* Steel Pier Amusement Co. v. Unemployment Comp. Comm'n, 21 A.2d 767 (N.J. 1941) (concluding musicians performing on amusement pier were rendering services in usual course of business of employer/owner of amusement pier); Yurs v. Dir. of Labor, 235 N.E.2d 871, 875 (Ill. App. Ct. (1968) (holding organist performed services within the usual course of a funeral home's business; "The frequency of the inclusion of music in the funeral services indicated that it was a usual part of the services offered by plaintiffs."); Bigfoot's, Inc. v. Board of Review of Indus. Comm'n of Utah, Dept. of Emp't Sec., 710 P.2d 180 (Utah 1985) (holding beer bar's band was part of usual course of the bar's business);

[81] *See* Sinclair Builders, Inc. v. Unemployment Ins. Comm'n, 73 A.3d 1061, 1068 (Me. 2013).

[82] *See In re* Bourbeau Custom Homes, Inc., 171 A.3d 40, 48 (Vt. 2014) (holding services provided by carpenters, concrete-siding installers, and painters hired as contractors for a home builder were not outside the usual course of home builder's business; rejecting employer's claims that it was not a general contractor but rather it "custom designs homes, connects customers with subcontractors, and manages the construction of the homes"). *But see* Great N. Constr., Inc. v. Dep't of Labor, 161 A.3d 1207, 1217 (Vt. 2016) (holding worker's services—historic restoration—were not within the usual course of business of general contractor employer); Me. Unemployment Comp. Comm'n v. Maine Sav. Bank, 3 A.2d 897, 899 (Me. 1939) (holding repair of real estate owned by bank was incidental to and not part of the bank's usual business).

[83] Q.D.-A., Inc. v. Indiana Dep't of Workforce Dev., 114 N.E.3d 840 (Ind. 2019).

[84] *Id.* at 847–88. The Indiana Supreme Court disagreed with an earlier ruling by the Court of Appeals of Indiana that drivers for a broker providing transportation of RVs from manufacturers to dealers were performing services within the usual course of business of the employer. *See* Company v. Ind. Dep't of Workforce Dev., 86 N.E.3d 204, 209 (Ind. Ct. App. 2017) ("[W]e seriously doubt that customers with RVs to transport contact Company to act as a "middle man" between them and independent haulers; they call Company to have an RV moved from point A to point B and almost certainly do not care how Company accomplishes that task."). The Indiana Supreme Court believed the appeals panel "supported its conclusion with speculative customer belief and facts not relevant to activities the company regularly or continually performed." *Q.D.-A*, 114 N.E.3d at 848.

[85] *See, e.g.,* State Dep't of Emp't, Training and Rehab., Emp't Sec. Div. v. Reliable Health Care Servs. of S. Nev., Inc., 983 P.2d 414, 418 (Nev. 1999) (concluding "the business of brokering health care workers does not translate into the business of treating patients for these purposes, and thus a temporary health care worker does not work in the usual course of an employment broker's business within the purview of" part B of the ABC Test); Trauma Nurses, Inc. v. Bd. of Review, N.J. Dep't of Labor, 576 A.2d 285, 291 (N.J. Super. Ct. App. Div. 1990) (holding nurses were not employees of broker who supplied nurses' temporary services to hospitals; "The record does not substantiate the naked claim that a broker in the business of matching a nurse with the personnel needs of a hospital is undertaking the provision of health care services. The service of supplying health care personnel does not translate into the business of caring for patients."); *see also* State of Neb., Dep't of Pub. Welfare v. Saville, 361 N.W.2d 215, 219–20 (Neb. 1985) (concluding workers who provided housecleaning, lawn work, and light transportation for

C. Part C: Independently Established Trade or Business

Part C of the ABC test requires that the worker, to be properly classified as an independent contractor, "has a profession that will plainly persist despite the termination of the challenged relationship."[87] The question is not whether the worker is free to engage in an independently established trade, occupation, or business, but that the worker actually did so.[88] However, part C must be considered in relation to the totality of the circumstances, with no dispositive single factor or set of factors.[89] Factors a court may consider include whether "the putative employee maintained a home office, that he was independently licensed by the state, that he had business cards, that he sought similar work from third parties, that he maintained his own liability insurance, and that he advertised his services to third parties."[90]

Though part C is considered to be inherited from the common law control test,[91] it has been argued that part C is most likely to narrow legitimate independent contracting.[92] Note that

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welfare recipients were not employees of welfare agency because the services provided were outside the usual course of the welfare agency's business, which was to pay for the services, not provide the services).

[86] *See, e.g.*, Ruggiero v. Am. United Life Ins. Co., 137 F. Supp. 3d 104, 122 (D. Mass. 2015) (concluding insurance sales agent was not performing services in the usual course of the insurance company's business because the agent's sales were only merely incidental because (1) the agent could and did sell for other companies, and (2) the company sold its policies through multiple sales agents). *But see* Valle v. Powertech Industrial Co. Ltd., 381 F. Supp. 3d 151, 167 (D. Mass. 2019) (contrasting *Ruggiero* because unlike the insurance company in *Ruggiero*, Powertech was involved in directly selling its products through its own internal sales force, meaning that its sales were in the usual course of its business).

[87] Hargrove v. Sleepy's, LLC, 106 A.3d 449, 459 (N.J. 2015); *see also* Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 593 A.2d 1177, 1187 (N.J. 1991) ("[I]f the person providing services is dependent on the employer, and on termination of that relationship would join the ranks of the unemployed, the C standard is not satisfied."); Great N. Constr., Inc. v. Dep't of Labor, 161 A.3d 1207, 1217 (Vt. 2016) (noting "the relevant inquiry involves the purported worker's ability to sustain an economic existence independent of the purported employer"). And, with respect to unemployment compensation, for example, "[a]n independent contractor whose business or trade continues to provide an adequate income despite the loss of a major customer will neither need unemployment benefits nor be eligible to receive them." *Carpet Remnant Warehouse*, 593 A.2d at 1189 (stating also that "in cases in which satisfaction of the C standard convincingly demonstrates a person's ineligibility for unemployment benefits, it would be inappropriate for the [Department of Labor] Commissioner to apply the A or B tests restrictively and mechanically if their applicability is otherwise uncertain").

[88] Kirby of Norwich v. Adm'r, Unemployment Comp. Act, 176 A.3d 1180, 1187 (Conn. 2018).

[89] *See* Sw. Appraisal Group, LLC v. Adm'r, Unemployment Comp. Act, 155 A.3d 738, 748–49 (Conn. 2017).

[90] *Kirby of Norwich*, 176 A.3d at 1188; *see also Sw. Appraisal Group, LLC*, 155 A.3d at 749 (listing ten factors to consider); COLO. REV. STAT. ANN. § 8-70-115(1)(c) (West 2016) (listing nine conjunctive elements that can be used to establish part C); *cf.* McGuire v. Dep't of Emp't Sec., 768 P.2d 985, 987–88 (Utah Ct. App. 1989) (concluding fact that nurses were licensed did not alone satisfy part C); State of Neb., Dep't of Pub. Welfare v. Saville, 361 N.W.2d 215, 220 (Neb. 1985) (finding part C satisfied, in part, because service providers were paid in much the same way as other vendors of goods and services).

[91] *See, e.g.*, *Carpet Remnant Warehouse*, 593 A.2d at 1187; RESTATEMENT (SECOND) OF AGENCY § 220(2)(b) (AM. LAW INST. 1958).

[92] *See* Deknatel & Hoff-Downing, *supra* note 14, at 70.

in some of the states' codification of part C, the independently established trade must be of the same nature as that involved in the service performed.[93]

Fundamentally, the issue is whether the worker has assumed the risk of his or her own unemployment, or does it remain with the employer?[94] And "[t]he fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.[95]

D. California and the ABC Test

In *Dynamex Operations West, Inc. v. Superior Court*,[96] the California Supreme Court adopted the ABC test to determine, for certain circumstances, whether employees are misclassified as independent contractors. Prior to this "landmark" decision[97] that "dropped a bomb" on the gig economy,[98] California courts used a multifactor test that focused on the intended scope and purposes of the particular statutory provision or provisions at issue.[99] While this so-called *Borello* standard emphasizes the employer's right to control the manner and means of the work performed, there are secondary factors that also must be considered.[100] In particular, since *Borello*, California courts have combined the common law "control test"[101] with the economic realities test.[102]

Dynamex involved delivery drivers who believed they were employees misclassified as independent contractors, and therefore denied legal protections under California's "wage orders," which impose obligations such a minimum wages, maximum hours, and basic working

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[93] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(3) (2004). *But see* MD. CODE ANN., LAB. & EMPL. § 3-903(c)(2) (West 2012) (defining work outside the usual course of business of the employer as, inter alia, work performed that is unrelated to the employer's business).

[94] *See* Lake Preston Housing Corp. v. S.D. Dep't of Labor, 587 N.W.2d 736, 739 (S.D. 1999).

[95] Dynamex Operations W. v. Superior Court, 416 P.3d 1, 39 (Cal. 2018).

[96] 416 P.3d 1 (interpreting the application of CAL. CODE REGS. tit. 8, § 11090 (2001), applying to all persons employed in the transportation industry and imposing obligations on hiring entities with respect to minimum wages, maximum hours, and specified basic working conditions).

[97] *See* Timothy Kim, *The* Dynamex *Decision: The California Supreme Court Restricts Use of Independent Contractors*, LAB. & EMP. L. BLOG (May 1, 2018), https://www.laboremploymentlawblog.com/2018/05/articles/class-actions/dynamex-decision-independent-contractors/.

[98] *See* Itai Gurari, *Understanding* Dynamex*: The California Supreme Court's Response to Silicon Valley*, JUDICATA (Jun 7, 2008), https://blog.judicata.com/understanding-dynamex-the-california-supreme-courts-response-to-silicon-valley-cdf281d75d2e.

[99] *See Dynamex*, 416 P.3d at 19; S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 406 (Cal. 1989).

[100] *See Borello*, 769 P.2d at 404.

[101] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958) (though minus the last factor: whether the employer is or is not in business); *supra* Part III.A.

[102] *See supra* Part III.B.

conditions on California employers.[103] At the heart of *Dynamex* was how to define "employ" under the wage orders with respect to determining whether a worker is an employee or independent contractor. The California Supreme Court concluded "suffer or permit to work" is the proper definition.[104] In particular, "the suffer or permit to work standard must be interpreted and applied broadly to include within the covered 'employee' category all individual workers who can reasonably be viewed as '*working in the [hiring entity's] business*.'"[105] Conversely,

> Under the suffer or permit to work standard, an individual worker who has been hired by a company can properly be viewed as the type of independent contractor to which the wage order was not intended to apply only if the worker is the type of traditional independent contractor—such as an independent plumber or electrician—who would *not* reasonably have been viewed as working *in the hiring business*.[106]

The California Supreme Court, while acknowledging that a "multifactor standard. . . that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages[,]" it also recognized "that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context."[107] The Court, with respect to wage orders, and particularly wage and hour matters, concluded that (1) the burden should be on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage, and (2) to meet this burden the hiring entity should be required to establish the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[108]

In 2019, California codified *Dynamex* through Assembly Bill 5 (AB 5).[109] Under the new law, the ABC test will be used for determining worker classification for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the

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[103] *See Dynamex*, 416 P.3d at 5 & n.3. Procedurally, the California Supreme Court was addressing the trial court's certification of class status of drivers with respect to whether they were properly classified as independent contractors. *See id.* at 6.

[104] *See id.* at 7 & 26.

[105] *Id.* at 32 (quoting Martinez v. Combs, 231 P.3d 259, 281 (Cal. 2010)) (emphasis and alteration added by *Dynamex* court).

[106] *Id.* at 33 (emphasis in original) ("Such an individual would have been realistically understood, instead, as *working only in his or her own independent business*.") (emphasis in original).

[107] *Id.*

[108] *See id*. at 35; *see also id*. at 34, n.23 (expressly adopting Massachusetts' version of the ABC test).

[109] Calif. Assembly Bill 5, § 2 (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).

Industrial Welfare Commission.[110] A number of work relationships are, however, excluded from application of the ABC test,[111] for which the *Borello* standard will still be used.[112]

Assembly Bill 5, in most part, applies to work performed on or after January 1, 2020.[113] For work performed before January 1, 2020, *Dynamex* is the controlling law—but for work performed how long before January 1, 2020? In *Gonzales v. San Gabriel Transit, Inc*., the California Court of Appeal concluded that *Dynamex* applies retroactively (to cases initiated before the *Dynamex* ruling).[114]

The next part of this article analyzes the application of the ABC test in online, platform-based working relationships.

V. The ABC Test Applied to Platform-Based Businesses

There do not appear to be any published court opinions applying the ABC test to a platform-based business model. However, at least one court has speculated that post-*Dynamex*, "Uber bears a hefty burden to establish that its drivers are not employees."[115] Although the ABC

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[110] *See id.*

[111] Licensed insurance and real estate agents, physicians, surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers and investment advisors and their agents, as well as direct salespeople, fishermen working on American vessels, contracts for certain professional services, certain business-to-business transactions, contracts between construction contractors and subcontractors, and referral agencies. *Id.* §§ 2(b)–(g).

[112] *See id.* On December 31, 2019, the District Court for the Southern District of California issued a temporary restraining order, preventing the classification of persons driving or hauling freight as an employee or independent contractor under AB 5. *See* Order Granting Temporary Restraining Order at 2, Cal. Trucking Ass'n v. Atty. Gen. Xavier Becerra, No.: 3:18-cv-02458-BEN-BLM (S.D. Cal. Dec. 31, 2019). Specifically, the court concluded the plaintiffs had shown that AB 5's part B is likely preempted by the Federal Aviation Administration Authorization Act (FAAAA) "because AB-5 effectively mandates that motor carriers treat owner-operators as employees, rather than as the independent contractors that they are." *Id.* at 3; *see also supra* note 78 (discussing cases finding pro and con on the issue of FAAAA preemption).

[113] *See id.* § 2(i)(3).

[114] 253 Cal. Rptr. 3d 681, 700–01 (Cal. Ct. App. 2019) ("*Dynamex* did not establish a new standard. Rather, its expressly articulated purpose was to streamline the existing complex, multifactor wage order analysis. . . ."; reversing and remanding to trial court since its ruling was made prior to *Dynamex*); *see also* Garcia v. Border Transp. Grp., LLC, 239 Cal. Rptr. 3d 360, 374 (Cal. Ct. App. 2018) (applying *Dynamex* retroactively to reverse trial court's decision taxi driver was an independent contractor); Vazquez v. Jan-Pro Franchising Int'l, Inc., 923 F.3d 575 (9th Cir. 2019) (applying *Dynamex* retroactively), 930 F.3d 1107 (withdrawing holding and certifying to California Supreme Court question of whether *Dynamex* applies retroactively); 939 F.3d 1050 (reinstating holding pending decision by California Supreme Court whether *Dynamex* applies retroactively). The California Supreme Court has reportedly agreed to determine whether *Dynamex* applies retroactively. *See* Michael Lotito & James Paretti, Jr., *California Supreme Court Agrees to Hear Dynamex Retroactivity Question*, JDSUPRA (Nov. 25, 2019), https://www.jdsupra.com/legalnews/california-supreme-court-agrees-to-hear-67503/.

[115] *See* O'Connor v. Uber Technologies, Inc., Nos. 13-cv-03826-EMC, 15-cv-00262-EMC, 2019 WL 1437101, at *9 (N.D. Cal. Mar. 29, 2019); *see also Garcia*, 239 Cal. Rptr. 3d at 374 (reversing trial court's decision taxi driver was an independent contractor; applying *Dynamex* retroactively to conclude taxi company could not satisfy part C of the ABC test); Leader, *supra* note 9, at 120 (asserting that under parts A and B, Uber drivers would be classified as employees); John O. McGinnis, *The Sharing Economy as an Equalizing Economy*, 94 NOTRE DAME L. REV. 329, 359 (2018) (stating *Dynamex* threatens to impose the "corporate–employee relationship" on platform-based businesses); Chris Opfer, *Uber Hit With $650 Million Employment Tax Bill in New Jersey*, BLOOMBERG L. (Nov. 14, 2019, 2:31 PM), https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-

test, on the surface, appears to be a more simplified classification test, as revealed in prior discussions, there are still numerous factors to consider on a case-by-case basis.[116] There are arguments pro and con whether a platform-based business, such as Uber, can satisfy all three requirements under the ABC test.

A. Control

Though not applying part A of the ABC test, courts have previously concluded that Uber and Lyft do exercise some control over their drivers.[117] Though the analysis underlying part A is not necessarily identical to the analysis of control under the common law control test,[118] the analysis of control under the latter test, as well as that under the economic realities test, can be instructive. In April 2019, the NLRB Office of the General Counsel issued an Advice Memorandum concluding that Uber drivers are independent contractors.[119] With respect to control under the common law test enunciated in *SuperShuttle DFW*,[120] the Office of the General Counsel concluded Uber did not exercise control over drivers, sufficient to classify them as independent contracts because drivers (1) "had virtually unfettered freedom to set their own work schedules[,]" (2) controlled their work locations rather than being restricted to assigned routes or neighborhoods, and (3) could work for competitors.[121] Also in April 2019, the Department of Labor's Wage and Hour Division issued an Opinion Letter concluding that service providers for an unnamed platform-based business are independent contractors.[122] Analyzing control under the economic realities test for purposes of the FLSA,[123] the Wage and

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in-new-jersey (reporting that Uber had assessed $650 million in unpaid New Jersey unemployment and disability payments for its employee-drivers; noting New Jersey has adopted the ABC test).

[116] *See, e.g., supra* notes 66, 73, & 89–90 and accompanying text; *see also* Pearce & Silva, *supra* note 22, at 26–30 (discussing the ABC test's popularity, but ultimately recognizing that distinguishing between employees and independent contractors is a continuum).

[117] *See, e.g.,* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1078 (2015) ("Although Lyft drivers enjoy great flexibility in when and how often to work, once they do accept ride requests, Lyft retains a good deal of control over how they proceed."); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (noting numerous instances in which Uber exercised control over its drivers, but ultimately concluding the matter could not be settled as a matter of law).

[118] *See supra* notes 67–68 and accompanying text.

[119] Advice Memorandum from the NLRB Office of the Gen. Counsel to Jill Coffman, Regional Director Region 20, Uber Technologies, Inc., Nos. 13-CA-163062, 14-CA-158833, 29-CA-177483 (Apr. 16, 2019) [hereinafter Uber Adv. Mem.], https://apps.nlrb.gov/link/document.aspx/09031d4582bd1a2e.

[120] *See id*. at 1; SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 2019 WL 342288 (2019).

[121] *See* Uber Adv. Mem., *supra* note 119, at 6. It is important to note that under the NLRB's common law control test analysis, opportunities for economic gain and entrepreneurial independence are paramount factors. *See id.*

[122] Dep't of Labor, Wage & Hour Div. Opinion Letter (April 29, 2019), [hereinafter DOL Op. Letter], https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf. Without naming the company, the Opinion Letter described the company's business as "an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation, delivery, shopping, moving, cleaning, plumbing, painting, and household services." *Id.* at 1. These are similar to the services offered by TaskRabbit. *See* https://www.taskrabbit.com/m/all-services.

[123] *See* DOL Op. Letter, *supra* note 122, at 3.

Hour Division concluded the business does not appear to exert control over its service providers: they "have complete autonomy to choose the hours of work that are most beneficial to them"; they have the right to simultaneously work for competitors; nor does the business inspect their work for quality or rate their performance.[124]

One might arguably conclude that in order for platform-based businesses to demonstrate a lack of control necessary to defeat the presumption of an employee-employer relationship, they will not be able to monitor the quality of the work performed, nor control any aspect of how, when, or where their workers will perform services for customers. Otherwise, they will fail to overcome the burden of establishing their workers are not employees.

B. Outside the Usual Course of Business

Before California's Governor had signed AB 5 into law, Uber's Chief Legal Officer claimed the company would not be subject to the new law because its drivers' work is outside the usual course of Uber's business, "which is serving as a technology platform for several different types of digital marketplaces."[125] In support of this argument, Uber's Chief Legal Officer pointed to a Vermont Department of Labor opinion that under part B, for purposes of unemployment insurance, drivers for Transportation Network Companies (TNCs) are not employees because TNCs are not in the business of owning or operating a fleet of vehicles for purposes of providing transportation for hire to the general public.[126] But Uber's Chief Legal Officer also pointed to an arbitration decision that found this factor equivocal.[127] While courts have previously dismissed similar arguments,[128] some courts have concluded service workers performed services outside the company's usual course of business when the company was considered a broker.[129] When Uber provided only driver services, its argument that it was merely a broker of transportation services, not a provider of such services, may have been merely a semantic distinction.[130] But platform-based companies may be able to overcome the presumption

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[124] *See id.* at 8. The economic realities test as applied by the Wage and Hour Division focuses on a worker's economic dependence on a potential employer. *See id.* at 4.

[125] Uber Press Release, *supra* note 5.

[126] Vermont Dep't of Labor U.I. Bulletin No. 539 (Sept. 1, 2017), [hereinafter Vermont U.I. Bulletin] https://legislature.vermont.gov/Documents/2018/WorkGroups/House%20Commerce/Bills/H.143/H.143~Maria%20Royle~UI%20Treatment%20of%20TNC~3-29-2018.pdf. The Vermont Department of Labor also concluded that TNCs do not exercise control over their drivers because the drivers are free to work as much or as little as they want and can simultaneously work for competing TNCs, and the drivers are engaged in an independent trade or business because they own their own vehicles.

[127] Biafore v. Uber Techs., Inc., at 18 (Jan. 10, 2018) (McCauley, Arb.), [hereinafter Biafore v. Uber Arbitration Decision], https://drive.google.com/file/d/1nwo0-oT7vaPv1tCs3VSvMcKbk9QZhqjR/view (applying *Borello* standard).

[128] *See supra* notes 76, 78, & 79 and accompanying text; *see also* Uber Adv. Mem., *supra* note 119, at 13 (assuming *arguendo* that Uber drivers "did not work in a distinct occupation or business, but worked as part of Uber's regular business of transporting passengers).

[129] *See supra* notes 83–86 and accompanying text; *see also* DOL Op. Letter, *supra* note 122, at 10 (concluding the unnamed online platform business's primary purpose is not to provide services to end-market consumers, but to provide a referral system that connects service providers with consumers).

[130] *See* Pinsof, *supra* note 20, at 358–59.

of employment if they present themselves primarily as an independent intermediary platform, rather than a provider of services.

C. Independently Established Trade or Business

As noted by Keith Cunningham-Parmeter, "Just as platform workers do not act like small businesses that connect directly to customers, the public does not perceive most gig workers as separate companies."[131] And while some gig workers may truly be independent contractors, using an online platform, such as TaskRabbit, to expand their own businesses, most gig workers do not first open a small business and then join a platform to expand that business.[132] As noted above, many gig workers are performing online platform-enabled services either temporarily, until more permanent, desirable work comes along, or are supplementing income provided by other (perhaps sporadic) jobs.[133] Query whether someone holding two part-time jobs, for example at Walmart and Starbucks, would consider themselves a distinctly established business. And it arguably strains credulity to assert that a person trying to make rent by using their personal vehicle to transport strangers is an independently established trade or business.[134]

VI. Conclusion

Widespread adoption of the ABC test could be a game changer. It significantly diminishes the role of control in the classification analysis. For example, when concluding Uber drivers are independent contractors, particularly because Uber exercised minimal control over the drivers, the Department of Labor Wage and Hour Division assumed *arguendo* that Uber drivers performed services as a regular part of Uber's business.[135] Since this was not a dispositive factor under the classification test used by the Wage and Hour Division,[136] it did not alter their ultimate conclusion. However, under the ABC test, this finding would result in Uber drivers being employees rather than independent contractors.

Unfortunately, though, the ABC test is no panacea with respect to employee/independent contractor classification. Courts and regulators still seem to impose old-fashioned notions of work, that because the worker does not work for the employer exclusively and does not regularly show up for a particular shift at a particular location, he or she must somehow be truly independent. While the ultimate goal of the ABC test is to identify businesses that are truly operated independently of the hiring party, there is the risk that courts will instead confuse the precarity of modern working relationships with independence.

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[131] Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 416 (2019).

[132] *See id.* at 416–17.

[133] *See supra* note 18.

[134] *Cf.* Vermont U.I. Bulletin, *supra* note 126.

[135] *See* Uber Adv. Mem., *supra* note 119, at 13.

[136] *See id.; cf.* Biafore v. Uber Arbitration Decision, *supra* note 127, at 18.