The Increasing Likelihood of the Creation of a "Third Classification" of Worker as a Result of the Increased Prevalence of the Gig Economy

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One of the central legal issues impacting nearly every aspect of ridesharing and other jobs in the "gig economy" is the question of whether workers should be classified as employees or independent contractors. The distinction between these classifications of workers has a tremendous impact on what benefits and legal protections workers are entitled to under local, state, and federal law. Additionally, the way in which workers are classified impacts how liability is allocated in the event of an accident.

However, the employment model used by gig-economy businesses presents a uniquely difficult challenge when it comes to worker classification. The dichotomous model of a worker either being an employee or an independent contractor with no middle ground has at times lacked the nuance necessary to properly define the relationship between ridesharing drivers and the ridesharing companies. Predictably, this has created problems for gig-economy businesses and workers in this sector.

As a result of the limitations presented by the binary, either/or approach to worker classification, there is an increasing push toward creating a third category of worker, which would bridge the gap between the rigid classification of "employee" or "independent contractor." However, discussions related to the creation of a third category of worker have focused exclusively on delineating the employment law concerns in the gig economy. Less attention has been given to how the creation of a third classification of worker would impact the allocation of liability in the context of tort law. This article will explore recent developments in the classification of ridesharing drivers and offer suggestions on how courts may react to these developments when considering the allocation of tort liability for cases involving gig-economy workers and companies that utilize the gig-economy model.

Worker Classification for Purposes of Tort Liability

In the context of tort liability, the characteristic that distinguishes an employee from an independent contractor is the level of control that the hiring party is permitted to exert over the worker. In an employer-employee relationship, the hiring party has a right to control the manner and means by which a worker accomplishes the tasks assigned by the employer.[1] If the hiring party retains a right to control the way in which the worker completes the job, then the hiring party will be held liable for injuries caused by the employee in the course and scope of the execution of work. By contrast, if the hiring party does not control the manner and means of the worker's labor, the relationship is an independent contractor relationship. An independent contractor is a person who is assigned a job to complete but is not given specific instructions on *how* to do the task. Ostensibly, hiring parties have less control over the actions of a retained independent contractor than the actions of an employee. Thus, there is less justification for holding the hiring party legally responsible for the actions of a contractor.

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The right-to-control test is the most common analysis used to determine whether a worker is an employee or an independent contractor for the purposes of tort liability. While the factors to be examined under the control test are not identical in all jurisdictions, some common factors include whether the employer furnished tools and equipment for the work, whether the employer provided training and supervision, whether the worker is paid by the hour or by the job, whether the employer may terminate the worker without cause, whether the worker is also hired by other employers, and whether the hiring party controls the worker's schedule.[2] Some courts also analyze the understanding between the parties regarding the nature of the relationship.[3] However, this factor is not dispositive.[4] In fact, no single factor is dispositive, and the analysis of worker classification has been described as a qualitative rather than quantitative analysis.[5]

While there is limited case law analyzing how gig-economy workers should be classified for the purposes of tort liability, there have been significant decisions related to the classification of ridesharing drivers for the purposes of employment law. Specifically, the U.S. District Court for the Northern District of California in *O'Connor v. Uber* and *Cotter v. Lyft* addressed the issue of whether rideshare drivers are employees or independent contractors.[6] In these cases, the court ultimately denied Uber's and Lyft's motions for summary judgment and outlined the factors to be considered under the right-to-control test.[7] The court held that rideshare drivers are presumed to be employees and that companies have the burden of proving that a worker is not an employee.[8] In both cases, the court held that a reasonable jury could find that an employment relationship exists.[9]

In *O'Connor*, the court noted that Uber provides its drivers with many guidelines, which Uber claims are merely suggestions.[10] The instructions to drivers include the "suggestion" that drivers should accept all ride requests, dress professionally, make sure the radio is on, open doors for their clients, and shield clients from rain with an umbrella.[11] Uber even provides instruction on such simple tasks as where to park when picking up clients.[12]

In *Cotter*, the court similarly pointed out guidelines that Lyft provides for its drivers, which Lyft also insists are just suggestions.[13] Lyft instructs its drivers not to talk on the phone while a passenger is in the car, not to pick up non-Lyft passengers, not to request tips, not to smoke, and not to request passengers' contact information.[14] It also instructs drivers to wash and vacuum their cars frequently, to greet passengers with a fist bump, to allow passengers to choose the music, and to offer to charge passengers' cell phones.[15] Considering these factors, the court could not decide as a matter of law whether the rideshare drivers should be classified as independent contractors or employees, but the order was instructive of the required analysis.

While the *O'Connor* and *Cotter* cases dealt with worker classification under an employment law test that is somewhat more favorable to a finding of an employment relationship, it would be unsurprising if courts faced with the question of worker classification in tort cases reached the same conclusion using reasoning similar to that in *O'Connor* and *Cotter*. That being said, the creation of a third classification of worker that exists between employee and independent contractor could significantly complicate this analysis.

The Legal Road That Led to California's Proposition 22

While the decision of whether a worker is an independent contractor or an employee for purposes of tort liability is not always an easy one, there are only two options. Either the employer will be liable for torts of the worker or it will not. In the employment law context, a third category is emerging. For purposes of employment law, a worker's classification depends in part on the benefits provided to workers as well as the control that the employer has over them. This third "in-between" category is one in which drivers are provided with some benefits but are able to keep their status as an independent contractor. Ridesharing companies have been on the forefront of creating a third category worker.

Uber and Lyft, joined by DoorDash, Instacart, and Postmates, spearheaded the Proposition 22 campaign. Together, they spent over $200 million campaigning for Proposition 22, making it the most expensive ballot measure in California history.[16] Uber displayed pro–Proposition 22 messages to drivers and customers on

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the Uber app,[17] Instacart workers were asked to put pro–Proposition 22 stickers in customers' bags, and DoorDash provided restaurants with pro–Proposition 22 delivery bags.[18]

Proposition 22 allows app-based rideshare and delivery drivers to nominally remain independent contractors, but it requires rideshare and delivery companies to provide certain benefits to drivers.[19] The benefits include an earnings minimum equal to 120 percent of the local minimum wage for the time a driver spends driving; a health insurance stipend for drivers who work more than 15 hours per week; and payment for costs incurred from job-related injuries, including medical bills and lost income.[20] Proposition 22 also limits local governments' ability to set additional rules on rideshare and delivery companies.[21]

The campaign against Proposition 22 was funded by the California Labor Federation with support from UC Berkeley Labor Center.[22] They raised $19 million for their campaign—just 10 percent of what the rideshare companies put up.[23] Opponents of Proposition 22 argued that it serves only to bring in more profit for rideshare and delivery companies.[24] The opposition claimed that Proposition 22 is a special exemption solely for app-based and delivery companies that denies drivers basic rights and protections that other California employees receive.[25] Although the rideshare companies claimed that Proposition 22 is about protecting flexibility for part-time drivers, opponents argued that this flexibility would not be limited by classifying drivers as employees—and a University of California study found that the majority of drivers work more than 30 hours per week anyway.[26]

Supporters of Proposition 22 argued that surveys show drivers prefer working as independent contractors rather than employees.[27] Supporters further argued that the independent contractor classification allows drivers to enjoy the flexibility of deciding when to work and that there would be fewer opportunities for part-time driving jobs if the employment classification was mandated.[28] Lowering the number of drivers could also lead to increased prices and wait times for customers. Proposition 22 supporters also argued that the ballot initiative improves the lives of app-based workers because it requires companies to provide added benefits.[29] Finally, supporters claimed that over 80 percent of drivers work less than 20 hours per week and are unable to work set shifts because of other jobs or responsibilities.[30]

Proposition 22 ultimately passed with 58.63 percent of the vote.[31] Its passage represents the first time that a group of workers has been placed into a third category of worker, outside of the typical independent contractor or employee classification. While app-based drivers in California are still technically considered independent contractors, they receive additional benefits, placing them in a sort of gray area between independent contractor and worker.

The Push for More Laws like Proposition 22

In an August 10, 2020, editorial in the *New York Times*, Uber's CEO, Dara Khosrowshahi repeatedly called for a third category of worker and also proposed "that gig economy companies be required to establish benefit funds which give workers cash that they can use for the benefits they want, like health insurance or paid time off."[32] Khosrowshahi noted that if such a benefit fund had been in place in all 50 states in 2019, Uber would have contributed $655 million to its drivers.[33] A driver who averaged over 35 hours per week would have accrued approximately $1,350 in benefit funds, all the while retaining his or her independence to choose when and where to work.[34]

On February 15, 2021, Khosrowshahi released another open letter calling for a "new standard for platform work."[35] This time, the letter was directed toward the European Union and individual European nations. In this letter, Khosrowshahi explicitly called for "societies to move beyond a binary model of employment."[36] The letter stressed that a third classification of employee will require collaboration between rideshare companies and governments.

From the rideshare companies' side, Khosrowshahi said that the platform should be built on five pillars: flexibility, protection/benefits, earnings, growth, and voice.[37] Flexibility has been rideshare companies' main argument against reclassification from the beginning. If drivers are classified as employees, companies like Uber claim they will be forced to lay off the majority of their drivers, which would necessitate set work shifts so that the companies

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can ensure customers have access to their services at all times. This would mean that drivers would not be able to choose to work only when they are available and when they are able to make the most money. This would potentially stifle the earnings and growth potential of drivers.

However, there is broad agreement that ridesharing companies should offer increased social protections to their drivers.[38] A 2018 study showed that drivers in London had higher levels of stress and anxiety than other workers.[39] Rideshare companies can help by providing protections such as health insurance, helping workers pay into public safety nets, or creating an industry-funded portable benefits fund.

Khosrowshahi also addressed the question of why the government should have to intervene in order for rideshare companies to be able to offer benefits that drivers need. He noted that employment classification of rideshare drivers is being debated all across Europe, and one of the key factors in classifying a worker is the extent of the provision of benefits and training. Khosrowshahi encouraged lawmakers to look beyond these factors so that companies like Uber can provide these benefits to their employees without risking reclassification.[40] Several countries have already adopted this approach. Portugal and India made social security more accessible to independent workers.[41] France gave independent workers access to a personal fund and vocational training. And, of course, California passed Proposition 22.[42] Clarifying labor laws would ultimately allow companies to provide benefits to their workers and would encourage growth.

Shortly after this letter, the Supreme Court of the United Kingdom ruled that Uber drivers should be classified as "workers."[43] In the U.K., there are five employment categories: (1) self-employed and contractor, (2) worker, (3) employee, (4) director, and (5) office holder.[44] Traditionally, rideshare drivers fell under the self-employed and contractor category. Under this category, they had protection for their health and safety and against discrimination, but the rest of their rights and responsibilities were governed only by the terms of their contract.[45] As workers, drivers are entitled to the national minimum wage; paid holidays; rest breaks; and protection against unlawful deductions from wages, unlawful discrimination, and retaliation for whistleblowing.[46]

Interestingly, the court did not even consider the benefits afforded to drivers, as Khosrowshahi suggested. Instead, it looked to five key factors. First, Uber sets the fare for the ride; therefore, it is Uber that dictates how much drivers earn.[47] Second, drivers have no say in the contract terms between themselves and Uber.[48] Third, a driver's choice to accept or reject rides is constrained by Uber because drivers' choices are monitored, and drivers may face penalties for declining too many rides.[49] Fourth, Uber maintains control over the way in which drivers perform their services.[50] Finally, Uber restricts communications between drivers and passengers, which prevents drivers from forming relationships with riders and necessitates communication through the Uber app.[51] The combination of these factors makes it clear that the drivers are "substantially interchangeable" and that Uber has control over all aspects of their interactions with passengers. Notably, the factors that the U.K. Supreme Court looked to are similar to those that U.S. courts consider under the right-to-control test for tort liability.[52]

Although this ruling only applied to the 25 drivers in the case and did not serve to automatically reclassify all rideshare drivers in the U.K., it was clearly a huge blow to companies like Uber because it set a precedent for other gig-economy workers in the U.K. who might bring similar legal challenges. It also signifies a shift that is occurring wherein more gig-economy workers are being classified as employees rather than independent contractors.

Tort Law Must Adapt to Reflect the Changing Landscape of Employment Relationships

Courts are recognizing that law governing the gig-economy is problematically underdeveloped.[53] The trend in employment law is clearly toward reclassifying gig-economy workers as quasi-employees. This change is motivated by the realization that changes in technology have allowed hiring parties to exert control in a limited yet impactful way. With the availability of new technologies that foster the ability of people to perform side jobs at their leisure, courts are likely to encounter worker classification issues in the tort context more frequently. It is clear that a change in employment law is on the horizon, and the elimination of the binary classification of workers will certainly have an effect on the consideration of correctly allocating tort liability as well.

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Vicarious liability. Because the tests to determine whether a worker is an employee or an independent contractor are similar for purposes of employment law and tort liability, a shift in the framework of employment law standards will likely require a corresponding shift in the way vicarious tort liability is considered.

If workers are classified as employees for purposes of employment law, they are likely to be classified as employees for purposes of tort liability. In fact, some jurisdictions include the understanding between the parties concerning the nature of the relationship as a factor in determining whether a worker is an employee or a contractor.

However, if the trend moves toward the expansion of a third category of worker, these tests will necessarily need to be reformed. Obviously, if a hiring party and a worker/tortfeasor accept that their relationship is that of a third category/quasi-independent contractor, this will be of little use to a court attempting to determine whether the company should be held vicariously liable through the application of the doctrine of respondeat superior. While workers under the third category are generally considered nominal independent contractors, they are afforded many of the benefits that are hallmarks of an employee-employer relationship. The likely effect would be that the scale tips toward classifying gig-economy workers as employees for purposes of tort liability.

However, this approach would be the result only if courts asked to consider worker classification for a gig-economy worker in a tort case refuse to abandon the binary worker classification. Courts considering worker classification for the purposes of tort law may instead opt to modify the binary approach of holding hiring parties liable for the acts of employees but shielding hiring parties from liability for torts of retained independent contractors. Such an approach could eliminate the consideration of how a worker is classified and focus solely on the issues that have always been at the core of the concept of vicarious liability—control and spreading the risk of loss. Under the current model, courts consider the issue of control based on references to a litany of factors that are used to evaluate whether the worker is an employee or a contractor. A more streamlined approach, which would correspond to the evolving realities of the modern employment landscape, would be to focus on whether a minimum level of control is present and if the employer is receiving a benefit from the actions of the worker at the time the tort was committed. In this way, the question of employment classification is reduced to the most important components. This would remove the needlessly complicated step of determining whether the worker should fit within the classification of "employee" or "contractor." By tying the determination of whether vicarious liability should exist directly to the issues of control and allowing liability to follow financial benefit, the analysis of allocating financial responsibility for injuries will be more predictable and fair.

Agency by estoppel. An additional alternative approach that courts may ultimately utilize is modifying or expanding existing doctrines in tort law, such as agency by estoppel, to extend liability for torts committed by gig-economy workers to the hiring platform involved. Under the doctrine of agency by estoppel, a hiring party is liable for the torts committed by the worker as a result of the hiring party holding out the worker as acting on behalf of the hiring party.[54] Because the hiring party has held out the worker as acting on behalf of the hiring party, it would be inconsistent and unfair to permit the hiring party to then refuse to accept responsibility for the actions of the hired party.[55]

The doctrine of agency by estoppel, or apparent agency, has been utilized in some specific circumstances throughout the U.S. For instance, some states hold that hospitals are estopped from denying responsibility for the acts of independent contractor emergency room physicians.[56] The basis for holding hospitals liable for the acts of independent contractor physicians is that a person who seeks out emergency medical services "is unaware of and unconcerned with the technical complexities and nuances surrounding the contractual and employment arrangements" between a hospital and physicians.[57] This fact, paired with the reality that hospitals market themselves to the public as providing emergency care services, leads to the public policy–based decision that hospitals should not be permitted to refute their tie to the emergency room physicians they retain.[58]

With this in mind, the potential for applying agency by estoppel principles to gig-economy torts is obvious.

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A person injured while a ridesharing passenger is likely to be "unaware of and unconcerned with the technical complexities" of how a company like Uber defines its relationship with drivers. Additionally, the public understanding is that companies like Lyft hold themselves out as providing transportation services. These facts, paired with the reality that ridesharing companies derive substantial income from the services provided by drivers, could result in courts turning to the doctrine of agency by estoppel to sidestep the worker classification issue altogether.[59]

Conclusion

Ultimately, the end result of how gig economy workers will be classified for the purposes of employment law remains unclear. However, it seems likely that the old binary model of classifying workers as employees or independent contractors, with no middle ground, is likely to be cast aside. When such a change occurs, courts and litigators will be forced to adapt and integrate these new realities into other areas of law. While the existing tools for allocating liability in the event of a crash could be bent to conform to the changing employment landscape, a better approach will likely require an evolution of the way vicarious liability is analyzed.

ENDNOTES

1 Restatement (Third) of Agency § 7.07(3)(a) (Am. L. Inst. 2006).

2 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).

3 *See, e.g.*, S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 48 Cal. 3d 341 (1989).

4 *Id.* at 349.

5 *d.* at 351.

6 O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

7 *O'Connor*, 82 F. Supp. 3d 1133; *Cotter*, 60 F. Supp. 3d 1067.

8 *Cotter*, 60 F. Supp. 3d at 1073.

9 *O'Connor*, 82 F. Supp. 3d at 1148; *Cotter*, 60 F. Supp. 3d at 1081.

10 *O'Connor*, 82 F. Supp. 3d at 1150.

11 *Id.* at 1149–50.

12 *Id.* at 1150.

13 *Cotter*, 60 F. Supp. 3d at 1079.

14 *Id.* at 1078–79.

15 *Id.* at 1079.

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24 *Proposition 22: Arguments and Rebuttals*, Off. Voter Info. Guide (Nov. 3, 2020), https://voterguide.sos.ca.gov/propositions/22/arguments-rebuttals.htm.

25 *Id.*

26 *Id.* (citing Chris Benner et al., *On-Demand and On-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*, UC Santa Cruz (May 5, 2020), https://transform.ucsc.edu/on-demand-and-on-the-edge).

27 *Id.*

28 *Id.*

29 *Id.*

30 Yes on 22, https://yeson22.com (last visited June 25, 2021).

31 Alex Padilla, Statement of Vote: General Election, November 3, 2020, at 71 (2020), https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf.

32 Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. Times (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html.

33 *Id.*

34 *Id.*

35 Dara Khosrowshahi, A Better Deal 3 (2021), https://uber.app.box.com/s/tuuydpqj4v6ezvmd9ze81nong03omf11?uclick_id=938f5198-14f1-401b-acd9-9397506892e5.

36 *Id.* at 29.

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37 *Id.* at 16.

38 *Id.* at 20.

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41 *Id.*

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44 *Employment Status*, GOV.UK, https://www.gov.uk/employment-status (last visited June 25, 2021).

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46 *Id.*

47 *Aslam*, [2021] UKSC 5, ¶ 96.

48 *Id.* ¶ 95.

49 *Id.* ¶ 96.

50 *Id.* ¶ 97.

51 *Id.* ¶ 98.

52 *Id.* ¶ 101.

53 *Nationwide Prop & Cas. Ins. Co. v. Ismakovic*, 532 F. Supp. 3d 926 (Penn. E.D., Mar. 31, 2021).

54 Cullen v. BMW of N. Am., 531 F. Supp 555 (E.D.N.Y. 1982).

55 *Id.*

56 *See, e.g.*, Clark v. Southview Hosp. & Fam. Health Ctr., 68 Ohio St. 3d 435 (1994).

57 *Id.* at 444.

58 *Id.*

59 Of course, this approach is not without its limitations. While passengers who are accepting a ride from Uber or Lyft may be looking to those companies to provide transportation services, which is the basis for estopping the companies from denying an agency relationship with drivers, this is not necessarily the case with third parties who may be involved in an accident with a ridesharing driver. Thus, if this approach were to be utilized in cases involving third parties, it is likely that public policy motivations would be the driving factor over the technicalities of reliance on the ridesharing company's representations.

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