

1-1-2024

## App-Based Drivers, Employees or Independent Contractors?: Big Tech's Fight to Classify Drivers as Independent Contractors Prioritizes Flexibility and Innovation Over Labor and Class Implications

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### Recommended Citation

29 Suffolk J. Trial & App. Advoc. 89 (2023-2024)

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# APP-BASED DRIVERS, EMPLOYEES OR INDEPENDENT CONTRACTORS?: BIG TECH'S FIGHT TO CLASSIFY DRIVERS AS INDEPENDENT CONTRACTORS PRIORITIZES FLEXIBILITY AND INNOVATION OVER LABOR AND CLASS IMPLICATIONS

*Erin Chow*

*We insist that labor is entitled to as much respect as property. But our workers with hand and brain deserve more than respect for their labor. They deserve practical protection in the opportunity to use their labor at a return adequate to support them at a decent and constantly rising standard of living, and to accumulate a margin of security against the inevitable vicissitudes of life.*<sup>1</sup>

*The labor movement was the principal force that transformed misery and despair into hope and progress. Out of its bold struggles, economic and social reform gave birth to unemployment insurance, old-age pensions, government relief for the destitute and, above all, new wage levels that meant not mere survival but a tolerable life. The captains of industry did not lead this transformation; they resisted it until they were overcome.*<sup>2</sup>

## I. INTRODUCTION

Worker classification, specifically the distinction between employee and independent contractor status, is a critical issue for American industries, employers, and workers.<sup>3</sup> Employee designation garners certain federal,

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<sup>1</sup> President Franklin D. Roosevelt, Evening Radio Eighth “Fireside Chat” Address (Sept. 6, 1936), [<https://perma.cc/4994-KM7P>].

<sup>2</sup> Martin Luther King, Jr., Address at the 8th Annual Convention of the Illinois State AFL-CIO (Oct. 7, 1965), [<https://perma.cc/2KW3-59X8>].

<sup>3</sup> See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1514, 1522 (2016) (explaining higher cost of employees could end on-demand, app-based industries). According to the Supreme Court, “[f]ew problems in the law have given greater variety of application and conflict . . . than . . . what is clearly an employer-employee relationship and . . . one of independent, entrepreneurial dealing.” *Id.* at 1514 (quoting *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 121 (1944)).

state, and local protections ranging from wage and benefit guarantees to protection against discrimination.<sup>4</sup> These protections operate within the presumptive at-will employment relationship between employees and their employers while seeking to balance power between the two parties.<sup>5</sup> Quite simply, hiring employees costs more than independent contractors because employers have additional financial responsibilities towards employees.<sup>6</sup> Particularly with a newly developed gig economy, there is a storied history of distinguishing employees from independent contractors in the labor market.<sup>7</sup>

While part-time work, contract work, and temporary help services are not new phenomena, traditional forms of employment increasingly give way to “flexible labor” as a result of technological advances.<sup>8</sup> The evolution of the market led to the “gig economy.”<sup>9</sup> With roughly 10.6 million

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<sup>4</sup> See *id.* at 1522-23; Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”:* *The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239-40 (1997) (explaining federal protections against discrimination only apply to employees and not independent contractors). According to the Commission of the Future of Worker-Management Relations’ 1994 Report and Recommendation, “[t]he single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors.” Maltby & Yamada, *supra*, at 242.

<sup>5</sup> See Means & Seiner, *supra* note 3, at 1520-21 (recognizing at-will employment favors employers because workers lack leverage to demand better terms and conditions). The presence of these employee protections signifies a common understanding that an “employer’s ability to completely structure the employment relationship” has bounds that should be enforced. *Id.* at 1523.

<sup>6</sup> See Means & Seiner, *supra* note 3, at 1513-14 (“Employees cost more than independent contractors because businesses are responsible for payroll taxes, workers’ compensation insurance, healthcare, minimum wage, overtime, and reimbursement of business-related expenses for employees.”).

<sup>7</sup> See Maltby & Yamada, *supra* note 4, at 240, 245 (explaining independent contractor classification reduces costs and exempts employers from federal labor and employment laws); Alyssa M. Stokes, Note, *Driving Courts Crazy: A Look at How Labor and Employment Laws Do Not Coincide with Ride Platforms in the Sharing Economy*, 95 NEB. L. REV. 853, 855 (2017) (stating start-up companies avoid traditional labor costs by classifying workers as independent contractors).

<sup>8</sup> See Maltby & Yamada, *supra* note 4, at 245 (describing how “fluid, less secure” work is replacing traditional blue- and white-collar jobs); Travis Clark, *The Gig is Up: An Analysis of the Gig-Economy and an Outdated Worker Classification System in Need of Reform*, 19 SEATTLE J. FOR SOC. JUST. 769, 773 (2021) (identifying increased use of smartphones as impetus for app-based industries).

<sup>9</sup> Stokes, *supra* note 7, at 856 (defining gig economy, also known as “sharing economy,” as “underutilized supply of a good or service that is put to productive use by an independent workforce that does not fit within the traditional employer-employee relationship” that is “difficult to regulate,” and requires “freedom to experiment and innovate”); see also Clark, *supra* note 8, at 773 (characterizing gig economy as “short-term or freelance employment relationship that offers flexible hours”). The number of contingent workers in the United States between 1995 and 2010 has quintupled, reflecting the rapidly growing gig economy. See U.S. BUREAU OF LAB. STATS., REPORT 900, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS (August 17,

independent contractors in the United States in 2017, and likely even more today, the sheer volume of non-traditional employees raises the need to settle worker classification disputes.<sup>10</sup>

This note discusses Transportation Network Companies (“TNCs”) and Delivery Network Companies (“DNCs”), such as Uber, Lyft, DoorDash, Instacart, and others, and their recent attempts to classify their drivers as independent contractors to cut costs and maximize profit.<sup>11</sup> More specifically, this note will explore TNCs’ and DNCs’ attempts to circumvent strong presumptions of employee status in California and Massachusetts and reactions to such attempts.<sup>12</sup> Finally, this note predicts that ongoing litigation between

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1995), [https://perma.cc/P2JU-3X24] (stating 6.7 percent of American workers were independent contractors, consultants, and free-lancers in 1995); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 1, 4 (Apr. 20, 2015), [https://perma.cc/S4J3-5WAN] (reporting contingent workers were over forty percent of American workforce in 2010). According to the Government Accountability Office, the increase in contingent workers is a result of increasing emphasis on flexibility. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-168R, *supra*, at 4 (describing contingent workers as “workers who lack job security and those with work schedules that are variable, unpredictable, or both”).

<sup>10</sup> *See* U.S. BUREAU OF LAB. STATS., USDL-18-0942, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS SUMMARY (2017), [https://perma.cc/YB7H-2UKR] (reporting 6.9 percent of American workforce identified as independent contractors); *see also* Stokes, *supra* note 7, at 856 (asserting evolving economy complicates classifying worker-employer relationships within current legal frameworks); Means & Seiner, *supra* note 3, at 1513 (claiming “one of the most controversial issues in labor and employment law” is how workers should be categorized in businesses that rely on applications and internet rather than hierarchical supervision). The gig industry has experienced “unprecedented market success.” Clark, *supra* note 8, at 774. However, this success is not felt by gig drivers that, unlike typical independent contractors that earn higher wages than employees that do similar work, earn less than their employee-counterparts. *See id.* at 775 (claiming gig workers do not receive higher wages like traditional independent contractors). When the traditional workplace becomes “more individualized, independent, and impersonal,” employer accountability diminishes, making gig workers “one of the most vulnerable workforces in generations.” *Id.* at 769, 775. Many independent contractors do not know the legal difference between independent contractors and employees and assume they are protected as employees until they attempt to invoke those protections. *See id.* at 784 (describing misclassified workers’ faulty assumptions regarding their worker protections). Workers that believe they have been misclassified bear the cost to litigate otherwise. *Id.* (illustrating financial cost of workers’ attempts to rectify misclassification).

<sup>11</sup> *See* Henry Moreno, Note, *The Statutory Death of the Gig Economy: How California Policy Incentivizes the Automation of Five Million Jobs*, 75 U. MIA. L. REV. 945, 946 (2021) (explaining introduction of Uber led to various Transportation Network Companies and subsequent “fight over driver classification”); Clark, *supra* note 8, at 770 (explaining employee status triggers employer’s financial liability for “payroll taxes, pension benefits . . . discrimination, sexual harassment, and on-the-job injuries”). Companies can save up to thirty percent on payroll taxes alone by classifying drivers as independent contractors. *Id.* at 771.

<sup>12</sup> *See* Moreno, *supra* note 12, at 948 (explaining how TNCs used California’s ballot initiative, Proposition 22, to avoid burden of “demonstrat[ing] workers are not employees”). After Massachusetts Attorney General Healey filed suit against Uber and Lyft for misclassifying their drivers as independent contractors in July 2020, TNCs and DNCs filed Petitions to Propose Laws with

the former Massachusetts Attorney General, Maura Healey, and Uber and Lyft regarding classification of app-based drivers will result in employee status for drivers, so long as the judiciary adheres to the legislative intent and goals of Massachusetts' employee presumption.<sup>13</sup>

## II. HISTORY

### A. *The Rise of TNCs and DNCs, and How They Work*

The advent of Uber in 2009 revolutionized the gig economy by introducing TNCs and DNCs to the labor market.<sup>14</sup> This new iteration of gig work, spearheaded by technology firms like Uber, Lyft, DoorDash, and Instacart, connects workers with jobs by channeling traditional work activities through digital or online platforms such as smartphone applications.<sup>15</sup> These gig workers, also known as application-based drivers (“app-based drivers”), log into TNCs’ and DNCs’ platforms to receive work and use their own motor vehicles to transport people or deliver goods.<sup>16</sup> Offering work through

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Healey in August 2021. *See id.* at 992 (describing recent suit against Uber and Lyft for misclassification in Massachusetts); Brief of Intervenors-Defendants at 17, *El Koussa v. Att’y Gen.*, 188 N.E.3d 510 (Mass. 2022) (No. 13237) (explaining suit against Uber and Lyft in Massachusetts).

<sup>13</sup> *See* *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (indicating California Legislature decided employees needed statutory protections as “check against the bargaining advantage employers have over employees – particularly unskilled, lower-wage employees”); Complaint for Declaratory Judgment at 10, *Healey v. Uber Techs., Inc.*, No. CIV. 2084-01519, 2020 WL 9148109, \*1 (Mass. Super. Ct. July 14, 2020) (clarifying Attorney General has “substantial interest in protecting workers ... and fostering a level playing field for businesses”).

<sup>14</sup> *See* *Moreno*, *supra* note 12, at 946; Brief of Plaintiffs/Appellants at 14, *El Koussa*, 188 N.E.3d 510 (No. 13237) (identifying transportation and delivery network companies as app-based companies that transport people and goods, respectively).

<sup>15</sup> *See* *Clark*, *supra* note 8, at 74 (characterizing new wave of gig economy); U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-561, WORKFORCE TRAINING: DOL CAN BETTER SHARE INFORMATION ON SERVICES FOR ON-DEMAND, OR GIG, WORKERS 13-14 (2017), [<https://perma.cc/A8HN-JEPD>] (redefining characteristics of gig work with onslaught of large technology companies). A gig worker is now characterized by the U.S. Government Accountability Office as someone who is:

- Self-employed and performing single projects or tasks on demand;
- Providing labor services rather than capital goods or assets;
- Working for pay (not providing services in-kind);
- Obtaining their work or performing services either offline or online – through applications or websites, also known as digital or online platforms, which connect workers with jobs; and
- Performing gig work either part-time or full-time.

U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-561, *supra*, at 1.

<sup>16</sup> *See* Brief of Plaintiffs/Appellants, *supra* note 14, at 14.

online platforms makes work more “accessible.”<sup>17</sup> Under a typical TNC or DNC contract, companies set the price of fares for rides or delivery services that customers book through the online platform, and customers pay the TNC or DNC directly for the services.<sup>18</sup> After deducting a service fee, the TNC or DNC pays the driver.<sup>19</sup>

*B. Flexibility and Innovation or Cutting Costs and Maximizing Profits?*

The draw towards classifying app-based drivers as independent contractors is rooted in the belief that worker autonomy and flexibility fosters progress, cuts costs, and reduces liability, promoting profit maximization and market competitiveness.<sup>20</sup> Independent contractor classification is seen as an opportunity to “unshackle workers from the constraints of more traditional employment while . . . unleashing the engine of capitalism to promote economic growth.”<sup>21</sup> Proponents of independent contractor classification allege that work flexibility helps underemployed individuals supplement their incomes and helps those excluded from traditional labor markets find gainful employment.<sup>22</sup>

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<sup>17</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 2 (claiming app-based work lowers entry and operating costs for workers). *But see* Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 526 (2021) (contesting TNCs' and DNCs' claim to offer accessibility of work to marginalized individuals).

<sup>18</sup> Complaint for Declaratory Judgment, *supra* note 13, at 24 (detailing control TNCs and DNCs have in relationship between driver and customer); *see* Stokes, *supra* note 7, at 855-56 (conveying gig work arrangement for app-based drivers).

<sup>19</sup> See Stokes, *supra* note 7, at 856-66 (illustrating typical app-based driver compensation). For Uber drivers, the deducted service fee is about twenty percent of the entire bill. *Id.* at 866 (describing breakdown of Uber costs).

<sup>20</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 17 (listing various benefits of gig work). *But see* Clark, *supra* note 8, at 771-72 (identifying TNCs' and DNCs' fear that costs associated with employee status will stifle innovation); Moreno, *supra* note 12, at 965 (revealing Uber and Lyft understand financial implications of employee status on business model); U.S. DEP'T OF LAB., No. 2015-1, ADMINISTRATOR'S INTERPRETATION (July 15, 2015), [<https://perma.cc/VC6W-9B5H>] (highlighting misclassification of workers as independent contractors cuts costs and avoids compliance with laws).

<sup>21</sup> Means & Seiner, *supra* note 3, at 1518.

<sup>22</sup> See Clark, *supra* note 8, at 778 (defining worker flexibility as benefit because “workers can decide when to work, where to work, and what kind of work to accept”). Workers' motivations for engaging in gig work include filling gaps in income, accommodation of work schedule preferences, and having something to do in their spare time. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 15 (explaining appeals of gig work). The Pew Research Center reported thirty-seven percent of gig workers stated they engage in app-based work to supplement gaps or changes in their income. *Id.* at 16. In 2016, thirty-two percent of workers used gig work as their primary source of income. Clark, *supra* note 8, at 778. Due to historical legislation and systemic racism,

While gig work offers greater flexibility, supplemental income, and autonomy, it can also be replete with downsides.<sup>23</sup> In addition to unpredictable workflow and wages, app-based drivers risk not being paid for the work they perform.<sup>24</sup> The Pew Research Center reported that twenty-nine percent of online gig workers stated that they performed work through an online platform for which they never received payment.<sup>25</sup>

Classification of app-based drivers as independent contractors or employees is vital to TNCs' and DNCs' business models because an employer's financial and legal obligations to an employee severely outweigh obligations to an independent contractor.<sup>26</sup> Independent contractor status

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groups such as people of color and immigrants are frequently excluded from traditional labor markets that afford standard worker protections. *See* Dubal, *supra* note 17, at 523 (alleging immigrants and people of color were “not afforded the same protection as other low-income workers—sometimes not even the same protections as other workers in the same sector”).

<sup>23</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 17 (stating key benefits of gig work include flexibility, autonomy, income, the “ability to build a business, a resume, or experience . . . low barrier to entry; and the ability to pursue a passion”). However, the downsides to gig work include a “lack of financial security; lack of benefits; and increased risk that arises from increased liability and high rate of failure in self-employment.” *Id.* at 18-20.

<sup>24</sup> *See* Dubal, *supra* note 17, at 515 (illustrating financial risks in gig work); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 19-20 (explaining how customer complaints or ratings could result in canceled payment for services).

<sup>25</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 19-20.

<sup>26</sup> *See* Clark, *supra* note 8, at 770 (describing how employee status “triggers ‘enormous liability’ for payroll taxes, pension benefits . . . as well as liability for discrimination, sexual harassment, and on-the-job injuries”); 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) (explaining employee status' current importance derives from modern social welfare legislation). Before the Industrial Revolution, worker classification was limited and primarily used to determine a hiring entity's liability for a worker's negligence. *See* Carlson, *supra*, at 301 (explaining classifying workers had little to no importance because of “fewer types of work, fewer occupations, simpler organization of work, and a pre-established and static view of relationships”). Nevertheless, a hiring entity's liability for third-party injuries because of a worker's negligence remained a concern during and after industrialization and led to the use of the “control test,” which determined a person's liability for another's negligence. *See id.* at 304 (elucidating how industrialization's risks to public contributed to inquiries of worker classification). The “control test” is the common-law test for determining an employer-employee relationship based on whether “the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished . . .” *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948). However, during the wave of New Deal federal legislation during the 1930s, lawmakers sought to protect workers with collective bargaining laws, social security benefits, minimum wage regulations, and anti-discrimination rules. *See* Carlson, *supra*, at 301 (explaining how economic and social factors during New Deal influenced importance of worker classification); *see also* 29 U.S.C. § 157 (codifying employees' “right to self-organization . . . bargain collectively . . . “ and take collective action) (emphasis added); 29 U.S.C. §§ 206-07, 212 (establishing federal minimum wage, “time-and-a-half” overtime pay, and prohibition of “oppressive child labor” for employees) (emphasis added).

lowers the financial burden on employers and limits government oversight.<sup>27</sup> The financial cost of hiring a person as an employee can be so substantial that employers sometimes lay off their employees and rehire them as independent contractors with lower pay or few-to-no benefits.<sup>28</sup> Logically, it is economical for new startup companies in the gig economy to classify their app-based drivers as independent contractors to avoid the traditional labor costs associated with employees.<sup>29</sup> In fact, both Uber and Lyft founded their business models on the independent contractor model because classifying their app-based drivers as employees would adversely impact their financial

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<sup>27</sup> See Clark, *supra* note 8, at 770 (listing employer's obligations from "payroll taxes [and] pension benefits . . . [to] liability for discrimination, sexual harassment, and on-the-job injuries"); Maltby & Yamada, *supra* note 4, at 245-46 (explaining independent contractor classification cuts personnel costs). Because major federal labor legislation such as the National Labor Relations Act of 1935 ("NLRA"), the Fair Labor Standards Act of 1938 ("FLSA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Occupational Safety and Health Act of 1970 ("OSHA"), and the American Disabilities Act of 1990 ("ADA") only protect "employees," employers do not need to abide by the same laws and provide the same workplace rights or safeguards to their independent contractors. See 29 U.S.C. § 152 (stating "'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor"); 29 U.S.C. § 203 (limiting FLSA protections to "employees," defined as "any individual[s] employed by an employer"); 42 U.S.C.S. §§ 2000e, e-2 (LexisNexis, Lexis Advance through Pub. L. 118-21, approved 11/13/23) (prohibiting employers' discriminatory conduct against *employees*) (emphasis added); 29 U.S.C. §§ 630(f), 631-32 (prohibiting employers from discriminating against *employees* ages forty and above on account of age) (emphasis added); 29 U.S.C. § 654 (demanding employers provide safe and healthy workplaces for their *employees*) (emphasis added); 42 U.S.C. § 12112 (prohibiting employers from discriminating against *employees* on account of disability) (emphasis added).

<sup>28</sup> See Maltby & Yamada, *supra* note 4, at 245-46 (demonstrating financial draw to classify workers as independent contractors); Louis Uchitelle, *More Downsized Workers Are Returning as Rentals*, N.Y. TIMES (Dec. 8, 1996), [<https://perma.cc/H9FU-43YQ>] (providing examples of former employees returning to same position, but as contract workers). There is a growing trend that contract workers were once employees of the same hiring entity before being laid off. See Uchitelle, *supra* (stating roughly one-fifth of contract workers were originally employees in their current place of employment). Alan Krueger, Princeton labor economist and former Assistant Secretary of Treasury for Economic Policy under the Obama administration, explained "[m]any companies don't want to lose experienced people and they don't want to keep them on expensive career tracks . . . [s]o they have come up with a contract-worker status for ex-employees." *Id.* Because replacing employees with contract workers saves corporations money on pension and health care benefits, employment may no longer be workers' primary sources of these benefits if enough hiring entities decide to follow this trend. See *id.* (suggesting impact of shift towards independent contract model for workers).

<sup>29</sup> See Stokes, *supra* note 7, at 858 (identifying incentives for startup companies to classify workers as independent contractors). The costs associated with employee classifications for app-based drivers will "overly burden employers," and economists, legislators, and employers fear that these additional costs will be passed onto consumers and ultimately impact business and innovation. Clark, *supra* note 8, at 771-72.



outlook.<sup>30</sup> In its 2020 Form 10-K, Uber alleged to its investors that classifying its drivers as employees would lead to significant and unplanned expenses.<sup>31</sup>

Classifying app-based drivers as independent contractors subjects them to lower wages and eliminates their labor protections.<sup>32</sup> While many states and municipalities have adopted laws providing employees additional protection, several federal protections exist for employees as well.<sup>33</sup> These

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<sup>30</sup> Moreno, *supra* note 11, at 965 (explaining independent contractors are integral to app-based gig industries' business models). The cost of classifying app-based drivers as employees in California alone would amount to an additional cost of about \$500 million a year for Uber and \$290 million a year for Lyft. *Id.* at 949, 994 (contemplating app-based industry's demise if forced to classify drivers as employees); *see also* Uber Techs., Inc., Annual Report (Form 10-K) (Feb. 26, 2021) at 14, [<https://perma.cc/5YWD-HXWF>] (detailing litigation costs of drivers' claims for misclassification damages in 2020). According to Uber, it paid twenty million dollars in a settlement for a class action brought by its drivers in California and Massachusetts for misclassification in 2020. Uber Techs., Inc., Annual Report (Form 10-K), *supra*, at 13-14. More than one hundred thousand drivers across the United States have made claims against Uber for misclassification. *Id.* at 14. Despite settling most of these claims individually, Uber has spent approximately \$155 million dollars on these settlements as of December 31, 2020. *Id.*

<sup>31</sup> Uber Techs., Inc., Annual Report (Form 10-K), *supra* note 30, at 14 ("If . . . we are required to classify Drivers as employees, we would incur significant additional expenses . . . associated with the application of wage and hour laws . . . employee benefits, social security contributions, taxes [direct and indirect], and potential penalties.").

<sup>32</sup> *See* U.S. DEP'T OF LAB., No. 2015-1, *supra* note 20, at 10 (describing how employee misclassification eliminates minimum wage, overtime compensation, unemployment insurance, and workers' compensation protections). "Correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers." *Id.* TNCs consistently lower their fares for customers to increase demand and limit competition, rendering lower wages for its app-based drivers. *See* Clark, *supra* note 8, at 785. Classifying workers as independent contractors rather than employees means that workers are not afforded protection under the following federal labor laws:

[T]he Fair Labor Standards Act (FLSA) [which] requires the payment of minimum wage and overtime to employees; the National Labor Relations Act (NLRA) [which] provides certain rights to employees, such as the right to self-organize, join labor organizations, bargain collectively through representatives, and engage in concerted activities; the Employee Retirement Income Security Act (ERISA) [which] protects the interests of employees in their pension and welfare benefit plans; and the Family and Medical Leave Act (FMLA) [which] entitles some employees to take leave for medical reasons, the birth or adoption of a child, or for the care of a child, spouse, or parent.

Stokes, *supra* note 7, at 857.

<sup>33</sup> *See* Means & Seiner, *supra* note 3, at 1523 (concluding local, state, and federal worker protections signifies importance of limiting employer control over employees). Examples of stronger state employee protections than federal protections include earned sick time in California and Massachusetts. *See* CAL. LAB. CODE § 202 (Deering 2022) (providing at-will California employees must receive final wages within seventy-two hours of termination); MASS. GEN. LAWS ch. 149, § 148C (2022) (codifying one hour of paid sick time for every thirty hours worked by Massachusetts employees).

employee protections date back to the New Deal era with the Fair Labor Standards Act of 1938 (“FLSA”), which established a federal minimum wage and overtime pay.<sup>34</sup> The National Labor Relations Act of 1935 (“NLRA”) gave employees the right to self-organize, bargain collectively, and take collective action, such as strikes, when negotiating with employers.<sup>35</sup> During the American Civil Rights era, federal labor legislation addressed discrimination in the workplace through the passage of Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Age Discrimination in Employment Act of 1967 (“ADEA”), which prohibit discrimination on the basis of certain protected classes in the hiring, firing, and treatment of employees.<sup>36</sup> More recently, federal protections prohibit discrimination against employees on account of actual or perceived disabilities under the Americans with Disabilities Act of 1990 (“ADA”), and provide employees with limited unpaid, job-protected leave for certain family and medical reasons under the Family and Medical Leave Act of 1993 (“FMLA”).<sup>37</sup> Without the protection of labor laws as independent contractors, app-based drivers may struggle to make a livable wage and foster a healthy family because TNCs and DNCs can pay their app-based drivers much lower wages, limit their ability to take collective action, and leave them without recourse for

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<sup>34</sup> 29 U.S.C. §§ 206-07. During President Franklin Delano Roosevelt’s 1936 presidential campaign, he promised stronger worker protections amid an era of sweat labor industries. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T OF LAB., [https://perma.cc/8RAE-9SJQ] (last visited Aug. 25, 2023) (describing how child workers experienced starvation wages and exploitive work hours). FLSA sought to address working conditions that left one-third of the working population “ill-nourished, ill-clad, and ill-housed.” *See id.* (stating FLSA outlawed child labor and established federal minimum wage and limited work hours). According to the Commissioner of Labor Statistics, Isador Lubin, the American economy “had deteriorated to the chaotic stage where employers with high standards were forced by cut-throat competition to exploit labor in order to survive.” *Id.*

<sup>35</sup> *See* 29 U.S.C. §§ 151, 157 (explaining right to organize and bargain collectively helps “restore equality of bargaining power between employers and employees”). Uber recognized the power the NLRA provides employees and disclosed to its investors that if its drivers were classified as employees, subsequently unionized, and settled on collective bargaining agreements with terms that “deviate significantly from [its] business model, [its] business, financial condition, operating results[,] and cash flows could be materially adversely affected.” Uber Techs., Inc., Annual Report (Form 10-K), *supra* note 30, at 14. Moreover, any labor dispute involving unionized drivers would likely hurt its reputation, disrupt its operations, and lead to costly litigation. *See id.* (describing economic and financial impact of driver unionization).

<sup>36</sup> *See* 42 U.S.C.S. § 2000e-2 (prohibiting discriminatory conduct against employees based on race, color, religion, sex, and national origin); 29 U.S.C. §§ 621, 623, 631 (protecting employees ages forty and above from discriminatory conduct in workplace).

<sup>37</sup> 42 U.S.C. § 12112 (prohibiting discrimination based on disability); 29 U.S.C. §§ 2601, 2614 (establishing leave for family and medical reasons “to promote the stability and economic security of families”).

workplace discrimination or job security during family or medical crises.<sup>38</sup> While proponents of classifying app-based drivers as independent contractors rely on the advantages of gig work, some view the current push to classify app-based drivers as independent contractors as a way to preserve class strata and maximize profits.<sup>39</sup>

As the debate over classification of app-based drivers continues, there is no doubt that misclassification has serious consequences for government programs.<sup>40</sup> When employers misclassify their employees as independent contractors, they rob billions of dollars from social programs and avoid paying taxes.<sup>41</sup> This creates greater financial strain on local, state, and

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<sup>38</sup> See Brief of the City of Boston as Amicus Curiae in Favor of the Plaintiffs/Appellants at 4-6, *El Koussa v. Att’y Gen.*, 188 N.E.3d 510 (Mass. 2022) (No. 13237) (illuminating financial and legal ramifications of absence of statutory wage protections for independent contractors).

<sup>39</sup> See Brief of Civil Rights Organizations as Amicus Curiae in Favor of the Plaintiffs/Appellants at 34, *El Koussa*, 188 N.E.3d 510 (No. 13237) (concluding TNCs and DNCs “weaponize” opportunity to justify “perpetuat[ing] occupational segregation by color and race”); Dubal, *supra* note 18, at 514 (stating that gig work in United States is primarily conducted by immigrants and subordinated minorities). Third-party organizations’ demographic data indicate Black Indigenous People of Color (“BIPOC”) make up a sizable portion of app-based drivers. Compare Christy England, *The Gig Economy by the Numbers*, THE EMP. RTS. ADVOC. INST. FOR L. & POL’Y 6 (2020), [https://perma.cc/AV8X-BTAC] (claiming forty percent of American gig workers are Black or Latinx) with Jenny Chang, FINANCES ONLINE, *47 Lyft Statistics in 2023: Data on Revenue, Riders & Drivers*, [https://perma.cc/8XHU-ADNJ] (last modified Jan. 8, 2023) (reporting sixty-nine percent of Lyft drivers in 2021 were minorities). Given this “highly racialized labor market,” the effects of low and unpredictable wages are disproportionately felt by BIPOC communities and create a new caste system. Dubal, *supra* note 18, at 514-15 (claiming gig work is primarily done by immigrants and people of color). Nicole Moore, a driver and organizer with Rideshare Drivers United explains the continuing history of excluding workers of color from federal employment protections by stating: “[h]istorically, who else hasn’t been covered by the minimum wage? Domestic workers. Farm workers. And now app-based workers. And just like domestic and farm workers, we’re a majority people of color and immigrant workforce . . . .” Eliza McCullough, et al., *Prop 22 Decreases Wages and Deepens Inequities for California Workers*, NAT’L EQUITY ATLAS, (Sept. 21, 2022), [https://perma.cc/UKS6-AD4Z].

<sup>40</sup> See Margot Roosevelt & Suhauna Hussain, *Prop. 22 is Ruled Unconstitutional, a Blow to California Gig Economy Law*, L.A. TIMES (Aug. 20, 2021, 10:22 PM), [https://perma.cc/UG5Y-HGAY] (explaining how app-based drivers’ status in California is unsettled after judge ruled Proposition 22 unconstitutional); Memorandum and Order Denying Defendant’s Motion to Dismiss, *Healey v. Uber Techs., Inc.*, No. CIV. 2084-01519, at 6, 2021 WL 1222199 (Mass. Super. Ct. Mar. 25, 2021) (holding Uber and Lyft’s motion to dismiss denied continuing litigation); sources cited *supra* note 29 and accompanying text (explaining how independent contract status cuts significant costs for employers); sources cited *supra* note 33 and accompanying text (detailing how independent contractor status undercuts stability and protection of workers); Clark, *supra* note 8, at 784 (claiming federal, state, and local governments suffer financially when employers misclassify employees).

<sup>41</sup> See Clark, *supra* note 8, at 784-85 (claiming misclassification robs “Social Security, Medicare, unemployment insurance, and workers’ compensation” while also reducing taxes). According to a 2004 University of Massachusetts and Harvard University research report, the misclassification

federal governments because governments often expand public benefits programs to respond to the financial needs of misclassified workers.<sup>42</sup>

### C. California Creates Employee Presumption Through Judicial Authority

California is seen as an “employee friendly” state because its Labor Code enumerates several worker protections, such as overtime pay, paid family leave, and fair chance hiring.<sup>43</sup> In 2015, several app-based drivers in California filed suit against Uber and Lyft to claim employee status.<sup>44</sup>

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of at least one in seven construction workers in Massachusetts resulted in a loss of roughly fifteen million dollars in employment taxes. *Id.* at 785.

<sup>42</sup> See Brief of the City of Boston, *supra* note 38, at 4-5 (conveying how misclassified employees receive lower wages, impacting their ability to afford everyday necessities). The Attorney General of Massachusetts argued before the Supreme Judicial Court that misclassification of employees as independent contractors “costs the state and local governments billions of dollars in revenue, and deprives Social Security, Medicare, unemployment insurance, and workers’ compensation funds of money that would otherwise go to vital public benefits.” Brief of Plaintiffs/Appellants, *supra* note 14, at 8 (citing *Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 750 (Mass. 2009)). Two studies estimated that Massachusetts loses between \$259 and \$278 million in revenue annually due to misclassification of workers as independent contractors. *Id.*

<sup>43</sup> See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (explaining worker protections like minimum wage, reimbursement, et cetera., were designed to protect workers); CAL. LAB. CODE § 246 (Deering 2022) (establishing one hour of paid sick time for every thirty hours employees work); CAL. LAB. CODE § 510 (Deering 2022) (codifying time-and-a-half pay for every hour worked after eight hours in one workday); CAL. GOV’T. CODE § 12952 (Deering 2022) (protecting job applicants from discrimination on basis of past criminal convictions). The “Fair Chance Act,” which prohibits employers from asking job applicants about their criminal conviction history prior to making a conditional job offer, enacted “fair chance hiring.” *Fair Chance Act: Guidance for California Employers and Job Applicants*, C.R. DEP’T, STATE OF CAL., [https://perma.cc/TQL7-9PCK] (last visited Jan. 20, 2023) (describing impact of Fair Chance Act on California employers and prospective employees). “The California Legislature decided that employees need these protections as a check against the bargaining advantage employers have over employees—particularly unskilled, lower-wage employees—and the corresponding ability employers would otherwise have to dictate the terms and conditions of the work.” *Cotter*, 60 F. Supp. 3d at 1074. These protections are limited to employees because independent contractors usually are in a much more advantageous position than employees. See *Clark*, *supra* note 8, at 775 (claiming traditional, non-gig-worker independent contractors usually earn higher wages than their employee-counterparts).

[C]ontractors who are truly independent readily can sever the business relationship and take their services and equipment elsewhere when faced with unfair or arbitrary treatment, or unfavorable working conditions . . . a true contractor does not suffer the effects of unequal bargaining power to any degree comparable to that suffered by employees.

*Cotter*, 60 F. Supp. 3d at 1074.

<sup>44</sup> See *Cotter*, 60 F. Supp. 3d at 1070 (outlining drivers’ claims against Lyft for misclassification, underpayment, and failure to reimburse work expenses); *O’Connor v. Uber Techs., Inc.*, 82 F.

Initially, California employed the Supreme Court of California's multifactor *Borello* test to determine a worker's legal status as an employee or an independent contractor, where the primary factor controlling a worker's status was whether the alleged employer had the right to "control the manner and means of accomplishing the desired result."<sup>45</sup> In the context of app-based drivers, the first step in the *Borello* analysis is to determine if the drivers provide the TNC or DNC with a service.<sup>46</sup> If the court finds that drivers do provide the TNC or DNC with a service, the court must then determine whether the TNC or DNC has significant control over the manner and means of the services provided.<sup>47</sup> In both of the 2015 app-based driver cases in California, the court stated that the traditional *Borello* test to classify workers was insufficient, given the rise of the app-based, gig economy.<sup>48</sup>

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Supp. 3d 1133, 1135 (N.D. Cal. 2015) (describing suit against Uber for misclassification and keeping portions of gratuity from customers).

<sup>45</sup> S.G. *Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399, 404 (Cal. 1989). The secondary factors considered under *Borello* included the right to terminate the employment relationship at will, without cause, but also

. . . [w]hether the one performing the services is engaged in a distinct occupation or business; . . . the kind of occupation[;] . . . the skill required in the particular occupation; . . . whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; . . . the length of time for which the services are to be performed; . . . the method of payment, whether by the time or by the job; . . . whether or not the work is a part of the regular business of the principal; and . . . whether or not the parties believe they are creating the relationship of employer-employee.

*Id.* When applying the *Borello* test, courts should keep "an eye towards the purpose [employee protection] statutes were meant to serve, and the type of person they were meant to protect." *Cotter*, 60 F. Supp. 3d at 1075.

<sup>46</sup> See *Cotter*, 60 F. Supp. 3d at 1073 (classifying someone who performs service is generally presumed to be employee under *Borello*); *O'Connor*, 82 F. Supp. 3d at 1142 (concluding that drivers perform services for Uber). Many TNCs and DNCs claim to be technology companies rather than transportation or delivery companies. See Brief of Intervenors-Defendants, *supra* note 12, at 14 (referencing TNCs' and DNCs' self-characterization as technology companies). Nevertheless, the court found in *O'Connor* that despite claiming to be a technology company, it is "clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one." 82 F. Supp. 3d at 1137, 1141. The court went on further to state that drivers clearly performed a service for Uber because without them offering transportation, Uber would not generate revenue. *Id.* at 1142.

<sup>47</sup> *O'Connor*, 82 F. Supp. 3d at 1149 (pointing to conflicting facts regarding Uber's extent of control over drivers). The plaintiffs in the case provided evidence of Uber documents instructing drivers what to wear, what to play on the radio, etc., but Uber alleged these instructions were only suggestions. *Id.* Similarly, the *Cotter* court recognized that Lyft did not control when drivers logged into their platform, but maintained a great deal of power over how drivers work by reserving the right to fire drivers for failing to meet certain expectations. 60 F. Supp. 3d at 1069 (claiming drivers do not appear to be employees, but are not independent contractors either).

<sup>48</sup> See *O'Connor*, 82 F. Supp. 3d at 1153 (denying motion to dismiss because could not classify drivers as matter of law under *Borello*). The court did opine that the California Legislature or

A few years later, the Supreme Court of California created a presumption of employee status and required employers to prove three prongs (the “ABC Test”) to rebut the presumption.<sup>49</sup> In *Dynamex Operations W., Inc. v. Super. Ct.*,<sup>50</sup> the Supreme Court of California decided that to overcome the employee presumption, the hiring business would need to prove that (a) “the worker is free from control and direction of the hirer in . . . [their] work,” (b) “the worker performs work that is outside the usual course of the hiring entity’s business[,]” and (c) “the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as . . . the work performed.”<sup>51</sup> The rationale behind this presumption of employee status was to “enable [workers] to provide at least minimally for themselves and their families.”<sup>52</sup>

In response to increasing misclassification of service industry workers, Assemblywoman Lorena Gonzalez introduced Assembly Bill No. 5 (“AB 5”) to the California Legislature in 2018 in an attempt to codify the presumption of employee status in California’s Labor Code.<sup>53</sup> AB 5 is also known as the “Gig Worker Law” because, despite its application to nearly

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appellate courts may eventually refine or revise the *Borello* test to meet the evolving economy. *Id.* The court in *Cotter* went beyond stating the insufficiency of the *Borello* test in the context of app-based drivers and declared that “the jury in th[e] case [would] be handed a square peg and asked to choose between two round holes” to figure out the status of app-based drivers. *Cotter*, 60 F. Supp. 3d at 1081. The court also gave insight that given some app-based drivers treat gig work as a full-time job and rely on gig work income that these app-based drivers resemble the “kind of worker the California Legislature has always intended to protect as an ‘employee.’” *Id.* at 1069.

<sup>49</sup> *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 35 (Cal. 2018); see Idrian Mollaneda, *The Aftermath of California’s Proposition 22*, CALIF. (May 2021), [https://perma.cc/8YKB-AX8C] (stating “ABC” test used to rebut newly created presumption that all workers are employees). The Supreme Court of California’s ruling in *Dynamex Operations* came after the court found that Dynamex reclassified all its drivers as independent contractors after management concluded doing so would “generate economic savings.” Moreno, *supra* note 12, at 961.

<sup>50</sup> 416 P.3d 1 (Cal. 2018).

<sup>51</sup> *Id.* at 35.

<sup>52</sup> *Id.* at 32. The Supreme Court of California further explained that the presumption of employee status helps to “accord [workers] a modicum of dignity and respect.” *Id.* Expanding minimum wage protections to all workers until employers prove workers are not employees is especially important for minority communities to “undo historical patterns of injustice.” Dubal, *supra* note 17, at 528 n.82.

<sup>53</sup> Dubal, *supra* note 17, at 528-29. According to Assemblywoman Gonzalez,

The gig companies strategically recruit drivers who are from working class, communities of color. They [seek] out vulnerable workers who would be caught in a continual cycle of desperation and need for immediate cash. [They try to] ensure that these drivers—who are overwhelmingly Black and brown—are relegated to a permanent underclass of workers who makes less than minimum wage without any actual benefits.

*Id.* at 529 n.86.

all California workers, it has the potential to undermine TNCs' and DNCs' legal claim that their drivers are independent contractors.<sup>54</sup> The following year, AB 5 passed, which placed the burden on employers to demonstrate that workers are not employees under the ABC Test.<sup>55</sup> Not long after, California sued TNCs and DNCs, including Uber and Lyft, for failing to comply with the new law.<sup>56</sup>

In 2022, the Northern District of California applied the ABC Test, codified by AB 5, in *Sportsman v. A Place for Rover, Inc.*<sup>57</sup> A pet care provider ("Sportsman"), brought this suit seeking to recover damages from A Place for Rover, Inc. ("Rover") for misclassifying her as an independent contractor.<sup>58</sup> Rover created and maintained an online platform that allowed pet care providers, like Sportsman, to create a profile and market their services to pet owners.<sup>59</sup> On Rover's platform, pet care providers select the services they offer, the rates to charge for each service, the type of cancellation policy, the geographic area where they provide services, and their availability to provide services.<sup>60</sup> Once a pet owner books services on the platform, the pet owner is charged, and Rover receives the pet owner's payment, holds the funds, deducts a service fee, and then remits payment to the pet care provider.<sup>61</sup> To use Rover's platform, both pet care providers and pet owners must agree to Rover's user agreement and terms of service.<sup>62</sup>

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<sup>54</sup> See *id.* at 529 (honing in on AB 5's significance for app-based drivers whose employers deny employment protections).

<sup>55</sup> CAL. LAB. CODE § 2775 (Deering 2022) (codifying three-part test for independent contractor status in California); *Dynamex Operations*, 416 P.3d at 32 (outlining three-part independent contractor test); see Moreno, *supra* note 11, at 948 (describing codification of *Dynamex Operations* in California).

<sup>56</sup> See *People v. Uber Techs., Inc.*, No. CIV. 20-584402, 2020 Cal. Super. LEXIS 152 \*1, \*1-2 (Super. Ct. of Cal. Aug. 10, 2020) (explaining California sought to enforce Uber's compliance with AB 5); Dubal, *supra* note 18, at 530 (stating TNCs and DNCs publicly insisted AB 5 did not apply to them). In response to these suits, Uber and Lyft threatened to shut down in California. See Mollaneda, *supra* note 49 (explaining Uber and Lyft's reaction to codification of *Dynamex Operations* in AB 5); Moreno, *supra* note 12, at 991 (alleging Uber and Lyft would rather reduce operations in California than comply with AB 5).

<sup>57</sup> 537 F. Supp. 3d 1081, 1085, 1091-93 (N.D. Cal. 2022) (applying AB 5 independent contractor test).

<sup>58</sup> *Id.* at 1085 (identifying parties in *Sportsman* case).

<sup>59</sup> *Id.* at 1086 (describing business of Defendant Rover); see also *About Rover*, Rover, [<https://perma.cc/KU9K-X62F>] (last visited Feb. 1, 2023) (explaining how pet care providers engage with Rover to provide services).

<sup>60</sup> *Sportsman*, 537 F. Supp. 3d at 1086 (detailing how pet care providers use Rover's platform). Pet care providers on Rover can also limit their services to pets of certain size, weight, and breed, as well as limit their services to a specific number of pets. *Id.*

<sup>61</sup> *Id.* at 1086 (describing Rover's fee collection and payment process).

<sup>62</sup> *Id.*

Under the ABC Test, the court found as a matter of law that Sportsman was an independent contractor and not an employee of Rover.<sup>63</sup> Despite Rover controlling the communication and payment between pet care providers and pet owners, the court held that Sportsman controlled the means by which she performs her pet care services because she chooses the services she provides, how much they cost, and which clientele to accept, which satisfies the first prong of the ABC test.<sup>64</sup>

Furthermore, while Rover generates revenue from the successful bookings between pet care providers and pet owners, the court held that the services that pet care providers provide pet owners is “distinct from Rover’s business of providing a marketplace” that connects pet owners to pet care providers.<sup>65</sup> Evidence also indicated that Sportsman used her Rover profile to advertise her services and distinguish herself from other providers on Rover’s platform.<sup>66</sup> Therefore, Sportsman painted herself as “operating an independent business,” fulfilling the final prong of the ABC test.<sup>67</sup> By satisfying all three prongs of the ABC test, Rover successfully rebutted the presumption that Sportsman and other Rover pet care providers are employees.<sup>68</sup>

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<sup>63</sup> *Id.* at 1102.

<sup>64</sup> *Id.* at 1091; *see also* CAL. LAB. CODE § 2775 (Deering 2022) (stating “the worker is ‘free from control and direction of the hirer’ in their work” as first prong of ABC test). Rover has requirements on how pet care providers assemble their respective profiles, but this control was limited to how pet care providers arrange their information and did not dictate “the manner and means by which [pet care providers] rendered services [they] chose to offer.” *Sportsman*, 537 F. Supp. 3d at 1091. Moreover, pet care providers controlled when they worked by including their availability on their profiles and could decline or cancel bookings for services on their own volition. *Id.*

<sup>65</sup> *Sportsman*, 537 F. Supp. 3d at 1094; *see also* CAL. LAB. CODE § 2775 (Deering 2022) (identifying “the worker performs work that is outside the usual course of the hiring entity’s business” as second prong of ABC test). The court rationalized that Rover gives pet care providers “access to its online marketplace and leaves them ‘to their own devices to make a profit from it.’” *Sportsman*, 537 F. Supp. 3d at 1096.

<sup>66</sup> *Sportsman*, 537 F. Supp. 3d at 1085. To determine if Rover satisfied the third prong of ABC test, court considered whether Sportsman was like a traditional independent contractor that “independently . . . made the decision to go into business for himself or herself . . . and generally takes the usual steps to establish and promote his or her independent business . . .” *Id.* at 1098. The court found that Sportsman’s actions and statements in her profile highlighted her personal experience, which indicated that Sportsman promoted herself as operating as an independent business and suggested that Sportsman was an independent contractor. *Id.* at 1099.

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

<sup>68</sup> *See supra* notes 66-69 and accompanying text (applying ABC test to Sportsman).



*D. TNCs and DNCs Attempt to Circumvent Employee Presumption through the Proposition 22 Ballot Initiative*

To preserve their business models and circumvent judicial precedent and statutory law, TNCs and DNCs sought to carve out an exception for their app-based drivers in California by authoring their own ballot initiative, Proposition 22 (“Prop 22”).<sup>69</sup> Prop 22 proposed classifying app-based workers as transportation or delivery “network workers” and instituted certain worker benefits and protections.<sup>70</sup>

In 2020, California Attorney General Xavier Becerra brought suit against Uber and Lyft to force them to comply with AB 5.<sup>71</sup> The appellate court affirmed the trial court’s preliminary injunction against classifying drivers as independent contractors, which violated state law.<sup>72</sup> However, Prop 22 was passed by the electorate, exempting TNCs and DNCs from compliance with AB 5 within days of this decision and after over two hundred million dollars was spent on the campaign.<sup>73</sup> The ratification of Prop 22 created a “new wage code” for transportation and delivery network workers,

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<sup>69</sup> See Mollaneda, *supra* note 49 (explaining purpose of Prop 22).

<sup>70</sup> *Id.* (outlining different benefits app-based drivers would receive as network workers). Prop 22

instituted a minimum wage for app-based drivers based on their “engaged time,” provided some mileage compensation for drivers, set caps on work hours, prohibited workplace discrimination and harassment, and required gig companies to provide healthcare subsidies and accident insurance. The new law also limited local governments’ abilities to set additional rules on rideshare and delivery companies and required a supermajority of the state legislature to amend.

*Id.* A health stipend would only be available for drivers who hit a minimum of twenty-five active hours per week and these drivers could receive a maximum of \$1,227.54 per quarter, roughly four hundred dollars per month. *Id.* It is important to note that Prop 22 has no provision for workers’ compensation, paid family leave, or unemployment insurance for app-based drivers. See *id.* Ultimately, network workers under Prop 22 would be treated similarly to independent contractors under the California Wage Code. See Dubal, *supra* note 17, at 530 (explaining network workers would be ineligible for protection under most state employment laws).

<sup>71</sup> *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290, 302 (Cal. Ct. App. 2020).

<sup>72</sup> See *id.* at 331-32 (affirming preliminary injunction against Uber and Lyft for “continued misclassification of drivers”); Dubal, *supra* note 17, at 532 (explaining California courts confirmed Uber and Lyft drivers were employees under state law).

<sup>73</sup> Dubal, *supra* note 17, at 532 (stating passage of Prop 22 gave TNCs and DNCs complete contractual control over their drivers); see Mollaneda, *supra* note 49 (describing Prop 22 as most expensive ballot initiative in California’s history). Prop 22 became law in California fifty-eight percent approval in November 2020. Roosevelt, *supra* note 40.

which encouraged the substitution of network workers' model for many forms of traditional employment.<sup>74</sup>

A year later, Service Employee International Union ("SEIU") sued the State of California to invalidate Prop 22 for violating the state's Constitution.<sup>75</sup> After an Alameda County Superior Court held Prop 22 unconstitutional, the First District Court of Appeal of California reversed this decision, upholding Prop 22 in March 2023.<sup>76</sup>

### III. FACTS

#### A. *An Overview of Massachusetts' Worker Protections under Chapter 148*

Massachusetts, like California, is seen as an "employee-friendly" state, granting several protections and benefits to employees in the Commonwealth.<sup>77</sup> Thus, it is not surprising that Massachusetts' Independent

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<sup>74</sup> See Mollaneda, *supra* note 49 (predicting Prop 22's expansion of cheap independent contractor model). In 2021, Albertsons and Vons, both grocery store chains, announced that they would replace their unionized delivery drivers with DoorDash contractors. *Id.*

<sup>75</sup> See Emergency Petition for Writ of Mandate and Request for Expedited Review at 10-13, 27, 29, *Castellanos v. State*, No. CIV. 266551, 2021 Cal. LEXIS 833, \*1 (Cal. Feb. 3, 2021) (describing SEIU's claim that Prop 22 usurped constitutionally enumerated legislative and judiciary powers). Prop 22 also violated the single-subject rule for amendments. *Id.* at 30-31.

<sup>76</sup> *Castellanos v. Hagen*, No. CIV. 21088725, 2021 Cal. Super. LEXIS 110166 \*1, \*3-4 (Cal. Super. Ct. Aug. 20, 2021); see Roosevelt, *supra* note 40 (detailing Prop 22's state constitutional violations). In a two-to-one decision, the appeals court upheld Prop 22 despite some provisions that "unduly constrained the California Legislature's authority," which were struck down. Suhauna Hussain, *California Appeals Court Reverses Most of Ruling Deeming Prop. 22 Invalid*, L.A. TIMES (Mar. 13, 2023, 6:02 PM), [<https://perma.cc/B7PS-J7DE>]. According to Judge Roesch, who held Prop 22 unconstitutional, "[i]f the people wish to use their initiative power to restrict . . . power granted to the Legislature, they must first do so by initiative constitutional amendment . . ." *Castellanos*, 2021 Cal. Super. LEXIS 110166, at \*5-6.

<sup>77</sup> See Complaint for Declaratory Judgment, *supra* note 13, at 47-48, 52-54, 57-59, 63. The Wage Act creates a right to full and timely payment of all earned wages and prohibits employers from requiring employees to incur necessary business-related expenses. *Id.* at 47-48; see also MASS GEN. LAWS ch. 149, §§ 148-50. Massachusetts Minimum Wage Law requires employees to receive no less than applicable minimum hourly wage rate in effect and expressly prohibits reducing employee's pay below minimum wage regardless of whether the employee agreed to such an arrangement. Complaint for Declaratory Judgment, *supra* note 13, at 52-53; see also MASS GEN. LAWS ch. 151, § 1. Massachusetts Overtime Law requires that an employee must be paid no less than time and one-half of regular hourly rate of pay for all hours worked over forty in a week and prohibits parties from agreeing between themselves that an employee may work for less than overtime rate. Complaint for Declaratory Judgment, *supra* note 13, at 54; see MASS. GEN. LAWS ch. 151, §§ 1A, 2. Massachusetts Earned Sick Time Law requires employers with eleven or more workers to provide paid leave to employees during absences from work to allow employees, whether employed full or part-time or on a seasonal or temporary basis, to care for themselves and

Contractor Misclassification Statute (“§ 148B”) creates a presumption of employee status that an employer must overcome by satisfying a three-prong test.<sup>78</sup> Under § 148B, a worker is an independent contractor if the employer can prove that:

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.<sup>79</sup>

*B. The Application of § 148B to Employee Misclassification Claims*

In *Sebago v. Boston Cab Dispatch, Inc.*,<sup>80</sup> the Massachusetts Supreme Judicial Court employed § 148B’s three-part conjunctive test to determine whether taxicab drivers were independent contractors or employees of the defendants, who were a collection of taxicab owners, radio associations, and a taxicab garage.<sup>81</sup> The first inquiry was whether these taxi drivers provided the defendants with a “service”, and the motion judge granted summary judgment in favor of the taxicab drivers because the drivers provided a service, that, without their work, would render the defendants’ taxicab licenses and cars worthless.<sup>82</sup> The Supreme Judicial Court found the inquiry

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family members without fear of reprisal. Complaint for Declaratory Judgment, *supra* note 13, at 57-59; see MASS. GEN. LAWS ch. 149, § 148C. Massachusetts anti-retaliation statutes prohibit employers from retaliating against those who assert their rights under the wage laws. Complaint for Declaratory Judgment, *supra* note 13, at 63; see MASS GEN. LAWS ch. 149, § 148A, ch. 151, § 19(1). Wage laws impose strict liability even if an employer made an error in good faith. See Complaint for Declaratory Judgment, *supra* note 13, at 22.

<sup>78</sup> Complaint for Declaratory Judgment, *supra* note 13, at 19; MASS. GEN. LAWS ch. 149, § 148B.

<sup>79</sup> MASS. GEN. LAWS ch. 149, § 148B. An employer violates § 148B if “(1) the employer misclassifies an individual as an independent contractor in violation of the 3-part test; and (2) as a result of that misclassification, the ER violates one or more of the enumerated employment-related offenses . . . .” Complaint for Declaratory Judgment, *supra* note 13, at 21.

<sup>80</sup> 28 N.E.3d 1139 (Mass. 2015).

<sup>81</sup> *Id.* at 1142-43. For a taxicab to be in service, the taxicab owner needed a license. *Id.* at 1144. Radio associations provided dispatch services to members with taxicab licenses. *Id.* at 1144.

<sup>82</sup> *Id.* at 1147.

unnecessary because the defendants satisfied all three prongs of § 148B even if the taxicab drivers did provide the defendants with a service.<sup>83</sup>

In considering the first element of § 148B, the court recognized that taxicab drivers were not entirely “free from control” because a comprehensive set of rules regulated the industry.<sup>84</sup> Nonetheless, the court concluded that taxicab drivers were free from control because they carried out their activities and duties with minimal instruction from the defendants.<sup>85</sup> The drivers chose their shifts and the number of passengers to transport during those shifts.<sup>86</sup>

Next, the court decided if the taxicab drivers’ service was outside the usual course of the employer’s business.<sup>87</sup> The court stated that a hiring entity’s own definition of its business is indicative of the usual course of that business, but that it also depends on “whether the service the individual is performing is necessary to the business of the employing unit or merely incidental.”<sup>88</sup> Because the defendants’ businesses were not directly dependent on the success of the drivers at securing passengers and earning revenue, the court found that the taxicab drivers’ services were outside the usual course of the defendants’ businesses.<sup>89</sup>

Last, the court examined whether the taxicab drivers engaged in an independently established business.<sup>90</sup> Evidence that the taxicab drivers were

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<sup>83</sup> *Id.* at 1148-49.

<sup>84</sup> *Sebago*, 28 N.E.3d at 1149. The Boston Police Commissioner had authority from the state legislature to regulate the taxicab industry. *Id.* at 1142. The regulations governed a driver’s appearance, cellular telephone usage, ability to smoke, procedure for obtaining or refusing passengers, standards for the treatment of passengers, and meter rates. *Id.* at 1150.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Similarly, the Massachusetts Supreme Judicial Court found that newspaper carriers for a newspaper company were free from company control because the company only required that the newspaper be delivered in good condition and by a certain time. *See Athol Daily News v. Bd. of Rev. of the Div. of Emp. & Training*, 786 N.E.2d 365, 367, 371 (Mass. 2003). The method of delivery was completely within the control and discretion of the carrier. *Id.* at 371. Ultimately, once the carriers obtained the newspapers for delivery, they were entirely free from supervision over their delivery performance. *Id.*

<sup>87</sup> *Sebago*, 28 N.E.3d at 1150.

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

<sup>89</sup> *Id.* at 1151-52. The cab drivers paid a flat recurring fee to the license owners for their medallions rather than a portion of their ride fares; thus, because the amount actually earned by the drivers in fares had no effect on the license owners’ incomes, the owners were not considered to be engaged in the business of transporting customers for fares like the drivers were. *Id.* at 1151. Similarly, radio associations’ business did not depend on the activities of drivers because Rule 403 required all taxicab license holders to purchase dispatch services from radio associations for a set rate, ensuring the associations’ income regardless of the drivers’ fares. *Id.* at 1152.

<sup>90</sup> *Id.* at 1152-53. According to the Massachusetts Supreme Judicial Court, the third-prong inquiry is whether the service is “an independent trade or business because the worker is capable of performing the service to anyone . . . or, conversely, whether the nature of the business compels

free to advertise their services through personalized business cards, coupled with the fact that they could lease taxicabs and licenses from whomever they wished, led the court to find that the drivers were engaged in independently established businesses of transporting people.<sup>91</sup> Given that the defendants were able to satisfy all three prongs of § 148B, the Massachusetts Supreme Judicial Court held that the taxicab drivers were correctly classified as independent contractors.<sup>92</sup>

*C. Massachusetts Attorney General Files Suit Against Uber and Lyft*

The same year Prop 22 passed in California, Attorney General Healey brought suit against Uber and Lyft for misclassifying their drivers as independent contractors and evading legal obligations to their drivers.<sup>93</sup> Healey alleged that Uber and Lyft failed to meet any of the three prongs in § 148B.<sup>94</sup> Specifically, Healey argued that Uber and Lyft failed the first prong because they impose various performance standards on their drivers.<sup>95</sup> The

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the worker to depend on a single employer for the continuation of services.” *Athol Daily News*, 786 N.E.2d at 373. In other words, § 148B’s final prong asks if the “worker is wearing the hat of an employee of the employing company, or [that] of his own independent enterprise.” *Id.* In *Athol Daily News*, the carriers were free to advertise their services or acquire similar delivery arrangements with other publishing companies, which indicated that the carriers were entrepreneurs and performed their services as independently established businesses. *Id.* at 374. Because the “breadth of . . . service” that each carrier provided was both a function of the newspaper company’s original subscriber list and individual carriers’ initiative to promote themselves, carriers acted like and should be treated as independent contractors. *See id.* at 374 (suggesting opportunity and freedom to promote services as evidence of independent contractor status).

<sup>91</sup> *Sebago*, 28 N.E.3d at 1150, 1153; *see also* Comm’r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., 862 N.E.2d 430, 436 (Mass. App. Ct. 2007) (finding taxicab drivers could find their own customers indicating independent contractor status). So long as taxicab drivers had a taxicab license, they could open their own taxi service or generate their own business while driving for another taxi service, and they exhibited an “‘entrepreneurial’ spirit” indicative of an independent contractor. *Comm’r of the Div. of Unemployment Assistance*, 862 N.E.2d at 436.

<sup>92</sup> *See Sebago*, 28 N.E.3d at 1156 (vacating summary judgment against defendants).

<sup>93</sup> *See* Moreno, *supra* note 11, at 991; Complaint for Declaratory Judgment, *supra* note 13, at 5-6 (alleging Uber and Lyft classified their drivers as independent contractors in their service agreements); *see generally* Lyft Terms of Service, LYFT, [<https://perma.cc/927T-2A22>] (last updated Dec. 12, 2022) (“You and Lyft expressly agree that (1) this is not an employment agreement and does not create an employment relationship between you and Lyft; and (2) no joint venture, franchisor- franchisee, partnership, or agency relationship is intended or created by this Agreement.”).

<sup>94</sup> *See* Complaint for Declaratory Judgment, *supra* note 13, at 42-45.

<sup>95</sup> *Id.* at 42. Uber and Lyft have the sole discretion to suspend, terminate, or penalize drivers. *Id.* at 32. Moreover, Uber and Lyft unilaterally set compensation rates for their drivers and do not inform drivers of the actual compensation they should expect prior to accepting a ride request. *See id.* at 33, 36. While Uber and Lyft claim that drivers have freedom and autonomy over when and where they work, both companies employ financial incentives and other techniques to influence

complaint alleged that Uber and Lyft failed the second prong as well because both companies' businesses rely regularly and continually on the services of their drivers.<sup>96</sup> Despite Uber and Lyft's claim that they are technology companies, Healey argued that without their drivers, these companies would cease to exist because they depend entirely on the service and success of their drivers to generate revenue.<sup>97</sup> Last, Healey asserted that Uber and Lyft drivers lack the opportunity to grow their own businesses, so they are not "customarily engaged in an independently established . . . business of the same nature as that involved in the service performed."<sup>98</sup>

In response to these allegations, Uber and Lyft questioned the suit's timeliness and Healey's standing in the matter.<sup>99</sup> Moreover, Uber cautioned that a successful attempt to reclassify its drivers as employees could leave fifty thousand app-based drivers in Massachusetts without work.<sup>100</sup> Despite Uber and Lyft's defenses, the Massachusetts Superior Court denied Uber and Lyft's Motion to Dismiss and affirmed Healey's role and authority as Attorney General "to take cognizance of all violations of law . . . affecting the general welfare of the people."<sup>101</sup>

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the timing, duration, and location of drivers' shifts according to the companies' desired outcomes. *See id.* at 34.

<sup>96</sup> *Id.* at 43.

<sup>97</sup> *Id.* at 43-44 (reasoning financial dependence on drivers demonstrates drivers' services are not outside usual course of businesses).

<sup>98</sup> *Id.* at 45. The work of app-based drivers does not offer them any evident opportunity to effectively market and offer their own independent services. *Id.* Riders do not know much information about the driver, which limits drivers' ability to differentiate themselves and increase their earnings in the way a true independent contractor typically would. *Id.* at 41.

<sup>99</sup> *See* Defendant Uber Technologies, Inc.'s Motion to Dismiss Plaintiff's Complaint, Healey v. Uber Techs., Inc., No. CIV. 2084-01519, 2021 WL 1307544, \*1 (Mass. Super. Ct. Jan. 22, 2021) (claiming Uber has operated in Massachusetts since 2011 without complaint). Uber alleged Healey's complaint was "conclusory" because it never referenced a driver who alleged injury under the employment laws. *Id.*

<sup>100</sup> Moreno, *supra* note 11, at 993.

<sup>101</sup> Memorandum and Order Denying Defendant's Motion to Dismiss, Healey v. Uber Techs., Inc., No. CIV. 2084-01519, 2021 WL 1222199, \*1 (Mass. Super. Ct. Mar. 25, 2021); *see also* Complaint for Declaratory Judgment, *supra* note 13, at 9-10 (claiming Attorney General enforces labor and employment laws and "protect[s] workers from exploitati[on] . . . and foster[s] a level playing field for businesses who abide by the law"). While no driver-plaintiff is party to this suit, Healey has "broad power under *parens patriae*" to take it upon herself to bring suit in the interests of Massachusetts citizens that may not be able to seek relief on their own behalf. Memorandum and Order Denying Defendant's Motion to Dismiss, *supra*.

*D. TNCs' and DNCs' Ballot Initiative in Massachusetts*

In the same manner in which TNCs and DNCs created a statutory exemption for their drivers in California under Prop 22, the companies proposed a similar ballot initiative in Massachusetts, which was slated to be voted on by the Massachusetts electorate in November 2022.<sup>102</sup> However, in January 2022, a group of Massachusetts app-based drivers, an economist, and a union representative filed suit with the Supreme Judicial Court alleging that the proposed law petition failed to satisfy Article 48 of the Massachusetts Constitution in two ways: (1) all the subjects of the proposed law were not “related to or mutually dependent on each other,” and (2) the Attorney General’s summaries of the proposed law were not fair because they did not discuss how the proposed law would repeal and replace existing law.<sup>103</sup> Ultimately, the Supreme Judicial Court found that the proposed law petition violated Article 48 because its language buried distinct policy considerations precluding the ballot initiative from the November 2022 ballot.<sup>104</sup>

*E. Legislative Efforts to Classify App-based Drivers in Massachusetts*

While the TNC- and DNC-backed ballot initiative failed to come to a vote in November 2022, supporters of the initiative hope that the Massachusetts Legislature will move forward on a bill classifying app-based drivers as independent contractors.<sup>105</sup> In February 2021, state representatives Mark J. Cusack and Carlos González filed a petition for the adoption of H. 1234, an “act establishing portable benefit accounts for app-based drivers.”<sup>106</sup>

H. 1234 classifies app-based drivers as independent contractors, but also proposes extending benefits and protections, such as funding for

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<sup>102</sup> See Brief of Plaintiffs/Appellants, *supra* note 14, at 14 (explaining “A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers” ballot initiative); Brief of Intervenor-Defendants, *supra* note 12, at 17 (describing Uber and Lyft’s ballot initiative process).

<sup>103</sup> Brief of Plaintiffs/Appellants, *supra* note 14, at 26, 28. Article 48, The Initiative, II, § 3 requires that initiative petitions contain subjects “related or . . . mutually dependent.” *Id.* at 29.

<sup>104</sup> *Massachusetts Justices Reject Uber-Backed Ballot Initiative (1)*, DAILY LAB. REP. (June 14, 2022, 3:02 PM), [<https://perma.cc/988T-LW9V>]; see also *El Koussa v. Att’y Gen.*, 188 N.E.3d 510, 522 (Mass. 2022) (“Petitions that bury separate policy decisions in obscure language heighten concerns that voters will be confused, misled, and deprived of a meaningful choice.”)

<sup>105</sup> See *Massachusetts Justices Reject Uber-Backed Ballot Initiative (1)*, *supra* note 104 (describing other efforts to classify app-based drivers as independent contractors in Massachusetts); H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (proposing classifying app-based drivers as independent contractors with “portable benefits”).

<sup>106</sup> H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021).

retirement accounts, on-the-job accident insurance, and anti-discrimination provisions, none of which are afforded to independent contractors under most federal and state laws.<sup>107</sup> The anti-discrimination provision of H. 1234 prohibits TNCs and DNCs from discriminating against any driver or prospective driver based on several protected classes, but explicitly names an exception to discriminatory conduct if the conduct is “based upon a bona fide occupational qualification or public or app-based driver safety need.”<sup>108</sup>

Proponents of app-based drivers as independent contractors look to the successful passage of similar legislation in Washington for hope.<sup>109</sup> In March 2022, Governor Jay Inslee of Washington signed H.B. 2076, an act relating to rights and obligations of transportation network company drivers and transportation network companies, which classified app-based drivers as independent contractors with additional protections typically reserved for employees.<sup>110</sup>

In addition to the success of H.B. 2076, proponents of classifying Massachusetts app-based drivers as independent contractors point to purported public support for their endeavors.<sup>111</sup> In 2022, 406 Massachusetts app-based drivers for DoorDash, Instacart, Lyft, and Uber were asked if they

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<sup>107</sup> *Id.* The bill relies on the common-law control test to classify drivers as independent contractors to conclude that they are not entitled to *some* employee protections. *Id.* (emphasis added); see *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948) (stating control test to determine employer-employee relationship); *Massachusetts Justices Reject Uber-Backed Ballot Initiative (1)*, *supra* note 104 (explaining proposed bill’s extension of certain benefits to independent contractors). The common-law control tests asks if “the person for whom the work is done has the right to control and direct the . . . result accomplished by the work [and] the details and means by which that result is accomplished . . . .” *NLRB*, 167 F.2d at 986. If so, there is an employee-employer relationship. *Id.*

<sup>108</sup> H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021).

<sup>109</sup> See *Lyft, Uber Washington Drivers Get Benefits, No Employee Status*, DAILY LAB. REP. (Mar. 31, 2022, 8:10 PM), [<https://perma.cc/VX6B-DMF6>] (noting H.B. 2076’s passage among other attempts to classify app-based drivers as independent contractors). Governor Inslee vetoed a section of H.B. 2076 that exempted TNCs from being classified as “common carriers” to preserve TNCs duty of care for passenger safety. *Id.*

<sup>110</sup> H.B. 2076, 67th Leg., Reg. Sess. (Wash. 2022); see also *Lyft, Uber Washington Drivers Get Benefits, No Employee Status*, *supra* note 109 (describing H.B. 2076 as “compromise among rideshare companies, drivers, and the Teamsters-affiliated Drivers Union”). H.B. 2076 took effect on December 31, 2022. H.B. 2076, 67th Leg., Reg. Sess. (Wash. 2022). Additional protections include a minimum payment for each dispatched trip to an app-based driver, paid sick leave, and non-discrimination policies for drivers and riders alike. *Id.*

<sup>111</sup> See *Massachusetts Justices Reject Uber-Backed Ballot Initiative (1)*, *supra* note 104 (reporting public support of H.1234 based on app-based driver survey). Adam Kovacevich, CEO of tech-industry policy group Chamber of Progress, would “like to think the legislature would recognize that public opinion generally supports drivers’ desire for flexibility” and will act accordingly. *Id.* Kovacevich’s claim refers to a recently conducted survey of app-based drivers in early 2022 by Beacon Research, LLP. *Id.*; Memorandum from Beacon Research to Interested Parties 1, 2 (Feb. 16, 2022) [<https://perma.cc/EZ8Z-JU7C>].



would support the Massachusetts ballot initiative to classify drivers as independent contractors.<sup>112</sup> When asked how they would vote on a proposed law that would classify them as independent contractors and “not ‘employees’ under Massachusetts law . . . [and] would establish new benefits and protections for these independent contractors,” eighty-one percent stated they would vote “yes” in favor of the initiative.<sup>113</sup> When asked how the driver wanted to be classified (as an independent contractor or employee), seventy-one percent of respondents answered “independent contractor,” while twenty-seven percent answered “employee.”<sup>114</sup>

In January 2023, State Representative Daniel Cahill of Tenth Essex District proposed H.D. 3456, an act establishing portable benefit accounts for app-based delivery drivers.<sup>115</sup> H.D. 3456 is very similar to H. 1234 in that it also classifies app-based drivers as independent contractors, provides “portable benefits” and occupational accident insurance to its drivers, and extends antidiscrimination protections to its drivers.<sup>116</sup> However, because H.D. 3456 is focused on DNC app-based drivers, this legislation proposes that DNCs supply automobile insurance to its drivers while giving rides.<sup>117</sup> Comparing these two proposed bills to the successful H.B. 2076 in

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<sup>112</sup> Memorandum from Beacon Research to Interested Parties, *supra* note 111, at 1. Beacon Research conducted this online survey from January 27, 2022, through February 4, 2022, to gauge drivers’ opinion regarding the Massachusetts app-based driver ballot initiative. *Id.* Beacon Research randomly contacted app-based drivers from a list of almost one hundred sixty-five thousand active drivers to complete the online survey. *Id.* at 3. The respondents did not receive any incentive to complete the survey, nor did they know that TNCs and DNCs sponsored the survey. *Id.* at 1.

<sup>113</sup> Memorandum from Beacon Research to Interested Parties, *supra* note 111, at 1. Ten percent of respondents voted “no” and seven percent were “undecided.” *Id.* A “yes” vote meant the respondent would “classify app-based drivers as independent contractors as opposed to company employees and provide drivers new protections and benefits.” *Id.* A “no” vote meant the respondent would “make no change to current laws relative to app-based drivers.” *Id.*

<sup>114</sup> *Id.* at 2.

<sup>115</sup> H.D. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>116</sup> Compare H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (explaining additional protections afforded to app-based drivers as independent contractors), with H.D. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (stating same additional protections). Both H. 1234 and H.D. 3456 state that app-based drivers “retain full control over where, when, and how they perform app-based services/work and are therefore classified as independent contractors.” H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021); H.D. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>117</sup> H.D. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (emphasis added). H.D. 3456 requires DNCs to maintain automobile insurance coverage for their app-based-delivery workers. *Id.* H. 1234 does not require DNCs and TNCs to maintain automobile insurance, aside from occupational accident insurance for its drivers. See H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (omitting mention of automobile insurance for app-based drivers).

Washington, it appears that TNCs and DNCs are willing to concede certain traditional employee protections for independent contractor status.<sup>118</sup>

Despite blocking the Massachusetts app-based driver ballot initiative from the November 2022 ballot, advocates of traditional employee protections for app-based drivers have proposed their own legislation in Massachusetts.<sup>119</sup> The two major proposed bills, an Act Establishing a Transportation Network Driver Bill of Rights (“Driver Bill of Rights”) and an Act Establishing Protections and Accountability for TNC and DNC Workers, Consumers, and Communities (“EPA”), differ in one fundamental way: the former does not propose any classification of app-based drivers while the latter presumes employee status.<sup>120</sup>

The Driver Bill of Rights establishes a guaranteed minimum wage, paid sick time, and unemployment insurance, as well as discrimination protection and collective bargaining rights for TNC app-based drivers.<sup>121</sup> Despite the fact that the Driver Bill of Rights is “essentially silent” on the issue of driver classification, it is backed by two unions: the International Association of Machinists and 32BJ SEIU.<sup>122</sup> Massachusetts State Senator James Lewis of Fifth Middlesex District, a cosponsor of the bill, contends that app-based drivers “should not need to go through the bargaining process to secure ‘fundamental rights and protections when [they] are already available to

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<sup>118</sup> See sources cited *supra* notes 107, 109-110, 116-117 and accompanying text (explaining bills H. 1234, H.D. 3456, and H.B. 2076).

<sup>119</sup> See H.D. 2071, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (proposing transportation network bill of rights); S.D. 1162, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (proposing collective bargaining rights for TNC drivers); H.D. 3832, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (presuming app-based drivers as employees and establishing minimum compensation and mileage reimbursement); S.D. 2186, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (reaffirming employee presumption of app-based drivers and establishing minimum compensation and mileage reimbursement); S.D. 510, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (proposing collecting money from TNCs and DNCs to fund drivers in need). Massachusetts State Senator Sal DiDomenico of Middlesex and Suffolk filed S. 1157, which proposes that five cents from each fare be collected to create a reserve to compensate drivers and their families for on-the-job injuries. S.D. 510, 193 Gen. Ct., Reg. Sess. (Mass. 2023). This bill also stipulates that the department of public utilities should monitor the impact of TNCs and DNCs on cities, the environment, and traffic. *Id.*

<sup>120</sup> Compare H.D. 2071, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (omitting classifying app-based drivers as either “employee” or “independent contractor”), with H. 1158, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (stating “TNC and DNC drivers and delivery workers are already entitled to the same presumptions of employment”).

<sup>121</sup> H.D. 2071, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>122</sup> *Id.*; see also Chris Lisinski, *Unions Back Basic Benefits Bill for Uber, Lyft Drivers*, WBUR (Jan. 24, 2023), [<https://perma.cc/PJ9P-8389>] (noting contentious driver classification issue was not addressed by Driver Bill of Rights). See generally *About 32BJ*, 32BJ SEIU, [<https://perma.cc/43QX-3WVY>] (last visited Sep. 10, 2023). 32BJ SEIU is a union of property service workers, including sanitation and maintenance workers, security officers, building engineers, and school and food service workers. *Id.*

most other workers[.]”<sup>123</sup> While the Driver Bill of Rights does not cover app-based drivers for DNCs, advocates hope that it will set a precedent across app-based service industries.<sup>124</sup>

Rather than avoid the issue of employment classification of app-based drivers, EPA attempts to protect these workers by establishing the presumption that TNC and DNC app-based drivers are employees entitled to traditional employee rights and protections.<sup>125</sup> EPA suggests that app-based drivers be paid a minimum hourly wage, obtain mileage reimbursement, and receive on-the-job accident insurance.<sup>126</sup> The diverse range of recently proposed legislation in Massachusetts that addresses the classification and treatment of app-based drivers for TNCs and/or DNCs indicates that the issue of gig worker classification is imminent.<sup>127</sup>

#### IV. ANALYSIS

##### A. Comparison of California’s and Massachusetts’ Current Independent Contractor Classifications

A close reading of the California AB 5 statute and § 148B reveals that both laws establish the same test to determine the status of a worker.<sup>128</sup> Despite a difference in terminology, these statutes establish a presumption that a “worker” or “person performing a service” is an employee, and is therefore afforded all federal, state, and local employee protections and benefits.<sup>129</sup> The employee presumption places the burden on hiring entities to show that a worker is not an employee, and only by proving all three elements of the independent contractor test is the presumption rebutted.<sup>130</sup>

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<sup>123</sup> Lisinski, *supra* note 122.

<sup>124</sup> *See id.* (addressing how H.D. 2071’s limited application may still benefit app-based drivers at large).

<sup>125</sup> *See* H. 1158, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (presuming app-based drivers are employees on page one). EPA states that app-based drivers are entitled to “wage and hour and anti-discrimination protections, unemployment, workers compensation, sick, family and medical leave benefits, under Massachusetts law that all other workers . . . enjoy . . .” *Id.*

<sup>126</sup> H. 1158, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>127</sup> *See* sources cited *supra* notes 119-121 and accompanying text (describing app-based driver classification legislation).

<sup>128</sup> *Compare* CAL. LAB. CODE § 2775 (Deering 2022) (enumerating three-prong ABC test), with MASS. GEN. LAWS ch. 149, § 148B (establishing same three-prong test).

<sup>129</sup> *Compare* CAL. LAB. CODE § 2775 (Deering 2022) (using term “work”), with MASS. GEN. LAWS ch. 149, § 148B (using term “service”); *see* sources cited *supra* notes 32-37 and accompanying text (discussing several traditional employee rights, protections, and benefits).

<sup>130</sup> *See* MASS. GEN. LAWS ch. 149, § 148B (stating “any individual performing any service . . . shall be considered to be an employee . . . unless . . .”) (emphasis added). For a hiring entity to

*B. Application of California's and Massachusetts' Three-Prong Independent Contractor Test to Healey v. Uber*

Applying the three-prong independent contractor test to former Attorney General Healey's suit against Uber and Lyft strongly indicates that app-based drivers are employees and not independent contractors.<sup>131</sup> First, to be classified as an independent contractor in Massachusetts, the service provider must be "free from control and direction" of the hiring entity while performing the service.<sup>132</sup> While it is accepted that app-based drivers choose when, where, and how often they work, neither AB 5 nor § 148B requires a hiring entity to prove that a worker is free from its complete control and direction.<sup>133</sup> While app-based drivers have some flexibility as to their work, they are not free from TNCs' and DNCs' control and direction as alleged in H. 1234 and H.D. 3456.<sup>134</sup> TNCs and DNCs unilaterally set prices for their services and do not notify their drivers of these prices ahead of performance.<sup>135</sup>

In *Sportsman*, the United States District Court for the Northern District of California held that a pet care provider that utilized an online platform to solicit customers was an independent contractor under the AB 5 test.<sup>136</sup> Like TNCs and DNCs, Rover is an online platform that allows pet owners to book pet care services directly from providers.<sup>137</sup> Rover's pet owner and pet care providers, similar to TNC and DNC users, must agree to Rover's user agreement and terms of service.<sup>138</sup> Rover receives payment from pet owners, holds the funds, and then deducts a service fee before remitting payment to

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overcome the employee presumption, the hiring entity must satisfy a three-part conjunctive test. *Id.*

<sup>131</sup> See Complaint for Declaratory Judgment, *supra* note 13, at 42-45 (emphasis added) (contending app-based drivers are not free from TNCs' and DNCs' "discretion and control," transportation services are not "outside the usual course" of TNC and DNC business, and app-based drivers are not "customarily engaged in an independently established trade" of transporting).

<sup>132</sup> MASS. GEN. LAWS ch. 149, § 148B.

<sup>133</sup> See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (alleging app-based drivers have great flexibility regarding when and how often to work); CAL. LAB. CODE § 2775 (Deering 2022) (stating "free from the control and direction of the hiring entity"); MASS. GEN. LAWS ch. 149, § 148B (stating "free from control and direction").

<sup>134</sup> See H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (claiming app-based drivers "retain full control over where, when, and how they perform app-based services/work").

<sup>135</sup> Complaint for Declaratory Judgment, *supra* note 13, at 33.

<sup>136</sup> *Sportsman v. A Place for Rover, Inc.*, 537 F. Supp. 3d 1081, 1085 (N.D. Cal. 2022).

<sup>137</sup> *Id.* at 1086; Complaint for Declaratory Judgment, *supra* note 13, at 31; see also *About Rover*, *supra* note 59 (explaining Rover as online platform connecting pet parents with pet care providers).

<sup>138</sup> *Sportsman*, 537 F. Supp. 3d at 1086; Complaint for Declaratory Judgment, *supra* note 13, at 31.

the pet care provider, which is similar to how TNCs and DNCs process payments, service fees, and driver compensation.<sup>139</sup> Despite the similarities between Rover pet care providers and TNC and DNC drivers, pet care providers in *Sportsman* select the rate for their services, which the court found most indicative that they were “free from the control and direction” of Rover.<sup>140</sup> The pet care providers’ ability to set prices is distinct from app-based drivers’ lack of awareness and involvement in service pricing.<sup>141</sup>

At first glance, it appears that the *Sebago* taxicab drivers are more similarly situated to app-based drivers, as both groups enjoy flexible work schedules.<sup>142</sup> However, unlike the defendants in *Sebago*, who had no interest in the success of the taxicab drivers’ transportation operations, Uber and Lyft can penalize, suspend, or terminate drivers that do not accept enough rides.<sup>143</sup> While both *Sebago* taxicab drivers and Uber and Lyft drivers are subject to many restrictions, the rules that govern the former manifest an express authorization from the Massachusetts Legislature.<sup>144</sup> In contrast, the restrictions placed on app-based drivers are a result of Uber and Lyft’s self-imposed policies.<sup>145</sup> Because the degree of flexibility differs between Rover pet care providers, the *Sebago* taxicab drivers, and Uber and Lyft drivers, a court would likely find that app-based drivers are not free from TNC and DNC control and direction despite being able to decide where, when, and how they provide services.<sup>146</sup>

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<sup>139</sup> *Sportsman*, 537 F. Supp. 3d at 1086; *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015).

<sup>140</sup> *See Sportsman*, 537 F. Supp. 3d at 1085, 1091, 1093 (explaining Rover’s control over platform, not services).

<sup>141</sup> *Compare Sportsman*, 537 F. Supp. 3d at 1086 (describing Rover pet care providers ability to set rates for services), with Complaint for Declaratory Judgment, *supra* note 13, at 35-36 (explaining TNCs and DNCs calculate fares without informing drivers of their actual compensation).

<sup>142</sup> *See Sebago v. Bos. Cab Dispatch, Inc.*, 28 N.E.3d 1139, 1150 (Mass. 2015) (indicating taxicab driver work flexibility); *see also* Complaint for Declaratory Judgment, *supra* note 13, at 34 (claiming TNC and DNC assert their drivers choose when and how often they work).

<sup>143</sup> *See Sebago*, 28 N.E.3d at 1151-52 (reasoning no financial incentive for defendants to monitor taxicab drivers’ performance); *see also* Complaint for Declaratory Judgment, *supra* note 13, at 37 (suggesting monitoring drivers’ performance indicates drivers’ lack of freedom from control).

<sup>144</sup> *See* Complaint for Declaratory Judgment, *supra* note 13, at 4, 31 (explaining Uber and Lyft require drivers to agree to non-negotiated contracts); *see also Sebago*, 28 N.E.3d at 1142 (providing historical and legal context to Rule 403 regulations of Boston taxicab drivers). Uber and Lyft can unilaterally alter the terms of the drivers’ service agreements at any time, and drivers that fail to accept these modifications can be terminated. Complaint for Declaratory Judgment, *supra* note 13, at 31.

<sup>145</sup> *See* Complaint for Declaratory Judgment, *supra* note 13, at 4 (describing Uber and Lyft’s service agreements as impositions resulting from “inherently unequal” bargaining power).

<sup>146</sup> *See* Complaint for Declaratory Judgment, *supra* note 13, at 35-36, 41-42 (reasoning that inability to set fares and subjection to company performance standards does not equate to “free from direction and control”).

For TNCs and DNCs to rebut the presumption that their app-based drivers are employees, they must prove that their drivers perform a service outside their usual course of business.<sup>147</sup> The Massachusetts Supreme Judicial Court stated that a hiring entity's definition of its business is indicative of the entity's usual course of business, so TNC and DNC claims that their principle business is providing technology, not rides, to app users is significant.<sup>148</sup> However, this inquiry also considers whether the workers provide services that are "necessary to the business" or those that are "merely incidental."<sup>149</sup> In assessing drivers' necessity to Uber in *O'Connor*, the United States District Court for the Northern District of California, found that it is "clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one."<sup>150</sup>

Distinct from the taxicab owners, radio associations, and taxicab garages in *Sebago*, whose business models did not depend on taxicab drivers' success in completing trips, TNCs' and DNCs' economic success is based on the number of trips their drivers complete.<sup>151</sup> Therefore, while the Massachusetts Supreme Judicial Court found that the taxicab drivers performed a service outside the usual course of the defendants' business in *Sebago*, the distinct business model exhibited by Uber and Lyft would not lead to the same conclusion.<sup>152</sup>

Rather, TNCs and DNCs, in a similar manner as Rover, generate revenue when services are booked and subsequently performed.<sup>153</sup> While

<sup>147</sup> MASS. GEN. LAWS ch. 149, § 148B.

<sup>148</sup> See *Sebago*, 28 N.E.3d at 1150 (discussing how to inquire whether performed service is within usual course of hiring entity's business).

<sup>149</sup> *Id.*

<sup>150</sup> *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015). Uber claims to be a tech company selling software rather than a transportation company. *Id.* at 1137; see also Complaint for Declaratory Judgment, *supra* note 13, at 36 (stating Uber describes itself as transportation company). However, Uber's company website on July 9, 2020, stated it was a "company that moves people." Complaint for Declaratory Judgment, *supra* note 13, at 36. Lyft has described itself as "the World's Best Transportation." *Id.* at 27. Thus, Uber may sell software, but it also sells rides. *O'Connor*, 82 F. Supp. 3d at 1141 (explaining Uber's business heavily relies on providing transportation).

<sup>151</sup> Compare *Sebago*, 28 N.E.3d at 1151-52 (explaining taxicab owners and radio associations have no financial investment in drivers' success), with Complaint for Declaratory Judgment, *supra* note 13, at 43-44 (alleging Uber and Lyft "directly rely on the success of their driver[s]" because they keep portions of passengers fees), and *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070-71 (N.D. Cal. 2015) (stating Lyft retains twenty percent of all rides charged to customers).

<sup>152</sup> See sources cited *supra* notes 90, 92, 96, and 151 and accompanying text (distinguishing *Sebago* defendants' economic models from that of Uber and Lyft).

<sup>153</sup> See *O'Connor*, 82 F. Supp. 3d at 1142 (highlighting Uber's reliance on rides for revenue); *Sportsman v. A Place for Rover, Inc.*, 537 F. Supp. 3d 1081, 1094 (N.D. Cal. 2022) (explaining Rover's revenue comes from booking services).

former Attorney General Healey claimed that TNCs' and DNCs' financial dependence on drivers demonstrated that ride and delivery services were not outside their usual course of business, the *Sportsman* court found that Rover's business was providing a marketplace rather than services, despite Rover generating revenue from pet care services bookings.<sup>154</sup> Rover, however, is unlike TNCs and DNCs which assign a customer to a driver or deliverer at a rate fixed by the TNC or DNC, substantially limiting how drivers engage in the marketplace.<sup>155</sup> Because TNC and DNC drivers lack the independence and control in marketing and offering their services while driving or delivering, they cannot grow their own transportation or delivery businesses like Rover's pet care providers can.<sup>156</sup>

Even if the Massachusetts Superior Court finds that app-based drivers are free from Uber and Lyft's control and direction, and that their services are outside Uber's and Lyft's usual courses of business, Uber and Lyft would still need to prevail on the final element of the three-prong independent contractor test.<sup>157</sup> Healey argued that app-based drivers would not transport people if not for access to Uber and Lyft's online platform, so they are not customarily engaged in business of transporting people.<sup>158</sup> App-based drivers do not market themselves as drivers while not driving for Uber and Lyft.<sup>159</sup> This contrasts with how *Sportsman* advertised her services and distinguished herself from other pet care providers on her Rover profile, as well as how the *Sebago* taxicab drivers could advertise themselves and their services while using the defendants' taxicabs and licenses.<sup>160</sup> While Uber, Lyft, and Rover

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<sup>154</sup> See *O'Connor*, 82 F. Supp. 3d at 1142 (using Uber's reliance on rides for profit to argue Uber as transportation company); *Sportsman*, 537 F. Supp. 3d at 1094 (holding Rover's business was operating marketplace). The court in *Sportsman* held that pet care services were incidental to the operation of an online marketplace. *Sportsman*, 537 F. Supp. 3d at 1099.

<sup>155</sup> *Sportsman*, 537 F. Supp. 3d at 1096 (contrasting Uber and Lyft's models from Rover). "Rover operates a true marketplace" because pet care providers can promote and modify their services and rates without Rover's input or permission. *Id.*

<sup>156</sup> Compare *Sportsman*, 537 F. Supp. 3d at 1096 (identifying Rover as "true marketplace" for pet care providers), with Complaint for Declaratory Judgment, *supra* note 13, at 45 (contending app-based drivers have no ability to grow their own businesses). Stakeholders report that gaining experience to help build a business is one benefit of gig work. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-561, *supra* note 15, at 17. If a worker cannot engage in the foundations of a business due to limited control, it begs whether the gig work is a stepping stone to entrepreneurship. See Complaint for Declaratory Judgment, *supra* note 13, at 45 (arguing TNC and DNC business models limit drivers as potential entrepreneurs).

<sup>157</sup> See MASS. GEN. LAWS ch. 149, § 148B (outlining elements of independent contractor).

<sup>158</sup> Complaint for Declaratory Judgment, *supra* note 13, at 43-44.

<sup>159</sup> *Id.* at 45.

<sup>160</sup> Compare *Sportsman*, 537 F. Supp. 3d at 1085, 1095 and *Sebago v. Bos. Cab Dispatch, Inc.*, 28 N.E.3d 1139, 1153 (Mass. 2015), with *Lyft Terms of Service*, *supra* note 93 (stipulating Lyft drivers "will not, while providing the Rideshare Services, operate as a public or common carrier").

all utilize electronic platforms to provide services, Rover is distinct because it operates a “true marketplace” where pet care providers differentiate themselves, market their own services, and independently gain the business of prospective customers.<sup>161</sup> Thus, while the courts in *Sportsman* and *Sebago* found that pet care providers and taxicab drivers engaged in an independently established business, the Massachusetts Superior Court here would likely conclude the opposite.<sup>162</sup> Given that Uber and Lyft are likely to fail at least one of the three prongs of the independent contractor test, they will not be able to overcome the presumption that their drivers are employees in Massachusetts.<sup>163</sup>

### C. *A Comparison of Proposed Massachusetts App-Based Drivers Legislation*

Since 2021, a handful of Massachusetts bills regarding the treatment and classification of app-based drivers have been proposed.<sup>164</sup> Most of these bills fall into one of three categories: (1) bills that classify app-based drivers as independent contractors with some traditional employee protections and benefits; (2) bills that avoid classifying drivers, but provide drivers some traditional employee protections and benefits; and (3) bills that affirm the presumption that drivers are employees and establish additional benefits.<sup>165</sup> This section of the Note will compare each of these three categories with current federal and state employee protections.<sup>166</sup>

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<sup>161</sup> *Sportsman*, 537 F. Supp. 3d at 1095.

<sup>162</sup> *Id.*; *Sebago*, 28 N.E.3d at 1153; *see also* Complaint for Declaratory Judgment, *supra* note 13, at 45 (contending that app-based drivers cannot independently market transportation services).

<sup>163</sup> *See* sources cited *supra* notes 151-155, 157 and accompanying text (predicting TNCs and DNCs cannot prove their drivers meet three prongs of independent contractor classification).

<sup>164</sup> *See* sources cited *supra* notes 108, 110-111, 117-120 and accompanying text (describing proposed legislation regarding app-based drivers since 2021).

<sup>165</sup> *See* sources cited *supra* notes 108, 110-111, 117-120 and accompanying text (describing proposed legislation related to app-based drivers). The bills that classify app-based drivers as independent contractors with certain additional protections include H. 1234 and H.D. 3456. H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021); H.D. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023). The bills that do not address the status of app-based drivers but establish protections for them include H.D. 2071 and S.D. 1162. H.D. 2071, 193 Gen. Ct., Reg. Sess. (Mass. 2023); S.D. 1162, 193 Gen. Ct., Reg. Sess. (Mass. 2023). The bills that affirm that app-based drivers are employees include H.D. 3832 and S.D. 2186. H.D. 3832, 193 Gen. Ct., Reg. Sess. (Mass. 2023); S.D. 2186, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>166</sup> *See* sources cited *supra* note 107, 109-110, 116-119, 165 (listing proposed Massachusetts legislation regarding app-based driver treatment and classification); sources cited *supra* notes 32-37 and accompanying text (discussing several traditional employee rights, protections, and benefits).



H. 1234 and H.D. 3456 classify app-based drivers as independent contractors and provide drivers on-the-job accident insurance, retirement funding, and protection against discrimination, but not other employee rights and protections under federal and state laws.<sup>167</sup> Furthermore, despite these proposed bills' appearance to shield app-based drivers from discrimination at work, their anti-discrimination policies are much weaker than federal anti-discrimination laws.<sup>168</sup>

H. 1234 and H.D. 3456's anti-discrimination provisions include several protected classes not enumerated in Title VII, but contain a phrase that severely limits the strength of the provision.<sup>169</sup> According to the language in H. 1234 and H.D. 3456, a bona fide occupational qualification does not need to be "reasonably necessary" for the operation of TNCs and DNCs to exempt discriminatory conduct.<sup>170</sup> This bona fide occupational qualification can also be applied to a myriad of characteristics listed in the anti-discrimination provision, far exceeding the three protected classes of religion, sex, and national origin in Title VII.<sup>171</sup> Furthermore, H. 1234 and H.D. 3456 insert another exception to discriminatory conduct: "app-based driver safety need."<sup>172</sup> Both exceptions to workplace discrimination appear vague and subjective,

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<sup>167</sup> H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021); H.D. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023); see sources cited *supra* notes 27, 32, 35-37 and accompanying text (discussing FLSA, NLRA, FMLA); sources cited *supra* note 79 and accompanying text (providing overview of Massachusetts laws providing employee protections and benefits).

<sup>168</sup> See H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (enumerating over ten protected characteristics in bill's anti-discrimination provision); sources cited *supra* notes 36-37 and accompanying text (explaining Title VII, ADEA, and ADA).

<sup>169</sup> Compare H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021); H. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (listing "race, color, religious creed, national origin, sex, gender identity, sexual orientation, . . . genetic information, pregnancy . . . ancestry or status as a veteran . . ."), with 42 U.S.C.S. § 2000e-2 (enumerating five protected classes: race, color, religion, sex, and national origin). Discriminatory conduct is permissible if it is "based upon a bona fide occupational qualification or public or app-based driver safety need . . ." H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021); H. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023). A bona fide occupational qualification also appears in Title VII, but religion, sex, and national origin can be discriminated against only if "reasonably necessary to the normal operation of that particular business or enterprise" for it to act as an exception to discriminatory conduct. 42 U.S.C.S. § 2000e-2.

<sup>170</sup> Compare H.1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (stating exception to anti-discrimination provision as "a bona fide occupational qualification"), and H.3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (stating exception to anti-discrimination provision as "a bona fide occupational qualification"), with 42 U.S.C.S. § 2000e-2 (defining bona fide occupational qualification as "reasonably necessary to the normal operation of that particular business").

<sup>171</sup> See H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (listing protected characteristics beyond Title VII's five protected classes); H. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023) (listing protected characteristics beyond Title VII's five protected classes).

<sup>172</sup> H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021); H. 3456, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

likely weakening the protection of app-based drivers in comparison to federal anti-discrimination laws.<sup>173</sup> Therefore, these bills likely do not effectively shield all of the characteristics listed in the provision.<sup>174</sup>

H.D. 2071 and S.D. 1162 establish earned sick time, minimum compensation, unemployment insurance, and the right to collective bargaining for app-based drivers, but do not address discrimination or overtime pay.<sup>175</sup> Perhaps the right to collective bargaining forgoes the need to enumerate traditional employee rights and protections because these could be secured through the collective bargaining process.<sup>176</sup> However, apart from the rights and protections incorporated into H.D. 2071 and S.D. 1162, app-based drivers will need to self-organize and bargain for other rights and protections, forcing them to actively protect themselves.<sup>177</sup>

Finally, H.D. 3832 and S.D. 2186 are proposed bills that presume app-based drivers are employees.<sup>178</sup> These bills would guarantee the greatest protections for app-based drivers because they would provide the rights and benefits that come with employee status.<sup>179</sup>

Ratification of any of the proposed laws through the Massachusetts Legislature regarding the worker classification of TNC and/or DNC drivers will require compromise between companies and worker advocates.<sup>180</sup> Until this compromise is reached, or one side offers a constitutional ballot initiative for the Massachusetts electorate to vote on, the § 148B three-prong test

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<sup>173</sup> See H. 1234, 192 Gen. Ct., Reg. Sess. (Mass. 2021) (containing language similar yet distinct from well-established federal anti-discrimination laws).

<sup>174</sup> See sources cited *supra* notes 170-173 and accompanying text (describing weak anti-discrimination provisions).

<sup>175</sup> H.D. 2071, 193 Gen. Ct., Reg. Sess. (Mass. 2023); S.D. 1162, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>176</sup> See Lisinski, *supra* note 122 (noting State Senator Lewis's rationale for prioritizing collective bargaining rights). Through collective bargaining, app-based drivers can secure additional protections as non-employees, though they should be afforded "fundamental rights and protections" available to most workers. *Id.*

<sup>177</sup> See Lisinski, *supra* note 122 (referencing Senator Lewis's statement that drivers should not need bargaining process for basic protections).

<sup>178</sup> H.D. 3832, 193 Gen. Ct., Reg. Sess. (Mass. 2023); S.D. 2186, 193 Gen. Ct., Reg. Sess. (Mass. 2023). These bills state that "TNC and DNC drivers and delivery workers are already entitled to the same presumptions of employment as well as wage and hour and anti-discrimination protections, unemployment, workers compensation, sick, family and medical leave benefits, under Massachusetts law that all other workers within the Commonwealth enjoy . . ." H.D. 3832, 193 Gen. Ct., Reg. Sess. (Mass. 2023); S.D. 2186, 193 Gen. Ct., Reg. Sess. (Mass. 2023).

<sup>179</sup> See sources cited *supra* notes 32-33 and accompanying text (analyzing importance of employee classification and rights and protections it affords workers).

<sup>180</sup> See sources cited *supra* notes 110-111 and accompanying text (characterizing Washington law classifying app-based drivers as independent contractors as "compromise among rideshare companies, drivers, and the Teamsters-affiliated Drivers Union").

remains the standard to rebut the presumption of employee status in Massachusetts.<sup>181</sup>

## V. CONCLUSION

With the rise and success of TNCs and DNCs in the last fifteen years came the advent of a new gig worker, the app-based driver. This novel worker is marketed to benefit from the advantages of the worker-friendly flexibility of the gig economy. However, below this surface-level understanding of app-based driving work lies the unresolved plight of the app-based driver, namely, whether these drivers are employees or independent contractors.

This debate over the status of app-based drivers has garnered national interest because classifying these drivers as independent contractors would exclude them from fundamental workplace protections while simultaneously saving hiring entities millions of dollars. Furthermore, classifying app-based drivers as independent contractors would incentivize employee-based industries to hire independent contractors, which would revolutionize workplace dynamics and likely leave workers in a far more unequal bargaining position than they are currently in.

Despite attempts by TNCs and DNCs to lobby state legislatures and voters to classify drivers as independent contractors, states with strong, codified employee-status presumptions, like California and Massachusetts, should be able to maintain that app-based drivers are employees, absent new legislation indicating otherwise. Therefore, labor advocates, community activists, and governments in these states should insist on the adherence to their states' strong employee presumption and argue in favor of the public policy considerations behind these presumptions, which are rooted in protecting workers from exploitative labor practices and creating a level playing field for businesses that comply with labor laws.

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<sup>181</sup> See sources cited *supra* notes 110-111 and accompanying text (providing example of stakeholders' compromise in state law classifying app-based drivers as independent contractors); see also sources cited *supra* notes 103-105 and accompanying text (describing Uber and Lyft's attempt to put app-based driver classification on 2022 state ballot); MASS. GEN. LAWS ch. 149, § 148B.