

The Benefits of Mandatory Binding Arbitration Agreements With Class Action Waivers in the Gig Economy—They Are Not Just For Employees Any More

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Introduction

Experts now predict that by 2020, 40% of workers will not fit into the traditional employment model as we currently know it.¹ Many individuals seeking more control or independence from the traditional employer-employee relationship, as well as those individuals who have been economically displaced from the traditional workforce as the result of technology and economic globalization, have now turned to the “Gig Economy” in their search for a long-term, viable alternative to traditional employment models. Gig Economy companies (“Gig companies”) have built their entire business models on the expectation that in this new business relationship the individuals providing services to actual customers (“Gig workers”) would all be mini-entrepreneurs running their own micro-businesses, much like independent contractors. Gig companies themselves facilitate individual transactions (“Gigs”) by providing the means by which customers (sometimes called buyers) could locate, and engage, Gig workers (sometimes called sellers) willing and able to provide the services in question. In the eyes of these Gig companies, Gig workers (as independent contractors) would happily walk away from the protections afforded traditional employees in exchange for the free-

dom of not having a boss—or anyone—who controlled how and when they chose to perform the services contracted for through use of the Gig company’s platform.

Unfortunately, the traditional concepts of “employee” and “independent contractor” that these Gig companies and many Gig workers had been relying on were created almost one hundred years ago, long before the concept of the Gig Economy had ever been visualized. Moreover, Gig companies’ assumption that all Gig workers would happily rid themselves of certain employment protections in favor of independent contractor status has proven not to be the case. Many Gig workers are now claiming, after the fact, that they were never really independent contractors, but instead were employees who should have been, and who are, entitled to employee-style protections relating to matters such as overtime, meal and rest periods, and safety protections.² This has been made crystal clear by the recent \$100 million settlement that Uber has agreed to with its drivers who were seeking those protections.³ Uber settled the drivers’ claims rather than risk having the presiding court deem all of Uber’s drivers—drivers whom Uber considered to be independent contractors—to be employees, thereby undermining Uber’s business model, and, potentially, the business model of the entire Gig Economy.⁴

The authors believe that in time these issues will be resolved by the law's statutory creation of new classifications of workers that have attributes reflecting a hybridization of the characteristics of independent contractors and employees.⁵ However, as is so often the case, the law is slow to react to changing circumstances and technology, and is currently not where Gig companies need it to be to provide the necessary certainty for their business models and their future. This is illustrated particularly well by the demonstrated risk of Gig workers, like those from Uber, coming together as plaintiffs in class actions against Gig companies, seeking wage-hour and workplace protections that until now were believed to have been traditionally reserved solely for employees. To survive these uncharted waters, the authors believe that Gig companies should consider implementing mandatory binding arbitration agreements containing class action waivers with all of their Gig workers.

What is the Gig Economy?

People have undoubtedly heard of Uber and Lyft, and maybe even Handy, Taskrabbit, or Fiverr.⁶ But there are even more: there are platforms that facilitate having food delivered to you⁷ or having people come to your home to do your laundry, for example.⁸ Your children can even utilize a platform to have someone do their homework for them.⁹

The Gig Economy facilitates Gigs on what is intended by the Gig companies to be an independent contractor basis. As such, each Gig worker is considered by the platform to be their own business owner, as well as a "rising entrepreneur."¹⁰

These multiple collaborations between customers and Gig workers make up the massive industry known as the Gig Economy. The Gig Economy is also known as the "on demand" economy, the "platform" economy, or the "sharing" economy.¹¹ No matter what you call it, it is here to stay. And with the Gig Economy come millions of Gig workers who provide their services directly to customers, mediated by one or another Gig Economy platform.

Independent Contractors vs. Employees

There are advantages for a worker to be classified as an independent contractor, which explains why many individuals eagerly enter into these relationships instead of looking for jobs in which they would be considered traditional employees. For example, because

the individual is not tied to any specific employer, they can set their own rules for business, and even work for several platforms. This is frequently seen in the ride-sharing arena, in which several drivers will drive for both Uber and Lyft.¹² The advantage can also be something as simple as "being your own boss," in which individuals have to report only to themselves, and are not told how to complete the job for which they have been engaged. At least traditionally, moreover, independent contractors enjoyed higher pay than typical employees, because the company was looking for a unique set of skills for a limited amount of time and would not be required to pay taxes or carry workers' compensation insurance with respect to the persons providing those skills. And, if an independent contractor creates anything tangible—for example, a painting, written work, computer programming, etc.—that work would be the property of the independent contractor instead of the company for whom they provided services.¹³

Of course there are disadvantages with the traditional independent contractor model as well. One is that independent contractors are responsible for their own payroll taxes. Because independent contractors receive only a 1099 form, as opposed to a W-2, the contractors are tasked with setting aside funds to ensure that all of their tax obligations have been met. Further, the lack of a guaranteed long-term position with a company without a guaranteed minimum wage is a large downside to agreeing to become an independent contractor. Nor are independent contractors eligible for workers' compensation or unemployment insurance benefits, and they are not protected under certain civil rights laws, such as Title VII.

To understand the unique impact this tension between being classified as an employee and being classified as an independent contractor has on the Gig Economy, it is important to understand the history of classifying workers as independent contractors instead of as employees, and the tests that courts and the federal government utilize to determine whether a worker has been properly classified.

The distinction between independent contractors and employees arose at common law to limit the vicarious liability that could be imposed on a person hiring someone else to perform a service for the misconduct of the person rendering that service.¹⁴ The amount of control a principal exercised over an individual was deemed to be

crucial because “[t]his extent to which the employer had a right to control [work-related] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them. . . .”¹⁵ Because independent contractors are independently responsible for how work is completed and are subject to minimal control, the principal is able to limit their vicarious liability.

Due to tax implications, the federal government has taken a special interest in drawing a concrete line between independent contractors and employees. Specifically, when companies classify service providers as independent contractors, the companies do not pay employment taxes on said providers.¹⁶ During the 1990s, the Internal Revenue Service (“IRS”) noted an increasing trend for companies to classify service providers as independent contractors, instead of as employees—so much so that, over the last several years, worker classification initiatives have been a top priority for the IRS and the Department of Labor.¹⁷ In 2011, the IRS and Department of Labor even signed a memorandum of understanding in an effort to jointly increase worker misclassification audits.¹⁸ The IRS utilized the well-known “20 factor test,” which can be categorized into three broad categories: 1) behavioral (does the employer control or have the right to control how the worker completes the job?); 2) financial (does the employer control the business aspects of the worker’s job?); and 3) the type of relationship (does the worker receive employee-type benefits?).¹⁹ In terms of federal and state courts, no single standard to distinguish between employee and independent contractor has emerged.²⁰

The IRS 20-factor, right-to-control test is used to assess an employer’s tax liability. A similar test is used in most states to determine status under workers’ compensation laws.²¹ To determine independent contractor status in other circumstances, courts will utilize the economic realities test,²² or a combination of the economic realities test and IRS right-to-control test.²³ In essence, the economic realities test makes it harder to classify a worker as an independent contractor, because, in addition to considering the degree of control the employer exercises, it takes into account the degree to which the workers are economically dependent on the business.²⁴ The economic realities test is used to determine employee status under the Family and Medical Leave Act and the Fair Labor Standards Act, as well as civil rights cases under Title VII of the Civil Rights Act,

the Age Discrimination in Employment Act, and the Americans with Disabilities Act.²⁵

Importantly, many states, such as California, presume an employment relationship once evidence has been presented that an individual provided services for a putative employer.²⁶ The burden then shifts to the now-presumed employer to prove, if it can, that the presumed employee was in fact an independent contractor.²⁷ The foremost consideration in determining whether a common law employer-employee relationship exists is the “hirer’s right to control how the end result is achieved.”²⁸ However, not just any amount of “freedom of action” will convert an employee into an independent contractor if the employer is found to have “general supervision and control” over the workplace.²⁹

Recent Cases Impacting the Gig Economy

Many Gig workers are now starting to demand the protections—particularly in the areas of wage and hour, meal and rest periods, and safety—ordinarily accorded to traditional employees.³⁰ As mentioned in the introduction, the authors believe that, ultimately, the solution for this problem is a legislative one: the passage of new statutes that update our century-old job classifications to account for this new economy. However, until these definitions change, Gig companies that consider themselves “platforms,” rather than “employers,” will need to prepare for the possibility of an explosion of misclassification litigation in which the people they thought were independent contractors will seek to be classified as employees.

Litigation of this type has already threatened, and has even shut down, Gig companies.³¹ For example, Homejoy was an on-demand cleaning services company that enabled customers to engage a Gig worker to come and clean their home. Homejoy classified the Gig workers as independent contractors; some of them, however, filed a class action lawsuit alleging that they had been misclassified, and that they instead should have been considered—and treated as—employees. The litigation proved costly, and, presumably as a result, Homejoy dissolved.³²

The problems do not stop there. If a Gig company is lucky enough to avoid dissolution, it is still looking at potentially huge settlements and disabling legal fees.

By now, “the Uber cases” have taken the legal world by storm. The parties originally agreed upon a \$100 million settlement, which was recently rejected by the court, sending the parties back to negotiations.³³ Uber’s rival, Lyft, was able to come to a \$27 million settlement with its drivers.³⁴ In the Uber case, drivers offering their services through Uber brought a class action lawsuit against it, alleging that they were misclassified as independent contractors—that instead they should be considered employees.³⁵ As employees, the drivers would be entitled to benefits available to traditional employees—the cost of which, claimed Uber, would destroy Uber’s (and almost every other Gig platform’s) business model.

The drivers alleged that they should have been classified as employees because Uber treated them as such. They provided examples supporting their claims, including that they provided a service *for Uber* that was synonymous with the service that *Uber provided its customers* (i.e., that Uber could not claim that Uber itself was merely a provider of a means of connection between passengers and ride providers—that Uber was in fact a ride-providing service), that drivers are subjected to Uber’s disciplinary procedure should they violate any rules, and the fact that Uber sets all charges for rides by the drivers.³⁶ Further, Uber being able to terminate drivers’ ability to use the platform to pick up passengers at any time for any reason contributed to the drivers’ claims that they were under Uber’s control.³⁷

The judge, in granting certification to the drivers’ lawsuit, gave not-so-subtle hints that the drivers were misclassified as independent contractors and should have been employees.³⁸ While the judge made clear that the actual decision as to whether the drivers were misclassified would be saved for after class certification (and could not be decided purely as a matter of law), he still completed a thorough analysis of Uber’s business model, noting areas where drivers appeared to be more like employees than independent contractors.³⁹ While this is by no means binding on other Gig platforms, it offers a potential glimpse into the future should this trend of litigation continue.

Importantly for all Gig companies, the Uber and Lyft settlements did not require that either company concede that its affiliated drivers should be classified as employees.⁴⁰ The platforms, at least temporarily, eliminated the drivers’ argument through a settlement that

called for the payment of a large sum of money and for Uber and Lyft to afford to members of the plaintiff class certain protections, including the ability to accept tips (and to notify customers that tips were not included in their fare, and would be appreciated) and specified avenues for challenging their “deactivation,” or being prohibited from using Uber’s app to arrange Gigs. The settlement enabled Uber to preserve its profitable business model, and arguably saved the Gig Economy.

Driving apps are not the only Gig Economy platforms that face misclassification lawsuits. Crowdfunder (crowdsourcing), Postmates (delivery of food and supplies), and Handy (house cleaning and repairs) are examples of other Gig companies, based on the independent contractor model, that are under attack.⁴¹ Based on the Uber and Lyft cases, as well as other decisions recently handed down in federal court, Gig companies vulnerable to class action lawsuits have the option of (1) litigating the case to the end and rolling the dice on whether a court will find its Gig workers to be employees instead of independent contractors, resulting in liability for damages potentially reaching into the tens, if not hundreds, of millions of dollars; (2) being prepared to offer a large settlement payment to affected Gig workers, as well as altering agreements to provide Gig workers with more protections than are currently available to independent contractors by statute; or (3) following the example of those Gig companies that have essentially folded under the risk and have sought to avoid litigation by reclassifying their affiliated Gig workers as employees.⁴²

A unique problem for the Gig Economy arises from the fact that, even though “control” by a putative employer over a putative employee is the touchstone of courts’ analyses, courts consider a number of other factors as well, and, when the facts of a case indicate that the services provided by the putative employees are the exact same services that the putative employer offers, the courts have tended to emphasize that in their analyses. For example, Uber drivers have argued that Uber is a ride offering service, and the drivers offer rides on behalf of Uber.⁴³ Uber argues that it is a technology platform and not a transportation company—that it is not a ride-offering service.⁴⁴ The more likely that the services the platform provides are synonymous with the services performed by their affiliated Gig workers, the more likely those Gig

workers will be viewed as employees, as it is a factor in the right to control test.⁴⁵ This furthers the argument as to the necessity for all Gig platforms to utilize arbitration agreements with class action waivers.

Arbitration Agreements with Class Action Waivers: Preparing for a Rainy Day

Arbitration agreements with class action waivers can be one of the most valuable tools for employers when being presented with employment claims, and this can seamlessly transfer over to Gig companies, as the Gig Economy will undoubtedly be presented with more “employment-style” lawsuits in the near future.

Arbitration agreements with class action waivers may take the uncertainty out of employment lawsuits by requiring that the parties litigate any claims arising out of their relationship in private arbitration while also doing so individually. Arbitration is similar to a traditional trial in that rules of evidence and procedure are followed. The case is that also presented before either a retired judge or an experienced arbitrator. The largest difference is the absence of a jury. The benefit for the employer or Gig platform is that the retired judge is a learned jurist with years of experience, and does not view the case as emotionally as would a jury. This argument in support of arbitration is bolstered by the fact that the plaintiffs in the Uber case moved for a bench trial based on the theory that a San Francisco jury would be biased in favor of Uber, due to Uber’s popularity in that city.⁴⁶ The arbitrator is completely neutral, and has years of experience applying the law to the facts at hand to come to a rational, non-emotional resolution. Workers sign an acknowledgement affirming not only that will they assert all claims relating to their relationship with the platform in arbitration alone, but also that they will not assert claims on behalf of any other workers. The benefit here is that workers are required to litigate any employment-style claims on an individual basis instead of one disgruntled worker bringing an action on behalf of several thousand other workers (many of whom likely wouldn’t have wanted to sue the Gig platform in the first place). With class action waivers, there is only one person with one dispute, and the arbitrator will look at remedies for only that one individual. To be clear, arbitration agreements with class action waivers offer dual protection to Gig companies: one being the removal of an emotional jury who is not as

familiar with the law, and the second keeping litigation narrowed to the one aggrieved employee.

We have seen examples of Gig platforms implementing arbitration agreements with class action waivers, which makes sense, because we can only expect to see more of these employment-type lawsuits while the employment classification of Gig workers remains up in the air. For example, Uber instituted arbitration agreements with class action waivers before any litigation was filed against it in 2013.⁴⁷ The judge ruled that Uber’s 2013 arbitration agreement was not enforceable due to being substantively and procedurally unconscionable.⁴⁸ Specifically, the judge found that under California law, the arbitration agreement was unenforceable as a matter of public policy because the agreement contained a provision purporting to waive drivers’ rights under California’s Private Attorney General Act (“PAGA”) by barring any PAGA claim from all fora, and the provision was unenforceable and expressly non-severable from the entire arbitration agreement.⁴⁹ The court further found that the delegation clause, outlining the specific claims that employees could bring to arbitration, was ambiguous, and that the provision allowing employees to opt-out of mandatory individual arbitration was too complicated. During the litigation, Uber modified its arbitration agreements with class action waivers to apply to employees not included in the current class action (2014 and 2015 agreements).⁵⁰ The modifications simplified the procedure allowing drivers to opt out of mandatory individual arbitration, making it so drivers could not waive rights to bring certain lawsuits in state court as required by state law, and clearing up ambiguous language pertaining to its delegation clause. The judge suggested that it would likely be enforceable, but failed to rule on that issue as it pertained to the class action at hand.⁵¹

These modified agreements have already been upheld by federal judges in Arizona, Ohio, Florida, and Maryland.⁵² Lyft similarly has been able to send to arbitration cases brought by drivers in California federal courts by ensuring the language was not unconscionable.⁵³

Arbitration agreements with class action waivers are ideal during this uncertain time for the Gig Economy. They are repeatedly enforced throughout several states and most federal courts.⁵⁴ As the case law expands to accommodate the Gig Economy, it is important that Gig

platforms and legal counsel are apprised of the current state of the law regarding arbitration agreements containing class action waivers. For the time being however, they are highly recommended tools to avoid potentially disastrous class action litigation. It is imperative that the agreements do not contain unconscionable language, and that they contain thoughtful, precise language to avoid the risk that a court may find one or more provisions of the agreement unlawful and determine that it is necessary to sever it (or them).⁵⁵

Given the uncertainty of Gig workers' classification, arbitration agreements containing class action waivers are a viable tool for any Gig company in most areas of the country.⁵⁶ Gig companies do not want to be caught out in the rain, without the security of an enforceable arbitration agreement with a class action waiver, while the Gig Economy waits for employment classification laws to catch up. While waiting for any changes, it is recommended that Gig companies consult with legal counsel to ensure enforceable agreements are in place to maintain the viability of their business models.

Endnotes

- 1 Steven Hill, *How Big is the Gig Economy?*, HUFFINGTON POST (Sept. 16, 2015), http://www.huffingtonpost.com/steven-hill/how-big-is-the-gig-econom_b_8147740.html.
- 2 See, e.g., CAL. LAB. CODE § 1194 (payment of overtime); CAL. LAB. CODE § 512 (entitlement to meal periods and rest breaks); CAL. LAB. CODE § 140 et. seq. (California Occupational Safety and Health).
- 3 See *infra* note 34.
- 4 O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097.
- 5 Scholars have called for a third classification, appropriately titled "the legal worker." See Seth D. Harris & Alan B. Kruger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, THE HAMILTON PROJECT (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf. Independent workers would be afforded some, although not all, of the rights afforded traditional employees. Independent workers would be able to collectively bargain (though would not be protected under the National Labor Relations Act), would be afforded civil rights protections, and have "employer" contributions for payroll taxes. However, because independent workers still have the flexibility to accept jobs from several gig platforms, they would not be eligible for benefits derived from hours worked (e.g., they would not be eligible for overtime pay or a minimum wage). While the independent worker classification is still a controversial idea, and at this time is simply being discussed in the academic world, we see settlement agreements like the one presented in the Uber case that are almost creating its own classification based on very similar concepts. To preserve

- its business model, Uber still classifies its drivers as independent contractors, but the terms of the settlement agreement give the drivers more rights, by prohibiting Uber from deactivating drivers from using the platform without a reason, setting up an appeals process for deactivated drivers through peer review and arbitration, and creating a drivers' association, which will be composed of drivers who will meet with Uber managers quarterly to discuss issues of concern to drivers.
- 6 Uber and Lyft offer platforms in which riders can connect with drivers for individual car rides. Handy provides a platform in which people can request housecleaning or handyman services. Taskrabbit allows users to engage "personal assistants," who will provide a variety of services, including running errands and assembling IKEA furniture. Fiverr is a marketplace in which Gig workers offer to complete a variety of services, from webpage design to copyrighting.
- 7 See, e.g., POSTMATES, <https://postmates.com> (last visited Aug. 10, 2016).
- 8 See, e.g., WASHIO, <https://www.getwashio.com/> (last visited Aug. 10, 2016).
- 9 See, e.g., HWPIC, <http://hwpic.com/> (last visited Aug. 15, 2016).
- 10 Lauren Smiley, *What Strippers Can Teach Uber*, MEDIUM (Apr. 20, 2015), <https://medium.com/matter/what-strippers-can-teach-uber-1f5b15e5b427#.i114lhqky>.
- 11 Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEW RES. CTR. (May 19, 2016), <http://www.pewinternet.org/2016/05/19/the-new-digital-economy/>.
- 12 Ellen Huet, *How Uber And Lyft Are Trying To Kill Each Other*, FORBES TECH (May 30, 2014), <http://www.forbes.com/sites/ellenhuet/2014/05/30/how-uber-and-lyft-are-trying-to-kill-each-other/#12207a113ba8>; Scott Van Maldegiam, *How to Drive for Uber and Lyft at the Same Time*, THE RIDE SHARE GUY (Feb. 4, 2015), <http://therideshareguy.com/how-to-drive-for-uber-and-lyft-at-the-same-time/>.
- 13 Alicia B. Oliver, *Top Ten IP Concerns When Working With Independent Contractors*, ASS'N OF CORP. COUNS. (Jan. 16, 2015), <http://www.acc.com/legalresources/publications/topten/ip-concerns-with-independent-contractors.cfm>; but see 17 U.S.C. § 101. Under the United States Copyright Act of 1976, a "work for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. The law creates an exception to the general rule that the person who actually creates a work is the legally recognized author of that work. 17 U.S.C. § 101
- 14 S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989).
- 15 1C LARSON, THE LAW OF WORKMEN'S COMPENSATION § 43.42, at 8–20 (1986); see also 2 HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 3.01[2], at 3–4 (2d ed.1988).
- 16 See TIGTA REPORT NO. 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER

- DETERMINATION RULINGS 2, <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>.
- 17 *Id.*
 - 18 News Release, Wage and Hour Div., Labor Sec’y, *IRS Commissioner Sign Memorandum of Understanding to Improve Agencies’ Coordination on Employee Misclassification Compliance and Education* (Sept. 19, 2011); ADMINISTRATOR’S INTERPRETATION 2015-1, DEP’T OF LABOR, https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. Pursuant to the memorandum, the Department of Labor now refers wage and hour investigations involving IRS employment tax compliance issues to the IRS, further complicating gig platforms’ business models. In fact, as recently as July 2015, the Department of Labor issued an advisory opinion that the determination of employee status should be expanded to meet the FLSA’s ever-broad “suffer and permit to work” standard. That is, if a company “suffers or permits” an individual to work, there is an employment relationship, and independent contractor status is unobtainable.
 - 19 *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last updated July 7, 2016); Matthew Koch, *The Tax Risks of Misclassifying Employees*, NAT’L L. REV. (June 6, 2014), <http://www.natlawreview.com/article/tax-risks-misclassifying-employees>.
 - 20 Susan N. Houseman, *Who is an Employee? Determining Independent Contractor Status*, U.S. DEP’T OF LAB. (Aug. 1999), https://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm#19.
 - 21 *Id.*
 - 22 *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). The economic realities test places more focus on whether, in fact, the putative employee is in business for himself rather than being economically dependent on the principal. As in the common law test, the “primary factor” in this fact-specific inquiry is “the extent of the employer’s right to control the means and manner of the worker’s performance.” Other factors include: the kind of occupation, and whether the work usually is done with or without supervision; whether the employer furnishes the equipment used and the place of work; the method of payment; whether the employer pays social security taxes; and the manner in which the work relationship is terminated. *Id.*
 - 23 *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 484-86 (8th Cir. 2000).
 - 24 Houseman, *supra* note 21.
 - 25 Houseman, *supra* note 21.
 - 26 *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).
 - 27 *Id.*
 - 28 *Ayala v. Antelope Valley Newspapers, Inc.*, 173 Cal. Rptr. 3d 332, 336, 339 (Ct. App. 2014).
 - 29 *Id.* While courts consider a number of other factors as well, control is the flagstone of the courts’ analyses. *Id.* These factors include: whether the person performing services is engaged in an occupation or business distinct from that of the principal; whether or not the work is a part of the regular business of the principal or alleged employer; whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; the alleged employee’s investment in the equipment or materials required by his or her task or his or her employment of helpers; whether the service rendered requires a special skill; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the alleged employee’s opportunity for profit or loss depending on his or her managerial skill; the length of time for which the services are to be performed; the degree of permanence of the working relationship; and the method of payment, whether by time or by the job.
 - 30 John Paul Titlow, *Instacart Is the Latest Gig Economy Startup To Get Sued for Employment Practices*, FASTCOMPANY (Mar. 18, 2015), <http://www.fastcompany.com/3043996/instacart-is-the-latest-gig-economy-startup-to-get-sued-for-employment-practices>.
 - 31 *Iglesias v. Homejoy, Inc.*, No. 15-CV-01286-EMC, 2015 WL 5698741, at *1 (N.D. Cal. Sept. 29, 2015).
 - 32 Carmel Deamicis, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, RECODE (July 17, 2015), <http://www.recode.net/2015/7/17/11614814/cleaning-services-startup-homejoy-shuts-down-after-battling-worker>; *but see*, Christina Farr, *Homejoy at the Unicorn Glue Factory*, BACKCHANNEL (Oct. 26, 2015), <https://backchannel.com/why-homejoy-failed-bb0ab39d901a#.aalfbw457> (“In interviews with more than a half-dozen former employees who spoke with Backchannel for this story, a more complicated story emerges. The lawsuits were not the primary nor the proximate reason for the company’s demise, these people assert.”).
 - 33 On August 18, 2016, the judge rejected the \$100 million settlement. Kat Greene, *BREAKING: Calif. Judge Rejects Uber’s \$100M Labor Deal with Drivers*, LAW360 (Aug. 18, 2016), http://www.law360.com/employment/articles/830335?nl_pk=c818f535-dea8-4c93-9e94-c2cdf5231b1b&utm_source=newsletter&utm_medium=email&utm_campaign=employment. The judge justified his rejection because the deal did not clarify whether drivers should be classified as employees or independent contractors, and it provided for the release of a claim under the state’s Private Attorney General Act (“PAGA”) for just \$1 million, even though the plaintiffs’ attorneys had argued earlier in the suit such a claim would be worth \$1 billion. *Id.* Notably, Judge Chen would likely be amenable to the underlying agreement not addressing the status of the drivers, but the minimal amount of settlement allocated to the drivers’ PAGA claim was the “deal breaker.” *Id.*
 - 34 *Cotter v. Lyft, Inc.*, No. 13-CV-04065-VC, 2016 WL 1394236 (N.D. Cal. Apr. 7, 2016). This settlement has not been rejected.
 - 35 *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015).
 - 36 *Id.*
 - 37 *Id.*
 - 38 *Id.* at *17.
 - 39 *Id.*
 - 40 *See supra n. 34 & 35.* Based on the most recent decision in the Uber case rejecting the \$100 million settlement, it is not clear whether Gig companies will be able to continue to sidestep the classification question by settling.

- 41 Zenelaj v. Handybook, 82 F. Supp. 3d 968 (N.D. Cal. 2015); Singer v. Postmates, No. 4:15-cv-01284 (N.D. Cal. 2015); Otey v. CrowdFlower, Inc., No. 12-CV-05524-JST, 2014 WL 1477630, at *1 (N.D. Cal. Apr. 15, 2014).
- 42 Cobarruviaz v. Maplebear, Inc., No. 15-CV-00697-EMC, 2015 WL 6694112 (N.D. Cal. Nov. 3, 2015).
- 43 O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015).
- 44 *Id.*
- 45 *Id.* at *35, n.22 (“The Court does not find that there is any individual variation with respect to the “distinct occupation” portion of the first *Borello* secondary factor. The Court has already held that Uber is in the transportation business as a matter of law, and it is similarly beyond dispute that its drivers are in the transportation business as well.”).
- 46 *O'Connor*, No. C-13-3826 EMC; Alison Griswold, *Why it Matters that a Big, Class-Action Lawsuit against Uber Will Be Tried in Front of a Jury*, QUARTZ (Dec. 24, 2015), <http://qz.com/581172/why-it-matters-that-a-big-class-action-lawsuit-against-uber-will-be-tried-in-front-of-a-jury/>.
- 47 O'Connor v. Uber Techs., Inc., 150 F. Supp. 3d 1095 (N.D. Cal. 2015)
- 48 *Id.* at 1108.
- 49 *Id.* at 1106–07.
- 50 O'Connor v. Uber Techs., Inc., Nos. 13-3826, 14-5200, 15-262, 2015 WL 9460292, at *4 (Dec. 23, 2015).
- 51 Razak v. Uber Techs., Inc., No. CV 16-573, 2016 WL 3960556, at *3 (E.D. Pa. July 21, 2016) (citing O'Connor v. Uber Techs., Inc., No. 13-CV-03826-EMC, 2015 WL 9460292, at *4 (N.D. Cal. Dec. 23, 2015)) (“Furthermore, Judge Chen’s Rule 23(d) Order states that “[t]he Court does not rule on the enforceability of the terms of the December 2015 Agreement, nor will it prevent Uber from sending out any arbitration agreements in the future (except as to the O’Connor certified class).”).
- 52 Joel Rosenblat, *How Gig Economy Is Using Private Arbitration to Win on Labor Classification*, INS. J. (June 6, 2016), <http://www.insurancejournal.com/news/national/2016/06/06/410983.htm>.
- 53 Loewen v. Lyft, Inc., 129 F. Supp. 3d 945, 966-67 (N.D. Cal. 2015), *appeal dismissed* (Jan. 27, 2016).
- 54 In fact, only two circuit courts have found arbitration agreements with class action waivers unenforceable. *See* Lewis v. Epic Sys. Corp., No. 15-2997, 2016 WL 3029464, at *1 (7th Cir. May 26, 2016). Importantly, this decision only currently applies to Indiana, Illinois, and Wisconsin. *See also* Morris v. Ernst & Young, LLP, No. 13-16599, 2016 WL 4433080, at *1 (9th Cir. Aug. 22, 2016). For the limited holding in the Ninth Circuit case, *see infra* note 56.
- 55 The Ninth Circuit has recently held that arbitration agreements that do not allow employees to bring in any forum a class action regarding wages, hours, and terms and conditions of employment are unenforceable, as they violate the National Labor Relations Act. Notably, the Ninth Circuit had concerns regarding Ernst & Young’s waiver language (*supra* note 55), specifically prohibiting claims on a class basis in what the agreement called “separate proceedings.” The term “separate proceedings” was not defined in the agreement, making the agreement unenforceable. However, the court also held that if employers allow employees to bring claims only in arbitration, they cannot at the same time prohibit employees from bringing collective actions. The court did suggest, though, that class action waivers nevertheless may be permissible when employees are not required to sign such waivers as a condition of employment. Further, in California state courts, arbitration agreements with class action waivers are still enforceable, provided that employees do not waive their rights to bring actions under the Private Attorney General Act (“PAGA”) in state court. *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 141 (Cal. 2014). The specific facts and language that are included in an employer’s arbitration agreement will dictate whether the *Ernst & Young* decision will have a widespread impact on class action waivers in arbitration agreements.
- 56 *See* O’Connor v. Uber Techs., Inc., 150 F. Supp. 3d 1095, 1106–07 (N.D. Cal. 2015).