HOLDING A SQUARE PEG AND CHOOSING BETWEEN TWO ROUND HOLES: THE CHALLENGE WORKERS' COMPENSATION LAW FACES WITH UBER AND THE SHARING ECONOMY

"As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes." – District Judge Vince Chhabria, describing the difficulty a jury will face in discerning whether drivers for the service Lyft are employees or independent contractors.[1]

I. INTRODUCTION

What happens when a worker is neither an employee nor an independent contractor? This question has long plagued even the country's highest court,[2] and is now exacerbated by the burgeoning sharing economy.[3] The sharing economy includes companies such as Uber, Lyft, Instacart, TaskRabbit, Postmates, and Caviar, all of which pair workers (which they classify as independent contractors) and pair them with consumers anxious to take advantage of their affordable and convenient services.[4] In the event these individuals get hurt on the job, the

[1] *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

[2] *See NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (grappling with the question of whether a union of newsboys were employees or independent contractors under the National Labor Relations Act).

[3] The "sharing economy" is also referred to as the "peer-to-peer marketplace" and "online gig economy" and this essay will use these terms interchangeably. Automobile transportation applications (apps) like Uber and Lyft are often referred to as "driver-on-demand" services. Both Uber and Lyft are essentially taxi services, but the drivers are private individuals using their own vehicles who are paired with customers via a smartphone app. The unifying feature in these sharing economy business models is that they rely on freelance labor and pair individual service-providers with consumers via online apps or websites. *See* Lauren Weber and Rachel Emma Silverman, *On-Demand Workers: 'We Are Not Robots'*, WALL STREET JOURNAL (Jan. 27, 2015), http://www.wsj.com/articles/on-demand-workers-we-are-not-robots-1422406524?KEYWORDS=on+demand+job (explaining companies like Uber and others that utilize the sharing economy "rely on freelance labor" and "describe their workers as micro-entrepreneurs at the vanguard of a new flexible future of work in which people only do the jobs they like, when they like").

[4] Uber's recent valuation at $50-billion demonstrates just how readily consumers have adopted the peer-to-peer marketplace. Douglas MacMillan and Telis Demos, *Uber Valued at More Than $50 Billion*, WALL STREET JOURNAL (July 31, 2015, 8:50 p.m.), http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457. There are 17 sharing economy businesses worth more than $1-billion. James B. Shrimp, *Uber and the Heightened Scrutiny of Independent Contractor Status*, THE LEGAL

classification of sharing economy workers as independent contractors deprives the workers of workers' compensation coverage.[5] If these workers were classified as employees, their lost wages and medical expenses would be covered by their employer.[6]

The problem with sharing economy workers is that they embody characteristics of both independent contractors and employees.[7] It is perhaps easier to describe what sharing economy workers seem *not* to be than what they are. They do not seem to be employees, as they have incredible flexibility in terms of the hours they work (indeed, they can work as little or much and as infrequently or regularly as they desire) and they have no supervisor exercising any traditional type of control.[8] But neither do they seem like independent contractors, who typically have a special skill, serve multiple employers, perform only a certain task for a defined period, and have substantial leeway with how they perform their work.[9] The question, then, is whether state courts should accept these workers as independent contractors, effectively prohibiting them from receiving workers compensation and other benefits.

This essay will explore the hurdles sharing economy workers face in terms of receiving workers' compensation benefits and the present legal battles where this issue arises, largely

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INTELLIGENCER (Sept. 30, 2015), http://www.thelegalintelligencer.com/id=1202738521960/Uber-and-the-Heightened-Scrutiny-of-Independent-Contractor-Status?slreturn=20160014234905.

[5] There are a bevy of legal issues that arise from the distinction between independent contractor and employee, of which the receipt of workers' compensation is only one. Other benefits of being an employee as opposed to an independent contractor include expense reimbursement, unemployment insurance, discrimination protection and organization for collective bargaining. However, this essay will focus on workers' compensation.

[6] Ellen Huet, *What Happens to Uber Drivers and Other Sharing Economy Workers Injured on the Job?*, FORBES (Jan. 6, 2015, 1:15 p.m.), http://www.forbes.com/sites/ellenhuet/2015/01/06/workers-compensation-uber-drivers-sharing-economy/.

[7] *Cotter*, 60 F. Supp. 3d at 1069.

[8] *Id.*

[9] *Id.*

focusing on the heavyweight sharing economy entity, Uber Technologies, Inc. This essay will also explore proposals for a new classification in addition to independent contractor and employee that would better reflect reality for sharing economy workers.

II. THE INDEPENDENT CONTRACTOR–EMPLOYEE DICHOTOMY AND ITS IMPACT

As explained above, workers have great incentive to lobby and litigate their classification as independent contractors as opposed to the more favorable position of employees. Workers' compensation is just one of the many benefits. When the Supreme Court addressed the question of whether newspaper deliverers were employees or independent contractors in 1944, it did so as a result of the newspaper sellers' union seeking a right to bargain with four newspaper publishers that did not recognize their union.[10] Workers' compensation—which is based on state law, as opposed to the federal law at issue in *NLRB v. Hearst Publications, Inc.*—is an ancillary benefit to employee status. While state law will determine who is an employee for purposes of workers' compensation, the Supreme Court's opinion is instructive in that it demonstrates the difficulty of this question and opts not to create any bright-line test.

The newspaper sellers petitioning the Supreme Court in *Hearst Publications, Inc.* had much in common with today's sharing economy workers: "They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily."[11] Also like todays' sharing economy workers, the newsboys' compensation was fixed by the publishers and "minimum standards of diligence and good conduct" were enforced, just as Uber

[10] *Hearst Publications, Inc.*, 322 U.S. at 113.

[11] *Id.* at 116. However, this description was for only one element of the diverse group of "newsboys" petitioning the Court in *Hearst*. The union also included individuals the Court referred to as "vendors," in a reflection of the vendors' more secure and traditional style of employment.

fixes the pay of its drivers and monitors user-based ratings to ensure quality.[12] Unlike todays' sharing economy workers, the newsboys were scrutinized to ensure they worked certain prescribed hours.[13] The Supreme Court explained that there is no "simple, uniform and easily applicable test which the courts have used in dealing with" the independent contractor-employee dichotomy.[14] In ultimately holding that the newsboys were employees, the Supreme Court deferred to the National Labor Relation Board's interpretation as the administrative agency tasked with enforcing the law.[15] The Supreme Court essentially side-stepped the crux of the question altogether.[16]

Over 60 years later, the Ninth Circuit of the United States Court of Appeals still struggled with the same question, again interpreting the National Labor Relations Act. In *NLRB v. Friendly Cab Co., Inc.*, the Ninth Circuit deferred to the NLRB like the Supreme Court did in *Hearst Publications, Inc.*, but the Ninth Circuit delved into a deeper analysis of the competing facts, some of which indicated the workers were employees, others indicated the workers were

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[12] *Id.* at 117-19.

[13] *Id.* This distinction is not of small significance. Workers' compensation pays for medical bills and lost wages. If an individual working in today's sharing economy worked wildly inconsistent hours before getting injured, calculating that individual's lost wages would impose a very difficult practical problem on workers' compensation judges. *See* Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, BROOKINGS INSTITUTION: THE HAMILTON PROJECT, 13 (December 2015), http://www.hamiltonproject.org/assets/files/modernizing_ labor_laws_for_twenty_first_century_work_krueger_harris.pdf (explaining the immeasurability of sharing economy workers' hours).

[14] *Hearst Publications, Inc.*, 322 U.S at 120.

[15] *Hearst Publications, Inc.*, 322 U.S at 130.

[16] Interestingly, because the question of whether an individual is an employee or independent contractor is so important, the Taft Administration attempted to reverse the Supreme Court's decision in *Hearst Publications, Inc.* with the Taft-Hartley Act. Justin Fox, *Uber and the Not-Quite-Independent Contractor*, BLOOMBERG VIEW (June 23, 2015, 11:59 a.m.), http://www.bloombergview.com/articles/2015-06-23/uber-drivers-are-neither-employees-nor-contractors.

independent contractors.[17] In *Friendly Cab Co.*, there was a "strong inference" that the taxi drivers were independent contractors because they paid a flat fee to *Friendly Cab Co.* and kept all of their fares for themselves.[18] Other factors indicating the taxi drivers were independent contractors included that there were no set hours or minimum hours that they had to work, no benefits were provided to the drivers, no taxes were withheld, and the taxicab lease agreements identified the drivers as independent contractors.[19]

However, the Ninth Circuit still found that these taxi drivers were employees, not independent contractors. The biggest factor in the Ninth Circuit's analysis was control. While the taxi cab company did not control the workers on a day-to-day basis, the lease agreement its drivers signed restricted its drivers from operating independent businesses or developing entrepreneurial opportunities while driving for their employer.[20] Significantly, the Ninth Circuit had previously found taxi drivers to be independent contractors in *SIDA of Hawaii, Inc. v. NLRB*,[21] but the drivers in that instance were permitted to operate their vehicles for any other purpose or business they so desired.[22] The distinction between these two Ninth Circuit cases would seemingly at first glance raise concerns for Uber drivers, who appear to be more akin to the *SIDA* taxi drivers. The Ninth Circuit's additional evidence of employer control of the drivers in *Friendly Cab Co., Inc.* included guidelines prohibiting certain conduct while driving and a

[17] 512 F.3d 1090 (9th Cir. 2008).

[18] *Id.* at 1097. Note that this is unlike Uber drivers, who are paid a percentage of their fares.

[19] *Id.* at 1097-98. Note that Uber drivers similarly have flexible hours and have agreements identifying them as independent contractors.

[20] *Id.* at 1098.

[21] 512 F.2d 354 (9th Cir. 1975)

[22] *Friendly Cab Co., Inc.*, 512 F.3d at 1098.

"strict disciplinary regime."[23] Further, while *SIDA* determined the drivers to be independent contractors in part because of the drivers' unlimited opportunities to operate their vehicles for other purposes, it was important to the Ninth Circuit that the *SIDA* drivers could create and capitalize on the goodwill they created with customers[24]—Uber drivers do not have that luxury as riders cannot request a particular driver. The takeaway from the Ninth Circuit's opposing holdings in *SIDA* and *Friendly Cab Co., Inc.* is that the question of a workers' status as an independent contractor or employee is an intensely fact-specific question.

While *Hearst Publications, Inc.* and *Friendly Cab Co., Inc.* do not directly deal with the impact of the independent contractor-employee decision in workers' compensation law, these cases show that the question is rife with complexities and their rulings make it more likely that the workers involved would be deemed employees for workers' compensation purposes. However, there has been little to no change from policymakers to add an additional classification or provide clarity. The growing number of sharing economy workers may finally provide an impetus for change. As discussed in Section III, companies like Uber face an influx of litigation at both the state and federal levels in which workers are asking courts to answer the incredibly difficult question that even the Supreme Court opted to effectively substantively avoid. State courts are then left to determine a question that has no correct answer, as sharing economy workers do not fit into the current framework.

Many states, courts answer the independent contractor-employee question by looking at the control exercised by the alleged employee, as the Ninth Circuit did in *Friendly Cab Co.*.[25]

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[23] *Id.* at 1098, 1100.

[24] *Id.* at 1098-99 (*citing SIDA*, 512 F.2d at 357-58).

[25] *See Cotter*, 60 F.Supp. 3d at 1075-76 (explaining the focus of California's test is on the company's right to control).

This is problematic for the sharing economy worker. Sharing economy workers set their own hours; they have no dictated schedule.[26] One employment lawyer summarized the situation sharing economy workers unwittingly get themselves into: "What they're not understanding is that this lack of control—where they can have a two-hour lunch if they want, or no lunch at all—that freedom comes at the price of if they're in an accident, the company doesn't have to pay."[27]

Into this dichotomy, judges and juries must somehow categorize workers whose employment situation can best described thusly:

> Independent workers operate in a triangular relationship: they provide services to customers identified with the help of intermediaries. The intermediaries create a communications channel, typically an "app," that customers use to identify themselves as needing a service—for example, a car ride, landscaping services, or food delivery. … The intermediaries' apps allow independent workers to select which customers they would like to serve. The intermediary does not assign the customer to the independent worker; rather, the independent worker chooses or declines to serve the customer (sometimes within broadly defined limits). However, the intermediary may set certain threshold requirements for independent workers who are eligible to use its app, such as criminal background checks. The intermediary may also set the price (or at least an upper bound on the price) for the service provided by independent workers through its app. But the intermediary exercises no further control over how and whether a particular independent worker will serve a particular customer. The intermediary is typically rewarded for its services with a predetermined percentage of the fee paid by the customer to the independent worker.[28]

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[26] Huet, *supra* note 6; Harris and Krueger, *supra* note 13 at 6-8.

[27] Huet, *supra* note 6 (quoting Nick Woodfield, an attorney with the Employment Law Group).

[28] Harris and Krueger, *supra* note 13 at 9. Note that Harris and Krueger have created a new classification for sharing economy workers that they call the "independent worker," which will be discussed more in depth in Section IV.

This mixture of control, loose guidelines, and total freedom in the execution of fairly menial—usually not skilled—tasks creates significant problems for modern courts. The question of employment status was always one with which courts struggled and the sharing economy has made it more difficult.

As a result of being deemed independent contractors by their bosses (if you can even say that they have a "boss"), sharing economy workers have limited to no remedy for injuries on the job. Uber and Lyft drivers are at risk for car accidents and assaults. Instacart shoppers may herniate a disc or tear a muscle carrying heavy grocery loads.[29] Sharing economy workers face a litany of on-the-job dangers, like any other employee, but without the same safeguards.

III. On-Going Legal Battles in the Sharing Economy

Not surprisingly, Uber and Lyft are already immersed in litigation over misclassification of employees. One of those legal battles is in federal court in the Northern District of California, where Judge Chhabria expressed particular frustration with trying to fit sharing economy workers—specifically drivers for Lyft—into either the category of employees or independent contractors.[30] *Cotter* analyzed the independent contractor-employee question by looking at the rationale behind California law for providing certain protections, such as workers' compensation and minimum wage, to employees but not to independent contractors. *Cotter* explained that independent contractors are not given certain protections because they "generally are in a far more advantageous position."[31] Independent contractors are in a more advantageous position

[29] Huet, *supra* note 6.

[30] *Cotter*, 60 F. Supp. At 1081.

[31] *Id.* at 1074

because they can sever their relationship easily, they have contracts with more than one company, and are therefore not dependent on a single company for all of their compensation.[32]

Cotter addressed the question of what actually constitutes control, as that is so often the test for employee status, yet it can take many different forms. "The right to terminate at will, without cause, is '[s]trong evidence in support of an employment relationship."[33] But beyond control, additional factors can indicate an employment relationship, such as a low-level of skill required, the method of payment, whether or not the parties believe they are forming an employer-employee relationship, and opportunity for profit or loss.[34] As *Cotter* was procedurally before the Norther District of California on cross-motions for summary judgment, the Court ultimately denied both motions reasonable minds could differ based on the facts presented of drivers' relationship with Lyft. *Cotter* specifically rejected Lyft's argument that the drivers "perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect."[35] While not making a factual determination about the level of control Lyft exercises over its drivers, *Cotter* observed that despite the drivers' flexibility, Lyft instructed its drivers on certain rules for driving, directed them as to what route to take, reserved the right to penalize them and retained the ability to terminate at will.[36] Significantly, *Cotter* was applying California law, not state law, meaning its opinion would be particularly persuasive in future California state court misclassification suits in

[32] *Id.*

[33] *Id.* at 1076 (citations omitted).

[34] *Id.*

[35] *Id.* at 1078.

[36] *Id.* at 1079.

which one or more drivers who are injured seek workers' compensation benefits from their sharing economy employer.

Alaska is the first state to take a definitive stand against Uber's classification of its drivers as independent contractors. In September 2015, Uber settled with the Alaskan Department of Labor and Workforce Development's Workers' Compensation Division for nearly $78,000 in unpaid guaranty funds as a result of Uber's misclassification.[37] As a result of the settlement, Uber is not operating in Alaska until it decides to deem its drivers to be employees as opposed to independent contractors.[38] The Alaskan Department of Labor and Workforce Development's statement on the Uber settlement succinctly stated the issue with Uber's current business model, at least how they viewed it:

> Misclassifying employees allows companies like Uber to avoid paying unemployment insurance, taxes and workers' compensation premiums. The Uber settlement is part of a broader state and federal effort to reduce worker misclassification fraud. Worker misclassification is the practice of mislabeling employees as independent contractors, or inaccurately classifying employees in lower paying job categories, in order to avoid paying state and federal taxes.[39]
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> …
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> The Uber settlement is part of a growing trend in which states and the federal government are working to stop misclassification, which deprives workers of health and labor rights protections. Worker misclassification also defrauds the state and federal government of tax revenue, costing taxpayers billions of dollars while leaving workers vulnerable to on-the-job injuries.

If Alaska's approach were adopted by other states, the sharing economy business model would likely be in serious financial trouble and forced to reevaluate its worker classifications.

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[37] "Press Release: Uber Agrees to Stop Worker Misclassification in Alaska," State of Alaska Dep't of Labor and Workforce Development (Sept. 3, 2015), http://labor.alaska.gov/news/2015/news15-38.pdf.

[38] *Id.*

[39] *Id.*

However, until more states find that sharing economy workers are employees and not independent contractors, companies like Uber can continue their business model with minimal economic impact.[40] Until more states follow Alaska's lead, Uber appears content to take the issue state by state. "[B]ecause there is pretty much zero chance that the current Congress will address this issue, advances are more likely to come state by state. That's good in the sense that it will allow room for experimentation and comparison—but it may prove maddening to companies operating in multiple states."[41]

IV. CREATING A NEW FRAMEWORK IN WORKERS' COMPENSATION FOR EVOLVING EMPLOYMENT RELATIONSHIPS

The need for a new classification to fill the space between employee and independent contractor has been recognized since at least 1965 in a paper when the concept of a third category of "dependent contractor" was proposed in a Canadian law review article, though it reviewed American case law such as *Hearst Publications*.[42] Canada and Germany have in fact recognized a dependent contractor status for instances in which an individual who would otherwise be an independent contractor performs all his/her work for one employer.[43] In *The*

[40] Alaska is the 48th-most populated state. As of the writing of this essay, Uber is not operating in Alaska due to the September 3, 2015 settlement. Uber has essentially forfeited Alaskan business over the worker misclassification issue. If, for instance, California's state government adopted the position of Alaska, Uber's business would be seriously impaired and a change in its business model would likely be necessary, as opposed to merely refusing to operate in that state. Not only is Uber's headquarters in San Francisco, California, but California, the nation's most populous state, has an estimated 160,000 Uber drivers, which would surely lead to a far more expensive settlement and detrimental loss of business. *See* Katy Steinmetz, *California Court Gets One Step Closer to Deciding Uber's Fate*, TIME (Aug. 6, 2015), http://time.com/3988272/uber-class-action-lawsuit/ (explaining the United States District Court of Norther California's decision in an analogous FedEx workers misclassification suit and its potential impact on Uber's pending class action case in that federal court).

[41] Fox, *supra* note 16.

[42] H.W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 Univ. of Toronto Law J. 89 (1965).

[43] Harris and Krueger, *supra* note 13 at 7.

Dependent Contractor: A Study of the Legal Problems of Countervailing Power, H.W. Arthurs specifically mentions self-employed truck drivers, peddlers, and taxicab operators as workers who he believes fall squarely within his proposed category of dependent contractors.[44] Dependent contractors are often individuals who would seem to clearly be employees but for the fact that the employer has "sought to transform employees into independent contractors by the magic of contractual language."[45] The idea of the dependent contractor category is to provide some benefits to workers, especially workers' compensation, without raising the cost to employers as severely.[46]

In many ways, not much has changed in American law since Arthurs introduced the concept of dependent contractors in 1965; businesses are surely still attempting to transform employees (or potential employees) into independent contractors though contractual language. However, for some companies, identifying their workers as employees has become a trade-off they are willing to make.[47] While the sharing economy business model allows companies to avoid paying workers' compensation benefits, unemployment benefits, and some taxes, it requires them to relinquish substantial control, thereby making it more difficult to run the business.[48] For instance, the company Luxe—an on-demand valet service that will park your car

[44] Arthurs, *supra* note 42 at 89.

[45] *Id.* at 96.

[46] Lydia DePillis, *No, driver lawsuits won't destroy the 'Uber for X' business model*, THE WASHINGTON POST (March 13, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/13/no-driver-lawsuits-wont-destroy-the-uber-for-x-business-model/.

[47] Katy Steinmetz, *Why Startups Are Making the Expensive Switch to Traditional Employment*, TIME (Aug. 5, 2015), http://time.com/3984957/independent-contractor-versus-employee-startups/.

[48] *Id.*

for you—had difficulty finding workers for their busiest nights, Friday and Saturday.[49] Luxe opted to take on the extra costs associated with having employees in exchange for being able to dictate more specific duties to their employees. However, this market correction cannot be expected to fill the gap for all disenfranchised workers. In summarizing the independent contractor-employee choice for Uber, one commentator observed "both routes have downsides for the companies": on one hand, giving up control and labeling workers as independent contractors "makes it difficult to maintain the same level of service," while "maintaining control, through making drivers into employees, comes with the cost of workers compensation" and other benefits and taxes.[50]

A proposal for a new "independent worker" status, similar to the "dependent contractor," has attempted to modernize a third worker classification so sharing economy businesses like Luxe and Uber do not have to make a choice between two ill-fitting classifications. Seth Harris and Alan Krueger of the Brookings Institute reject the notion that the market, or even the courts as currently constrained by statute, can adequately address the employer classification question. "[C]ourts do not have the power, on their own, to ensure that independent workers receive their full and fair share of the social compact—that is, the full complement of protections and benefits that must be established by statute."[51] Harris and Krueger lay out an elaborate argument for what benefits should be transferred to the independent worker and how it would be done. As for workers' compensation, Harris and Krueger suggest that the existing tort system is adequate for many workers' injuries in the sharing economy—although this is a contention to which many

[49] *Id.*

[50] DePillis, *supra* note 46.

[51] Harris and Krueger, *supra* note 13, at 15.

Uber drivers would disagree.[52] Harris and Krueger acknowledge that this may not be sufficient, and therefore propose "that [businesses] be permitted to provide expansive workers' compensation insurance policies to the independent workers with which they work without transforming these relationships into employment. In exchange for this no-fault insurance coverage, [businesses] would receive limited liability and protection from tort suits."[53] Their proposal goes on to allow variance between some states, with some states allowing this optional workers' compensation to operate privately, or requiring that there be more protections for independent workers.[54] The pitfall of such an option seems immediately apparent: why would a business opt to provide this coverage if they are unlikely to be found negligent and thus liable in a typical civil suit? Harris and Krueger acknowledge that the opt-in system "create adverse selection and moral hazard problems" but believe that experience would lead to companies striking the appropriate balance.[55] One can easily imagine that sharing economy workers—especially Uber drivers constantly at risk of a motor vehicle accident—would not find this plan adequate, at least in regard to workers' compensation insurance.

California enacted a stopgap law that does not add an additional worker classification, but rather specifically targeted the driver-on-demand companies and required them to provide primary insurance coverage for drivers while there is an Uber/Lyft passenger in the drivers' vehicle.[56] This measure, while an improvement on leaving their drivers to their own devices,

[52] *Id.* at 19; Huet, *supra* note 6.

[53] Harris and Krueger, *supra* note 13, at 19.

[54] *Id.*

[55] *Id.*

[56] Stephanie Ross, *Uber Drives Insurance Industry to Innovate*, WORKERS' COMPENSATION INSTITUTE (Oct. 12, 2015), http://www.wci360.com/news/article/uber-drives-insurance-industry-to-innovate.

falls far short of the benefits these drivers would receive from workers' compensation if they were simply classified as employees or a similar new classification. California's law does not protect drivers when there is no passenger in the vehicle but the driver is still technically working in an effort to pick-up a passenger.[57] The law would also not cover lost wages as workers' compensation would. Further, there are a myriad of ways in which a driver can be injured other than in a car accident.[58]

The executive director of the company Peer, which is based on a sharing economy business model, thinks work and benefits will eventually separate, as did pensions.[59] If that prediction is right, perhaps this employment classification question that has plagued courts for decades will fade away. If not, however, serious consideration should be given by state legislatures to the idea that workers' compensation law must evolve to provide benefits to worthy individuals, who are currently being deprived of such benefits solely on the basis of a crafty business model.

V. CONCLUSION

In response to the Forbes article on misclassification of employees, a Lyft spokeswoman said, "[T]he nature of Lyft's relationship with drivers is very different than the typical employee relationship in which an employer would provide workers' comp insurance."[60] This spokeswoman is of course exactly correct. However, what she neglects to mention is that Lyft

[57] *Id.*

[58] *See* Huet, *supra* note 6 (detailing the story of an Uber driver who was assaulted by a passenger).

[59] Huet, *supra* note 6; *see also* Arun Sundararajan, *A safety net fit for the sharing economy*, FINANCIAL TIMES (June 22, 2015, 6:07 p.m.), http://www.ft.com/cms/s/0/b1d854de-169f-11e5-b07f-00144feabdc0.html#axzz3xI8kmxVO (arguing that "market-based solutions can work" to provide insurance to workers, much as private pensions are now standard).

[60] Huet, *supra* note 6.

and other sharing economy businesses also have a relationship with their workers that is very different from the typical independent contractor relationship. The advent of new technologies[61] begot new business models that introduced a new wrinkle to an old legal issue. Now that sharing economy businesses are nearly ubiquitous (at least in urban areas), it may be time for policymakers to undertake the arduous task of defining a new category of workers to better reflect the reality of modern employment relationships, and hopefully extend much-needed benefits to hundreds of thousands of workers who have no proper classification in the current dichotomy. If legislation is not enacted, courts will be forced to adjudicate sharing economy business models on a case-by-case basis, perhaps creating inconsistent results between states.[62] It is conceivable that a policy could be crafted to extend workers' compensation to sharing economy workers in an acknowledgement that thousands of these workers treat driving for Uber or picking up groceries for Instacart as their full time job and are at risk of injury, like any other employee. Until such a change is made, workers' compensation judges and state appellate courts are left trying to fit a square peg into two round holes.[63]

[61] While technology in the form of apps have expanded the sharing economy through companies like Uber, Lyft, Instacart, and Postmates and thereby grown the complex independent contractor versus employee question, technology may also soon eradicate this problem, at least for drivers-on-demand. Uber is ferociously working toward a self-driving car, the successful implementation of which could erase the need for human drivers altogether. Jillian D'Onfro, *Travis Kalanick says Uber needs self-driving cars to avoid ending up like the taxi industry*, BUSINESS INSIDER (Oct. 21, 2015, 12:48 a.m.), http://www.businessinsider.com/uber-ceo-travis-kalanick-on-self-driving-cars-2015-10.

[62] Ross, *supra* note 56.

[63] *Cotter*, 60 F. Supp. 3d at 1081.