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EASY AS ABC: WHY THE ABC TEST SHOULD BE ADOPTED AS THE SOLE TEST OF EMPLOYEE-INDEPENDENT CONTRACTOR STATUS

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INTRODUCTION

Whether or not a worker is classified as an employee is one of the most contentious and frequently litigated questions in labor and employment law.[1] This is partially because of the incredibly high stakes of the determination.[2] As opposed to independent contractors, employees are entitled to various statutory benefits and protections including antidiscrimination laws, access to unemployment insurance and workers' compensation funds, family and medical leave protections, and wage and hour protections.[3] Furthermore, employees, but not independent contractors, have the right to unionize and engage in other concerted protective activity.[4] It is easy to see why workers would want to be covered by these protections, and why business organizations are equally

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1 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944); William B. Gould IV, Dynamex *is Dynamite, But* Epic Systems *Is Its Foil*—Chamber of Commerce*: The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 989 (2018) ("Disputes about whether individual workers are employees or independent contractors have emerged with increasing frequency as the twenty-first century has unfolded." (footnote omitted)).

2 Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 4 (Cal. 2018) ("[W]hether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally." (footnote omitted)).

3 Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 346–47 (2016).

4 National Labor Relations Act, 29 U.S.C. §§ 152(3), 157 (2018) (granting employees the right to self-organize and join a labor organization, while defining employee so as not to include "any individual having the status of an independent contractor").

motivated to avoid the costs that come along with actually employing people.[5]

Beyond the stakes for each side in this determination, another reason why this is such a difficult question is the wide variety of tests proposed to answer it.[6] Generally speaking, there are three main categories of tests which courts and agencies apply with their own variations: (1) the common law agency—or right to control—test; (2) the economic reality test; and (3) the ABC test.[7] Different courts and agencies make use of different tests, and the tests themselves differ in the factors to be considered and the weight given to each factor, leading to still greater confusion about who is and is not an employee.[8]

There have been a number of recent developments regarding worker classification, some leading to results in direct conflict with each other. In 2018, California became the largest state, by population, to adopt the ABC test for wage and hour purposes in the case of *Dynamex Operations West, Inc. v. Superior Court*.[9] More recently, in September of 2019, California enacted Assembly Bill No. 5 (A.B. 5) which codifies and expands the holding of *Dynamex*.[10] Due to California's size, and its status as the home of Silicon Valley and so-called "gig-economy" companies, this change in law has caused a great deal of discussion and concern about its potential impacts on the nation's economy,[11] especially among California practitioners.[12]

Conversely, on April 29, 2019—in between the *Dynamex* decision and A.B. 5's enactment—the United States Department of Labor (DOL) published an Opinion Letter[13] addressed to a "virtual marketplace

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5 Pinsof, *supra* note 3, at 351–52.

6 *Id.* at 349–50.

7 *See* Vincent Cheng, *A Jigsaw of Worker Classifications*, 54 TRIAL 20, 21–23 (2018).

8 Pinsof, *supra* note 3, at 350.

9 Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 7 (Cal. 2018); *see Population Estimates, July 1, 2019, (V2019)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/geo/chart/US/PST045219 [https://perma.cc/C3JH-8M3A]; *see also infra* Section I.C.2.c.

10 Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

11 *See, e.g.*, Jon Steingart, *Calif. Supreme Court Transforms Test for Who Is an Employee*, BLOOMBERG L. (Apr. 30, 2018, 1:43 PM), https://news.bloomberglaw.com/daily-labor-report/calif-supreme-court-transforms-test-for-who-is-an-employee [https://perma.cc/9YWK-ST2U] ("Even though this is a state law decision, it will affect a large number of workers." (quoting Michael Rubin)).

12 *See* Tamara M. Kurtzman, *Deconstructing* Dynamex, 41 L.A. LAW. 28, 28 (2018) ("[T]he stakes have never been higher for employers and workers alike regarding the distinction between independent contractors and employees."); Teresa A. McQueen, Dynamex *Is Not "Armageddon" . . . Even Though It May Feel Like It!*, 60 ORANGE COUNTY LAW. 51 (2018).

13 For a discussion of DOL Opinion Letters see *infra* notes 86–88 and accompanying text.

company" (VMC).[14] In the letter, the DOL reaffirmed its commitment to the use of a six-factor economic realities test to determine whether an individual should be properly classified as an employee or independent contractor.[15] A conflict exists then between California's adoption of the ABC test, DOL's use of the economic reality test, and the continued use by certain federal agencies of the common law right to control test.[16] This Note will examine the conflict between these three competing tests for employee classification in an attempt to determine which of the three most common tests should be more broadly adopted going forward.

Part I of this Note will provide a background on the law of employee–independent contractor classification. Part I will begin with an introduction to the common law agency test, as both the economic reality and ABC test have their roots in the common law agency test.[17] Part II will then examine the economic reality test that the DOL applies to worker classification in disputes under the Fair Labor Standards Act (FLSA).[18] After discussing the economic reality test, this Note will turn to California's adoption of the ABC test, first in the *Dynamex* decision, and then with the passage of A.B. 5. Part II will then argue that because of the negative consequences of employee misclassification, and the confusion caused by the use of various multi-factor tests to classify workers, a single test should be used for employee-independent contractor determinations. This Note will finally propose that if one test is to be adopted, that test should be the ABC test because of its presumption of employee status, consideration of fewer factors, and superior framing of the core considerations in employee independent contractor classification.

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14 U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2019-6 (Apr. 29, 2019) [hereinafter DOL Opinion Letter], *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf [https://perma.cc/QK6V-F56A]. A VMC is a company that provides an online platform for service providers to connect with consumers in need of their services. They are often associated with the "sharing" or "gig" economy. *Id.* at 1. Uber and Lyft are two frequently invoked examples of virtual—or online—marketplaces. *See* Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, 37 COMP. LAB. L. & POL'Y J. 653, 672–75 (2016) (describing Uber and Lyft as the "[p]aradigm of [w]ork-on-[d]emand" apps). *See also id.* app. at 688 (providing a table of popular "[o]n-[d]emand/[g]ig [e]conomy" platforms and describing Freelancer explicitly as a "[v]irtual marketplace").

15 *See* DOL Opinion Letter, *supra* note 14.

16 See *infra* Section I.A.2 for a discussion of current use of the common law agency test.

17 John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 9 (2018).

18 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2018); *see* DOL Opinion Letter, *supra* note 14.

I. BACKGROUND

A. *Common Law Agency Test*

1. Development and Characteristics

Any discussion of employee–independent contractor classification schemes in the United States must begin with the common law agency test. Also known as the right to control test, the common law agency test was the first of the three employee classification tests to be established.[19] Initially, the question of whether or not a worker was an employee was almost only relevant in cases involving an employer's liability to third parties for injuries caused by those they employed.[20] In fact, nearly all recorded cases from before 1880 that dealt with issues of worker classification were tort cases.[21] The Restatement (First) of Agency,[22] which is considered the first significant and authoritative statement on worker status, distinguished servants and independent contractors solely for tort liability purposes.[23]

When facing the question of whether someone should be held liable for the actions of a worker, judges in the nineteenth and early twentieth centuries looked to the doctrine of respondeat superior, otherwise known as the master-servant rule, for guidance.[24] Under the master-servant rule, the master is held liable for the tortious action of the servant because it is presumed that the master controls the actions of the servant.[25] Accordingly, judges looked to the extent that the hiring party controlled the actions of the worker in order to determine whether the potential employer should be held liable for the consequences of those actions.[26] This test came to be known as the right to control test, and was the predominant test for determining employee status in the late nineteenth century.[27] Courts' use of the right to control test expanded in the early twentieth century, as they looked to the extent of the employer's control

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19 Pinsof, *supra* note 3, at 347.

20 Pearce & Silva, *supra* note 17, at 5.

21 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, 315 n.96 (2001).

22 RESTATEMENT (FIRST) OF AGENCY (AM. LAW INST. 1933).

23 Carlson, *supra* note 21, at 315.

24 Pearce & Silva, *supra* note 17, at 5–6; Carlson, *supra* note 21, at 302 ("The 'master-servant' relationship . . . is widely regarded as the pre-industrial precursor of the 'employer-employee' relationship . . . ." (footnote omitted)).

25 Pearce & Silva, *supra* note 17, at 5–6.

26 *Id.*

27 *Id.*

over the worker to determine employee status for the purpose of protective legislation, such as workers' compensation laws.[28]

The modern right to control test finds its clearest expression in the Restatement (Second) of Agency § 220.[29] The Restatement defines an employee, or servant, as someone who performs services for another person, and who is subject to that person's control or right to control.[30] The Restatement then goes on to give a non-exhaustive list of the factors to be considered in determining whether a worker is an employee/servant.[31] Those factors include: 1) the extent of control the employer may exercise over the details of the work; 2) whether the worker is engaged in a distinct occupation or business; 3) whether the work being done is usually done under the direction of the employer or by a specialist without supervision; 4) the skill required to do the work; 5) whether the employer or the worker supplies the tools and the place of work; 6) the length of time the worker is employed; 7) whether the worker is paid by the time or by the job; 8) whether the work is a part of the regular business of the employer; 9) whether the parties believe they are creating the relation of master and servant; and 10) whether the principal is or is not in business.[32]

The above factors are considered simultaneously, and no one factor is decisive.[33] The Restatement's test is considered the predominant articulation of the right to control test,[34] which is why the terms "common law agency" and "right to control" are used interchangeably in this Note.

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28 Carlson, *supra* note 21, at 309–10; *see also*, 1 HARRY B. BRADBURY, BRADBURY'S WORKMEN'S COMPENSATION AND STATE INSURANCE LAW, 9–11 (2d ed. 1914) (describing the rise of worker's' compensation laws in the United States from 1902–1914).

29 Pearce & Silva, *supra* note 17, at 8; Carlson, *supra* note 21, at 328 ("[T]he Restatement (Second) of Agency, [is] routinely cited as the embodiment of the modernized common law rule . . . .").

30 RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958). Though the Restatement refers specifically to servants, it is generally understood as pertaining to modern employees as well. Professor Richard R. Carlson has discussed the various terms that could have come to replace "servant" in early employment legislation, which legislatures at the time believed "carried the historical baggage of a class system and connoted a feudal relationship of domination and dependence that was offensive to the American culture." Carlson, *supra* note 21, at 308–09. Carlson also suggests that employee won out "by default" and "served mainly as a near substitute for 'servant.'" *Id.* at 309.

31 RESTATEMENT (SECOND) OF AGENCY § 220.

32 *Id.*

33 Pearce & Silva, *supra* note 17, at 9; *see* NLRB v. United Ins., 390 U.S. 254, 258 (1968).

34 Pearce & Silva, *supra* note 17, at 9.

2. Use in Interpreting Federal Statutes

Although the common law agency test is now used to determine employee status under federal statutes which do not meaningfully define "employee," which is most federal employment statutes,[35] the test was not initially embraced by the Supreme Court.[36] In *NLRB v. Hearst Publications, Inc.,*[37] the Court rejected respondents' argument that the employee status of the workers in question should be determined by "common-law standards," and instead held that the meaning of employee in a particular statute should be determined according to the purpose of the statute itself. *Hearst* was a case brought under the National Labor Relations Act (NLRA), in which the publishers of four Los Angeles-based newspapers challenged the National Labor Relations Board's (NLRB) finding that they had violated the NLRA by refusing to bargain with a certified union representing the "newsboys" who sold their newspapers on the city's streets.[38] The publishers' main argument was that under the common law, the newsboys were not employees, and so they did not come under the protection of the NLRA.[39]

The Court, however, did not invoke the right to control test to determine whether the newsboys were employees, but instead focused on the purpose of the NLRA, which was to avoid "industrial strife" and encourage collective bargaining.[40] The Court then held that there was sufficient evidence for the Board to find that the newsboys were employees, and that doing so furthered the purposes of the NLRA.[41] Interestingly, although the Court said it was not following the common law test for determining employee status, when reciting the evidence in support of a finding that the newsboys were employees, the Court noted that the publishers controlled the markets the newsboys could sell in, set

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35 Laurie E. Leader, *Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 96, 101–03 (2019) ("[L]abor and employment statutes provide little guidance on who is an employee."). *See* National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (defining "employee" as "any employee" but not including "any individual having the status of an independent contractor"); Employee Retirement Income Security Act (ERISA) § 3(6), 29 U.S.C. § 1002(6) (defining "employee" as "any individual employed by an employer"); Occupational Safety and Health Act of 1970 § 3(6), 29 U.S.C. § 652(6) (defining "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce").

36 Carlson, *supra* note 21, at 317–18 (asserting that *Hearst* included "a direct attack against the 'common law' test").

37 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120–24 (1944).

38 *Id.* at 113–15.

39 *Id.* at 119–20.

40 *Id.* at 124–26.

41 *Id.* at 131–32.

their hours, and provided their equipment, which are all factors to be considered under the common law test.[42]

While *Hearst* was a case about the meaning of "employee" as used in the NLRA, the Court soon expanded its use of a statutory purpose test to determine the meaning of employee as used in other federal employment statutes as well.[43] In *United States v. Silk*,[44] the Court affirmed its rejection of the right to control test, and declared that for the purposes of the Social Security Act, employee status should be determined as it was in *Hearst*.[45] Nevertheless, when the Court explained why the unloaders Silk employed in his coal business were employees, one of the reasons it gave was Silk's ability to supervise the unloaders' work.[46]

On the same day the Court decided *Silk*, it also announced its decision in *Rutherford Food Corp. v. McComb*,[47] a case about the meaning of "employee" as used in the FLSA.[48] Once again the Court looked to the statute in question for direction on how "employee" should be defined, and in this case the Court noted that the FLSA incorporated a broad definition of "employ."[49] The Court then said that whether the "boners" at Rutherford's meatpacking plant were employees did not depend on isolated factors but the whole economic activity.[50] After discussing the nature of the boners' work, and the structure of the defendant's business, the Court declared that the boners were in fact employees.[51] As in *Silk*, however, despite the Court's stated rejection of the right to control test, it noted the manager's close supervision as a reason to consider the boners employees.[52] This has led some commentators to question the extent to which the right to control test was ever truly abandoned.[53]

Despite the suggestions of some commentators that little had changed, Congress, at the time, was concerned enough with the Court's

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42 *Id.*

43 Carlson, *supra* note 21, at 319.

44 United States v. Silk, 331 U.S. 704 (1947).

45 *Id.* at 713–14. Although the term was never used in *Hearst*, the Court in *Silk* describes the *Hearst* approach as focusing on the economic reality of the employment relationship, thus representing the first use of the term "economic reality" to describe the test. *Id.* at 713.

46 *Id.* at 718.

47 Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

48 *See id.*

49 *Id.* at 728. The FLSA's definition of "employ" states only that "'[e]mploy' includes to suffer or permit to work." 29 U.S.C. § 203(g).

50 *Rutherford*, 331 U.S. at 730.

51 *Id.*

52 *Id.*

53 *See* Carlson, *supra* note 21, at 321.

decisions on employee–independent contractor status to take action.[54] In 1947, the same year *Silk* and *Rutherford* were decided, Congress passed the Taft-Hartley Amendment to the NLRA, which, among many other things, rejected the Court's statutory purpose approach in favor of the common law agency test.[55] While the language of Taft-Hartley, as it concerns employee classification, appears only to confirm that the NLRA applies to employees and not independent contractors—a position the Court always held—its true purpose can be found in an accompanying House report that criticized the NLRB's reasoning in expanding the definition of employee, and the Court's embrace of said reasoning.[56]

The Court would signal that it received Congress's message in *NLRB v. United Insurance*,[57] in which it stated that the "obvious purpose" of Taft-Hartley was for the Board and courts to use the common law agency test to determine employee status under the NLRA.[58] The Court then applied the common law agency test to the insurance debit agents in question, and affirmed the Board's finding that they were employees.[59] In the Court's view, the decisive factors under the common law agency test included the agents' performance of essential functions of the company's normal operations, their lack of special skills, and the amount of control the company's managers exercised over the agents' work.[60]

Eventually, the Court's use of the common law agency test would expand beyond the NLRA context, as seen in *Community for Creative Non-Violence v. Reid*.[61] In *Reid*, a case about whether a sculpture qualified as a "work for hire" under the Copyright Act, the Court said that when Congress uses "employee" without defining it, it should be assumed that Congress was referring to the traditional master-servant relationship under the common law agency doctrine.[62] Accordingly, because the word employee, as used in the Copyright Act, must be understood in the common law agency context, the Court applied the

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54 *Id.*

55 Pearce & Silva, *supra* note 17, at 7. The passage of Taft-Hartley over President Truman's veto represented a major blow to the U.S. labor movement. Beyond acting as a check on an expanding definition of employee under the NLRA, Taft-Hartley outlawed the closed shop, and prohibited unions from engaging in various secondary boycotts or refusing to negotiate with management. *See* 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch.3.II (John E. Higgins, Jr. et al. eds., 7th ed. 2017) (ebook); *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533–34 (2002).

56 Carlson, *supra* note 21, at 321–22.

57 NLRB v. United Ins., 390 U.S. 254 (1968).

58 *Id.* at 256.

59 *Id.* at 256–60.

60 *Id.* at 258–59.

61 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

62 *Id.* at 739–40.

common law agency test to determine whether the artist, Reid, was an employee of Creative Community for Non-Violence (CCNV).[63] In this case, the Court found that Reid was not an employee of CCNV because, although CCNV provided the specifications for the sculpture, which the Court acknowledged was a form of control,[64] Reid was a skilled sculptor who provided his own tools and was generally free to complete the sculpture as he saw fit.[65]

While the Court has generally rejected considerations of statutory purpose in favor of the common law agency test, there is at least one area of the law where the Court's initial expanded view of "employee" still applies: claims under the FLSA.[66] The Court has said that because the FLSA defines "employ" as "suffer or permit to work," a very broad definition, it follows that the definition of employee under the FLSA should also go beyond the common law agency meaning.[67] Because of this expanded definition of employ, the DOL does not use the common law agency test but the economic reality test to determine employee status under the FLSA.[68] This Note will now discuss that test.

B. *The Economic Reality Test*

1. Development and Characteristics

The economic reality test, along with the common law agency and ABC tests, is one of the most prominent tests used for determining employee–independent contractor status.[69] As previously stated, the test

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63 *Id.* at 740–41, 751.

64 *Id.* at 752 ("True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. But the extent of control the hiring party exercises over the details of the product is not dispositive." (citation omitted)).

65 *Id.* at 752–53 ("[Reid] worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. . . . Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work.").

66 Carlson, *supra* note 21, at 325–26.

67 Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 325–26 (1992).

68 Pearce & Silva, *supra* note 17, at 16; Karen R. Harned, Georgine M. Kryda & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 100 (2010).

69 Cheng, *supra* note 7, at 21–24 (finding that employee–independent contractor "tests fall under three general categories": common law agency, economic reality, and ABC); Pearce & Silva, *supra* note 17, at 9 ("[S]everal other legal tests for the classification of workers exist and may be applied depending on the circumstances of each particular case. The economic realities test, the hybrid test, and the IRS twenty-factor test are a few prominent variations . . . ."); Harned et al., *supra* note 68, at 100 ("This section of the article examines the major strengths and weaknesses of three of the most common independent contractor classification tests: (1) the common law

has its roots in the right to control test.[70] Under the economic reality test however, courts focus on the degree to which the worker is economically dependent on the employer.[71] The more the worker is economically dependent on the employer, the more likely it is that a court will find that the worker is an employee, and not an independent contractor in business for themselves.[72] Today, the economic reality test is most associated with its use in determining employee status for purposes of the FLSA, but the test is also used in relation to various other federal statutes.[73]

While some commentators point to *Hearst* as the origin of the economic reality test,[74] others have found courts applying versions of the test decades before the *Hearst* decision.[75] In *Lehigh Valley Coal Co. v. Yensavage*,[76] a case under an early workers' compensation statute, Judge Learned Hand of the Second Circuit held that the miners hired by Lehigh Valley were employees because of the economic reality of the business arrangement between the parties.[77] Hand focused specifically on the miners' dependence on the company for their employment, their lack of capital or financial responsibility, and their performance of an essential function of the company: mining.[78] Without then ever using the phrase "economic reality," Hand in his *Lehigh Valley* opinion applied the same test that the Court would later apply in *Hearst* and its progeny.[79] While it is true that since *Rutherford* the Court has rejected its earlier approach

approaches; (2) the IRS approach; and (3) the ABC Test. . . . The common law definition of independent contractor has two approaches, the right to control test and the economic reality test.").

70 Pearce & Silva, *supra* note 17, at 9.

71 Leader, *supra* note 35, at 107–08.

72 *Id.*

73 Harned et al., *supra* note 68, at 100 ("The economic reality test, in some variation, is used to classify workers under the Fair Labor Standards Act of 1938 ('FLSA'), Equal Pay Act of 1963, Family and Medical Leave Act of 1993 ('FMLA'), and the Employee Polygraph Protection Act of 1988 ('EPPA')." (footnote omitted)). The economic reality test, as well as a hybrid common law–economic reality test, is also used to define employment under many federal antidiscrimination laws including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. *See* 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, 248–52 (1997); Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 939 (2017).

74 Harned et al., *supra* note 68, at 101.

75 Carlson, *supra* note 21, at 311.

76 Lehigh Valley Coal Co. v. Yensavage, 218 F. 547 (2d Cir. 1914).

77 Carlson, *supra* note 21, at 311–12.

78 *Lehigh Valley*, 218 F. at 552–53.

79 Carlson, *supra* note 21, at 311. For a discussion of the development of the economic reality test in the Supreme Court from *Hearst* to *Rutherford*, see *supra* notes 37–52 and accompanying text.

and embraced the common law agency test,[80] application of the economic reality test to disputes under the FLSA has remained untouched.[81]

In the current iteration of the economic reality test, courts consider a number of factors in order to develop a picture of the economic reality of the business situation and whether the worker in question should be considered an employee.[82] When the DOL's Wage and Hour Division (WHD) attempts to determine employee status, it looks at the following six factors, among others: 1) the degree of control the hiring party has over the worker; 2) the relative investments made by both sides in materials and equipment; 3) the worker's opportunity for profit or loss; 4) the level of skill required to do the work; 5) the permanency of the relationship; and 6) whether the work done is an integral part of the hiring party's business.[83]

Although some courts apply different or fewer factors, all agree that no one factor is dispositive, and the purpose of the factors is to measure the degree of economic dependence the worker has on the hiring party.[84] Because the test relies on to the broad definition of "employ" as "to suffer or permit to work" found in the FLSA, the economic reality test is generally considered broader than the common law agency test, and more likely to result in a finding of employee status.[85]

2. FLSA Opinion Letter 2019-6

The WHD is the division of the DOL tasked with enforcing and administering the minimum wage and overtime pay requirements, among others, of the FLSA.[86] As part of its administration of the FLSA and to provide the public with a clearer understanding of what FLSA compliance entails, the WHD may, upon request by an interested party, issue an opinion letter advising what the law requires in a specific situation.[87] While these opinion letters are not binding on courts, they

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80 *See supra* notes 57–65 and accompanying text.

81 Carlson, *supra* note 21, at 325–26. The Supreme Court affirmed that the economic reality test should be used to define "employee" under the FLSA in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992), a case in which the Court failed to extend the use of the economic reality test to claims brought under the Employee Retirement Income Security Act (ERISA).

82 Leader, *supra* note 35, at 107–08.

83 Harned et al., *supra* note 68, at 100–01.

84 Leader, *supra* note 35, at 108.

85 *See id.* at 106–07 (discussing the broadness of the FLSA's "suffer or permit to work" definition of "employ" and how taken literally it even encompasses independent contractors).

86 Wage & Hour Div., *About Us*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/about [https://perma.cc/4D4G-YU7S].

87 Wage & Hour Div., *Final Rulings and Opinion Letters: Ruling and Interpretations*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance [https://perma.cc/2NUV-NKSH].

qualify as an official interpretation of the FLSA that can potentially be relied upon as a defense to wage claims under the FLSA.[88]

FLSA Opinion Letter 2019-6 provides an example of a modern economic reality analysis to determine employee–independent contractor status.[89] As previously mentioned, the letter in question was sent at the request of a representative for a VMC. A VMC is an online referral service that connects service providers with consumers; they are often associated with the "sharing" or "gig" economy.[90] Popular VMCs include Uber, Lyft, TaskRabbit, and others.[91] The letter begins with a description of the VMC's business, though for privacy reasons it is never stated what services are offered by providers on the company's platform.[92] The letter details how service providers gain access to the company's platform, how service providers and consumers are connected, how prices are set and providers paid, and the company's policies regarding how service providers may select and perform different jobs, as well as other features of the business.[93]

After describing the business, the letter recites the general legal principles that inform the WHD's opinion.[94] This section of the letter begins by stating that the FLSA applies only to employees, which are defined as "any individual whom an employer suffers, permits, or otherwise employs to work," and does not include independent contractors.[95] The letter then explains that the main determinant in deciding employee–independent contractor status is the extent to which the worker depends on the hiring entity.[96] To determine whether a worker is economically dependent on the party that hired them, the WHD conducts a fact-specific inquiry into the business arrangement, considering at least the six previously listed factors.[97] The letter clarifies that other factors may also be considered, and that the factors shouldn't simply be tallied, but instead the whole activity should be examined.[98]

After providing a more detailed explanation of the various factors, the WHD delivers its opinion, which is that the service providers on the VMC's platform are independent contractors, and not employees.[99] The

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88 *Id.*; *see also* 29 U.S.C. § 259 (2018).

89 DOL Opinion Letter, *supra* note 14.

90 *Id.*

91 Aloisi, *supra* note 14, app. at 688 (providing a table of popular "[o]n-[d]emand/[g]ig [e]conomy" platforms).

92 DOL Opinion Letter, *supra* note 14, at 1–3, 10.

93 *Id.* at 1–8.

94 *Id.* at 7–20.

95 *Id.* at 8.

96 *Id.* at 8–10.

97 *Id.* at 11–13; *see also supra* note 83 and accompanying text.

98 DOL Opinion Letter, *supra* note 14, at 13.

99 *Id.* at 20–21, 31.

letter then goes through the six factors to explain why the WHD believes that the service providers are not economically dependent on the VMC.[100] With regard to control, the WHD said that the VMC exercises little control over the service providers because service providers are able to choose which jobs to perform, and how and when to do them, and the VMC provides minimal, if any, supervision of their work.[101] The WHD then said that the relationship between the VMC and service providers was not permanent because the providers worked on a project-by-project basis, and could stop accepting jobs on the platform at any time.[102] Another factor that the WHD said weighed in favor of independent contractor status was the fact that service providers purchase all necessary resources and equipment for their work themselves.[103]

As for the skills required and opportunity for profit factors, the WHD focused primarily on the service providers' ability to select which jobs they want to take as a reason to find that they were independent contractors.[104] The WHD said that by selecting which job to take the service providers exercise managerial discretion, and that this, plus the lack of any mandatory training, weighs in favor of independent contractor status.[105] The WHD also said that the service providers' ability to select jobs and set their own prices gives them significant opportunity for profit and loss, another factor weighing in favor of independent contractor status.[106]

Finally, the WHD said that the service providers were not an integrated part of the VMC's business, because the VMC is a referral service, not a service provider.[107] According to the WHD, the VMC's business involves operating a platform that service providers can use to find clients.[108] Therefore, only work done developing, maintaining, or operating the platform qualifies as an integrated part of the VMC's business.[109] Because all six factors weighed in favor of independent contractor status, the WHD had no trouble finding that the service providers were not economically dependent on the VMC, and were thus not employees, but independent contractors.[110]

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100 *Id.* at 7–10.
101 *Id.* at 7–8.
102 *Id.* at 8–9.
103 *Id.* at 9.
104 *Id.*
105 *Id.*
106 *Id.* at 9–10.
107 *Id.* at 10.
108 *Id.*
109 *Id.*
110 *See id.*

C. *The ABC Test*

1. Development and Characteristics

The third and final test of employee–independent contractor status that this Note discusses is the ABC test. The ABC test originated in Maine in 1935 with the passage of the Maine Employment Security Law, a form of unemployment compensation legislation.[111] Since then, many more states have followed suit in using the ABC test to determine employee status for the purpose of unemployment benefits and taxes.[112] Use of the ABC test has also expanded beyond the realm of unemployment taxes. The Massachusetts legislature, for example, adopted the ABC test for wage and hour purposes in 2004,[113] and the New Jersey Supreme Court followed suit in 2015.[114] And with a number of state legislatures continuing to adopt its use for various purposes, use of the ABC test continues to grow.[115]

The first thing that sets the ABC test apart from the other previously considered employee status tests is that it begins with a presumption that the worker is an employee.[116] From there, the test looks at just three factors to determine whether the presumptive employee is in fact an independent contractor: (A) whether the worker is free from the hiring party's control in performance of their work; (B) whether the work done is outside the hiring party's usual line of business; and (C) whether the worker is engaged in an independent trade.[117] If the hiring party cannot

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111 Pearce & Silva, *supra* note 17, at 27; Christopher J. Cotnoir, Comment, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"*, 46 ME. L. REV. 325, 332 (1994).

112 Harned et al., *supra* note 68, at 102. Of the sixteen states that modified their definition of independent contractor between 2004 and 2012, fourteen adopted some variation of the ABC test that included a presumption of employee status. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 66–67 (2015) (noting that some of the updated statutes applied to "only a portion of the state's statutory scheme, either specific benefits or certain industries . . . .").

113 Deknatel & Hoff-Downing, *supra* note 112, at 65, 94–96; MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2020). The definition of employee found in § 148B applies to workers under Massachusetts's minimum wage and overtime pay statutes. *Id.* § 148B(d); MASS. GEN. LAWS ANN. ch. 151, § 1 (West 2020); *Id.* § 1A.

114 Hargrove v. Sleepy's, LLC, 106 A.3d 449, 463 (N.J. 2015).

115 Deknatel & Hoff-Downing, *supra* note 112, at 66–67.

116 Pinsof, *supra* note 3, at 369.

117 *Id.* at 369–70. That the ABC test considers only three factors has led some to describe the test as a simplified version of the right to control test. *See* Pearce & Silva, *supra* note 17, at 27. However, others have pushed back against this characterization, noting that because the ABC test incorporates and then expands upon the right to control test, it cannot accurately be said to have

satisfy all three factors—A, B, and C—then the presumption is not rebutted and the worker is an employee.[118]

While the A prong of the ABC test rather straightforwardly mirrors the common law agency test's focus on control, the B and C prongs may best be understood through an example. When a law office hires a lawyer, they are hiring someone to do work that is within their usual line of business, namely practicing law. Under prong B of the ABC test this lawyer would be an employee of the law office. When the law office hires a plumber to fix a sink in their break room however, the plumber is not doing work within the law office's usual line of business because they are not practicing law, and thus the B prong would be satisfied and this person could still be an independent contractor. Furthermore, the plumber would likely be found to be engaged in an independent trade under prong C. Presumably, when this plumber is done fixing the law office's sink, they will go to one of many other clients they work for and have solicited, and are thus engaged in business independent from the law office.[119]

California's adoption of the ABC test provides a useful example of the test's strengths and weaknesses, and how courts apply the test in practice. One reason why California's adoption of the ABC test is notable is its size. California has the largest state economy by GDP, and in 2019 had a labor force of almost twenty million people.[120] Because of California's size, more workers are potentially affected by a change in California law than one in any other state's law.[121] Another important reason why California's embrace of the ABC test is worth examining is that it is the home of Silicon Valley and the many technology companies that are based there, which have become notorious for their classification of workers on their platforms as independent contractors.[122] Finally, California has a history of adopting worker protections that then spread

simplified it. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 129 (2009).

118 Harned et al., *supra* note 68, at 102. In this sense, the ABC factors can be better thought of as cumulative elements rather than factors to be weighed against each other.

119 Many thanks to Professor Weisenfeld for this helpful example.

120 Mark J. Perry, *Putting America's Enormous $21.5T Economy into Perspective by Comparing US State GDPs to Entire Countries*, AM. ENTERPRISE INST.: CARPE DIEM (Feb. 5, 2020), https://www.aei.org/carpe-diem/putting-americas-huge-21-5t-economy-into-perspective-by-comparing-us-state-gdps-to-entire-countries [https://perma.cc/22DG-8MZ3].

121 U.S. CENSUS BUREAU, *supra* note 9.

122 Alexia Fernández Campbell, *Gig Workers' Win in California Is a Victory for Workers Everywhere*, VOX (Sept. 11, 2019, 12:40 PM), https://www.vox.com/2019/9/11/20851034/california-ab-5-workers-labor-unions [https://perma.cc/K5DE-JN8A]. That so many of these companies are based in California has led some observers to describe A.B. 5 as a gig worker law, despite the fact that the statute is facially neutral as to technology companies and the gig economy. *See id.*

to other states, so its use of the ABC test could inspire other state legislatures to follow suit.[123]

2. The ABC Test in California: *Dynamex* and A.B. 5

a. Employee Classification in California Pre-*Dynamex*

Although now codified into law through the passage of A.B. 5, California first adopted the ABC test for wage and hour claims in the California Supreme Court case of *Dynamex Operations West, Inc. v. Superior Court*.[124] The court in *Dynamex* spoke at length about the prior California Supreme Court cases that shaped its opinion.[125] In order then to better understand the court's decision in *Dynamex*, this Note provides a brief overview of the cases that the court considered in making its decision in *Dynamex*.

i. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,[126] the defendant grower, Borello, challenged a California deputy labor commissioner's finding that the workers Borello hired to harvest cucumbers were employees, and not independent contractors as Borello claimed.[127] The California Supreme Court began its discussion in *Borello* by stating that the definition of employee in the Workers' Compensation Act must be interpreted liberally, to extend benefits to the maximum number of workers,[128] and with reference to the history and purpose of the Act.[129] The court went on to say that because the common law test was developed in the context of an employer's liability for injuries caused by an employee, the common law test alone does not define the employee–independent contractor distinction as it applies to workers' compensation.[130] Without abandoning the common law test, the court took note of the six-factor economic reality test and its similarity to the common law test, and declared that all factors from both tests were pertinent to the determination of employee status.[131] The court then determined that Borello retained all necessary control over the cucumber harvesters to be considered their employer, and that the laborers were part

123 *Id.*

124 Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 7 (Cal. 2018).

125 *Id.* at 14–25.

126 S.G. Borello & Sons v. Dep't of Indus. Relations, 769 P.2d 399 (Cal. 1989).

127 *Id.* at 400–01.

128 *See id.* at 403, 406.

129 *Id.* at 405.

130 *Id.* at 405–07.

131 *Id.* at 406–07.

of the class of workers to whom the workers' compensation statute was intended to apply.[132]

For the *Dynamex* court, there are two important takeaways from *Borello*. The first is that when deciding whether a worker is an employee, the purpose of the statute for which the determination is being made should guide the inquiry.[133] The other is that in deciding which classification better serves the statute's purpose, courts should consider the business organization's control over the details of work, and factors from both the common law and economic reality tests.[134]

ii. *Martinez v. Combs*

Martinez v. Combs[135] was a case brought by seasonal agricultural workers hired to grow and harvest strawberries to recover unpaid minimum wages under a California Industrial Welfare Commission's (IWC) wage order.[136] At issue was whether the produce merchants that the grower sold the berries to could be considered joint employers with the grower.[137] The court in *Martinez* first held that, in actions to recover unpaid minimum wages, the IWC's wage orders should be used to define "employ," and that the wage orders do not incorporate the federal definition.[138] The court then went through an extensive examination of the IWC's wage orders to determine that under the IWC definition, "employ" has three alternative meanings: (1) "to exercise control over the wages, hours or working conditions," (2) "to suffer or permit to work," or (3) "to engage, thereby creating a common law employment relationship."[139] Finally, the court held that even under the broad IWC definition of "employ," the produce merchants were not joint employers of the agricultural workers, and thus not liable for unpaid minimum wages.[140]

The most important takeaway from *Martinez* for the court in *Dynamex* was the broad definition of employ to be used in cases brought

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132 *Id.* at 407–08.

133 Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 19–20 (Cal. 2018). Interestingly, the California legislature drafted A.B. 5 to apply the same test of employee status to workers under the California Labor Code, Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, thus abandoning somewhat the California Supreme Court's emphasis on statutory purpose. Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

134 *Dynamex*, 416 P.3d at 19–20.

135 Martinez v. Combs, 231 P.3d 259 (Cal. 2010).

136 *Id.* at 262–63.

137 *Id.* at 266–67.

138 *Id.* at 269.

139 *Id.* at 278.

140 *Id.* at 281–87.

under California's IWC's wage orders.[141] The primary issue in *Dynamex* was what standard the court should apply to determine whether workers were employees or independent contractors, specifically for purposes of California's wage orders.[142] Because *Martinez* itself was a decision about joint employer status, the proper scope of *Martinez* and whether its definition of "employ" should be applied outside of the joint employment question was at the heart of *Dynamex*.[143] Ultimately, *Borello*'s focus on statutory purpose, combined with the broad definition of "employ" found in *Martinez*, would lead the California Supreme Court to adopt the ABC test in *Dynamex*.[144]

iii. *Ayala v. Antelope Valley Newspapers, Inc.*

In *Ayala v. Antelope Valley Newspapers, Inc.*,[145] a newspaper carrier sued on behalf of a class of similarly employed workers, alleging that the defendant Antelope Valley Newspapers, Inc. had improperly classified them as independent contractors instead of employees.[146] The trial court in *Ayala* denied class certification because it found that the degree of control the defendant exercised over the individual newspaper carriers varied, and thus their employee status needed to be determined on an individual, and not class wide, basis.[147] The California Supreme Court said that the trial court had asked the wrong question at the certification stage, and that it did not matter how great or small the extent of Antelope Valley's control over working conditions was, but how uniform Antelope Valley's *right* to control its workers was.[148] Because *Dynamex* itself was a class action suit,[149] the proper standard for class certification was relevant to its final outcome.

The trial and intermediate appellate courts in *Ayala* applied the common law test (as discussed in *Borello*) to determine the employment status of the newspaper carriers in question.[150] The California Supreme Court then solicited briefs about the possible relevance of other employment classification tests to the workers in *Ayala*, including the

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141 *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 20 (2018) ("[*Martinez*] did address the meaning of the terms 'employ' and 'employer' as used in California wage orders, and the proper scope of the *Martinez* decision lies at the heart of the issue before our court in the present case.").

142 *Id.* at 5.

143 *Id.* at 20.

144 *See id.* at 29–32.

145 Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165 (Cal. 2014).

146 *Id.* at 168.

147 *Id.* at 169.

148 *Id.* at 172.

149 *Dynamex*, 416 P.3d at 5.

150 *Ayala*, 327 P.3d at 170.

IWC wage order definition of "employ."[151] However, because the plaintiffs in the lower courts only argued that they were employees under the common law test, the California Supreme Court did not consider the applicability of other tests at that time.[152] That was the question the court took up in *Dynamex*: whether in a wage and hour action, a class may be certified based on the wage order definition of "employ" set forth in *Martinez*, or whether the *Borello* test was the only applicable standard.[153]

b. *Dynamex*: Facts and Procedural History

Dynamex is a nationwide courier and delivery service that provides on-demand, same day pick up and delivery services to both the public generally and a number of large corporations.[154] Dynamex obtains its own customers, sets the rates to be charged to those customers, and negotiates the amount to be paid to the drivers on an individual basis.[155] Once Dynamex receives a delivery order, that order is assigned to an on-demand driver who can choose to accept or reject the assignment.[156] If a driver accepts an assignment, they are required to complete the delivery that day.[157] Drivers make pick ups and deliveries using their own vehicles, but are expected to wear Dynamex shirts and badges when making deliveries.[158] Dynamex drivers can hire other persons to complete deliveries that Dynamex assigned to them, and can make deliveries for another delivery company, including their own personal delivery business.[159] Finally, Dynamex can terminate its agreement with any driver without cause on three days' notice.[160]

In 2004, Dynamex converted all of its drivers, who had been previously classified as employees, to independent contractors.[161] In 2005, Charles Lee, who performed delivery services for Dynamex for fifteen days in January 2005, brought suit against Dynamex on behalf of himself and a class of similarly situated Dynamex drivers, alleging that Dynamex had improperly classified its drivers as independent contractors and violated California's Labor Code by failing to pay them overtime.[162] In order to certify the class of drivers, the trial court had to decide which

151 *Id.*
152 *Id.*
153 *Dynamex*, 416 P.3d at 25.
154 *Id.* at 8.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.* at 8.
162 *Id.* at 9.

definition of "employ" it would use. The trial court held the drivers could be certified as a class if it could be determined through common proof that they met one of the three alternative definitions of "employ" set out in *Martinez*.[163] The trial court then held that in this case, either of the first two alternative definitions of "employ"—to exercise control over wages, hours, or working conditions, or to suffer or permit to work—could be established through common proof, as opposed to individualized determinations, and thus certified the class.[164] The appellate court affirmed the use of the alternative definitions of "employ" with respect to the drivers' claims that fell within the scope of the wage order, but not to those outside of the scope of the wage order.[165] It is from this decision that Dynamex appealed to the California Supreme Court, challenging only the appellate court's ruling that the alternative definitions of "employ" could be used to determine if a worker is an employee for purposes of the wage order violations.[166]

c. *Dynamex*: Analysis and Holding

As previously mentioned, the court in *Dynamex* began its analysis with a lengthy discussion of the relevant prior California Supreme Court cases.[167] After providing the context for its current decision, the court held that the second alternative definition, the suffer or permit to work standard, applied to the question of whether a worker is an employee for wage order purposes, and that under the suffer or permit to work standard the trial court's certification order should be upheld.[168] The court justified its decision to adopt the broad suffer or permit to work standard because of the purpose and necessity of the minimum wage and maximum hours laws to which the standard had traditionally been applied.[169] The court explained that the purposes of wage and hour laws, which are to provide workers with a "subsistence standard of living and to protect [their] health

163 *Id.* at 6, 10.

164 *Id.* at 10–12.

165 *Id.* at 12–13. The complaint alleged five causes of action stemming from Dynamex's misclassification of employees. Two causes of action were for unfair and unlawful business practices under the Business and Professions Code, and the remaining three causes of action were brought under the Labor Code for failure to pay overtime, provide itemized wage statements, and compensate drivers for business expenses. *Id.* at 9. Only those Labor Code violations that were subject to the wage order—the claims for unpaid overtime and failure to provide itemized wage statements—were allowed to proceed as a class action. *Id.* at 6, 13.

166 *Id.* at 7, 13.

167 *See id.* at 14–25.

168 *Id.* at 25–26. The court also said that because the suffer or permit to work standard was applicable to the employee–independent contractor determination, it did not need to decide at that time if the exercise control over wages, hours, and working conditions definition applied outside of the joint employer context. *Id.*

169 *Id.* at 31–32.

and welfare," were so critically important that they support a broad definition of employee that would be covered by the law.[170] The court not only held that the suffer or permit to work standard applied to employee classification in wage and hour cases, but also that it must be interpreted and applied broadly to all workers who could reasonably be viewed as working in the hiring entity's business.[171]

After determining that the suffer or permit to work standard applied to the drivers' bid for class certification, the court needed to decide what test should be used to determine if a business organization suffered or permitted a worker to work for them.[172] The court noted that in making employee–independent contractor determinations for claims brought under the FLSA, which incorporated the suffer or permit to work definition, federal courts had made use of the economic reality test.[173] The court, however, declined to adopt the economic reality test because it provided less guidance to workers and business organizations about who should be classified as an employee and was more easily exploitable by businesses because of its many factors.[174] Instead, noting that a number of jurisdictions[175] already made use of the ABC test in the wage and hour context, the court adopted it for use in California.[176]

In adopting the ABC test, the court concluded that for California's wage orders, the burden was on the hiring entity to prove that the worker was an independent contractor, and that in order to meet that burden, the hiring entity must show that: (A) "the worker is free from the control and direction of the hiring entity in connection with the performance of the 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."[177]

The court then went on to demonstrate how each of the three factors of the ABC test aligned with the purpose of the broad suffer or permit to work standard.[178] Finally, the court applied the ABC test to the specific

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170 *Id.*

171 *Id.* at 32–33.

172 *Id.* at 29–30 ("As other jurisdictions have recognized . . . the literal language of the suffer or permit to work standard does not itself resolve the question whether a worker is properly considered a covered employee rather than an excluded independent contractor . . . .").

173 *Id.* at 33.

174 *Id.* at 33–35.

175 These jurisdictions include Massachusetts and New Jersey, the legislatures of which have each passed laws codifying the ABC test as the test of whether or not a worker is an employee. MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2020); N.J. STAT. ANN. § 43:21-19(i)(6) (West 2020).

176 *Dynamex,* 416 at 35–36.

177 *Id.*

178 *Id.* at 36–41.

facts of *Dynamex* and determined that there was sufficient commonality of interest to uphold the class certification.[179] Specifically, the court looked at part B of the ABC test and determined that because Dynamex's usual course of business was delivery services, whether a class of delivery drivers performed work outside the usual course of business could be determined in a class-wide manner.[180] Because the hiring entity has the burden of proving all three of the ABC test factors, the court held that the sufficiency of commonality under part B of the test was enough to affirm the class certification.[181]

d. A.B. 5

On September 18, 2019, A.B. 5 was signed into law.[182] In section one of the bill, the legislature declares its intent to codify the *Dynamex* decision and clarify its application to state law.[183] The bill then amends California's Labor Code and Unemployment Insurance Code to incorporate the ABC test as the test of whether a worker is an employee or independent contractor for the purposes of the Labor and Unemployment Insurance Codes and the IWC's wage orders.[184] The bill states that if a court determines the ABC test cannot be applied in a particular context, then the *Borello* test should be applied instead.[185] The bill then goes on to list a number of occupations which are exempt from the ABC test, and to which the *Borello* test still applies.[186] These occupations include doctors, lawyers, commercial fishermen, and those who provide "professional services" such as marketing, graphic design, and administration of human resources.[187] Finally, the bill prohibits any employer from reclassifying a worker who was an employee on January 1, 2019 to an independent contractor because of the bill's enactment.[188]

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179 *Id.* at 40–42.

180 *Id.* at 41.

181 *Id.*

182 Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

183 *Id.* § 1(d).

184 *Id.* § 2.

185 *Id.* § 2(a)(1)(3).

186 *Id.*

187 *Id.* The California Senate Committee on Labor, Public Employment and Retirement's report on the bill states that the three factors that are present across the exempted professions, and which explain their exemptions, are the market strength of individual workers, the workers' ability to set rates, and the existence of a direct relationship between the worker and the client. S. COMM. ON LABOR, PUB. EMP'T & RET., COMMITTEE REPORT FOR 2019 CALIFORNIA ASSEMBLY BILL NO. 5, 2019–2020 Reg. Sess., at 10–12 (2019).

188 Cal. Assemb. B. 5 § 6 (enacted).

II. ANALYSIS

The tests discussed differ in their common uses, their focuses, and in the number and variety of factors that are considered in determining a worker's employment status. Because of this a worker can be considered an employee for some purposes, but for others that same worker in the same position could be found to be an independent contractor.[189] The effect of having this jumble of tests and factors is that compliance with the law becomes more difficult for employers who want to properly classify their employees, and enforcement of the law becomes more difficult for the agencies tasked with identifying misclassified employees.[190]

As discussed at the beginning of this Note, employee misclassification produces a myriad of negative consequences.[191] The misclassified workers are deprived of protections and benefits that they are legally entitled to, businesses that attempt to classify their employees correctly are forced to compete against those that do not in order to gain a competitive advantage, and governments at all levels are deprived of tax dollars owed by unscrupulous employers.[192] In fact, it has been estimated that the federal government misses out on $4.7 billion in unpaid income tax revenue annually due to employee misclassification.[193]

The negative effects of employee misclassification are readily apparent, and the confusion caused by the current use of multiple overlapping but differently focused tests to determine who is an employee exacerbates these problems, and allows bad actors to go unpunished.[194] One clear solution then would be to adopt just one test to determine employee–independent contractor status for all contexts.[195] The remainder of this Note will argue that the ABC test should be the sole test used for determining whether a worker is an employee or an independent contractor. The ABC test should be adopted over the other two tests because it begins with the presumption of employee status, uses cumulative elements instead of equally weighted factors, and presents a more straightforward statement of the key questions the tests are attempting to answer.

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189 Harned et al., *supra* note 68, at 99–100.

190 Deknatel & Hoff-Downing, *supra* note 112, at 73.

191 *See* sources cited *supra* notes 2–5 and accompanying text.

192 Deknatel & Hoff-Downing, *supra* note 112, at 55.

193 *Id.* at 62.

194 Pearce & Silva, *supra* note 17, at 14–18.

195 Unsurprisingly this idea has occurred to other commentators as well. *See* Pinsof, *supra* note 3, at 368–69; Pearce & Silva, *supra* note 17, at 29; Deknatel & Hoff-Downing, *supra* note 112, at 73.

A. *The Presumption of Employee Status*

The presumption that a worker is an employee has a number of important benefits. First, the presumption would make it more difficult for employers to misclassify their employees as independent contractors because the employer would have to be able to prove that the worker meets all three factors.[196] Unlike with the other tests, under the ABC test, when a worker or group of workers challenges their classification as independent contractors, the burden falls on the employer to show that the workers are in fact independent contractors.[197] This changes the inquiry from one in which both sides argue over how factors should be evaluated to one in which the employer must proactively show that all three elements are met.[198] Employers subject to the ABC test then would have to weigh more carefully the risks of worker misclassification, knowing that they would face the ultimate burden to defend their labeling of workers.

Aside from making misclassification more difficult, the presumption that a worker is an employee also makes it so that the burden of persuasion lies with the party that is best able to prove its case.[199] One reason the employer is better able to challenge the employee–independent contractor status is that the employer will likely have greater access to relevant evidence, particularly with regard to the second prong of the ABC test—whether the worker performs work outside the usual course of the hiring entity's business. This is because as compared to an individual employee, the hiring entity is far more likely to have evidence on hand of their usual course of business.[200] Other commentators have also argued that the employer should have the burden to prove independent contractor status because they are the party better able to control and dictate the terms of the employment relationship.[201]

A final benefit of the ABC test's presumption of employee status is that it makes it easier for workers to know their rights, because workers can presume that they are employees until their employer is able to show otherwise. The current system creates greater ambiguity for both workers and employers because neither party can know in advance how a judge

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196 Harned et al., *supra* note 68, at 102.

197 *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 34 (2018).

198 Deknatel & Hoff-Downing, *supra* note 112, at 71 ("By placing the onus on employers to proactively establish their workers as independent contractors, the presumption transforms the assessment of independent contracting status.").

199 Pinsof, *supra* note 3, at 367–68.

200 For example, California requires that every employer "maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer" for a period of three years. CAL. LAB. CODE § 1197.5(e) (West 2020).

201 Pearce & Silva, *supra* note 17, at 27.

will choose to balance the various factors they choose to apply, and what their attendant rights and obligations are or should be.[202] The presumption of employment rectifies this by enabling the worker to presume that they are an employee unless their employer can meet all three prongs of the test.

The presumption that a worker is an employee could be particularly beneficial to workers who are already more likely to be taken advantage of, such as migrant and agricultural workers.[203] Almost 80% of farm workers are foreign born,[204] and generally farm laborers are considerably less educated than other employees in the agricultural field and the U.S. workforce as a whole.[205] It is easy to see how the lack of formal education among farm workers, along with the potential unfamiliarity a recent migrant might have with U.S. laws, could exacerbate the already difficult task for a worker to know how they should be properly classified.[206] With this in mind, it is perhaps no coincidence that two of the seminal California employee classification cases, *Borello* and *Martinez*, were brought by farm workers alleging that their employer had misclassified them.[207] By starting from a presumption that all workers are employees, the most vulnerable workers would be more likely to receive the benefits and protections they are owed.

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202 Pinsof, *supra* note 3, at 351.

203 *See* Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 126, 146 (2009) (arguing that migrant workers "suffer severe mistreatment from their employers," and "overtime violations are so rampant that, in practice, there is essentially an 'immigrant exception' to FLSA's overtime law" (footnotes omitted)).

204 *Fairness for Farmworkers: A Migrant and Seasonal Farmworker Initiative*, NAT'L FARMWORKER ALLIANCE, http://www.nationalfarmworkeralliance.org/fairness_for_farmworkers_agenda.html [https://perma.cc/7JAD-SUFF].

205 *Id.*; *Farm Labor*, U.S. DEP'T AGRIC. (Apr. 22, 2020), https://www.ers.usda.gov/topics/farm-economy/farm-labor [https://perma.cc/4TZ4-C6EX].

206 Agricultural workers are also more likely than other workers to be undocumented, which may mitigate the effect implementation of the ABC test will have on workers' propensity to bring claims alleging misclassification. *See Fairness for Farmworkers*, *supra* note 204.

207 S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 400 (Cal. 1989) ("We ordered review to decide whether agricultural laborers engaged to harvest cucumbers under a written 'sharefarmer' agreement are 'independent contractors' exempt from workers' compensation coverage." (footnote omitted)); Martinez v. Combs, 231 P.3d 259, 262–63 (Cal. 2010) ("Plaintiffs, seasonal agricultural workers, brought this action under Labor Code section 11941 and other theories to recover unpaid minimum wages." (footnote omitted)). That these two cases were brought by agricultural workers and reached the California Supreme Court suggests somewhat that the pre-ABC system was sufficiently able to address these workers concerns. However, the existence of these two cases cannot tell us how many potentially winning cases were not brought under the more restrictive classification test.

B. *Use of Cumulative Elements as Opposed to Equally Weighted Factors*

Beyond the presumption of employee status, another reason why the ABC test represents an improvement over the right to control and economic reality tests is that it makes use of cumulative elements as opposed to equally weighted factors. Under the right to control and economic reality tests, judges consider ten or six, respectively, equally weighted factors in order to determine whether a worker is an employee.[208] Under the ABC test however, the hiring party must be able to show that all three elements are satisfied in order to defeat the presumption of employee status.[209]

There are a number of reasons why the ABC test's use of cumulative elements is superior to the common law agency and economic reality tests' use of many equally weighted factors. To begin with, the common law agency and economic reality tests both ask judges to consider a relatively large number of factors,[210] and the more factors that are considered, the more likely it is that some factors will point in one direction and some in the other.[211] Furthermore, because the tests do not provide any guidance on how individual factors should be weighed, there is the potential for greater discrepancy in rulings between judges depending on how they choose to weigh each factor. The potential for some factors to support each classification and the lack of guidance on how judges should weigh each factor make it more difficult for a party to know in advance how a judge will ultimately classify the worker in question and thus what their rights or obligations should be.[212] By requiring that all three elements be satisfied for the presumption of employee status to be defeated, the ABC test makes it easier for workers to know if they are properly classified because they don't have to worry about how a particular judge may weigh potentially contradicting factors. Instead, they can be confident that if their employer is unable to satisfy even one of the ABC test's elements, they are employees and are entitled to the attendant rights and privileges.

The ABC test's use of elements as opposed to factors is especially important because many of the factors still included in the common law agency and economic reality tests have become outdated or are irrelevant

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208 *See supra* notes 31–33, 82–84 and accompanying text.

209 *See supra* notes 116–118 and accompanying text.

210 At the very least, they each ask judges to keep track of more than three factors, in contrast to the ABC test's simplicity.

211 Melissa Luna, *The Gig Economy and Worker Classification*, 62 ADVOCATE 30, 31–32 (2019).

212 Pearce & Silva, *supra* note 17, at 17–18.

to the common understanding of what an employee is.[213] The common law agency test, for example, still includes the location where the work is done, and both the common law agency and economic reality tests include the method of payment as relevant factors.[214] The rise of telecommuting, however, has made the location where the work is done far less indicative of employee status,[215] and many "gig" workers are paid per job while still being wholly dependent on an employer to provide customers and set rates.[216]

Not only are many of these factors not indicative of a worker's employment status, they are also easily manipulatable by employers looking to avoid the legal and financial burdens that come with employing employees.[217] For example, both the common law agency and economic reality tests consider the length or permanency of the relationship as a relevant factor.[218] The inclusion of this factor could invite unscrupulous employers to structure the employment relationship as a series of short term, renewable contracts in order to give the impression of impermanence. By using three cumulatively applied elements however, the ABC test mitigates the risk of potential manipulation by hiring parties because being able to manipulate just one of the ABC elements would not be enough to overcome the presumption of employee status.[219] In this way, the ABC test's use of cumulative elements reduces opportunities for manipulation and provides greater clarity to workers about what their proper status should be.

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213 Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 408 (2019).

214 RESTATEMENT (SECOND) OF AGENCY §§ 220(2)(e), (g) (AM. LAW INST. 1958); DOL Opinion Letter, *supra* note 14, at 4 ("(3) The amount of the worker's investment in facilities, equipment, or helpers . . . .").

215 Pinsof, *supra* note 3, at 351. This has become even more true since the start of the COVID-19 pandemic, during which almost all non-essential work has been done remotely.

216 Cunningham-Parmeter, *supra* note 213, at 408.

217 Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 34 (2018) ("[T]he use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law . . . ."); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 568–69 (1996) ("The legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability." (footnote omitted)).

218 RESTATEMENT (SECOND) OF AGENCY § 220(2)(f); DOL Opinion Letter, *supra* note 14.

219 Pearce & Silva, *supra* note 17, at 28 ("The simplicity of both the small number of prongs and how they are collectively applied makes the ABC Test more user-friendly to judges, workers, and businesses compared to the complexity of current common-law tests.").

C. *More Straightforward Framing of Elements*

Of course, if the three elements of the ABC test did not accurately get at the difference between an employee and an independent contractor, the fact that they are elements and not factors would matter little. As important as their cumulative nature is the way in which the three ABC elements incorporate the best insights of the common law agency and economic reality tests, while shedding the outdated and more easily gameable factors.

The first prong of the ABC test incorporates the common law agency test's focus on control.[220] While control should not be the sole determinant of employee status, a true independent contractor would work free from the control of the hiring entity, so it is sensible to include control as a factor.[221] The ABC test's treatment of control as one factor to be assessed holistically, however, improves on the common law multifactor control test by making it harder for employers to manipulate certain factors to give the appearance of an independent contractor relationship.[222]

The B and C factors, on the other hand, incorporate the economic reality test's worthwhile focus on the entirety of the business relationship between the worker and the hiring entity.[223] Prong B asks if the worker performs work outside of the usual course of the hiring entity's business, and prong C asks if the worker is engaged in an independently established trade.[224] These two factors thus incorporate the whole of the business relationship; B from the employer's side by focusing on the usual course of the employer's business,[225] and C from the worker's side by asking

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220 Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621).

221 NLRB v. United Ins., 390 U.S. 254, 258 (1968) (distinguishing independent contractors from employees based on the "initiative and decision-making authority" that the former retains); Harned et al., *supra* note 68, at 100 ("The 'right to control' looks at the control the employer has over the employee but not over an independent contractor . . . .").

222 *Dynamex*, 416 P.3d at 34 ("[C]ommentators have also pointed out that the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its workforce into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard." (citation omitted)).

223 Leader, *supra* note 35, at 107 ("To determine whether an individual is an 'employee' under the FLSA, courts look to the economic reality of the business relationship as a whole." (footnote omitted)).

224 Cal. Assemb. B. 5 § 2 (enacted).

225 *Dynamex*, 416 P.3d at 37 ("[W]hen a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company . . . the workers are part of the hiring entity's usual business operation and

whether the worker holds their self out as a true independent contractor.[226]

These factors do not just incorporate the economic reality test, they also improve on it by removing opportunities for gamesmanship on the part of the employer. In place of B, the economic reality test looks at the extent of the integration of the worker's services into the employer's business.[227] These two concepts—the usual course of business and the degree of integration—are similar, but the usual course of business is the superior framing. Not only does the usual course of business approach align with how businesses are seen by the public at large,[228] this framing is also less manipulatable than the economic reality test's integration language.

In order to defeat the integration factor, the employer could structure their business in such a way that the individual units are never integrated into a whole.[229] To return to the law office example,[230] the office could attempt to contract with lawyers as independent contractors working on specific cases, as opposed to hiring them as attorneys at a joint practice. If the focus is instead on the usual course of business—in the law office example, the practice of law—there will be no way around the B factor except for the employer to argue that its usual course of business is not what it appears to be, a difficult hurdle to clear.[231]

Similarly, factor C can be seen as incorporating various economic reality test factors that attempt to answer whether the worker is truly engaged in an independent trade. Economic reality test factors including the permanency of the working relationship, the worker's investment in equipment and helpers, the amount of skill the work requires, and the worker's opportunities for profit or loss, are all factors that may point to

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the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees.").

226 *Id.* at 39 (describing an independent contractor as one who "takes the usual steps to establish and promote his or her independent business").

227 DOL Opinion Letter , *supra* note 14.

228 *Dynamex*, 416 P.3d at 37 ("Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.").

229 Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 163 (2003) ("Since the factors for determining whether a worker is an 'employee' are prone to manipulation, many firms consciously structure work relationships in a manner that will avoid 'employee' status and its accompanying legal strictures." (footnotes omitted)).

230 See *supra* note 119 and accompanying text.

231 Cunningham-Parmeter, *supra* note 213, at 394–95 (describing Uber and Lyft's failed attempts to argue they were software companies and not service providers).

the worker being engaged in an independent trade.[232] By treating them as individual factors, however, the economic reality test makes it possible for employers to game the test by not providing equipment, or structuring the relationship through a series of short term contracts.[233] The ABC test is an improvement because it cuts right to the heart of the matter and asks whether the worker is engaged in an independent trade. While the same evidence may ultimately end up being produced in an inquiry under either test, the framing of the ABC test keeps the judge's focus on the degree to which the worker is in business for themselves and avoids a mechanical counting of factors.

CONCLUSION

This Note has described three of the most commonly used tests for determining employee–independent contractor status: the common law agency test, the economic reality test, and the ABC test. After examining the tests' origins, uses, and characteristics, the case was made for the adoption of the ABC test as the sole test to be used for employee status determinations. Based on the scale of employee misclassification and its wide-ranging negative consequences,[234] universal adoption of the ABC test could lead to many more workers receiving the benefits and protections they lawfully deserve, which would benefit workers, law-abiding employers, and society as a whole.

However, just because the ABC test is the best of the currently used tests, it must still be implemented responsibly. California's A.B. 5, for example, caps the number of submissions a freelance journalist can make to a particular publication at thirty five submissions per year.[235] This has led to many publications cutting ties with all California-based freelancers, and an outcry from freelancers themselves.[236] Clearly then, if the ABC

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232 *See* DOL Opinion Letter, *supra* note 14, at 4.

233 *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 401–03 (1989) (describing employment agreement which lasted for only a particular harvest and required workers to provider their own tools, and which the intermediate appellate court found established an independent contractor relationship).

234 *See* Deknatel & Hoff-Downing, *supra* note 112, at 54–57.

235 Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified at CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 606.5, 621); Sasha Abramsky, *California's New 'Gig Worker' Law Will Hurt Freelancers*, NATION (Jan. 10, 2020), https://www.thenation.com/article/archive/immigration-california-labor-rights [https://perma.cc/JVV2-GKAA].

236 Abramsky, *supra* note 235; Allana Akhtar, *'It Feels Cold and Heartless': Hundreds of California Freelancers Have Been Fired Before the Holidays Over a State Law Meant to Help Uber and Lyft Drivers*, BUS. INSIDER (Dec. 18, 2019, 11:54 AM), https://www.businessinsider.com/california-ab5-bill-left-freelancers-out-of-work-2019-12 [https://perma.cc/XPG8-U5QC].

test is to be adopted as the sole test of employee–independent contractor status, caution will need to be taken to make sure actual independent workers are not negatively affected.

Despite this unfortunate drafting, the greatest pushback to the ABC test in California has come not from aggrieved freelancers, but from many of the leading VMCs described in the Opinion Letter. Uber and Lyft, for example, threatened to suspend service in California after a Superior Court judge, applying A.B. 5, ordered them to reclassify their drivers as employees.[237] In addition, those two companies and several app-based delivery companies spent almost two hundred million dollars in support of Proposition 22, a proposition on the November 2020 California ballot which would classify their drivers as independent contractors, A.B. 5 notwithstanding.[238] California voters approved Prop 22 on November 3, 2020.[239] Under Prop 22, amending the law would require seven eighths majority approval in each chamber of the California State Legislature, provided the amendment was consistent with the purpose of the proposition; inconsistent amendments would require voter approval.[240] With this high barrier to repeal or amendment, Prop 22's passing could signal a final blow against application of the ABC test to app-based drivers in California.

Even with these challenges, the ABC test remains the best test for determining employee status, and its wider use and implementation would provide greater clarity to workers and business organizations, and benefit society as a whole by reducing employee misclassification.

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237 Kate Conger, *Uber and Lyft Get Reprieve After Threatening to Shut Down*, N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/technology/uber-lyft-california-shutdown.html [https://perma.cc/4LRM-6ZXZ]. An appeals court subsequently ruled that the companies could continue to treat their workers as independent contractors while their case was on appeal. *Id.*

238 *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) [https://perma.cc/H9AM-VGD6] ("Through October 29, 2020, Yes on Proposition 22 received $202.97 million . . . . Uber contributed $57 million, DoorDash contributed $52 million, Lyft provided $49 million, InstaCart provided $32 million, and Postmates provided $13 million."). On the other side, the California Labor Federation and several unions contributed to the No on Prop 22 campaign, which raised nearly twenty million dollars. *Id.* The levels of spending on both sides provide further demonstration of the importance of employee classification to both workers and employers. *See Prop 22*, CAL. SEC'Y STATE, https://voterguide.sos.ca.gov/propositions/22 [https://perma.cc/WQ35-K97E].

239 Taryn Luna, *California Voters Approve Prop. 22, Allowing Uber and Lyft Drivers to Remain Independent Contractors*, L.A. TIMES (Nov. 3, 2020, 8:25 PM), https://www.latimes.com/california/story/2020-11-03/2020-california-election-tracking-prop-22 [https://perma.cc/ETJ9-EY5M].

240 BALLOTPEDIA, *supra* note 238.