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THAT'S NOT MY NAME: AN ANALYSIS OF NORTH CAROLINA LAWS USED TO CLASSIFY EMPLOYEES AND INDEPENDENT CONTRACTORS OF SHARING-ECONOMY BUSINESSES

GABRIEL J. WRIGHT*

I. INTRODUCTION

I want it, and I want it now: this is the mentality that drives today's consumer.¹ While many businesses are struggling to deliver on these customer expectations,² companies like Uber have found their niche and are thriving in this market. This is because Uber's business model is not rooted in traditional principles of inventing new products or categories.³ Instead, the company has focused on providing the things consumers want most: instant gratification and convenience.⁴ Thus, people looking for a ride across town no longer have to look up a taxi company's phone number, call to make arrangements for a ride, and then wait 20 minutes for the taxi to show up. Now, Uber provides passengers with the instant gratification⁵ they desire by allowing them use the company's mobile app to catch a ride quickly with the nearest driver in his private vehicle.

While this business model helped propel Uber's meteoric rise to success, it also raised the eyebrows of state and local legislatures wondering how to regulate the company. As the company continued to grow, so did the myriad questions about the company's legal structure and how to regulate it. For instance, is Uber more similar to a taxi service that transports customers or a technology platform that helps service providers find customers? Addi-

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1. *Retailers Unprepared to Meet Demand*, BUSINESS WIRE (Sept. 15, 2015, 11:11 AM), <http://www.businesswire.com/news/home/20150915006463/en/Retailers-Unprepared-Meet-%E2%80%9CNow%E2%80%9D-Consumer-Demand>.

2. *Id.*

3. Zalmi Duchman, *On-Demand Economy Here to Stay*, FORBES/ENTREPRENEURS (July 14, 2014, 10:00 AM), <http://www.forbes.com/sites/zalmiduchman/2015/07/14/the-on-demand-economy-is-here-to-stay-and-now-is-the-time-to-put-it-to-use-for-your-business/#64c24ab843f813e28d1443f8>.

4. *Id.*

5. *Id.*

tionally, whose insurance covers the private driver's vehicle while it is engaged in commercial activity, and does Uber need to provide coverage independent of the driver's personal coverage? Finally, are the drivers who use Uber's app to find customers employees or independent contractors, and what is the correct test to apply to make this determination?

Following recent court decisions in California where Uber drivers were deemed to be employees, this comment will focus on the appropriateness of the tests used to make these determinations.⁶ Next, North Carolina's common-law test for distinguishing independent contractors and employees will be compared against California's test to illuminate the shortcomings of North Carolina laws. Finally, this comment will set forth several proposals to strengthen North Carolina's legislation.

II. BACKGROUND

On September 19, 2013, California became the first state to legalize peer-to-peer ridesourcing⁷ services that connect individual, private drivers with people looking for a ride.⁸ As part of its legalization effort, the California Public Utilities Commission created the category of Transportation Network Company (TNC) to identify and regulate companies like Uber that provide pre-arranged transportation services in exchange for compensation via an app or other online platform.⁹ Thus, Uber basically functions by allowing people who need a ride to log in to Uber's app on their phone, request a ride, be paired with an available driver through the app, be picked up by the available driver, and ultimately be driven to their final destination.¹⁰ At the end of the ride, the passenger pays Uber via credit card and the company disburses a significant portion to the driver.¹¹ As a result of building of this business model since its founding in 2009,¹² ridesourcing

6. The question of whether or not Uber drivers should be classified as employees is beyond the scope of this comment and will not be addressed.

7. The California Public Utilities Commission distinguishes "ridesharing" as a separate activity, which it likens to the practice of casual carpooling. Tomio Geron, *California Becomes First State to Regulate UberX*, FORBES/TECH (Sept. 19, 2013, 4:40 PM), <http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/#6395847d67fe5b9ede6067fe>.

8. Geron, *supra* note 7.

9. Press Release, California Pub. Util. Comm'n, CPUC Establishes Rules for Transportation Network Companies (Sept. 13, 2013) (on file with author).

10. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

11. *Id.*

12. Travis Kalanick, *Uber's Founding*, UBER NEWSROOM (Dec. 22, 2010), <https://newsroom.uber.com/ubers-founding/>.

giant Uber has become the world's largest TNC.¹³ In North Carolina alone, the company operates in 10 metropolitan areas across the state: Asheville, Charlotte, Winston-Salem, High Point, Greensboro, Chapel Hill, Durham, Raleigh, Fayetteville, and Wilmington.¹⁴

Much of this success is due to Uber's classification and continuous branding of its drivers as independent contractors.¹⁵ In fact, the company's website recruits potential drivers by appealing to their sense of independence and assuring them they can make good money and help their community by driving when they want without being tied to an office or having to report to a boss.¹⁶ Moreover, Uber expressly markets itself as a "technology platform" that does not provide transportation or function as a transportation carrier like a traditional taxi service; instead, the company simply enables users of its mobile apps or websites to arrange and schedule transportation.¹⁷ As a result, Uber has revolutionized the sharing economy¹⁸ by creating a ride-hailing service without owning a single vehicle, and the company is now primed to fetch a valuation as high as \$68 billion—more than GM, Ford, and Honda—after its latest funding round.¹⁹

Courts, however, have struggled to determine the veracity of Uber's claims that it is a technology company that provides a "lead generation platform" that can be used to connect independent-contractor drivers with passengers looking for transportation.²⁰ Additionally, state legislatures have also had a tough time figuring out the appropriate regulations for TNCs in critical areas including the amount and type of insurance coverage required for private vehicles engaged in commercial activity.²¹ This regulatory debate about TNCs has even spilled into the political arena, prompting Democratic presidential candidate Hillary Clinton to remark that on-demand

13. 2013-2014 REVENUE LAWS STUDY COMM., REPORT TO THE 2015-2016 GEN. ASSEMBLY, 2015 Sess., at 15 (N.C. 2015), available at <http://www.ncleg.net/DocumentSites/committees/revenuelaws/Reports/2015-16%20Report.pdf>

14. *Id.* at 15.

15. *Uber Needs Partners Like You*, UBER, <https://get.uber.com/drive/> (last visited Jan. 18, 2016).

16. *Id.*

17. *Terms and Conditions*, UBER, <https://www.uber.com/legal/terms/us/> (last updated Jan. 2, 2016).

18. This economic model allows people to borrow or rent assets owned by someone else, and the increasing efficiency of using the Internet as a medium to bridge gaps of time and space has made it easier than ever for asset owners to connect with customers. See *Sharing Economy*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sharing-economy.asp> (last visited Jan. 20, 2016).

19. Liyan Chen, *Uber's \$68 Billion Valuation*, FORBES/INVESTING (Dec. 4, 2015, 11:23 AM), <http://www.forbes.com/sites/liyanchen/2015/12/04/at-68-billion-valuation-uber-will-be-bigger-than-gm-ford-and-honda/#179ebb9858584ba363695858>.

20. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015).

21. See Emily Dobson, *Transp. Network Companies: How Should S. Carolina Adjust Its Regulatory Framework?*, 66 S.C. L. Rev. 701, 707–12 (2015) (discussing the various approaches taken by legislative bodies in different states).

companies raise “hard questions” about workplace protections and “what a good job will look like in the future.”²² But what exactly are the legal implications of Uber’s business model, and what are the hard questions these TNCs pose for regulators?

A. *Employee vs. Independent Contractor*

One of the primary issues surrounding Uber’s classification of its drivers is whether they are, in fact, employees of the company or merely independent contractors. While seemingly innocuous, this distinction could have profound consequences for TNCs, TNC drivers, and the sharing economy as a whole.²³ If Uber’s drivers are not deemed to be independent contractors as the company insists, Uber would have to pay these drivers the same benefits that all employees are entitled to from their employers: overtime, unemployment insurance, workers compensation, and drivers’ expenses, including gas and vehicle wear and tear.²⁴

One of the most pronounced consequences of a court’s potential determination that drivers are actually employees instead of independent contractors is increased operating costs for Uber, and consequently, a major hit to the company’s current astronomical valuation by venture-capital firms that are pumping money into the company.²⁵ Uber, however, is not the only company that would be affected; the business models of dozens of other on-demand businesses²⁶ that have popped up in recent years would also be at stake.²⁷ Still, some argue that an unfavorable court ruling will not doom TNCs, but rather slow the speed of their growth and ability to scale to be more like businesses based on more traditional, old-fashioned models.²⁸

B. *O’Connor v. Uber*

Despite Uber’s claims that it is a technology company and that none of its drivers are actually employees, some of these workers have pushed back

22. Dan Levine, *Uber Drivers Granted Class Action Status*, REUTERS (Sept. 1, 2015, 7:36 PM), <http://www.reuters.com/article/us-uber-tech-drivers-lawsuit-idUSKCN0R14O920150901>.

23. See Annie Lowrey, *How One Woman Could Destroy Uber’s Business Model*, NEW YORK MAGAZINE (Apr. 30, 2015, 7:30 AM), <http://nymag.com/daily/intelligencer/2015/04/meet-the-lawyer-fighting-ubers-business-model.html#>.

24. Patrick Hoge, *Attorney Suing Uber Won Similar Fights*, SAN FRANCISCO BUSINESS TIMES (Feb. 4, 2015, 6:14 AM), <http://www.bizjournals.com/sanfrancisco/blog/2015/02/uber-lyft-independent-contractor-lawsuit-riordan.html?page=all>.

25. See Lowrey, *supra* note 23.

26. Following Uber’s favorable reception with users, dozens of on-demand businesses copying the technology-facilitated, middleman model have begun to pepper the economic landscape in various fields, ranging from housekeeping to delivery to home-rental services. *Id.*

27. *Id.*

28. *Id.*

against these claims and challenged Uber in court.²⁹ In *O'Connor v. Uber Technologies, Inc.*, a case that threatens to topple Uber and similar TNCs' current business models, drivers in California filed a putative class action suit against Uber claiming they were employees of the company.³⁰ As such, these plaintiffs claimed they were eligible for various protections and benefits for employees under the California Labor Code, including the requirement that employers pass the entire amount of any tip left on to the employee.³¹ In response, Uber filed for summary judgment against these drivers.³²

In support of their position, these drivers called the court's attention to the fact that Uber has previously referred to itself as an "On-Demand Car Service," and that the company employs the tagline "Everyone's Private Driver."³³ Moreover, Uber's CEO once wrote on the company's official blog that it was "rolling out a *transportation system* in a city near you."³⁴ Similarly, the drivers arguments that Uber is transportation company instead of a simple technology platform are bolstered by Uber documents plainly stating that "Uber provides the best transportation service in San Francisco"³⁵ Additionally, the *O'Connor* court noted that Uber does not sell its software like a typical distributor.³⁶ Instead, the company is heavily involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices.³⁷

By contrast, Uber maintains its assertion that the drivers who use its app and website to be matched with passengers looking for a ride are independent contractors by emphasizing the minimal control it asserts over these drivers.³⁸ To support this claim, Uber pointed to evidence that drivers set their own hours and work schedules, provide their own vehicles, and are subject to little direct supervision.³⁹

At the outset of its analysis, the *O'Connor* court noted that under California law, once an employee presents evidence that he provided services for an employer, a rebuttable presumption that he is an employee is created.⁴⁰ Upon presentation of this evidence, the burden then shifts to an em-

29. See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015).

30. *Id.* at 1135.

31. *Id.*

32. *Id.*

33. *Id.* at 1137.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1138.

39. *Id.*

40. *Id.*

ployer to prove that the putative employee is, in fact, an independent contractor.⁴¹ To determine whether an employer can rebut this presumption, California uses a test outlined in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*.⁴² This test sets forth a number of indicia of an employment relationship, but a putative employer's "right to control work details" is considered to be the most significant consideration.⁴³ California case law indicates that the proper inquiry regarding an employer's right to control is not whether it extends to every detail of work, but rather whether the employer retains all necessary control over the worker's performance.⁴⁴

Notably, however, California courts recognize that when this control test is applied rigidly and in isolation, it is often of little use in evaluating the infinite variety of service arrangements.⁴⁵ Consequently, these courts have embraced a number of secondary indicia relevant to determining whether an employer-employee relationship exists.⁴⁶ These factors include:

- (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.⁴⁷

Furthermore, these courts use the following five additional factors—some of which overlap with the above-mentioned factors—to evaluate a potential employment relationship:

- (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.⁴⁸

41. *Id.*; see also *Yellow Cab Coop. Inc. v. Worker's Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1294 (Cal. Ct. App. 1991) (explaining that under California law there is "a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise").

42. *O'Connor*, 82 F. Supp. 3d at 1138.

43. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

44. *Id.* at 408.

45. *Id.* at 404.

46. *O'Connor*, 82 F. Supp. 3d at 1139.

47. *Id.*

48. *Id.*

After applying these factors in *O'Connor*, the court held that the Uber drivers were presumptively employees since they provided a service to the company,⁴⁹ and that material issues of fact regarding the independent contractor label and the extent of the company's control over drivers precluded a summary judgment ruling in Uber's favor.⁵⁰

C. *Berwick v. Uber*

O'Connor is not an isolated ruling where a California court found that the company's drivers were employees instead of independent contractors. In *Berwick v. Uber Technologies, Inc.*, a driver filed a claim with the state's Labor Commission alleging the company owed her reimbursable employee's expenses pursuant to the California Labor Code.⁵¹ Similar to *O'Connor*, Uber maintained that it was a technological platform,⁵² and that the company did not exert any control over the hours the driver worked, making her an independent contractor.⁵³ Contrary to these assertions, the Commission pointed to several facts that seemed to imply Uber maintained some degree of control over drivers.⁵⁴ For instance, Uber performs background and DMV checks on prospective drivers, and the company requires that drivers provide it with a California driver's license, bank information, and proof of insurance.⁵⁵ Additionally, the Commission found that Uber maintained a star rating system as part of its quality control measures for both passenger and drivers.⁵⁶

To discern whether Uber's classification of the driver as an independent contractor was correct, the Commission applied the *Borello* factors discussed above.⁵⁷ Relying on *Borello* as a guide, the Commission stated that the modern tendency is to find an employment relationship "when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service."⁵⁸

49. *Id.* at 1141.

50. *Id.* at 1133.

51. *Berwick v. Uber Tech., Inc.*, No. 11-46739, 2015 WL 4153765, at *1 (Ca. Dept. Lab. June 3, 2015).

52. *Id.* at 3.

53. *Id.* at 4.

54. *See Id.*

55. *Id.*

56. The rating system allows passengers to rate their experience with their driver on a scale of one to five stars, with one being a bad experience and five being the best experience. *Id.* Notably, drivers were required to maintain a star rating of 4.6 or higher, or Uber would deactivate the driver's app. *Id.*

57. *Id.* at 4–5.

58. *Id.* at 6.

168 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 38:161]

Using this framework, the Commission quickly dismantled Uber's argument that it was simply a technology platform because the company was involved in every aspect of the operation.⁵⁹ Moreover, the Commission highlighted several areas in which Uber exercised control over drivers, including vetting prospective drivers, requiring cars be no older than 10 years old, and terminating drivers' access to the company's app if their star rating fell below 4.6 stars.⁶⁰ Consequently, the Labor Commission held that the driver was an Uber employee, and that the company was required to reimburse her for employee expenses pursuant to the California Labor Code.⁶¹

III. NORTH CAROLINA'S APPROACH TO THE EMPLOYEE VS. INDEPENDENT CONTRACTOR DEBATE

In October 2015, the North Carolina legislature determined that there was a simple solution to the problem of classifying TNC drivers as either employees of the TNCs or independent contractors: create a rebuttable presumption that drivers are independent contractors.⁶² The legislation provides that "[a] rebuttable presumption exists that a TNC driver is an independent contractor and not an employee. The presumption may be rebutted by application of the common law test for determining employment status."⁶³ This fence-straddling approach gives the appearance of placating TNCs like Uber by mimicking their driver classifications, but it also provides enough wiggle room for drivers to rebut this presumption by satisfying the state's common law test for an employee.⁶⁴

Despite seeming to kill two birds with one stone at first glance, this legislation raises two key questions: (1) following rulings like *O'Connor* and *Berwick* in California, is North Carolina's presumption that drivers are independent contractors misguided, and (2) is North Carolina's common law test for determining employment status sufficient to make this kind of determination in our current sharing economy? Regarding the first question, several other articles have examined the proper classification of Uber drivers generally,⁶⁵ and thus, it is beyond the scope of this article. The second question, however, is fair game.

59. *See Id.*

60. *Id.*

61. *Id.* at 6–7.

62. *See* N.C. GEN. STAT. § 20-280.8 (2015).

63. *Id.*

64. *Id.*

65. *See, e.g., Regulating Rideshare Without Stifling Innovation: Examining The Drivers, The Ins. "Gap," & Why Pa. Should get on Board*, 15 U. PITT. J. TECH. L. & POL'Y 81, 85 (2014).

A. *North Carolina's common-law test for employment relationships*

Under North Carolina law, an independent contractor—as distinguished from an employee—is a worker who “exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.”⁶⁶ The relevant factors to consider when attempting to discern whether a person is an employee or an independent contractor include whether the person:

- (1) is engaged in an independent business, calling, or occupation; (2) is to have the independent use of his or her special skill, knowledge, or training in the execution of the work; (3) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) is not subject to discharge because he or she adopts one method of doing the work rather than another; (5) is not in the regular employ of the other contracting party; (6) is free to use such assistants as he or she may think proper; (7) has full control over such assistants; and (8) selects his or her own time.⁶⁷

Thus, under this traditional approach, North Carolina places heavy consideration on a putative employer's right to control a worker in determining whether he is an employee or independent contractor.⁶⁸ Additionally, North Carolina courts note that no particular factor used in this analysis is controlling in itself, and all the factors are not required; rather, each factor must be considered in view of the circumstances to determine if a worker possesses the requisite degree of independence for classification as an independent contractor.⁶⁹

These common law tests are similar to California's control test enunciated in *Borello*.⁷⁰ The multi-layered *Borello* test provided extensive guidance to courts attempting to apply decades-old principles from California's common law to new problems created by on-demand companies in our current sharing economy.⁷¹ However, unlike California's test, North Carolina's test only provides a hint that other circumstances, similar to the sec-

66. *McCown v. Hines*, 549 S.E.2d 175, 177 (N.C. 2001) (quoting *Youngblood v. N. State Ford Truck Sales*, 364 S.E.2d 433, 437 (N.C. 1988)).

67. *Estate of Redding ex rel. Redding v. Welborn*, 612 S.E.2d 664, 669 (N.C. Ct. App. 2005) (citing *Hayes v. Bd. of Trustees of Elon Coll.*, 29 S.E.2d 137, 140 (N.C. 1944); *Johnson v. News & Observer Publ'g. Co.*, 604 S.E.2d 344, 347 (N.C. Ct. App. 2004)).

68. *Hayes v. Bd. of Trustees of Elon Coll.*, 29 S.E.2d 137, 140 (N.C. 1944).

69. *Hughart v. Dasco Transp., Inc.*, 606 S.E.2d 379, 385 (N.C. Ct. App. 2005) (quoting *McCown v. Hines*, 549 S.E.2d 175, 178 (N.C. 2001)).

70. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (quoting *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 977 (Cal. 1970)).

71. *Id.*

ondary indicia mentioned in *Borello*,⁷² play any role in the analysis. When juxtaposed with the primary and secondary indicia in *Borello*, North Carolina's employee-independent contractor test is exposed as a rudimentary, inflexible approach to a constantly evolving concept.⁷³ By primarily focusing on traditional business relationships and the extent an employer's control over a worker, North Carolina's test proves to be an inadequate model for on-demand companies like Uber. Ultimately, then, by creating a presumption that TNC drivers are independent contractors that can only be rebutted by applying a common-law test with limited utility in a sharing economy,⁷⁴ North Carolina has created the perfect environment for prolonged court battles regarding classification without providing courts with adequate guidance to navigate this murky legal landscape.

B. Proposals for modifications to North Carolina laws

To remedy the shortcomings of North Carolina's current common-law test for distinguishing an independent contractor from an employee, there are a few approaches the state could follow. First, North Carolina could supplement or replace its current test with the test used in the fourth circuit: the economic realities test.⁷⁵ Under this test, the factors used to determine whether a worker is an independent contractor or employee include:

(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business.⁷⁶

Similar to North Carolina's current test, no single factor is dispositive.⁷⁷ However, unlike North Carolina's test, the economic realities test was designed to capture the economic reality of the relationship between a putative employer and a worker,⁷⁸ instead of simply focusing on the extent of

72. See *Hughart*, 606 S.E.2d at 385

73. Interestingly, the California federal judge overseeing a class action suit by drivers against Uber's competitor, Lyft, stated that California's test and classification system governing whether drivers are employees or independent contractors seemed woefully outdated and that common sense indicates that perhaps Lyft drivers are neither independent contractors nor employees, but rather fall into some third category. Beth Winegarner, *Employment Laws Outdated*, LAW360 (Jan. 29, 2015, 6:49 PM ET), <http://www.law360.com/articles/616594/employment-laws-outdatedjudge-in-lyft-wage-row-says>.

74. *Hughart*, 606 S.E.2d at 379.

75. *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 578 (D. Md. 2008).

76. *Id.*

77. *Id.*

78. *Id.*

the employer's control over the worker. In the event of future litigation calling upon North Carolina law to determine the classification of TNC drivers, the sixth factor of the economic realities test could provide courts with much-needed guidance regarding business models rooted in the sharing economy.⁷⁹

Alternatively, a second option for North Carolina could be to follow the lead of other states that have created a separate test for TNCs altogether.⁸⁰ For instance, Arkansas state law related to workers compensation coverage now provides that a TNC driver is an independent contractor and not an employee if:

- (1) The transportation network company does not prescribe specific hours during which a transportation network company driver must be logged in-to the transportation network company's website, digital platform, or software application;
- (2) The transportation network company imposes no restrictions on the transportation network company driver's ability to utilize a website, digital network, or software application of other transportation network companies;
- (3) The transportation network company does not assign a transportation network company driver a particular territory in which transportation network company services may be provided;
- (4) The transportation network company does not restrict a transportation network company driver from engaging in any other occupation or business; and
- (5) The transportation network company and transportation network company driver agree in writing that the transportation network company driver is an independent contractor of the transportation network company.⁸¹

While the efficacy of the specific content in Arkansas's statute would be a point of debate for the North Carolina legislature, the overarching premise remains the same: a statute with pre-determined factors designed specifically for application to TNCs provide more guidance for courts than vague tests designed for more traditional businesses.⁸²

A final option for North Carolina would be to leave the current test unaltered—despite its shortcomings and singular focus on extent of employer control—and amend the current legislation governing TNCs. Instead of a broad-sweeping application of the presumption that all TNC drivers are independent contractors and relying on a rigid, antiquated test to rebut this

79. See *Berwick v. Uber Tech., Inc.*, No. 11-46739, 2015 WL 4153765, at *1, 4-7 (Ca. Dept. Lab. June 3, 2015).

80. See ARK. CODE ANN. § 23-13-719 (2015).

81. *Id.*

82. *Id.*

presumption, the legislature could simply divide TNC drivers into two groups with opposing presumptions. For instance, drivers who, on average, work 20 hours or less each week would be placed into one category, and they would be governed by the presumption as it currently stands.⁸³ Conversely, drivers who, on average, work more than 20 hours each week would be placed into a second category, and there would be a rebuttable presumption that they are employees of the TNC's for whom they drive.

IV. CONCLUSION

On-demand companies like Uber that rely on peer-to-peer sharing to boost profits have successfully transformed our economic landscape by introducing an innovative business model. However, by evolving so quickly, these companies have left courts and state legislatures in a violent wake of confusion as they scrambled to find the correct legal classification for the companies themselves,⁸⁴ as well as the workers who use these companies' mobile apps to find customers. Notwithstanding these difficulties, California courts have provided similar rulings⁸⁵ in multiple cases, proving that its common-law test for distinguishing independent contractors from employees is fit to tackle the challenges of businesses built on Uber's sharing model.

North Carolina, on the other hand, has not yet faced the onslaught of litigation over business and employee classification that California has seen. However, the state has enacted legislation that creates a rebuttable presumption that TNC drivers are independent contractors.⁸⁶ This designation is problematic, though, because North Carolina's common-law test for determining whether or not an employment relationship exists has an antiquated focus on a putative employer's right to control a worker instead of judging the economic realities of the parties' relationship.⁸⁷ As a result, North Carolina is ill-equipped to make accurate determinations of whether a TNC driver is actually an employee or an independent contractor. By supplementing the current test with a more flexible, in-depth test, creating a separate set of statutory factors for TNC drivers, or dividing TNC drivers into categories based on hours worked, North Carolina will be better prepared to deal with future litigation arising from businesses in the sharing economy.

83. See N.C. Gen. Stat. § 20-280.8 (2015).

84. For instance, should Uber be classified as a technology platform or a transportation company?

85. See *O'Connor v. Uber Techs, Inc.*, 82 F.Supp. 3d 1133, 1138 (N.D. Cal. 2015); see also *Berwick v. Uber Techs, Inc.*, No. 11-46739, 2015 WL 4153765, at *1, *4-5 (Cal. Dept. Lab. June 3, 2015).

86. See N.C. Gen. Stat. § 20-280.8 (2015).

87. *McCown v. Hines*, 549 S.E.2d 175, 177 (N.C. 2001).