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Looking Through the (Mis)Classifieds: Why TaskRabbit is Better Suited than Uber and Lyft to Succeed Against a Worker Misclassification Claim

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LOOKING THROUGH THE (MIS)CLASSIFIEDS: WHY TASKRABBIT IS BETTER SUITED THAN UBER AND LYFT TO SUCCEED AGAINST A WORKER MISCLASSIFICATION CLAIM

JOSEPH W. MCHUGH*

ABSTRACT

In the highly competitive gig-economy, companies are constantly trying to leverage whatever they can to gain a competitive advantage over competitors. One method of doing so is saving on employment costs by classifying workers as independent contractors. There are two ways to accomplish this: (1) structure the business as an internet-based marketplace or platform; or (2) structure the relationship between the business and the worker in a way that ensures the worker remains classified as an independent contractor under either the common law control test or the economic realities test. Both Uber and Lyft have faced accusations of intentionally misclassifying their workers to utilize this competitive advantage. Taking an in-depth look at Uber's and Lyft's business models reveals that both companies have failed to accomplish either of the two methods above, indicating their workers may in fact be misclassified. TaskRabbit's model, on the other hand, has key distinguishing characteristics that make it more of a marketplace than Uber or Lyft while also allowing for proper classification of its workers as independent contractors under both the common law control and the economic realities tests. Therefore, TaskRabbit's model allows the company to legally enjoy the benefits of classifying its workers as independent contractors, providing it a competitive edge in the gig-economy.

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I. INTRODUCTION

Over eight million people worldwide use Uber to get from point A to point B.¹ In June 2016, Uber completed its two-billionth ride, just six months after it completed its one-billionth ride that took six years to accomplish.² These numbers indicate how widespread Uber has become; however, circumstances could change for both drivers and riders in the near future. Several lawsuits, such as *O'Connor v. Uber Technologies, Inc.*,³ have raised the issue of whether Uber is misclassifying its drivers as independent contractors rather than employees.⁴ Additionally, agencies and courts in several other countries, such as France, England, and Switzerland, argue that Uber's drivers should be classified as employees.⁵

If Uber cannot settle these lawsuits and loses in court, its drivers would be classified as employees, resulting in significant ramifications for Uber. If Uber drivers are deemed employees, the law would require that Uber provide them with certain benefits, driving up Uber's costs. Uber would likely pass these increased costs onto the consumers through increased fares, which would impact not only the people that

¹ Artyom Dogtiev, *Uber Revenue and Usage Statistics*, BUS. APPS (Jan. 9, 2018), <http://www.businessofapps.com/uber-usage-statistics-and-revenue/>; Kia Kokalitcheva, *Uber Completes 1 Billion Rides*, FORTUNE (Dec. 31, 2015) <http://fortune.com/2015/12/30/uber-completes-1-billion-rides/>; Lawrence M. Schall, *I Run a University. I'm Also an Uber Driver*, WASH. POST (July 29, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/29/i-run-a-university-im-also-an-uber-driver/?utm_term=.e64726f39966.

² Will Drabold, *Uber Drivers Complete 2 Billion Rides*, TIME (July 19, 2016), <http://time.com/4412550/uber-drivers-complete-2-billion-rides/> (noting that Uber's CEO announced the milestone on Facebook); Heather Somerville, *Uber Reaches 2 Billion Rides Six Months After Hitting Its First Billion*, REUTERS (July 18, 2016), <http://www.reuters.com/article/us-uber-rides-idUSKCN0ZY1T8>.

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

⁴ *Id.* at 1135.

⁵ William Louch & Greg Bensinger, *Uber Drivers Entitled to Workers' Rights*, U.K. Tribunal Rules, WALL ST. J. (Oct. 28, 2016), <http://www.wsj.com/articles/u-k-court-rules-uber-drivers-entitled-to-workers-rights-1477663924>; Michael Shields, *Uber Drivers Are Employees "Eligible for Company Social Security Contributions"—Swiss Agency*, REUTERS (Jan. 5, 2017), <http://in.reuters.com/article/swiss-uber-idINL5N1EV0JU>; David Whitehouse, *France Seeks to Classify Uber Drivers as Employees*, AFP SAYS, BLOOMBERG (May 16, 2016), <http://www.bloomberg.com/news/articles/2016-05-16/france-seeks-to-classify-uber-drivers-as-employees-afp-says>.

use Uber's app, but also the drivers, as Uber would likely place restrictions on when and how much a driver could work.⁶

Uber is not the only company under scrutiny for the way it classifies its workers. Lyft, a direct competitor of Uber, is also facing lawsuits from former drivers claiming they were misclassified.⁷ Today's "gig-economy"—a microeconomic system that utilizes Internet platforms to more efficiently match the needs of buyers with unused human and physical resources⁸—as a whole is arguably the catalyst behind the increased scrutiny for worker classification.⁹ This increased scrutiny has heightened awareness of the tests used to determine a worker's employment status.¹⁰ Courts and agencies use two main tests to determine a worker's employment status: the common law control test and the economic realities test.¹¹ However, some commentators argue these tests are outdated and ill-suited not only to the gig-economy, but to the modern economy as a whole.¹²

Current employment and labor laws create strong incentives for employers to classify workers as independent contractors to avoid costs associated with employees, such as workers' compensation, unemployment benefits, and minimum wage.¹³ In the gig-economy, two alternatives accomplish this: (1) structure the business as an internet-based marketplace or platform; or (2) structure the relationship between the business and the worker to ensure the worker remains classified as an independent contractor under either of the tests mentioned above. This Note argues that TaskRabbit's model, discussed below, not only makes TaskRabbit more of a marketplace than Uber or Lyft, but also guarantees that its workers remain classified

⁶ Timothy Doescher, *Turning Independent Contractors into Employees Would Kill the Gig Economy*, FOUND. ECON. EDUC. (Oct. 31, 2016), <https://fee.org/articles/turning-independent-contractors-into-employees-would-kill-the-gig-economy/>. Uber has already introduced some restrictions on drivers by limiting the amount of hours they can drive consecutively without a break. Andrew J. Hawkins, *Uber Will Require Drivers in the US to Take Six-Hour Breaks Between Shifts*, VERGE (Feb. 12, 2018), <https://www.theverge.com/2018/2/12/17004236/uber-driver-require-6-hour-break-rest>; *Uber to Introduce Limit on Drivers' Hours*, BBC (Jan. 16, 2018), <http://www.bbc.com/news/business-42707753>.

⁷ See *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930 (N.D. Cal. 2016); see also *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284 (D. Mass. 2016).

⁸ See Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 466 n.45 (2017) ("[D]efining the sharing economy as 'a microeconomic system built around the utilization of unused human and physical resources.'" (quoting Andrew T. Bond, *An App for That: Local Governments and the Rise of the Sharing Economy*, 90 NOTRE DAME L. REV. ONLINE 77, 78–79 (2015))); Joseph V. Kennedy, *Three Paths to Update Labor Law for the Gig Economy*, INFO. TECH. & INNOVATION FOUND. 2 (Apr. 2016), <http://www2.itif.org/2016-labor-law-gig-economy.pdf> (defining the gig-economy as the growing phenomenon of businesses "using Internet platforms that try to match the skills and desires of workers with the needs of potential buyers.").

⁹ Kennedy, *supra* note 8, at 1.

¹⁰ *Id.* at 2.

¹¹ Bales & Woo, *supra* note 8, at 469.

¹² Kennedy, *supra* note 8, at 2.

¹³ Bales & Woo, *supra* note 8, at 468–69.

as independent contractors under either worker classification test should a court challenge arise.

Section II of this Note provides the relevant background information necessary for understanding the arguments set forth in the analysis. First, it provides a brief overview of the “gig-economy” and briefly discusses the models of Uber, Lyft, and TaskRabbit. Then, it discusses the two major misclassification lawsuits facing Uber and Lyft—*O’Connor v. Uber Technologies, Inc.* and *Cotter v. Lyft, Inc.*—providing a launching point for the analysis. Section II also provides a concise history of the common law control test and the economic realities test and addresses the factors that comprise these tests.

Section III of this Note evaluates Uber, Lyft, and TaskRabbit’s working models, highlighting key characteristics in TaskRabbit’s model that distinguish it from Uber and Lyft’s models. These differences also may explain the dearth of litigation involving TaskRabbit.

Finally, Section IV of this Note concludes that TaskRabbit’s model is better suited to legally reap the benefits of classifying its workers as independent contractors while simultaneously providing TaskRabbit with a competitive edge in the gig-economy.

II. BACKGROUND

A. The Gig-Economy

Although some form of the gig-economy has always existed, increased access to the Internet and the widespread use of mobile technology have greatly increased its scale, scope, and pervasiveness.¹⁴ People participate as workers in the gig-economy for various reasons, whether as a hobby, a means of supplemental income for a traditional job, one of multiple sources of income from multiple freelance jobs, or a full-time occupation.¹⁵ Economists expect the popularity of the gig-economy to increase not only with consumers, but also with workers.¹⁶ Currently, “[m]ore than a third of U.S. workers now identify as freelancers, according to a recent study by the Freelancers Union, with over thirty million identifying as either ‘independent’ or ‘diversified’ workers who work for multiple employers. That number is expected to grow.”¹⁷

Unfortunately, labor and unemployment laws have not kept up with the growth in prominence of the gig-economy.¹⁸ Employment law traditionally regulates the relationship between an employer and its employees; independent contractors,

¹⁴ Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 998 (2016).

¹⁵ Caleb Holloway, *Keeping Freedom in Freelance: It’s Time for Gig Firms and Gig Workers to Update Their Relationship Status*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 298, 307 (2016).

¹⁶ *Id.* at 302, 306.

¹⁷ *Id.* at 306 (quoting Annie Gaus, *Can the ‘1099’ Labor Model Survive the Collision Between Uber and Its Drivers?*, UPSTART BUS. J. (Nov. 2, 2015), <http://upstart.bizjournals.com/companies/startups/2015/11/02/can-the-1099-labor-model-survive-the-collision.html?page=all>).

¹⁸ Kennedy, *supra* note 8, at 2; *see* Bales & Woo, *supra* note 8, at 469.

however, are “presumed to be able to look out for themselves”¹⁹ Not much discussion has addressed what work relationships exist between these two classifications, which is where most of the gig-economy resides.²⁰ “Instead of adapting to the evolving needs of both workers and those who would benefit from their skills, the nation’s federal, state, and local labor laws continue to depend on the historical distinction between an employee and an independent contractor.”²¹ This distinction carries considerable weight. If a worker is an independent contractor, the employer is relieved of responsibility for and costs of “payroll taxes, minimum wage, and overtime; the risks of employment discrimination law[,] . . . unemployment insurance, workers’ compensation, or family and medical leave.”²² This benefit creates a strong incentive for employers in competitive industries, including many in the gig-economy, as such a classification can save companies an estimated twenty to thirty percent per worker.²³ Consequently, classifying workers as independent contractors, rather than employees, has become commonplace in the gig-economy.²⁴

1. Uber and Lyft

Uber is a rideshare app, downloadable for Android, iOS, and Windows operating systems, that utilizes the GPS in a passenger’s smartphone to connect with drivers.²⁵ The passenger inputs her pickup location, the type of vehicle she wants (based on the number of seats and desired level of luxury), and the location where she wants to be dropped off.²⁶ After arriving at her desired destination, the Uber app charges the passenger’s credit card.²⁷ Several factors determine the price of the ride, including the aggregate demand for rides in the area, which may trigger “surge price fare.”²⁸ Uber

¹⁹ Kennedy, *supra* note 8, at 2.

²⁰ *Id.*

²¹ *Id.*

²² Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 352 (2016) (first citing 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, 337 (2001); then citing 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, 53 (2015)).

²³ Alison Griswold, *The Scariest Thing About the Gig Economy Is How Little We Actually Know About It*, QUARTZ (Feb. 23, 2016), <https://qz.com/614218/the-scariest-thing-about-the-gig-economy-is-how-little-we-actually-know-about-it/> (“Signing up workers as independent contractors instead of traditional employees can save companies an estimated [thirty percent] on staffing costs.”); Pinsof, *supra* note 22, at 352 (“As a result of these savings, independent contractors are estimated to cost twenty to thirty percent less per worker.”).

²⁴ Pinsof, *supra* note 22, at 352.

²⁵ Bales & Woo, *supra* note 8, at 463.

²⁶ *Id.* at 463–64.

²⁷ *Id.* at 464.

²⁸ *Id.*; see Oei & Ring, *supra* note 14, at 1000–01 (describing how increases in wait times, unfulfilled requests, and demand, as well as holidays and inclement weather, affect surge pricing).

keeps a percentage of the fare collected and pays the rest to the driver.²⁹ Almost anyone can drive for Uber, provided they meet several minimal requirements.³⁰ If an applicant meets all the requirements, the final step is to sign a contract with Uber or a subsidiary, where she agrees that she is an independent contractor, not an employee.³¹

Uber has become ubiquitous within the gig-economy.³² Its prominence as a gig-economy platform has resulted in new services—particularly those utilizing a software application on a smartphone—being described as “Uber for X.”³³ For example, “Airbnb is [often referred to as] Uber for lodging, where consumers can use the app to rent out couches, rooms, or whole apartments and homes as if they were hotels.”³⁴

Uber’s most prominent competitor is Lyft.³⁵ Lyft’s business model is nearly identical to Uber’s: it connects passengers to drivers through its app, collects payment through the app, determines pricing based on factors such as demand, keeps a commission from the fare collected, and vets all its drivers.³⁶ Lyft also treats its drivers as independent contractors.³⁷

Until recently, one notable difference between Uber and Lyft was how riders paid for the service. Rather than automatically taking the payment, Lyft’s app prompts

²⁹ Bales & Woo, *supra* note 8, at 464; Oei & Ring, *supra* note 14, at 1002.

³⁰ Bales & Woo, *supra* note 8, at 465 (stating some of the requirements are “a background and Department of Motor Vehicle check, owning a vehicle, and having car insurance.” (citing John Patrick Pullen, *Everything You Need to Know About Uber*, TIME (Nov. 4, 2014), <http://time.com/3556741/uber/>); Oei & Ring, *supra* note 14, at 1000 (“To become an UberX driver, applicants must meet an age requirement and have a driver’s license, a car (2005 or newer, in most cities), proper insurance, and a clean driving record. Applicants must also clear a background check.” (footnote omitted)).

³¹ See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1528 (2016); see also *Legal: U.S. Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> (last updated Dec. 13, 2017) (“No joint venture, partnership, employment, or agency relationship exists between you, Uber or any Third Party Provider as a result of this Agreement or use of the Services.”).

³² Holloway, *supra* note 15, at 303.

³³ *Id.*

³⁴ *Id.* (footnote omitted).

³⁵ Oei & Ring, *supra* note 14, at 1003.

³⁶ *Id.*; see *Drive with Lyft*, LYFT, <https://www.lyft.com/drive-with-lyft> (last visited Jan. 7, 2018); *How Your Pay Is Calculated*, LYFT (July 26, 2016), <https://thehub.lyft.com/blog/how-your-pay-is-calculated>.

³⁷ Lyft’s Terms of Service provide the following:

As a Driver on the Lyft Platform, you acknowledge and agree that you and Lyft are in a direct business relationship, and the relationship between the parties under this Agreement is solely that of independent contracting parties. You and Lyft expressly agree that (1) this is not an employment agreement and does not create an employment relationship between you and Lyft; and (2) no joint venture, franchisor- franchisee, partnership, or agency relationship is intended or created by this Agreement.

Lyft Terms of Service, LYFT, <https://www.lyft.com/terms> (last updated Feb. 6, 2018).

riders for payment and allows riders to add tips to their fare.³⁸ Although Lyft takes a percentage of the fares, the drivers keep one hundred percent of the tips.³⁹ Until June 2017, Uber did not allow tipping in its app.⁴⁰ However, after a string of scandals resulting in negative press, Uber added the ability to tip drivers through the app in three cities and planned to allow tipping nationwide by the end of July 2017.⁴¹ Like Lyft, Uber does not take any fees from the drivers' tips, allowing the drivers to keep one hundred percent of their tips.⁴²

2. TaskRabbit

To allow individuals to hire local freelancers to perform services, TaskRabbit provides an online marketplace that is accessible through its website or an app available for iOS and Android operating systems.⁴³ TaskRabbit offers users the option of hiring a Tasker—what TaskRabbit calls the workers—the same day or for a future date.⁴⁴ When hiring a Tasker for a same-day task, the user is limited to Quick Assign, where the user does not have the option to choose a particular Tasker for the job.⁴⁵ Rather, after the user selects a category and provides a description of the job, TaskRabbit sends a notification to all Taskers in the area.⁴⁶ If a Tasker has the necessary skills and experience, he or she can choose to accept the task.⁴⁷ Once a

³⁸ Oei & Ring, *supra* note 14, at 1003.

³⁹ *How Your Pay Is Calculated*, *supra* note 36; Oei & Ring, *supra* note 14, at 1004.

⁴⁰ Andrew J. Hawkins, *Uber Finally Caves and Adds a Tipping Option to Its App*, VERGE (June 20, 2017), <https://www.theverge.com/2017/6/20/15840818/uber-tipping-option-app-seattle-minneapolis-houston>.

⁴¹ *Id.*; *In-App Tips on Uber*, UBER, <https://www.uber.com/ride/how-it-works/tips/> (last visited Jan. 27, 2018) (“In-app tipping is currently available in the US only. We will make announcements if and when tipping is made available in other countries.”).

⁴² *Do Trip Fares Include a Tip?*, UBER, <https://help.uber.com/h/c23aa32f-f9fc-4671-b2cc-e419d67fe8f9> (last visited Jan. 27, 2018) (“Any cash gratuity offered by a rider is voluntary. If a rider wishes to tip you, please feel free to accept.”); *How Does Tipping Work?*, UBER, <https://help.uber.com/h/532d3937-e0aa-442b-a949-d23e2c23cc6d> (last visited Mar. 3, 2018) (“Uber takes zero service fees on tips.”); *In-App Tips on Uber*, *supra* note 41.

⁴³ Oei & Ring, *supra* note 14, at 1007; *see How It Works*, TASKRABBIT, <https://www.taskrabbit.com/how-it-works> (last visited Jan. 27, 2018). A list of the most common services Taskers perform can be found on TaskRabbit's website. *What TaskRabbit Offers*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411410-What-TaskRabbit-Offers> (last updated Jan. 18, 2017).

⁴⁴ *See How to Hire for a Future Date*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/210861763-How-to-Hire-for-Future-Date> (last updated Jan. 26, 2017); *How to Hire for Same Day*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/210729683-How-to-Hire-for-Same-Day> (last updated Jan. 21, 2017).

⁴⁵ *How to Hire for Same Day*, *supra* note 44; *What Is Quick Assign?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/205313120-What-is-Quick-Assign-> (last updated Jan. 5, 2017).

⁴⁶ *How to Hire for Same Day*, *supra* note 44; *What Is Quick Assign?*, *supra* note 45.

⁴⁷ *How to Hire for Same Day*, *supra* note 44; *What Is Quick Assign?*, *supra* note 45.

Tasker accepts the user's task, the user can communicate with the Tasker via phone or the chat function in the TaskRabbit platform.⁴⁸

When hiring a Tasker for a future date, the user follows the same procedure for selecting a category and posting a description of the job as described above, but also selects the future date and time for the requested task.⁴⁹ After submitting the task, TaskRabbit gives the user the option to use Quick Assign or to select a particular Tasker.⁵⁰ If the user wishes to select a particular Tasker, he or she is shown a list of Taskers along with information about each, including whether the user has hired the Tasker previously, how many tasks the Tasker has completed in that category, and each Tasker's hourly rate.⁵¹

Ordinarily, hourly rates vary between Taskers because each Tasker sets his or her own rate.⁵² However, when using the Quick Assign option, TaskRabbit's system predetermines an hourly rate based on the "task category, location, and Tasker availability."⁵³ This predetermined rate may be higher or lower than the individual rate of the Tasker performing the job.⁵⁴ In 2013, TaskRabbit implemented a minimum wage for Taskers of \$11.20 per hour, which is among the highest minimum wages in the United States.⁵⁵

⁴⁸ *How to Hire for Same Day*, *supra* note 44; *What Is Quick Assign?*, *supra* note 45.

⁴⁹ *How to Hire for a Future Date*, *supra* note 44.

⁵⁰ *Id.*

⁵¹ *Id.* In 2013, TaskRabbit changed its model from an auction-based model to its current system. Under the old model, users would post jobs, Taskers would bid on them, and the Tasker with the winning bid would get the job. Switching to the new model, where Taskers post their hourly rates up front, resulted in a 400% increase in earnings. Jeff Bercovici, *TaskRabbit Quadruples Its Business, Says It Will Turn Profitable in 2016*, INC. (Mar. 1, 2016), <http://www.inc.com/jeff-bercovici/taskrabbit-becoming-profitable.html>.

⁵² *How Pricing Works*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/205313140-How-Pricing-Works> (last updated Feb. 2, 2017); *compare TaskRabbit Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> (last updated Mar. 1, 2016) ("COMPANY DOES NOT PERFORM TASKS AND DOES NOT EMPLOY INDIVIDUALS TO PERFORM TASKS. COMPANY DOES NOT SUPERVISE, DIRECT OR CONTROL A TASKER'S WORK OR THE TASKS IN ANY MANNER, WHICH TASKER HEREBY ACKNOWLEDGES."), *with TaskRabbit Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> (last updated June 1, 2017) ("COMPANY DOES NOT PERFORM TASKS AND DOES NOT EMPLOY INDIVIDUALS TO PERFORM TASKS. USERS HEREBY ACKNOWLEDGE THAT COMPANY DOES NOT SUPERVISE, DIRECT CONTROL, OR MONITOR A TASKER'S WORK AND IS NOT RESPONSIBLE FOR THE WORK PERFORMED OR THE TASKS IN ANY MANNER.").

⁵³ *How to Hire for Same Day*, *supra* note 44.

⁵⁴ *How Pricing Works*, *supra* note 52.

⁵⁵ Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST CO. (Feb. 17, 2015), <https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death>. The current CEO of TaskRabbit, Stacy Brown-Philpot, has said Taskers earn "an average hourly rate of \$35 an hour." Lauren Goode, *People Will Still Power an AI Workforce*, VERGE (Nov. 3, 2016), <http://www.theverge.com/a/verge-2021/stacy-brown-philpot-taskrabbit-ceo-interview-ai-gig-economy>.

TaskRabbit makes money by implementing a seven-and-a-half percent Trust and Support fee and a thirty percent TaskRabbit service fee.⁵⁶ TaskRabbit uses the Trust and Support fee to support its one million dollar customer service guarantee, its customer support team, and its process for vetting potential Taskers.⁵⁷ TaskRabbit adds the Trust and Support fee to the Tasker's hourly rate, preventing it from reducing the Tasker's earnings.⁵⁸ However, the Trust and Support fee does not apply to out-of-pocket expenses and reimbursements.⁵⁹

TaskRabbit adds its thirty percent TaskRabbit service fee after the Tasker chooses his hourly rate. So, when a user selects a Tasker, the rate displayed includes the thirty percent TaskRabbit service fee in addition to the Tasker's hourly rate.⁶⁰ Thus, the Tasker can see the hourly rate she will earn as well as the price the user will pay.⁶¹ Like the Trust and Support fee, the TaskRabbit service fee does not apply to reimbursements made to the Tasker.⁶²

To become a Tasker, a person must be at least twenty-one years old, pass a background check, possess a smartphone, and work in one of the cities in which TaskRabbit offers its service.⁶³ This last requirement is important because TaskRabbit is not as widespread as Uber or Lyft and is currently limited to thirty-nine "metro areas" across the United States as well as London, England.⁶⁴ Once approved, the Tasker must attend a mandatory orientation that provides the history of TaskRabbit, instructions on how to use the app, and information about how to be offered and accept

⁵⁶ *The TaskRabbit Trust & Support Fee*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204940570-The-TaskRabbit-Trust-Support-Fee> (last updated Feb. 7, 2017); *What Is the TaskRabbit Service Fee?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411610-What-is-the-TaskRabbit-Service-Fee-> (last updated Jan. 21, 2017).

⁵⁷ *The TaskRabbit Trust & Support Fee*, *supra* note 56.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *What Is the TaskRabbit Service Fee?*, *supra* note 56. TaskRabbit provides as an example: "[I]f you pay \$100, \$70 goes to your Tasker." *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *What Do I Need to Be a Tasker?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411070-What-do-I-need-to-be-a-Tasker-> (last updated Jan. 31, 2017).

⁶⁴ *Id.* TaskRabbit is currently present in the following cities in the United States: Atlanta, GA; Ann Arbor, MI; Austin, TX; Baltimore, MD; Boston, MA; Charlotte, NC; Chicago, IL; Cincinnati, OH; Cleveland, OH; Columbus, OH; Dallas, TX; Denver, CO; Detroit, MI; Durham, NC; Houston, TX; Indianapolis, IN; Kansas City, MO; Las Vegas, NV; Los Angeles, CA; Louisville, KY; Miami, FL; Milwaukee, WI; Minneapolis, MN; Nashville, TN; New York City, NY; Oklahoma City, OK; Orange County, CA; Orlando, FL; Philadelphia, PA; Pittsburgh, PA; Phoenix, AZ; Portland, OR; Raleigh, NC; Sacramento, CA; Salt Lake City, UT; San Antonio, TX; San Diego, CA; Seattle, WA; San Francisco Bay Area, CA; St. Louis, MO; St. Paul, MN; St. Petersburg, FL; Tampa, FL; and Washington, D.C. *Is TaskRabbit in My City?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411090-Is-TaskRabbit-in-my-city-> (last updated Nov. 9, 2017).

a task, communicate with the client through the app, and submit an invoice.⁶⁵ The orientation trains the Tasker how to use the app, not how to perform the tasks.

B. Relevant Cases

1. *O'Connor v. Uber Technologies, Inc.*

Due to its prominence in the gig-economy, Uber has become a focal point for the issues facing gig-economy businesses, such as the misclassification of workers. *O'Connor v. Uber Technologies, Inc.*⁶⁶ involved Uber drivers in California alleging that Uber misclassified its drivers as independent contractors rather than employees.⁶⁷ The plaintiffs argued the misclassification denied drivers protections under the California Labor Code, which is closely related to the Fair Labor Standards Act of 1938.⁶⁸ Uber argued that it was not a transportation company, but rather a technology company.⁶⁹ The court disagreed and determined that Uber was ultimately “a transportation company, albeit a technologically sophisticated one.”⁷⁰ This determination led the court to conclude that Uber’s drivers provided a service to Uber, which “created a rebuttable presumption of employment status.”⁷¹

Responding to Uber’s emphasis of drivers’ freedom to choose when they work, the court found that such freedom is not determinative of an independent contractor relationship because “the more relevant inquiry is how much control Uber exercises over drivers *while* they are on duty for Uber.”⁷² “The control factor focuses on power held, rather than power actually wielded,” and the court found Uber possessed substantial power.⁷³ The court substantiated this finding on the facts that Uber: (1) sets the pay rate for drivers unilaterally, (2) monitors driver performance and compliance with “heavy-handed” suggestions through its rating system, and (3) has the ability to terminate drivers’ contracts at will.⁷⁴ However, several factors weigh against the finding of an employment relationship between Uber and its drivers including that Uber in no way: (1) restricts drivers from also driving for Uber’s competitors, such as Lyft, (2) determines routes or territories for the drivers, or (3) manages drivers’ schedules.⁷⁵

⁶⁵ *Trust & Safety: Registration*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/208224273-Trust-Safety-Registration> (last visited Mar. 3, 2018); *When Will My Registration Be Processed?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204411020-When-will-my-registration-be-processed-> (last visited Mar. 3, 2018).

⁶⁶ *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁶⁷ *Id.* at 1135.

⁶⁸ *Id.*; Means & Seiner, *supra* note 31, at 1528.

⁶⁹ *O'Connor*, 82 F. Supp. 3d at 1137.

⁷⁰ *Id.* at 1141.

⁷¹ *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1114 (N.D. Cal. 2016).

⁷² *Id.* at 1126.

⁷³ Holloway, *supra* note 15, at 319.

⁷⁴ *Id.*

⁷⁵ *Id.*

2. *Cotter v. Lyft, Inc.*

In a case that parallels *O'Connor*, drivers for Lyft brought suit in *Cotter v. Lyft, Inc.*⁷⁶ and argued that Lyft should treat them as employees.⁷⁷ The drivers advanced several arguments in support of their claim: (1) Lyft can terminate drivers at its discretion, (2) Lyft can control how the drivers provide the service by taking a twenty percent administrative fee from the gratuities drivers earn, (3) drivers are the only source of income for Lyft, (4) drivers do not require special skills to drive for Lyft, (5) drivers require software provided by Lyft, and finally (6) drivers' relationships with Lyft are indefinite.⁷⁸

In response, Lyft proffered two arguments. First, they argued that Lyft merely provides drivers and riders the means to connect, and consequently, the drivers do not perform services for Lyft.⁷⁹ The court quickly dismissed this argument, noting it was "obviously wrong" and "not a serious one."⁸⁰ The court reached this conclusion by determining Lyft "concerns itself with far more than simply connecting random users of its platform."⁸¹ The court also found that Lyft marketed itself as a transportation service, provided detailed instructions regarding driver conduct, and stated in its driver's guide and FAQs that the drivers were "driving for Lyft."⁸²

Next, Lyft argued that the drivers were independent contractors as a matter of law.⁸³ However, the court found certain factors supported the claim that the drivers were independent contractors, while other factors supported the claim that the drivers were employees.⁸⁴ Facts the court found to support independent contractor status included: (1) the parties' belief that they were entering an independent contractor relationship, (2) the great flexibility the drivers enjoyed, including determining when and where they worked as well as having no appearance standard, and (3) the lack of contact between drivers and Lyft management.⁸⁵ Facts the court found to support employee status included: (1) Lyft's assertion of some degree of control over how drivers behave while giving rides, (2) Lyft's unlimited power to terminate the relationship, (3) the full integration of the drivers' work into Lyft's business, (4) the lack of special skills driving requires, and (5) the existence of recent case law

⁷⁶ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015).

⁷⁷ Andrea Bolton, *Regulating Ride-Sharing Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefitting Both Consumers and Drivers*, 46 CUMB. L. REV. 137, 175 (2015).

⁷⁸ *Id.*

⁷⁹ *Cotter*, 60 F. Supp. 3d at 1078 ("Under this theory, Lyft drivers perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay.").

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1081 ("Some factors point in one direction, some point in the other, and some are ambiguous.").

⁸⁵ *Id.*

undermining Lyft's arguments.⁸⁶ Because neither classification neatly fit the Lyft drivers, the court noted "the jury in this case will be handed a square peg and asked to choose between two round holes."⁸⁷

C. Common Law Control Test

The common law control test was the first test designed to determine if a worker was an independent contractor or an employee.⁸⁸ Originally established to determine the vicarious liability of an employer through the doctrine of respondeat superior, the Court first used the test to distinguish between an employee and an independent contractor in *Railroad Co. v. Hanning*.⁸⁹ In that case,

[i]n light of new social welfare legislation driven in part by the New Deal, the Supreme Court had to determine whether the control test, which was primarily used to determine tort liability, could be used to determine whether an employment relationship existed for the purposes of employment liability, employee coverage, and protection.⁹⁰

The common law control test has remained remarkably unchanged since its inception.⁹¹ The test considers eleven factors, none of which are dispositive: (1) control, (2) supervision, (3) integration, (4) skill level, (5) continuing relationship, (6) tools, (7) location, (8) method of payment, (9) intent of the parties, (10) employment,

⁸⁶ *Id.* at 1078–80. The case law the court relied on was from two decisions: (1) *JKH Enters., Inc. v. Dep't of Indus. Relations*, 48 Cal. Rptr. 3d 563 (Cal. Ct. App. 2006) and (2) *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37 (Cal. Ct. App. 2007). See *Cotter*, 60 F. Supp. 3d at 1080.

⁸⁷ *Cotter*, 60 F. Supp. 3d at 1081. At the time of this writing, the court had set a final fairness hearing on March 9, 2017, to approve of a settlement between the parties. Order Re Fairness Hearing & Supplemental Class Notice at 1, *Cotter v. Lyft, Inc.*, No. 13-CV-04065-VC (N.D. Cal. Dec. 23, 2016), Dkt. Nos. 291, 292. On March 16, 2017, the district court issued an order granting final approval of a settlement agreement between the parties. On appeal, the Ninth Circuit reviewed the record de novo and found "the district court did not abuse its discretion in granting final approval of the class action settlement in this case . . ." *Cotter v. Page*, No. 17-15648, No. 17-15692, No. 17-15702, No. 17-16072, 2017 U.S. App. LEXIS 20101, 2017 WL 4535961 at *1 (9th Cir. Sept. 15, 2017). On September 15, 2017, the Ninth Circuit issued its opinion affirming the district court's decision and denying all other pending motions in the case as moot. *Id.*

⁸⁸ *Pinsof*, *supra* note 22, at 347.

⁸⁹ *R.R. Co. v. Hanning*, 82 U.S. 649, 656 (1872); Julien M. Mundeley, Note, *Not Everything That Glitters Is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 258 (2015).

⁹⁰ Mundeley, *supra* note 89, at 259 (first citing John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. & EMP. L.J. 337, 348–49 (1999); then citing Thomas J. Murray, *Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relations Act*, 16 CARDOZO ARTS & ENT. L.J. 303, 310–11 (1998)).

⁹¹ *Pinsof*, *supra* note 22, at 348.

and (11) the type of business.⁹² Courts apply the test “with an eye towards determining which party generally has control over the work process: if the employer controls, the worker is deemed an employee, and if the worker controls, he is deemed an independent contractor.”⁹³

D. Economic Realities Test

In *United States v. Silk*,⁹⁴ the Supreme Court of the United States established the groundwork for the economic realities test.⁹⁵ The Court decided that the economic realities test better defined the employer-employee relationship, as opposed to the common law control test.⁹⁶ Since then, Congress has incorporated the economic realities test into the Fair Labor Standards Act of 1938 (“FLSA”), the Family Medical Leave Act of 1993 (“FMLA”), and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”).⁹⁷ The factors of the economic realities test are: (1) whether the work is integral to the business, (2) the opportunity for the worker to experience profit or loss, (3) the worker’s capital investment in the job, (4) the degree of skill necessary to perform the job, (5) the permanency of the relationship between worker and employer, and (6) the control the employer maintains over the worker.⁹⁸ Courts use the economic realities factors to determine “whether the employees are economically dependent upon the business.”⁹⁹

Like the common law control test, a substantial obstacle found in the economic realities test is that the test does not have a single, determinative factor.¹⁰⁰ Difficulty exists in determining “which factors best illuminate the economic reality of the situation” when the factors conflict with one another.¹⁰¹ This is readily apparent when

⁹² *Id.* at 347. The cited source states there are ten factors to the common law control test. However, the author combined two of the named eleven factors into one when listing them and combined two different factors when applying the test to Uber. *Id.* at 347, 355. Several iterations of the common law control test exist. For a list of federal statutes and agencies that use a variation of the common law control test, see *id.* at 347 n.33. Additionally, numerous state courts use a variation of the common law control test. The court in *O’Connor v. Uber Techs., Inc.* applied the *Borello* test, which applies several of the factors listed above and mentions the rest as factors for additional consideration. *Id.* (first citing *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1139 (N.D. Cal. 2015); then citing *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations (Borello)*, 769 P.2d 399 (Cal. 1989)).

⁹³ *Id.* at 347.

⁹⁴ *United States v. Silk*, 331 U.S. 704 (1947), *superseded by statute*, Social Security Act of 1948, ch. 468, Pub. L. No. 80-642, 62 Stat. 438, *as recognized in* *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318 (1992).

⁹⁵ *Mundeley*, *supra* note 89, at 259.

⁹⁶ *Id.*

⁹⁷ U.S. DEP’T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION 2015-1, at 3, 3 n.3 (2015); *Bales & Woo*, *supra* note 8, at 12; *see infra* notes 104–06 and accompanying text.

⁹⁸ *See Means & Seiner*, *supra* note 31, at 1526; *Mundeley*, *supra* note 89, at 259.

⁹⁹ *Mundeley*, *supra* note 89, at 260 (footnote omitted).

¹⁰⁰ *Id.* at 275.

¹⁰¹ *Means & Seiner*, *supra* note 31, at 1527.

courts attempt to apply the test to the gig-economy, as evidenced by the class-action cases involving Uber and Lyft, respectively.¹⁰² The factors alone cannot classify workers in the gig-economy “because the factors merely illuminate what is already evident—that neither category neatly fits hybrid circumstances [like those found in the gig-economy].”¹⁰³

In an attempt to address the lack of guidance, on July 15, 2015, the Administrator for the Wage and Hour Division of the Department of Labor (“DOL”) released *Administrator’s Interpretation No. 2015-1*.¹⁰⁴ This document addressed the misclassification of employees as independent contractors rather than employees, focusing on the implications of such misclassifications under the FLSA.¹⁰⁵ The interpretation offered “additional guidance regarding the application of the standards for determining who is an employee under the Fair Labor Standards Act”¹⁰⁶ However, the DOL’s interpretation of the economic realities test appears to support the pre-determined outcome of employment rather than support a more objective, open inquiry as to the classification of a worker.¹⁰⁷ This approach arguably is designed to “stack the deck against on-demand businesses,” such as Uber.¹⁰⁸ But as this Note argues, TaskRabbit’s model allows TaskRabbit to continue to classify its workers as independent contractors, despite the DOL’s approach.

III. ANALYSIS

If Taskers filed a misclassification lawsuit against TaskRabbit, the company would be better suited to deal with that claim than Uber or Lyft. This is because TaskRabbit possesses more characteristics of a marketplace than does Uber or Lyft, and, consequently, a court likely would find TaskRabbit to be merely “a technology company” whose software provides a “lead generation platform.”¹⁰⁹ However, even if a court determined that TaskRabbit was an employer for Taskers, application of both

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ U.S. DEP’T OF LABOR, *supra* note 97, at 1; *but see* Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, LITTLER MENDELSON P.C. (June 7, 2017), <https://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance> (“In a three-sentence press release, Labor Secretary Alexander Acosta announced the withdrawal of two Wage and Hour Administrator’s Interpretations (AIs) on joint employment and independent contractors. . . . [Administrator’s Interpretation No. 2015-1 and No. 2016-1] were criticized for creating informal standards outside of the notice-and-comment process required for formal agency rulemaking.”). Despite its withdrawal, *Administrator’s Interpretation No. 2015-1* still offers value to this Note’s analysis in that it provides insight into how the DOL would likely approach and analyze a misclassification claim.

¹⁰⁵ *See* U.S. DEP’T OF LABOR, *supra* note 97, at 1.

¹⁰⁶ *Id.*

¹⁰⁷ Means & Seiner, *supra* note 31, at 1532.

¹⁰⁸ *Id.*

¹⁰⁹ O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015).

the common law control test and the economic realities test would achieve the same result: Taskers are independent contractors.¹¹⁰

A. Uber and Lyft

1. Why Uber's and Lyft's Arguments Failed

Both Uber and Lyft argued that they were merely technology companies that provided platforms allowing for easier connection between riders and drivers.¹¹¹ Likewise, the judge in each case subsequently dismissed these arguments.¹¹² As stated previously, the *Cotter* court found that Lyft was more than a platform provider because it marketed itself as a transportation service, provided detailed instructions regarding driver conduct, and stated in its driver's guide and FAQs that the drivers were "driving for Lyft."¹¹³ The *O'Connor* court made similar findings as well as several others.¹¹⁴ For instance, the *O'Connor* court found that Uber exercised substantial control over the qualification and selection of its drivers, as well as the fare price for rides.¹¹⁵ Additionally, the court determined that Uber's drivers were integral to Uber's business.¹¹⁶ The court also found that Uber's claim of being merely a technology company was too narrow a framework in which to consider the company, focusing "exclusively on the mechanics of its platform (*i.e.*, the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually *does* (*i.e.*, enable customers to book and receive rides)."¹¹⁷

2. Consequences of the Courts' Determinations

The *O'Connor* court's determination resulted in the presumption that drivers for Uber were employees because they performed a service for Uber.¹¹⁸ The *Cotter* court, on the other hand, considered factors that were inconclusive as to the classification of

¹¹⁰ *Am I a TaskRabbit Employee?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/207555983-Am-I-a-TaskRabbit-employee-> (last visited Mar. 3, 2018). This page was created after this Note was written, and although it is not dispositive of a potential misclassification issue, it lends credence to the classification of Taskers as independent contractors by making TaskRabbit's claims in its Terms of Service more prominent and visible to Taskers.

¹¹¹ *O'Connor*, 82 F. Supp. 3d at 1141; *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

¹¹² *O'Connor*, 82 F. Supp. 3d at 1141 ("[I]t is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one."); *Cotter*, 60 F. Supp. 3d 1078 ("Therefore, the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one.").

¹¹³ *Cotter*, 60 F. Supp. 3d at 1078.

¹¹⁴ *O'Connor*, 82 F. Supp. 3d at 1141–43.

¹¹⁵ *Id.* at 1142–43.

¹¹⁶ *Id.* at 1142.

¹¹⁷ *Id.* at 1141–42.

¹¹⁸ *Id.* at 1135.

Lyft's drivers and ultimately concluded that the jury should decide.¹¹⁹ Responding to these determinations, both Uber and Lyft agreed to settle with the plaintiff drivers.¹²⁰

B. TaskRabbit

1. TaskRabbit's Argument Would Likely Succeed

While Uber and Lyft were unsuccessful in arguing they were merely providing a platform, TaskRabbit would likely succeed if it were to make the same argument. At first glance, such an argument by TaskRabbit appears likely to fail. TaskRabbit markets itself as the entity that helps people accomplish their chores, not the entity that connects them with an independent contractor who can help them accomplish those chores (as evidenced by TaskRabbit's homepage stating, "We do chores. You live life."¹²¹ TaskRabbit also provides a guide on Best Practices for Tasker Success, stating how Taskers should conduct themselves.¹²² Moreover, Taskers are fully integrated into TaskRabbit's business, which is explored in more depth in Section C below.

Despite these initial appearances, TaskRabbit's argument is a strong one. Looking past "the mechanics of its platform . . . [to] the substance of what [TaskRabbit] actually *does*" reveals that TaskRabbit in fact provides a marketplace for users and independent contractors to more easily connect.¹²³ Although its marketing suggests that TaskRabbit itself is the one performing the tasks, TaskRabbit explicitly states that it "is only a venue for connecting Users" and "gives entrepreneurs a platform to build their business."¹²⁴ On their own, these statements are hollow and do not prove much. However, several characteristics distinguishing TaskRabbit from Uber and Lyft

¹¹⁹ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

¹²⁰ *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2016 WL 3548370, 2016 U.S. Dist. LEXIS 85641, at *9 (N.D. Cal. June 30, 2016); *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1040 (N.D. Cal. 2016). Plaintiffs in both cases claimed that California law entitled the drivers to reimbursements for expenses. *O'Connor*, No. 13-CV-03826-EMC at *10; *Cotter*, 60 F. Supp. 3d at 1070. Plaintiffs in *O'Connor* also claimed Uber failed to remit gratuities. *O'Connor*, No. 13-CV-03826-EMC at *11. Plaintiffs in *Cotter* also claimed Lyft failed to pay minimum wage at times. *Cotter*, 60 F. Supp. 3d at 1070.

¹²¹ TASKRABBIT, <https://www.taskrabbit.com> (last visited Feb. 11, 2017). This phrase was the subject of TaskRabbit's marketing campaign in 2016, and although TaskRabbit has since removed this statement from its homepage, searching for "We do chores. You live life." on Google still returns TaskRabbit's homepage as the first result. Michael Zelenko, *Ditch TaskRabbit and Do Your Own Laundry*, VERGE (Sept. 15, 2016), <https://www.theverge.com/tech/2016/9/15/12933074/taskrabbit-app-ads-chores-leisure-work-startups>. Another example of TaskRabbit marketing Taskers as employees is "Let TaskRabbit do your chores while you live life!" *What TaskRabbit Offers*, *supra* note 43. However, some materials do indicate that TaskRabbit connects you with a third party. "TaskRabbit connects you with the same-day help in [three] simple steps." *How It Works*, *supra* note 43.

¹²² *Best Practices for Tasker Success*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/204409440-Best-Practices-for-Tasker-Success> (last visited Feb. 11, 2017).

¹²³ *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015).

¹²⁴ *Accepting Available Tasks*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/208020423-Accepting-Available-Tasks> (last visited Feb. 9, 2017); *TaskRabbit Terms of Service*, *supra* note 52.

support these claims. For example, TaskRabbit allows users to choose which Tasker they want to complete the job, and Taskers can choose to accept or deny jobs without penalty.¹²⁵ TaskRabbit also allows Taskers to market their business through TaskRabbit and to hire additional workers to assist with tasks provided that the additional worker also registers as a Tasker.¹²⁶

Additionally, despite exercising substantial control over the qualification and selection of its Taskers—much like Uber and Lyft exercise over their drivers—TaskRabbit does not terminate Taskers for receiving low ratings from users; it can only terminate Taskers for violating its Terms of Service Agreement (“Terms of Service” or “Agreement”).¹²⁷ TaskRabbit also allows Taskers to set their own hourly rates, unless the user utilizes the Quick Assign option.¹²⁸ As a final note, TaskRabbit shares many characteristics with Angie’s List, which has never faced legal challenges to classify the contractors as employees.¹²⁹ Both companies provide information for the user to make an informed decision about which contractor to hire.¹³⁰ As one author notes, TaskRabbit, more than other platforms, seems akin to an employment agency, although TaskRabbit explicitly denies this notion.¹³¹

2. Consequences of Marketplace Designation

By showing that TaskRabbit is more like a marketplace for, rather than an employer of, its Taskers, TaskRabbit could achieve what Uber and Lyft failed to do:

¹²⁵ “Uber considers [drivers] ‘[r]ejecting too many trips’ to be a performance issue that could lead to possible termination from the Uber platform.” *O’Connor*, 82 F. Supp. 3d at 1149 (quoting the Uber Driver Handbook). TaskRabbit, on the other hand, states, “[w]hether or not to accept a task is entirely up to [the Tasker].” *Accepting Available Tasks*, *supra* note 124.

¹²⁶ *Grow Your Business with Marketing Materials!*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/207519403-Grow-your-business-with-marketing-materials-> (last visited Jan. 12, 2017); *TaskRabbit Terms of Service*, *supra* note 52.

¹²⁷ *TaskRabbit Terms of Service*, *supra* note 52. The Agreement incorporates TaskRabbit’s Terms of Service, Privacy Policy, Best Practices Guide, and TaskRabbit Guarantee. *Id.*

¹²⁸ *How Pricing Works*, *supra* note 52.

¹²⁹ “[H]ouseholds nationwide check Angie’s List reviews to find the best local service providers” *About Us*, ANGIE’S LIST, <https://www.angieslist.com/basic/angie-s-list.htm> (last visited Feb. 13, 2017); “Angie’s List, Inc. . . . helps consumers research, hire, rate, and review a variety of service contractors” *Angie’s List Terms of Use*, ANGIE’S LIST, <https://www.angieslist.com/terms-of-use.htm> (last updated Apr. 24, 2017).

¹³⁰ Angie’s List runs background checks on providers and companies listed on its website. *How It Works*, ANGIE’S LIST, <https://www.angieslist.com/how-it-works.htm> (last visited Feb. 13, 2017). One author notes the value that TaskRabbit adds to transactions:

The logic in hiring someone to mow your lawn via TaskRabbit rather than using Craigslist’s “Odd Jobs” section is that the Tasker has been vetted by a third party and comes with easily available performance evaluations. Put differently, platforms meaningfully change the terms on which individuals transact by adding information and security to the process of two strangers conducting business sight unseen.

Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL’Y J. 1, 10 (2016) (footnotes omitted).

¹³¹ Das Acevedo, *supra* note 130, at 9; *TaskRabbit Terms of Service*, *supra* note 52.

avoid having to apply any classification tests to its workers to determine if they were actually employees rather than independent contractors. This would allow TaskRabbit to keep its current model and avoid increasing any of its costs associated with employees, allowing the company to continue on its path to becoming profitable.¹³²

C. Applying the Tests

Even if a court rejects the argument that TaskRabbit merely provides a platform to connect workers to customers, TaskRabbit would win on the second argument that Uber and Lyft unsuccessfully presented: its workers are independent contractors as a matter of law.¹³³ Depending on the statute at issue, either the common law control test or the economic realities test would apply to TaskRabbit and its workers.¹³⁴ Although both tests have numerous variations, this Note applies the general common law control test and the DOL's interpretation of the six factors of the economic realities test. This Note uses this iteration of the control test because it serves as the basis for the other iterations of the test.¹³⁵ Moreover, this Note uses the DOL's interpretation because it is arguably the strictest iteration of the test.¹³⁶

1. Taskers Likely Are Not Employees Under the Common Law Control Test

a. Control and Supervision

The factors of control and supervision are so closely related that courts can analyze them together.¹³⁷ The control factor indicates employee status when the employer, rather than the worker, controls the details of the work performed.¹³⁸ The supervision factor indicates employee status when the employer directly supervises the worker.¹³⁹

¹³² *Why TaskRabbit Is One of the Most Innovative Companies of 2017*, FAST CO. (Feb. 13, 2017), <https://www.fastcompany.com/3067481/most-innovative-companies/why-taskrabbit-is-one-of-the-most-innovative-companies-in-business> (“TaskRabbit has quadrupled [its] annual revenue and is profitable in each of its [eighteen] cities.”).

¹³³ *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137–38 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

¹³⁴ See U.S. DEP'T OF LABOR, *supra* note 97, at 3 n.3; Bales & Woo, *supra* note 8, at 12; Pinosof, *supra* note 22, at 347 n.33.

¹³⁵ The IRS's iteration of the common law control test was considered for use in this Note. However, in 2016, the IRS launched the Sharing Economy Tax Center, “designed to help taxpayers involved in the sharing economy quickly locate the resources they need to help them meet their tax obligations.” *IRS Launches New Sharing Economy Resource Center on IRS.gov, Provides Tips for Emerging Business Area*, IRS (Aug. 22, 2016), <https://www.irs.gov/newsroom/irs-launches-new-sharing-economy-resource-center-on-irsgov>. This seems to indicate that the IRS has accepted the classification of these workers as independent contractors and will not challenge that classification. As a result, this Note focuses on the broader application of the common law control test.

¹³⁶ Means & Seiner, *supra* note 31, at 1532 (“[I]t appears that the DOL's overall intent is to stack the deck against on-demand businesses, thereby supporting a pre-determined result, rather than facilitating an honest inquiry.” (footnote omitted)).

¹³⁷ Pinosof, *supra* note 22, at 355.

¹³⁸ *Id.*

¹³⁹ *Id.*

In its Terms of Service, TaskRabbit explicitly states that it “does not, in any way, supervise, direct, control or monitor a Tasker’s work or Tasks performed in any manner.”¹⁴⁰ Although this appears to determine these factors as indicative of independent contractor status, courts require further fact-specific analyses to confirm that indication. For example, the *O’Connor* court found that Uber’s rating system “arguably gives Uber a tremendous amount of control over the ‘manner and means’ of its drivers’ performance.”¹⁴¹ Uber documents also state that customer feedback and ratings could be sufficient grounds for discipline or termination.¹⁴² Furthermore, Uber retained the right to terminate drivers at will, which courts often view as strong evidence of control.¹⁴³

Applying these considerations to TaskRabbit, the control and supervision factors still appear to indicate independent contractor status for Taskers. Although users provide ratings and reviews for Taskers, TaskRabbit does not investigate this feedback unless a user specifically requests it to do so.¹⁴⁴ Additionally, TaskRabbit does not retain the right to terminate Taskers at will, but can only terminate them for breaching its Terms of Service.¹⁴⁵ The Terms of Service includes the Best Practices for Tasker Success, which set forth principles that Taskers must adhere to when conducting themselves.¹⁴⁶ However, these principles do not directly instruct Taskers on how to perform their tasks, unlike Uber’s “Onboarding Script” and Lyft’s “Rules of the Road” that instruct drivers how to perform their jobs.¹⁴⁷ Instead, these principles operate as guidelines rather than strict requirements. For these reasons, the control and supervision factors indicate independent contractor status for Taskers.

¹⁴⁰ *TaskRabbit Terms of Service*, *supra* note 52.

¹⁴¹ *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1151 (N.D. Cal. 2015).

¹⁴² Pinfof, *supra* note 22, at 357; *see Understanding Ratings*, UBER, <https://help.uber.com/h/99928811-f3a0-4fd6-9fce-a3436b5238d0> (last visited Jan. 7, 2018) (“[D]river-partner accounts with consistently low ratings may be deactivated . . .”).

¹⁴³ *Legal: U.S. Terms of Use*, *supra* note 31 (“Uber may immediately terminate these Terms or any Services with respect to you, or generally cease offering or deny access to the Services or any portion thereof, at any time for any reason.”); *Understanding Ratings*, *supra* note 142.

¹⁴⁴ *TaskRabbit Terms of Service*, *supra* note 52 (“Company does not investigate any remarks posted by Users for accuracy or reliability but may do so if a User requests that Company do so.”).

¹⁴⁵ TaskRabbit’s Terms of Service provide the following:

Company may terminate or suspend your right to use the TaskRabbit Platform in the event that we believe that you have breached this Agreement (a “User Breach”) by providing you with written or email notice of such User Breach and such termination or suspension, and termination or suspension will be effective immediately upon delivery of such notice.

Id. Since writing this Note, TaskRabbit updated this clause. The clause now states: “Company may terminate, *limit* or suspend your right to use . . .” *Id.* (emphasis added).

¹⁴⁶ *Best Practices for Tasker Success*, *supra* note 122.

¹⁴⁷ *See O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1072, 1079 (N.D. Cal. 2015).

b. Integration

The integration factor of the common law control test considers whether the worker's service is integral to the employer's business—"in other words, whether the business is conceivable without [the worker's services]."¹⁴⁸ If the worker's service is integral to the business, the worker is more likely to be an employee. The court in *O'Connor v. Uber Techs., Inc.*, in deciding whether or not the drivers performed a service for Uber, determined that Uber would not be viable without the drivers because "Uber *only* makes money if its drivers actually transport passengers."¹⁴⁹ The court concluded, "[a] jury could also find . . . that drivers perform a regular and integral part of Uber's business."¹⁵⁰

TaskRabbit does not make money unless its Taskers are completing tasks.¹⁵¹ Under the integration analysis, this means TaskRabbit would not be conceivable without the Taskers' services, and the Taskers are integral to TaskRabbit's business. Consequently, the integral factor indicates employee status for Taskers.

c. Skill Level

The skill factor looks at the degree of skill required by the worker's job. Employees are more likely to perform jobs requiring common or general skills, whereas independent contractors are more likely to perform jobs requiring unique or specialized skills.¹⁵² This is because independent contractors are typically hired because of their specialized skillset, which allows them to perform work outside of the typical scope of an employer's business.¹⁵³

This factor is difficult to apply to TaskRabbit because Taskers can perform various tasks, each with varying levels of required skills. Some tasks, such as plumbing, web design and development, or those requiring an electrician, require certain specialized skills.¹⁵⁴ Other tasks, however, do not require specialized skills, such as heavy lifting, yard work, or junk removal.¹⁵⁵ Due to the numerous different tasks and the various skills each requires, the skills factor is inconclusive and could support employee status or independent contractor status depending on the particular Tasker.¹⁵⁶

¹⁴⁸ Pinsof, *supra* note 22, at 358 (citing Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., Jan. 2002, at 5, 8–9).

¹⁴⁹ *O'Connor*, 82 F. Supp. 3d at 1142.

¹⁵⁰ *Id.* at 1153.

¹⁵¹ See generally *The TaskRabbit Trust & Support Fee*, *supra* note 56; *What Is the TaskRabbit Service Fee?*, *supra* note 56.

¹⁵² Pinsof, *supra* note 22, at 360.

¹⁵³ *Id.*

¹⁵⁴ *What TaskRabbit Offers*, *supra* note 43.

¹⁵⁵ *Id.*

¹⁵⁶ Regarding how it treats its Taskers, TaskRabbit could follow the lead of Instacart, the online grocery delivery service. Instacart separated its shopper and driver roles and has since given its shoppers the option of becoming part-time employees. Brad Stone, *Instacart Reclassifies Part of Its Workforce Amid Regulatory Pressure on Uber*, BLOOMBERG (June 22, 2015) <https://www.bloomberg.com/news/articles/2015-06-22/instacart-reclassifies-part-of-its-workforce-amid-regulatory-pressure-on-uber>. TaskRabbit could take a similar approach and separate its Taskers by category of task and by the skills required for each category. However,

d. Continuing Relationship

The control test also considers the duration of the relationship between the worker and the employer.¹⁵⁷ The employee relationships tend toward being long-term in nature, while independent contractor relationships tend to be short-term.¹⁵⁸ TaskRabbit's Terms of Service provides that TaskRabbit can only terminate a Tasker's right to use TaskRabbit if the Tasker has breached the Terms of Service and a Tasker can terminate the relationship at any time by ceasing all use of TaskRabbit.¹⁵⁹ Because only some action by either party will bring a definitive end to the relationship between TaskRabbit and the Tasker, the relationship appears long-term in nature. Thus, the continuing relationship factor indicates employee status for Taskers.

e. Tools

The common law control test then considers whether the employer or the worker provides any tools and materials required to perform the work.¹⁶⁰ Using tools and materials supplied by an employer indicates employee status for the worker; conversely, using tools and materials that the worker supplies herself indicates independent contractor status for the worker.¹⁶¹ TaskRabbit does not provide any equipment or materials to Taskers, making Taskers responsible for any tools or materials necessary to complete a task.¹⁶² Consequently, the tools factor indicates independent contractor status for Taskers.

f. Location

The common law control test next looks to where the worker performs the work.¹⁶³ Employees typically perform work at the employer's place of business, while independent contractors perform work outside the employer's place of business.¹⁶⁴ Although this factor embodies the traditional view of employment, it "is growing outdated in the modern economy" and has been "absent or under-emphasized in many recent judicial inquiries using the common law control test."¹⁶⁵ Because Taskers perform tasks at the locations designated by the users, typically a home, Taskers do not perform work at TaskRabbit's place of business. As a result, the location factor indicates independent contractor status. However, this factor is unlikely to carry much weight in an analysis.

Instacart and TaskRabbit have key differences that may make this strategy unnecessary—mainly the fact that Taskers set their own hourly rates.

¹⁵⁷ Pinfof, *supra* note 22, at 361.

¹⁵⁸ *Id.*

¹⁵⁹ *TaskRabbit Terms of Service*, *supra* note 52.

¹⁶⁰ Pinfof, *supra* note 22, at 361.

¹⁶¹ *Id.* at 361–62.

¹⁶² *TaskRabbit Terms of Service*, *supra* note 52 ("Company will not provide any equipment, labor or materials needed for a particular Task.").

¹⁶³ Pinfof, *supra* note 22, at 363.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (footnote omitted).

g. Method of Payment

The method of payment factor views workers paid hourly wages or salaries as employees and views workers paid on a per-job basis as independent contractors.¹⁶⁶ Although Taskers set an hourly wage, they are paid on a per-job basis.¹⁶⁷ They are not compensated until they complete the task to the satisfaction of the user.¹⁶⁸ Because the Taskers are compensated on a per-job basis, the method of payment factor indicates independent contractor status for Taskers.

h. Intent of Parties

The common law control test also requires consideration of the intent of the parties when entering the relationship.¹⁶⁹ If an employment agreement exists, the terms of that agreement indicating whether the parties entered into an employee or independent contractor relationship are given significant weight.¹⁷⁰ TaskRabbit's Terms of Service expressly states multiple times that TaskRabbit does not employ individuals to perform tasks, indicating that Taskers are not employees.¹⁷¹ Accordingly, the intent of parties factor indicates independent contractor status for Taskers.¹⁷²

i. Employment by More Than One Company

The next factor of the common law control test looks to whether the worker performs work for more than one employer.¹⁷³ Traditionally, employees only work for one employer at a time, while independent contractors work for multiple employers.¹⁷⁴ TaskRabbit does not restrict Taskers from working for other employers while signed up as a Tasker, similarly to how Uber does not restrict its drivers from driving for competitors.¹⁷⁵ Therefore, the employment by more than one company factor indicates independent contractor status for Taskers.

¹⁶⁶ *Id.* at 364.

¹⁶⁷ See *TaskRabbit Terms of Service*, *supra* note 52.

¹⁶⁸ *How to Hire for a Future Date*, *supra* note 44.

¹⁶⁹ Pinsof, *supra* note 22, at 364.

¹⁷⁰ *Id.*

¹⁷¹ *TaskRabbit Terms of Service*, *supra* note 52; *accord Am I a TaskRabbit Employee?*, *supra* note 110.

¹⁷² Some courts grant less weight to this factor because employers may have "unequal bargaining power" and "can easily manipulate contract language to include a statement of intent in order to create the appearance of an independent contractor relationship on paper to avoid employment laws." Pinsof, *supra* note 22, at 365 (citing Deknatel & Hoff-Downing, *supra* note 22, at 98).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 365–66.

j. Type-of-Business

The type-of-business factor seeks to determine whether the worker's business is distinct from that of the employer.¹⁷⁶ "This factor is typically applied either to determine whether the worker works for another employer (covered by employment by more than one company) or whether the worker is engaged in the same type of business as the employer (covered by integration)."¹⁷⁷ Here, the two factors mentioned, employment by more than one company and integration, point in opposite directions based on the preceding analysis in this section.¹⁷⁸ With one factor indicating independent contractor status and the other indicating employment status, the type-of-business factor is inconclusive.

k. Common Law Control Test Conclusion

Applying the common law control test to TaskRabbit results in seven factors indicating independent contractor status, two factors indicating employee status, and two inconclusive factors. Perhaps most important, however, is that the control factor, which is given significant weight in the analysis, indicated independent contractor status for Taskers.¹⁷⁹ Taking this into account with the fact that the majority of the other factors evidence a general lack of control by TaskRabbit over Taskers, the results of the analysis appear to strongly indicate that Taskers are independent contractors rather than employees of TaskRabbit.

2. Taskers Likely Are Not Employees Under the Economic Realities Test

The Interpretation released by the Wage and Hour Division Administrator of the DOL includes a description of how the economic realities test should be applied.

All of the factors must be considered in each case, and no one factor (particularly the control factor) is determinative of whether a worker is an employee. Moreover, the factors themselves should not be applied in a mechanical fashion, but with an understanding that the factors are indicators of the broader concept of economic dependence. Ultimately, the goal is not simply to tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor). The factors are a guide to make this ultimate determination of economic dependence or independence.¹⁸⁰

The important takeaways from this description are that each factor is weighted equally and that the factors cannot simply be tallied one way or the other.

¹⁷⁶ *Id.* at 366.

¹⁷⁷ *Id.*

¹⁷⁸ Compare discussion *supra* Section III.C.1.b, with discussion *supra* Section III.C.1.i.

¹⁷⁹ *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) ("The 'most significant consideration' is the putative employer's 'right to control work details.'" (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989))).

¹⁸⁰ U.S. DEP'T OF LABOR, *supra* note 97, at 2 (footnote omitted).

a. Whether the Work Is Integral to the Business

The DOL argues that “[c]ourts have found the ‘integral’ factor to be compelling.”¹⁸¹ “If the work performed by a worker is integral to the employer’s business, it is more likely that the worker is [an employee]. . . . A true independent contractor’s work, on the other hand, is unlikely to be integral to the employer’s business.”¹⁸² The DOL interprets work as integral even if it is a single component or if multiple workers perform it.¹⁸³

The DOL does not specify how to determine if the worker’s work is integral to the employer’s business. It provides an example, but the example itself only describes a situation rather than explaining the facts of the situation that lead to the determination of whether work is integral or not.¹⁸⁴ However, the DOL’s example of a construction company is consistent with the *O’Connor* court’s analysis. The DOL’s example shows that a carpenter building frames for homes is integral to the construction business, while a software developer hired to create managerial software is not integral to the business.¹⁸⁵ This evidences the *O’Connor* court’s reasoning: the construction company would not be viable without the carpenter, but it would be without the software developer. In other words, the construction company would not make money without the carpenter, but it would without the software developer—just less efficiently. Because the example provided by the DOL accords with the *O’Connor* court’s reasoning, the DOL would likely agree with the court’s analysis of the integral factor.

Applying this factor to TaskRabbit leads to the same analysis and result as the integral factor for the common law control test: TaskRabbit would not be conceivable without the Taskers’ services, the Taskers are integral to TaskRabbit’s business, and, consequently, this factor indicates employee status for Taskers.

b. The Opportunity for the Worker to Experience Profit or Loss

The DOL emphasizes that this factor should focus on whether the worker exercises managerial skills and the effect of the worker’s managerial skill on his or her opportunity for profit or loss; the focus is not merely on the opportunity for profit or loss.¹⁸⁶ Specifically, the worker’s managerial skill should affect the opportunity for profit or loss beyond the current job.¹⁸⁷ The managerial skills should “lead[] to additional business from other parties or . . . reduce[] the opportunity for future work.”¹⁸⁸ These managerial skills can include “a worker’s decisions to hire others,

¹⁸¹ See *id.* at 6 (“holding [in *Dole*] that work performed by cake decorators ‘is obviously integral’ to the business of selling cakes which are custom decorated” (quoting *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989))); *id.* (“It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business . . .” quoting Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen, 835 F.2d 1529, 1537–38 (7th Cir. 1987)).

¹⁸² *Id.* (footnotes and citations omitted).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

purchase materials and equipment, advertise, rent space, and manage time tables¹⁸⁹ The DOL stresses that “the worker’s ability to work more hours and the amount of work available from the employer” are not managerial skills, despite the fact that they can lead to increased earnings and available work and have little bearing on the distinction between an employee and an independent contractor.¹⁹⁰

Taskers exhibit managerial skills that affect their profit or loss. Taskers can hire others to either assist with a task or to complete it for them, provided the other person also registers as a Tasker with TaskRabbit.¹⁹¹ If a Tasker hires another person, he becomes responsible for “payment of all compensation, benefits and expenses” for that person, including “all required and applicable state and federal income tax withholdings”¹⁹² The Tasker is also responsible for purchasing any materials or equipment necessary to complete a task.¹⁹³ Additionally, Taskers can decide to market their business through TaskRabbit.¹⁹⁴ Because Taskers possess these managerial skills that affect their own profit or loss beyond the current task, this factor indicates independent contractor status for Taskers.

c. The Worker’s Capital Investment in the Job

The nature and extent of a worker’s capital investment in the job is useful in determining whether he or she is an independent contractor. Under the DOL analysis, the worker must not only make an investment, but the investment must also be one that supports the business beyond any particular job.¹⁹⁵ Furthermore, the worker’s investment is not viewed in isolation; it must be compared to the employer’s relative investment.¹⁹⁶ Finally, the proper comparison is not between the worker’s investment and the employer’s investment in that particular job, but the employer’s investment in its entire business.¹⁹⁷

Similar to the skills factor of the common law control test, the application of this factor varies by Tasker and the categories of tasks completed. Electricians, plumbers, or yard workers, for example, may make investments in tools and transport to allow them to better perform their tasks. Taskers that perform heavy lifting, dog watching, or shopping, for example, are less likely to make investments. Because application of this factor varies by Tasker and category, this factor is inconclusive and could indicate independent contractor status or employee status for Taskers.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *TaskRabbit Terms of Service*, *supra* note 52.

¹⁹² *Id.*

¹⁹³ *See id.* (“Company will not provide any equipment, labor (or materials needed for a particular Task.”).

¹⁹⁴ *Grow Your Business with Marketing Materials!*, *supra* note 126.

¹⁹⁵ U.S. DEP’T OF LABOR, *supra* note 97, at 9.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

d. The Degree of Skill Necessary to Perform the Job

The degree of skill that is necessary to perform the job can indicate an independent contractor. Under the DOL's analysis, the focus is on the worker's business skills, judgment, and initiative rather than on his or her technical skills.¹⁹⁸ "Even specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical and used to perform the work."¹⁹⁹

Taskers exhibit business skills, judgment, and initiative upon joining TaskRabbit. "Taskers decide what categories to task in, when and where to task and what hourly rates to set or accept. Whether or not to accept a task is entirely up to [the Tasker]."²⁰⁰ These decisions exemplify business skills, judgment, and initiative. Hence, this factor indicates independent contractor status for Taskers.

e. The Permanency of the Relationship Between Worker and Employer

The DOL looks to the permanency or indefiniteness of the relationship between the worker and the employer as an indicator of employment status.²⁰¹ The reasoning here is that an independent contractor will "eschew a permanent or indefinite relationship with an employer"²⁰² The DOL also notes, however, that "a lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship"²⁰³ Impermanence or definiteness in the relationship indicates independent contractor status only if it results from the worker's own business initiative.²⁰⁴

As mentioned previously, TaskRabbit's Terms of Service provides that TaskRabbit can only terminate a Tasker's right to use TaskRabbit for a breach of the Agreement, but a Tasker can terminate the Agreement at any time by no longer using TaskRabbit.²⁰⁵ Due to the lack of a definitive end to the relationship without some action by either party, the relationship between TaskRabbit and the Tasker appears long-term in nature. Therefore, this factor indicates employee status for Taskers.

f. The Control the Employer Maintains over the Worker

The control factor is often given the most prominence, as was the case in *O'Connor v. Uber Techs., Inc.*²⁰⁶ However, the DOL emphasizes that courts should not give greater weight to the control factor than the other factors.²⁰⁷ For the control factor, the

¹⁹⁸ *Id.* at 10.

¹⁹⁹ *Id.*

²⁰⁰ *Accepting Available Tasks*, *supra* note 124.

²⁰¹ U.S. DEP'T OF LABOR, *supra* note 97, at 11.

²⁰² *Id.* at 12.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *TaskRabbit Terms of Service*, *supra* note 52.

²⁰⁶ *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015) ("The 'most significant consideration' is the putative employer's 'right to control work details.'" (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 399 (Cal. 1989))).

²⁰⁷ U.S. DEP'T OF LABOR, *supra* note 97, at 14.

DOL looks not only at whether the worker controls any meaningful aspect of the work, but also whether or not the worker actually exercises that control.²⁰⁸ The DOL also explicitly mentions that a worker's control over how many hours he or she works is not solely indicative of independent contractor status.²⁰⁹

As discussed in the application of the control factor for the common law control test, TaskRabbit does not (1) use user feedback to discipline or terminate Taskers unless specifically asked to investigate, (2) retain the right to terminate a Tasker at will, or (3) provide direct instructions to Taskers on how to perform tasks. Accordingly, this factor indicates independent contractor status for Taskers.

g. Economic Realities Test Conclusion

Applying the economic realities test to TaskRabbit results in an understanding that Taskers are not economically dependent upon TaskRabbit; four of the factors indicate independent contractor status, one indicates employee status, and one is inconclusive. Although the factors are not supposed to be tallied, looking at these results as “indicators of the broader concept of economic dependence” supports the finding that Taskers are independent contractors rather than employees of TaskRabbit.²¹⁰

D. Dearth of Litigation Against TaskRabbit

Interestingly, neither a worker nor a government entity has brought any misclassification litigation against TaskRabbit.²¹¹ This contrasts with Uber, which is facing several lawsuits in the United States brought by former drivers as well as legal pressure from foreign governments in countries where Uber operates.²¹² Several potential reasons could explain this lack of legal challenge. The first possible reason is that TaskRabbit has not butt heads with local governments as Uber has.²¹³ TaskRabbit claims it has been doing just the opposite, “cooperating at all levels, the federal, the city and the state level of government”²¹⁴ The second possible reason is that TaskRabbit is not as widespread as Uber or Lyft, as it operates in only thirty-nine cities in the United States as well as in London, England.²¹⁵ This could mean that TaskRabbit simply has not garnered enough of the attention of class-action attorneys. A third possible reason is that Taskers are content with how TaskRabbit treats them. TaskRabbit's CEO has stated that TaskRabbit realized it was becoming a social safety

²⁰⁸ *Id.* at 13.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2.

²¹¹ Jeff Bercovici, *Why the Next Uber Wannabe Is Already Dead*, INC. (Nov. 2015), <https://www.inc.com/magazine/201511/jeff-bercovici/the-1099-bind.html>.

²¹² Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN (Aug. 11, 2016), <http://money.cnn.com/2016/08/11/technology/uber-lawsuits/>; see Louch & Bensinger, *supra* note 5; Shields, *supra* note 5; Whitehouse, *supra* note 5.

²¹³ Brad Stone, *The \$99 Billion Idea*, BLOOMBERG (Jan. 26, 2017), <https://www.bloomberg.com/features/2017-uber-airbnb-99-billion-idea/>.

²¹⁴ Eric Johnson, *Full Transcript: TaskRabbit CEO Stacy Brown-Philpot on Recode Decode*, RECODE (Sept. 22, 2016), <http://www.recode.net/2016/9/22/13023530/stacy-brown-philpot-taskrabbit-diversity-recode-decode-podcast-transcript>.

²¹⁵ *Is TaskRabbit in My City?*, *supra* note 64.

net for people, which is why it instituted its minimum wage.²¹⁶ If the Taskers are kept happy, they are less likely to sue TaskRabbit.

IV. CONCLUSION

In the highly competitive gig-economy, companies are constantly trying to leverage whatever they can to get a leg-up on their competitors. One method of doing so is saving on employment costs by classifying their workers as independent contractors. There are two ways to accomplish this: (1) structure the business as an internet-based marketplace or platform; or (2) structure the relationship between the business and the worker so the worker would be classified as an independent contractor under either the common law control test or the economic realities test. Uber and Lyft both failed to accomplish the first option and arguably have failed to accomplish the second as well. As discussed, some have argued that companies such as Uber and Lyft have intentionally misclassified their workers to utilize this advantage. TaskRabbit's model, on the other hand, has key distinguishing characteristics, making it more of a marketplace than Uber or Lyft while also allowing for proper classification of its workers as independent contractors. This allows TaskRabbit to legally enjoy the benefits of classifying its workers as independent contractors, providing it a competitive edge in the gig-economy. Perhaps other companies in the gig-economy should take note.

²¹⁶ Johnson, *supra* note 214.