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DRIVING THE INDUSTRY CRAZY: CLASSIFYING RIDE-SHARE DRIVERS FOLLOWING *DYNAMEX*

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I. INTRODUCTION

A. *Growth of the Gig Economy and Ride-Sharing Companies*

For better or worse, technology has transformed the economy, with the development of the "gig economy"[1] serving as a hallmark of this

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1. Other common terms for the gig-economy include the "on-demand economy" and the "sharing economy." *See* Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), http://time.com/4169532/sharing-economy-poll/.

transformation. The gig economy defines the recent labor phenomenon in which companies do not directly provide services to customers, but rather mediate between workers who actually provide services and customers who receive these services.[2] Using an internet platform as the intermediary, the gig economy companies connect customers to workers who then perform short-term assignments for the customers.[3] Despite spanning many different types of labor, the gig economy can be catalogued into five fundamental categories: "buying things, hiring people to do things, sharing things, borrowing things, and exchanging things."[4] The second category, "hiring people to do things," is especially popular thanks to the innovation of "ride-sharing." "Ride-sharing" is a service in which a customer can use a gig-economy company's mobile application to request a driver to transport them to a requested destination.[5] The rapid financial success of one dominant ride-sharing business, Uber, highlights the popularity of such gig-economy companies.[6]

However, while the popularity of ride-sharing certainly aids these companies in achieving their financial success, ride-sharing companies also flourish by classifying drivers as independent contractors rather than employees; this classification allows the companies to forego providing the drivers with certain employment rights that only inhere in employer-employee relationships.[7] Such rights include the right to overtime pay, workers' compensation, and unemployment benefits.[8] These rights would be costly for ride-share companies—in fact, companies can save as much as 40% of business operations by not paying for these rights and protections.[9] As such, ride-share companies are financially motivated to classify workers as independent contractors instead of employees in order to continue earning high profits, but at a cost of drivers' rights.

2. Andrew G. Malik, Note, *Worker Classification and the Gig-Economy*, 69 RUTGERS U. L. REV. 1729, 1730 (2017).

3. *Id.* at 1745.

4. *Id.* at 1746.

5. *See id.* at 1746–47.

6. *See* Steinmetz, *supra* note 1 (noting that Uber had a value greater than $60 billion after being established for merely five years and, as of 2016, was the all-time "fastest-growing startup"). Furthermore, Uber's initial public offering was valued at $82.4 billion, the third highest of all-time following Alibaba and Facebook. *See* Michael J. de la Merced & Kate Conger, *Uber I.P.O. Values Ride-Hailing Giant at $82.4 Billion*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/technology/uber-ipo-stock-price.html.

7. *See* Malik, *supra* note 2, at 1730–31.

8. *Id.* at 1731. These rights will be further discussed *infra* Part II.

9. *See* Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443, 459 (2018).

This model of classifying drivers as independent contractors rather than employees is not a concept unique to ride-sharing companies of the gig economy. A number of delivery companies have also attempted to benefit from classifying drivers as independent contractors, with varying results.[10] One such business, the delivery company Dynamex, was recently subject to litigation in the California Supreme Court concerning the classification of its delivery drivers.[11] As this Note posits, the outcome of this litigation has potentially changed the legal landscape in jurisdictions such as California and New Jersey for companies that utilize independent contractors. In particular, the *Dynamex* decision may greatly affect the ride-share companies that have become a hallmark of the gig economy, impacting how these companies must classify and fulfill certain rights for workers.

B. The Dynamex *Decision*

Dynamex, a national document and package delivery company, classified its delivery drivers as independent contractors.[12] Consequently, two of the company's delivery drivers sued on behalf of themselves and a class of similarly-situated drivers, alleging that Dynamex misclassified them as independent contractors instead of employees.[13] Due to this misclassification, they argued, Dynamex violated California's wage order laws that govern certain employee rights.[14] On April 30, 2018, in reviewing the drivers' claim and request to certify all Dynamex drivers as a class, the California Supreme Court adopted a new test by which to classify workers as employees or independent contractors for the purpose of enforcing California wage order laws.[15] This new test for determining worker classification is

10. *See generally* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 5–7 (Cal. 2018) (finding that Dynamex delivery drivers were misclassified as independent contractors rather than employees for the purposes of California wage laws). *But see* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1124 (D.C. Cir. 2017) (holding that a company's delivery drivers were correctly classified as independent contractors instead of employees for purposes of the National Labor Relations Act); Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018) (finding, pre-*Dynamex*, that a business's delivery drivers were correctly classified as independent contractors rather than employees for the purposes of California minimum wage and overtime laws).

11. *See Dynamex*, 416 P.3d at 5.

12. *Id.*

13. *Id.*

14. *Id.* The applicable wage order laws are found in provisions of California's IWC Wage Order No. 9. *See id.* These wage orders concern employees' maximum hours, minimum wages, and certain basic working conditions. *Id.*

15. *Id.* at 5–7.

known as the "ABC" test, which has been utilized to classify workers in other jurisdictions as well.[16]

In effect, the new ABC test that *Dynamex* instated makes it more difficult to classify workers as independent contractors instead of employees, by shifting the burden onto the employer to prove that its workers are independent contractors.[17] Moreover, the B prong of the ABC test, which requires the employer to prove that "the worker performs work that is outside the usual course of the hiring entity's business,"[18] could greatly impact ride-share companies. Under the B prong, it would be difficult for delivery companies to argue that drivers are actually independent contractors because the companies' entire business *is* transportation.[19] Although California is not the first jurisdiction to implement the ABC test for worker classification, the way in which the *Dynamex* court analyzed the test in regard to delivery drivers, who share similarities with ride-share drivers, could influence the classification of ride-share drivers in California and other ABC test jurisdictions.[20]

The *Dynamex* decision subsequently inspired news headlines that were more worthy of a natural disaster, including titles such as "*Dynamex* Is Not 'Armageddon' . . . Even Though It May Feel Like It!"[21] and "The End of an Era? How the ABC Test Could Affect Your Use of Independent Contractors."[22] Businesses, particularly those ride-share companies of the gig economy that rely heavily on classifying workers as independent contractors, have been since forced to reassess business models to determine continued feasibility, due to the possible economic

16. *Id.* at 5, 7..

17. *See* Mike Kappel, *The End of an Era? How the ABC Test Could Affect Your Use of Independent Contractors*, FORBES (Aug. 8, 2018, 9:10 AM), https://www.forbes.com/sites/mikekappel/2018/08/08/the-end-of-an-era-how-the-abc-test-could-affect-your-use-of-independent-contractors/#7c6980711f66.

18. *See Dynamex*, 416 P.3d at 35; *see also infra* Section Part II.B.2.

19. *Cf.* Bradford G. Hughes, *Post-Dynamex: A Narrow Road Ahead for Calif. Trucking Cos.*, LAW360 (May 21, 2018, 11:49 AM), https://www.law360.com/articles/1043986 (discussing how *Dynamex* may affect the trucking industry and its classification of truck drivers as independent contractors).

20. *See* Andrew J. Hawkins, *Uber and Lyft Drivers Could Get Employment Status Under California Court Ruling*, VERGE (May 1, 2018, 2:56 PM), https://www.theverge.com/2018/5/1/17308178/uber-lyft-drivers-california-court-classification-dynamex; *see also* Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/business/economy/gig-economy-ruling.html (stating that New Jersey also uses the ABC test for employment classification).

21. Teresa A. McQueen, Dynamex *Is Not "Armageddon" . . . Even Though It May Feel Like It!*, 60 ORANGE CTY. LAW. 51 (Sept. 2018), https://saffirelegal.com/wp-content/uploads/2018/09/Authorized-Reprint-OC-Lawyer-Sept-2018-McQueen-HiRes.pdf.

22. *See* Kappel, *supra* note 17.

effects that reclassification could impose.[23] Many California-based companies lobbied the state legislature to override the ruling, emphasizing the potentially negative ramifications that the decision could have on individual businesses and the state economy.[24] Notably, two of the businesses that participated in this lobbying effort were ride-share companies Uber and Lyft.[25]

Considering the widespread use of independent contractors, this Note argues that the California Supreme Court's decision to adopt the ABC test, which favors the classification of employees rather than independent contractors, has potentially changed the legal and economic landscape for ride-share companies. Given the similarities between ride-share drivers and delivery drivers, particularly in light of the B prong of the ABC test, ride-share companies must reevaluate how to classify and fulfill the rights owed to drivers moving forward. The *Dynamex* impact will be most apparent on ride-share companies in jurisdictions that already implement the ABC test, especially California and New Jersey.

This Note addresses the *Dynamex* decision and its potential ramifications on ride-share driver classifications in California and New Jersey. First, Part II, the Note analyzes the importance of classifying workers and two of the main classification tests—the common law test and the ABC test. Next, Part III examines the *Dynamex* decision, focusing largely on California's previous test for determining a worker's classification status, and the new ABC test that *Dynamex* instated. Part IV scrutinizes the consequences of the *Dynamex* decision, especially in light of past settlements and similar prior cases. Part IV then focuses on the decision's effects on the worker classification of gig-economy ride-share companies in California and New Jersey. Finally, Part V concludes that the *Dynamex* decision will transform the manner in which ride-share companies classify drivers and conduct business moving forward,

23. *See* McQueen, *supra* note 21, at 51–52. Because gig-economy companies can provide lower prices to customers by shifting certain costs to their workers as a result of the independent contractor classification, their workers' classification is critical to their continued success. *See* Alex Kirven, Comment, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 251–52 (2018). Notable examples of ride-share companies include Uber, Lyft, and Gett. *See* Liya Palagashvili, *Disrupting the Employee and Contractor Laws*, 2017 U. CHI. LEGAL F. 379, 380 (2017).

24. *See* Letter from Cal. Chamber of Commerce et al. to Edmund G. Brown, Governor, Cal., and Members of the California State Legislature (June 20, 2018), https://www.electran.org/wp-content/uploads/Dynamex-Coalition-Letter.pdf (noting that "[e]ffectively, *Dynamex* has the potential to eliminate the vast majority of independent contractors in California").

25. *Id.*

principally in jurisdictions that use the "ABC" classification test similar to that established in *Dynamex*.

II. WORKERS AND THEIR CLASSIFICATIONS

A. The Significance of Worker Classification

It is essential for employers to determine whether workers are independent contractors or employees for a number of reasons. Employers' tort liability for the negligent actions of their workers heavily depends on distinguishing between the two classifications, as employers are generally not held liable for negligent actions taken by independent contractors.[26] Federal and state governments also require determining this classification in order to calculate the amount of money that must be withheld from a worker's paycheck in satisfaction of federal income taxes, Social Security, Medicare, and unemployment taxes.[27] Moreover, workers themselves derive an assortment of rights and protections depending on the category in which they are classified.[28] For example, when workers are classified as independent contractors, they are excluded from employee rights and protections such as minimum wage, health insurance, workers' compensation, unemployment benefits, and overtime benefits.[29]

Given the wide array of benefits and protections to which independent contractors are not entitled, businesses that classify workers as independent contractors instead of employees are able to save great sums of money since the businesses are not required to internalize the costs of fulfilling these rights.[30] Executives in the gig economy, in particular, estimate that classifying workers as employees costs 20 to 30% more than classifying them as independent contractors.[31] Some

26. *See* Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 192 (2016) (explaining that one common category "of vicarious liability is the doctrine of *respondeat superior*, which allows an employer to be held liable for an employee's tortious conduct").

27. *See* David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 139–40 (2015).

28. *See* Malik, *supra* note 2, at 1734 (explaining that, although independent contractors enjoy more freedom and less income taxes, they are excluded from key employee benefits); *see also* Peter Tran, Comment, *The Misclassification of Employees and California's Latest Confusion Regarding Who Is an Employee or an Independent Contractor*, 56 SANTA CLARA L. REV. 677, 678 (2016) (explaining that employees, but not independent contractors, benefit from vacation time, pensions, and most wage and hour laws).

29. *See* Malik, *supra* note 2, at 1734.

30. *See* Nadler, *supra* note 9.

31. Scheiber, *supra* note 20.

scholars estimate that, in general, "[t]he burden of hiring an employee instead of an independent contractor is . . . as high as a 40% cost differential in light of the various benefits and protections afforded to employees."[32] For Uber in particular, one journalist estimated that if the company were required to classify its drivers as employees instead of independent contractors, this reclassification would cost the company a stunning sum: over *four billion dollars* each year.[33]

Due to the economic importance of worker classification, gig-economy companies that heavily rely on workers' classification as independent contractors have sought to avoid any litigation that would determine whether these workers have been misclassified.[34] In particular, although ride-share drivers have claimed that they should be reclassified as employees and consequently filed a number of class action worker misclassification lawsuits against their companies, expensive settlements with these drivers have allowed ride-share companies to avoid settling the misclassification issue and, therefore, continue to benefit from allegedly misclassifying drivers as independent contractors.[35]

Moreover, despite the all-encompassing importance of determining whether a worker is an independent contractor or an employee, defining these classifications can be a difficult legal exercise.[36] Although general definitions for "employee" and "independent contractor" may be useful, the standards for worker classification vary depending on the jurisdiction and the purpose for which the worker is being classified.[37]

B. Worker Classification Tests

Because there are a number of classification tests in use that are contingent on both the jurisdiction and reason for which the worker is being classified, a worker may be classified as an independent contractor under one test for a certain purpose and an employee under a different test for another purpose within the same jurisdiction.[38] Furthermore, although certain classification tests have the same name across

32. Nadler, *supra* note 9.

33. Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 481 (2016).

34. *See* Pamela A. Izvanariu, *Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 135–37 (2016).

35. *See id.* at 136. This issue will be discussed further *infra* Part IV.

36. *See* Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POL'Y INST. 1 (June 8, 2015), https://www.epi.org/files/pdf/87595.pdf (finding that 10 to 20% of employers have misclassified at least one worker as an independent contractor).

37. *See* Malik, *supra* note 2, at 1732–33.

38. *See* Izvanariu, *supra* note 34, at 142.

jurisdictions, the tests themselves may vary slightly in each jurisdiction because state legislatures have tailored new worker classification statutes based on already-existing individual laws.[39] With this variation in mind, the following section examines generally the two main tests that are currently being used for a variety of worker classification purposes: the common law test and the ABC test.

1. The Common Law Test

The common law test, which has also been called the right-to-control test, largely focuses on the control that the employer exerts over the worker.[40] In general, there are ten factors that courts consider in determining whether a worker is an employee or an independent contractor under the common law worker classification test.[41] These factors are: control, supervision, skill level, integration, tools and location, continuing relationship, intent, employment by more than one company, type of business, and method of payment.[42] After analyzing all of the factors, courts determine who exercises control over the work process.[43] The worker is classified as an employee if it is the employer that controls the work process; conversely, if the worker controls the work process, then they are classified as an independent contractor.[44]

Many states have codified this common law control test in order to determine if the worker's classification provides them with the respective statute's benefits and protections.[45] Despite this widespread codification of the common law test, at least one scholar has criticized the test because some of its factors are outdated and easy for employers to manipulate.[46] However, all other worker classification tests are derived from the

39. *See* 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, 64 (2015).

40. *See* John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 8–9 (2018).

41. *See* Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. TECH. L. REV. 341, 347 (2016).

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.* at 348. The common law test has been expressed in the Restatement (Second) of Agency § 220. *See id.* at 348 n.36; s*ee also* Pearce & Silva, *supra* note 40, at 8. The Internal Revenue Service and many government agencies also use some form of the common law test when determining worker classification. Izvanariu, *supra* note 34, at 142.

46. *See* Pinsof, *supra* note 41, at 367.

common law test, particularly in regard to the "control" factor—which can also be found in the ABC test.[47]

2. The "ABC" Test

Under the increasingly common ABC test,[48] the employer must rebut the presumption that its worker is an employee by satisfying the test's three prongs:

> (A) that "the individual is free from direction and control," applicable both "under his contract for the performance of service and in fact," (B) that "the service is performed outside the usual course of business of the employer," and (C) that the "individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[49]

While a number of state legislatures have acted to modify the factors required to classify a worker as an independent contractor over the last fifteen years, the vast majority have favored the ABC test due to its presumption that a worker is an employee unless the employer can rebut it.[50] Several courts have also adopted or applied the ABC test in interpreting state worker classification laws in recent years, such as in California in *Dynamex,*[51] and in New Jersey in *Hargrove v. Sleepy's, LLC*.[52] Moreover, scholars have proclaimed the ABC test the most effective test when applied uniformly to all worker classification purposes.[53]

Given the many benefits of this test, fourteen out of the sixteen states that modified independent contractor requirements from 2004 to 2012

47. *See* Pearce & Silva, *supra* note 40, at 9.

48. The ABC test is used in almost two-thirds of states. *See id.* at 27.

49. *See* Deknatel & Hoff-Downing, *supra* note 39, at 65 (quoting MASS. GEN. LAWS ANN. ch.149, § 148B(a)(1) to (3) (West 2014)).

50. *See id.* at 66–67. According to one New Jersey attorney's opinion, the ABC test is one of the most difficult under which an employer can prevail. *See* Mark Tabakman, *NJ Governor Issues Executive Order on Independent Contractors—The More Things Change, the More They Stay the Same*, FOX ROTHSCHILD, (May 16, 2018) https://wageh ourlaw.foxrothschild.com/2018/05/articles/independent-contractor/nj-governor-issues-exec utive-order-on-independent-contractors-the-more-things-change-the-more-they-stay-the-s ame/. In addition, the ABC test eliminates the most easily manipulated factors of the common law test, most notably intent and location. Pearce & Silva, *supra* note 40, at 28.

51. Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 10 (Cal. 2018).

52. 106 A.3d 449, 453 (N.J. 2015).

53. Pearce & Silva, *supra* note 40, at 29.

chose to establish some form of the ABC test.[54] Notably, however, the B and C prongs of the ABC test have been subject to great variation in different jurisdictions' interpretations of the test, impeding a more uniform analysis and application of the test across jurisdictions.[55] As such, analyzing the jurisdiction's interpretation of the B prong is of particular importance in the ride-share context. The interpretation of the B prong is important here because, generally, it will be difficult for ride-share companies to prove under the B prong that drivers are performing services outside the normal course of the companies' business, given that the companies' business *is* transportation and drivers are the ones actually engaging in transportation.[56] After considering the potential effect of applying the B prong to ride-share driver classification, the significance of the *Dynamex* decision in adopting the ABC test for another type of driver—delivery drivers—becomes even more apparent.

III. ANALYZING THE *DYNAMEX* DECISION

A. Background Facts and Procedural History

Dynamex, a national delivery and courier service, uses drivers classified as independent contractors to provide services to its customers.[57] Initially, Dynamex had classified its drivers as employees, but the company reclassified them as independent contractors in 2004, despite no real difference having developed in its drivers' duties.[58] There are several notable duties that Dynamex drivers owe to the company. For example, although Dynamex drivers are free to set their own schedule, they are required to notify Dynamex of the days that they want to work.[59] Then, on the days that they work, drivers are only assigned deliveries at Dynamex's discretion.[60] Furthermore, all drivers must use their own

54. *See* Deknatel & Hoff-Downing, *supra* note 39, at 66.

55. *See* Richard Reibstein & Nina Huerta, *Unanswered Questions After Dynamex, and What Lies Ahead*, LAW360 (May 4, 2018, 5:22 PM), https://www.law360.com/articles/1040243/unanswered-questions-after-dynamex-and-what-lies-ahead. For example, four states (New Jersey, Nebraska, Maryland, and Washington) have varied the "B" prong by providing that work done outside the employer's physical place of business is a sufficient indication of that worker being an independent contractor. Deknatel & Hoff-Downing, *supra* note 39, at 69.

56. *Cf.* Hughes, *supra* note 19 (discussing the effect of *Dynamex* on the trucking industry in regard to classifying truck drivers as independent contractors).

57. Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 8 (Cal. 2018).

58. *Id.* at 8–9.

59. *Id.* at 8.

60. *Id.* Dynamex also "reserve[d] the right, throughout the contract period, to control the number and nature of deliveries." *Id.* Drivers can generally choose the order of deliveries and their routes but must complete deliveries on the day they were assigned. *Id.*

vehicles, pay for all transportation expenses, and wear Dynamex shirts and badges purchased with their own money.[61]

In 2005, a former Dynamex driver[62] sued the company on behalf of himself and similarly situated Dynamex drivers, arguing that the drivers were misclassified as independent contractors instead of employees.[63] In so doing, the driver contended, Dynamex violated provisions of California's Industrial Welfare Commission ("IWC") Wage Order No. 9, which governs the wage order laws of the transportation industry.[64] These California wage orders impose a number of rights that employers are obliged to provide for their employees, which include "minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks)."[65]

The trial court certified a class of Dynamex drivers, stipulating that to be part of the class they could not have delivered for other delivery companies or for their own customers.[66] When the trial court certified the class, it utilized alternate definitions of "employ" and "employer" that the California Supreme Court established in an earlier case, *Martinez v. Combs*,[67] in order to interpret to which workers the IWC wage order law applied.[68] In *Martinez*, the California Supreme Court held that "[t]o employ . . . under the [wage order], has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship."[69] After considering *Martinez*, the trial court in *Dynamex* found that the drivers met each of the broad alternate definitions to certify them as a class of employees.[70] Additionally, in relying on *Martinez* to find that the Dynamex drivers could be certified, the trial court also rejected Dynamex's argument that the common law multifactor test established in *S.G. Borello & Sons, Inc.*

61. *Id.*

62. A second plaintiff, also a former Dynamex driver, was later added when they filed the lawsuit's first amended complaint. *Id.* at 9.

63. *Id.* at 5. The former driver pointed to the fact that the Dynamex drivers "performed essentially the same tasks in the same manner as when [they] were classified as employees." *Id.* at 9.

64. *Id.* at 5, 9.

65. *Id.* at 5.

66. *Id.* at 6. To be considered part of the class, the Dynamex drivers also could not have employed other drivers themselves. *Id.*

67. 231 P.3d 259, 278 (Cal. 2010).

68. *Dynamex*, 416 P.3d at 6, 10.

69. *Id.* at 10 (quoting *Martinez*, 231 P.3d at 278).

70. *Id.* at 10–12.

v. Department of Industrial Relations[71] is California's only standard by which to classify whether a worker is an independent contractor or an employee.[72]

The appellate court affirmed the trial court's class certification order, as well as the application of the broad *Martinez* definitions instead of the *Borello* test to determine whether a worker is an employee or an independent contractor for the purposes of the state's wage order law.[73] However, Dynamex contested the use of *Martinez* rather than *Borello* to classify whether its drivers were employees or independent contractors, and filed a petition for review by the California Supreme Court, which the court granted.[74]

B. The Dynamex *Decision—Adopting the "ABC" Test*

Dynamex continued to be unsuccessful in its classification lawsuit—the California Supreme Court affirmed the Court of Appeals' decision.[75] Although Dynamex maintained its argument that *Borello* was the correct standard, the court concluded that *Borello's* multifactor test did not actually embody a standard common law test to classify workers as either independent contractors or employees in any situation.[76] Instead, *Borello* was intended to create "a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at

71. 769 P.2d 399 (Cal. 1989). The multifactor *Borello* test mainly focuses on if "the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired." *Dynamex*, 416 P.3d at 11 (quoting *Borello*, 769 P.2d at 404). However, because it's an all-the-circumstances test, other factors must also be considered, which include:

> (1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) 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; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating the relationship of employer-employee.

Id. at 11 (quoting *Borello*, 769 P.2d at 404).

72. *Dynamex*, 416 P.3d at 6, 12.

73. *Id.* at 6.

74. *Id.* at 7.

75. *Id.* at 42.

76. *Id.* at 19–20.

issue."[77] With this standard in mind, the court continued to analyze this issue by looking at the statutory purpose behind the IWC wage order law, particularly as the IWC was interpreted in *Martinez*.[78]

Using the statutory purpose standard, the court focused on the second alternate definition of *Martinez* ("suffer or permit to work") and found that, although the definition was broad, its use by the trial court was justified due to the essential purpose of wage order laws.[79] According to the court, because each individual worker generally enjoys less bargaining power than their employer, the purpose of the wage order laws is to protect workers by regulating their working conditions.[80] So, the broadness of the *Martinez* "suffer or permit to work" definition is justified here because, as the court reasoned, "employee" should be liberally interpreted to include all workers who are reasonably working in the employer's business.[81] Considering *Martinez* and the statutory purpose standard, the court held that it could adopt a worker classification test that was more favorable to workers.[82] As such, the court rejected the *Borello* multifactor test due to the complexity of applying such a standard.[83] The court also noted and disparaged the ability of employers to take advantage of the *Borello* factors and, therefore, manipulate their business practices, ensuring that workers would continue to be considered independent contractors.[84]

Given the issues with the *Borello* test and the breadth that the *Martinez* definitions and statutory purpose standard provide for classifying workers, the *Dynamex* court decided to adopt a test already in use in other jurisdictions, the "ABC" test, which minimizes the abovementioned disadvantages of *Borello*.[85] By adopting this new ABC test, the California Supreme Court concluded that it would:

> (1) plac[e] the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requir[e] the

77. *Id.* at 19–20.
78. *Id.* at 21–22.
79. *Id.* at 31–32.
80. *Id.* (noting that the "fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves . . . to accord them a modicum of dignity and self-respect").
81. *Id.* at 32.
82. *Id.* at 35.
83. *Id.* at 33–34 (stating that a multifactor, all-the-circumstances test like *Borello* has "significant disadvantages" in the wage orders context due to the difficulty in applying it case-by-case).
84. *Id.* at 34.
85. *Id.* at 32–33, 35.

> hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[86]

Therefore, following *Dynamex*, a worker will only be considered an independent contractor, rather than an employee, for the purposes of the California wage order law if the employer can satisfactorily prove each prong of the ABC test.[87] Additionally, by reason of the above considerations, the California Supreme Court concluded that the Dynamex drivers could be certified as a class of employees for the purpose of the California wage order litigation, ultimately affirming the lower courts.[88]

IV. THE CONSEQUENCES OF *DYNAMEX*

California's *Dynamex* decision may produce wide-ranging consequences for ride-share companies and worker classifications, particularly in states that already use the ABC test. Part IV analyzes past settlements that ride-share and similar gig-economy companies have reached with workers who alleged that they were misclassified, prior cases in which the ABC test was utilized in comparable situations to *Dynamex*, and the effect that *Dynamex* may generate moving forward in misclassification lawsuits involving ride-share drivers in California and other jurisdictions.

A. The Past—Settlements in Lieu of Litigation

As discussed, settlements by ride-share and other gig-economy companies in the past have been a common approach by which these companies have avoided litigating the misclassification lawsuits brought by their workers.[89] These settlements can be costly to the companies,

86. *Id.* at 35.
87. *Id.* at 7.
88. *Id.* at 42.
89. *See* Nancy Cremins, *The On-Demand Economy Continues to Grow, But Legal Consequences Abound for Employers and Employees in the U.S. and Abroad*, 62 BOS. B.J. 26, 26 (2018). For further discussion of ride-share company settlements see *supra* Part III.

with ride-share company Lyft paying $27 million in one such misclassification settlement.[90] However, while these settlements are expensive, the companies consider it better to settle than to realize the potential alternative of a court determining that workers have been misclassified as independent contractors, which would upend the companies' business models by forcing them to provide workers with the even more costly benefits and protections to which employees are entitled.[91] Gig-economy company workers have filed dozens of class action worker misclassification lawsuits, yet as of 2017 no suit has managed to accomplish anything but settlement.[92] Settling in lieu of litigating the misclassification issue has been an especially incredible feat for Uber, as misclassification lawsuits comprised roughly one-third of all litigation against the ride-share company from 2012 until 2016.[93] While the costs of repeatedly settling add up—a single misclassification settlement in 2018 cost Uber $3 million—settlement is apparently preferable to the alternative: reclassifying its drivers.[94]

Although commentators largely agree that class action lawsuits against gig-economy companies would be the most effective method by which workers could resolve whether or not they are misclassified as independent contractors, the gig-economy workers prefer to settle because of the financial incentives, uncertain arbitration laws, and expensive discovery.[95] The financial incentives of settling may especially seem worthwhile given the large payouts that gig-economy companies have paid in recent settlements to their workers over misclassification lawsuits.[96] Furthermore, they may be discouraged from litigating and instead decide to settle after seeing the results of similar litigation in which the workers decided not to settle.

90. Cremins, *supra* note 89.

91. *See id.*

92. V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 17 WIS. L. REV. 739, 757 (2017).

93. *Id.*

94. *See Uber Lawsuit Contends Company Saves Money by Misclassifying Drivers*, PYMNTS (Sept. 12, 2018), https://www.pymnts.com/news/ridesharing/2018/uber-lawsuit-misclassifying-drivers/.

95. *See* Dubal, *supra* note 92. In addition, some workers decide not to litigate because they prefer to be classified as independent contractors or are altogether ambivalent in regard to their classification. *Id.* at 796.

96. DoorDash, a food-delivery company, paid $5 million in 2017 to settle a misclassification class action in which over thirty thousand of its drivers alleged they were misclassified as independent contractors. Cremins, *supra* note 89. In another significant settlement of a worker misclassification suit, gig-economy delivery company Postmates paid $8.75 million to their workers in 2017. *Id.*

B. The Past—Prior Worker (Mis)Classification Cases

Arbitration clauses have often thwarted misclassification litigation against ride-share companies that do not settle. For example, Uber drivers experienced brief success in April 2016 when a federal district court in California rejected a proposed $100 million payout that Uber struck with its workers in order to settle a misclassification class action suit, claiming the settlement to be unfair to the drivers.[97] However, this success was dashed in 2018 when the Ninth Circuit determined that the "district court's denial of Uber's motions to compel arbitration . . . must be reversed," which effectively ended the misclassification litigation and the possibility of Uber drivers acquiring employment benefits.[98]

Arbitration clauses that ride-share companies require their drivers to sign have presented issues in other jurisdictions as well. In *Singh v. Uber Techs., Inc.*,[99] a New Jersey Uber driver filed a misclassification lawsuit against Uber, arguing that the ride-share company violated New Jersey overtime laws by classifying him as independent contractor.[100] Although he signed an arbitration agreement, the driver argued that it should not be enforced because it was unconscionable.[101] However, the court ultimately compelled arbitration and dismissed the suit, finding that the arbitration provision was valid.[102] As such, arbitration provisions present an extra hurdle for ride-share drivers to meet when litigating for reclassification, and demoralize potential ride-share driver litigants from filing suit.

Given both the workers' and ride-share companies' preference to settle and the lack of success that workers have experienced with misclassification class action lawsuits, it is no surprise that, even in states with the ABC test, ride-share drivers have not often been reclassified from independent contractors to employees for any purpose. However, despite these impediments, the *Dynamex* decision nonetheless

97. *Id.* at 27 (citing O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015)).

98. O'Connor v. Uber Techs., 904 F.3d 1087, 1095 (9th Cir. 2018); *see also* Joel Rosenblatt & Bob Van Voris, *Uber Drivers Suing for Better Pay Lose Critical Court Ruling*, BLOOMBERG (Sept. 25, 2018, 12:17 PM), https://www.bloomberg.com/news/articles/2018-09-25/uber-wins-appeal-in-case-targeting-classification-of-drivers (reporting Uber "drivers suffered a major defeat in one of the gig economy's most closely watched labor fights with a ruling barring hundreds of thousands of drivers from suing as a group for better pay and benefits").

99. 235 F. Supp. 3d 656 (D.N.J. 2017).

100. *Id.* at 663.

101. *Id.* at 663–64. The driver also argued that the arbitration was exempt from the Federal Arbitration Act and that it violated the National Labor Relations Act. *Id.*

102. *Id.* at 676.

has the potential to change workers' success in California and in other similar jurisdictions.

*C. The Future—Moving Forward Post-*Dynamex

Momentous decisions regarding worker classifications and the rights derived from them are almost certain to result in further litigation by disenfranchised workers.[103] For example, the success of one famous worker misclassification case in the 1990s consequently galvanized a number of class action lawsuits by workers who also wished to reclassify themselves as employees in order to take advantage of their companies' benefit plans.[104] This kind of momentum is particularly salient in the context of ride-share companies and *Dynamex* due to the B prong of the ABC test that the decision enacted, which provides that the employer must prove "the worker performs work that is outside the usual course of the hiring entity's business."[105]

As discussed, the B prong of the ABC test is the most problematic to prove for transportation businesses, like ride-share companies. It is difficult for these transportation businesses to argue that drivers are actually independent contractors under the B prong because these companies' business model *is* transportation.[106] It has already been speculated that the *Dynamex* decision may ultimately force companies such as Uber to treat workers like employees and pay for overtime, workers' compensation, payroll taxes, and unemployment insurance.[107] In fact, in the days following the *Dynamex* decision, several workers who were classified by their employers as independent contractors filed misclassification class action lawsuits.[108]

103. *Cf.* John J. McGowan, *Insight: Thinking Through the* Dynamex *Decision*, BLOOMBERG LAW (June 5, 2018, 6:49 AM), https://news.bloomberglaw.com/daily-labor-report/insight-thinking-through-the-dynamex-decision (examining a worker misclassification case in the 1990s that reclassified workers as employees, which then inspired more class action lawsuits by workers).

104. *Id.* (citing Vizcaino, et al. v. Microsoft Corp., 173 F.3d 1006, 1008–09 (9th Cir. 1997)).

105. Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 35 (Cal. 2018).

106. *See* discussion *supra* Part I.B; *cf.* Hughes, *supra* note 19 (discussing the effect of *Dynamex* on the trucking industry regarding the classification of truck drivers as independent contractors).

107. *See* Scheiber, *supra* note 20.

108. Erika Skougard, *What Companies Should Know in the Wake of California's New Worker Classification Ruling*, INSIDE COMPENSATION (May 16, 2018), https://www.insidecompensation.com/2018/05/16/what-companies-should-know-in-the-wake-of-californias-new-worker-classification-ruling/ (stating that workers of Lyft and Postmates allege that the companies now owe the workers back pay due to misclassifying them, amongst other relief). Notably, the suit against Postmates resulted in the court upholding

Again, although arbitration clauses present a barrier to success in these misclassification lawsuits, this barrier is not insurmountable. One attorney at the forefront of the Uber class action misclassification lawsuits has been encouraging as many Uber drivers as possible to arbitrate their claims individually to put economic pressure on the company.[109] Per Uber's arbitration clause, the ride-share company must pay the arbitrator's nonrefundable $1,500 retainer fee for each case.[110] If enough drivers are galvanized by the *Dynamex* decision to sue Uber for misclassification but are compelled to arbitrate, or immediately sign up for arbitration, the costs of arbitrating each individual case will prove to be costly in both money and time for the ride-share company. Ultimately, Uber and similar ride-share companies may feel sufficient economic pressure to litigate instead of arbitrate if enough drivers are spurred by *Dynamex* to file suit in jurisdictions where they may find similar success, like California and New Jersey.

Notably, California is not the first state to classify drivers as employees for a certain purpose, nor is *Dynamex* even the first time that independent contractor drivers have been classified as employees in California.[111] However, *Dynamex* will likely prove to be the most important development in this area of law because a state's highest court adopted the ABC test in order to apply it to Dynamex drivers—who are similar to ride-share drivers under the B prong—and consequently found that the drivers should be certified as a class of employees rather than independent contractors. *Dynamex* may stimulate litigation against ride-

the arbitration clause between the worker and employer. *See* Lee, et al. v. Postmates Inc., No. 18-cv-03421-JCS, 2018 WL 6605659, at *1 (N.D. Cal. Dec. 17, 2018).

109. *See* Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM), https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html.

110. Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS (Dec. 6, 2018, 2:58 PM), https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-case s-idUSKBN1O52C6. Lyft must similarly pay a $1,900 initial fee and a $750 case management fee for each driver arbitration case. Alison Frankel, *3,420 Lyft Drivers Claim the Company Won't Pay Arbitration Fees to Launch Their Cases*, REUTERS (Dec. 14, 2018, 3:19 PM), https://www.reuters.com/article/legal-us-otc-lyft/3420-lyft-drivers-claim-the-company-wont-pay-arbitration-fees-to-launch-their-cases-idUSKBN1OD2KC.

111. For example, in Oregon, the Bureau of Labor and Industries issued an advisory opinion declaring Uber drivers to be employees after analyzing the "economic realities" of their relationship with Uber. *See* Izvanariu, *supra* note 34, at 146. In California, its Employment Development Department determined that a former Uber driver was an employee for unemployment benefits purposes. *Id.* at 149. Similarly, New York's Unemployment Insurance Appeal Board also ruled that Uber drivers are employees for the purposes of unemployment benefits. *See* David Z. Morris, *Uber Drivers Are Employees, New York Unemployment Insurance Board Rules*, FORTUNE (July 21, 2018), http://fortune.com/2018/07/21/uber-drivers-employees-new-york-unemployment/.

share companies in California and New Jersey, another jurisdiction that uses the ABC test.

1. California

With the adoption of the ABC test to classify workers for the purposes of California wage laws following *Dynamex*,[112] ride-share drivers will be able to successfully litigate that they were misclassified as independent contractors. As discussed in Parts II and III, under a common law classification test such as *Borello*, the analysis as to whether ride-share drivers are employees or independent contractors mainly focuses on the ride-sharing companies' *right* to control what and how the ride-share drivers perform the work.[113] Uber, for example, stresses the fact that Uber drivers create their own schedules and choose whether or not to accept passengers, demonstrating Uber's negligible control over its drivers.[114] Additionally, no managers directly supervise the Uber drivers, although the company can monitor the drivers through the mobile app's rating system.[115] Uber, however, retains the right to terminate its drivers at will, which courts commonly hold as being strong evidence in finding employment under the right to control test.[116] Arguably, Uber exerts less control over its drivers than Dynamex does. While Dynamex drivers are also free to set their own schedule, they must notify Dynamex as to which days they wish to work.[117] Further, Dynamex drivers are assigned deliveries at Dynamex's discretion and must wear Dynamex shirts and badges, unlike Uber drivers.[118] However, Dynamex drivers, like Uber drivers, must use their own vehicles and pay for all transportation expenses.[119] Most significantly, both Dynamex delivery drivers and Uber drivers provide their services within the normal course of their employers' businesses—delivery and transportation of customers, respectively.

However, when other gig-economy workers alleged that they were misclassified as independent contractors in a lawsuit against their employer, they often could not prevail under this common law test. For

112. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 35 (Cal. 2018).

113. *See* Izvanariu, *supra* note 34, at 142; *see also Dynamex*, 416 P.3d at 11 (describing the *Borello* multifactor test as California's common law classification test for employment). Notably, companies only need the *right* to control—they do not actually need to exercise this right. *See* Izvanariu, *supra* note 34, at 142.

114. *See* Pinsof, *supra* note 41, at 355–56.

115. *See id.*

116. *See id.* at 357.

117. *See Dynamex*, 416 P.3d at 8.

118. *See id.*

119. *See id.*

example, in pre-*Dynamex* lawsuit *Lawson v. Grubhub, Inc.*, a delivery driver for an internet food ordering service sued his employer, alleging that the employer misclassified him as an independent contractor and so violated the California laws regarding employees' overtime and minimum wage rights.[120] After analyzing the relationship between the driver and his employer under the common law *Borello* test, the court ultimately determined that the driver had been correctly classified as an independent contractor.[121] The court noted that, although "some factors weigh in favor of an employment relationship, [the employer]'s lack of all necessary control over [the driver]'s work . . . persuade the Court that the contractor classification was appropriate."[122]

However, this problem of finding control over drivers by the ride-share companies is largely eliminated in adopting the ABC test, especially due to the fact that the employer has the burden to prove each prong and must, under the B prong of *Dynamex*, demonstrate that "the worker performs work that is outside the usual course of the hiring entity's business."[123] As such, despite the negligible control that Uber exerts over its drivers and that it is less than the control exerted over Dynamex drivers, the amount of control is irrelevant under the B prong.[124] Instead, all that matters under the B prong is whether the ride-share companies can prove their drivers are doing work that is outside the normal course of their business—which seems impossible when the normal course of any ride-share company's business is providing transportation services to their customers via their drivers.

Furthermore, recent legislation passed by the California legislature that is modeled on the *Dynamex* decision may also galvanize ride-share drivers to litigate against their employers.[125] The legislation, called Assembly Bill 5, codifies the *Dynamex* test but applies it more broadly because it will reclassify workers for the purpose of determining a number of additional benefits, including a minimum wage and workers'

120. 302 F. Supp. 3d 1071, 1072–73 (N.D. Cal. 2018).
121. *Id.* at 1072.
122. *Id.*
123. *See Dynamex*, 416 P.3d at 35.
124. *See* Pinsof, *supra* note 41, at 355–56.
125. Alejandro Lazo & Sebastian Herrera, *Uber Vows to Fight California Legislation on Gig Economy*, WALL ST. J. (Sept. 11, 2019, 7:36 PM), https://www.wsj.com/articles/california-governor-still-in-talks-with-uber-lyft-over-gig-workers-law-11568212014 (remarking that this legislation "is the first significant step in a new paradigm for a changing workforce, fueled by people who have forgone benefits for the sake of flexibility and occasional incentives"); Margot Roosevelt, Liam Dillon & Johana Bhuiyan, *A Bill Giving Workplace Protection to a Million Californians Moves One Step Closer to Law*, L.A. TIMES (Aug. 30, 2019, 4:40 PM), https://www.latimes.com/business/story/2019-08-30/ab5-dynamex-independent-contractors-bill.

compensation.[126] Although gig-economy companies are continuing to fight Assembly Bill 5—with Uber vowing to continue arbitrating misclassification lawsuits and Uber, Lyft, and DoorDash planning to spend $90 million to support a ballot initiative in the 2020 election that would exempt them from this legislation—the legal tides are turning against these companies in order to protect workers from their exploitative practices.[127]

The strength of the ABC test's B prong, as implemented by *Dynamex* and the California legislature, makes it likely that ride-share drivers will be inspired by the decision and Assembly Bill 5, soon galvanizing them to bring more misclassification litigation in California. Given the similarities between the ride-share drivers and Dynamex drivers, it would be inequitable for a court to find that drivers of a delivery company are employees under the ABC test, but hold that drivers of a ride-share company are not under the same exact test. This sentiment is especially true of California's IWC wage order laws, which were intended to protect workers who have less bargaining power than their employers by regulating their working conditions.[128] Therefore, ride-share drivers will likely have success in California if they sue for misclassification under the state's laws, especially considering the legislative intent behind the laws, the equity in finding both types of drivers to be employees, and the centrality of transportation to both types of businesses that makes it so that the drivers of either company are clearly performing work that is within "the usual course of the hiring entity's business."[129]

2. New Jersey

Several factors indicate that New Jersey is a highly probable battleground for the next big ride-share worker classification lawsuit, especially following *Dynamex*. In 2018, Governor Phil Murphy signed an Executive Order to establish a new task force dedicated to examining the problem of worker misclassification, asserting that this misclassification causes over $500 million in tax revenue loss for the state each year.[130] Furthermore, the New Jersey Legislature has signaled, through the

126. *See* Lazo & Herrera, *supra* note 125.

127. *See id.*; Roosevelt, Dillon & Bhuiyan, *supra* note 125 (noting a state senator's defense of Assembly Bill 5 by quoting him as saying that the legislature "must protect workers from exploitation").

128. *See Dynamex*, 416 P.3d at 31–32 (noting that the "fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves . . . to accord them a modicum of dignity and self-respect").

129. *Id.* at 35.

130. *See* Tabakman, *supra* note 50.

enactment of several statutes, that it considers misclassification a serious issue. New Jersey, along with five other states, has instated private rights of action for worker misclassification lawsuits, authorizing wronged workers to file suit against an employer for allegedly violating the independent contractor statute.[131] The state has also provided that intentional worker misclassification may subject the employer to a low-level felony.[132]

Additionally, the New Jersey Supreme Court in *Hargrove v. Sleepy's, LLC* recently adopted the ABC test as the standard by which to classify a worker as an independent contractor or an employee for the purposes of the state's Wage and Hour Law ("WHL") and its Wage Payment Law ("WPL").[133] The WPL, which controls the timing and method of paying employees, and the WHL, which governs employees' minimum wage and overtime payments, define the term "employee" but not the test by which to classify workers.[134] As such, when the Third Circuit presided over litigation brought by delivery drivers who asserted that their employer misclassified them as independent contractors and thereby deprived them of employee benefits, the Third Circuit certified this question to the New Jersey Supreme Court as to which test to apply.[135] The employer contended that the common law control test should be applied to the WHL and WPL statutes in determining worker classification, while the drivers and the state Department of Labor advocated for adopting the ABC test.[136] Ultimately, because the legislature intended the WHL to protect all workers' well-being and for the WPL to be remedial, the New Jersey Supreme Court liberally construed the statutes and determined that it should follow the Department of Labor's recommendation to implement the ABC test for determining employment under both statutes.[137]

After the certified question was resolved, the Third Circuit consequently remanded the case to the federal district court for further consideration of the matter based on the ABC test.[138] Using the ABC test

131. *See* Deknatel & Hoff-Downing, *supra* note 39, at 78. The five other states are Delaware, Illinois, Massachusetts, Maryland, and Washington. *Id.*

132. *See id.* at 77. Only three other states—Connecticut, Illinois, and Utah—have also instated a possible low-level felony charge for intentional misclassification. *Id.* New Jersey further imposes a fine ranging from $100 to $1000, in addition to administrative penalties of up to $5000, for intentional misclassifications. *See id.* at 75–76, 76 n.155.

133. *See* 106 A.3d 449, 453 (N.J. 2015). The court derived the ABC test from the New Jersey Unemployment Compensation Act. *Id.*

134. *Id.* at 456–58.

135. *Id.* at 453.

136. *Id.* at 459.

137. *Id.* at 457–58, 465.

138. Hargrove v. Sleepy's, LLC, 612 F. App'x 116, 118–19 (3d Cir. 2015).

and New Jersey law, the New Jersey District Court found that the drivers had been misclassified as independent contractors and, therefore, reclassified them as employees.[139] The court held that the delivery drivers were employees for several reasons. Under prong A, which concerns proving that the employer did not "exercise[] control over the worker," the court found that the employer controlled the drivers because it monitored and supervised the drivers through an electronic system, and regulated the delivery process by training the drivers as to how to interact with customers.[140] As such, the employer could not satisfy prong A to prove that the drivers were independent contractors. Although the court did not need to analyze more prongs once it found that one prong could not be satisfied, the court also found that because a central part of the employer's mattress business is delivery, the employer also could not satisfy the B prong, proving that the worker does not provide services in the employer's "usual course of business."[141] Therefore, the delivery drivers were employees, not independent contractors.[142]

Given the similarities between the business model in *Hargrove* and that of ride-share companies, ride-share drivers have a strong probability of prevailing as plaintiffs in litigation regarding their rights under New Jersey's WPL and WHL. Although a federal district court decided *Hargrove*, the use and positive application of New Jersey law is nonetheless persuasive to the state courts. Furthermore, while ride-share companies could possibly satisfy prong A of the ABC test because drivers may not be sufficiently controlled by the companies, the onus is on the employer to prove *each* prong of the ABC test.[143] As mentioned, given the fact that the entire purpose of ride-share companies is to transport customers, it will be impossible for ride-share companies to prove that their drivers are not providing services in the companies'

139. Hargrove v. Sleepy's, LLC, No. 10-1138, 2016 U.S. Dist. LEXIS 156697, at *12–13 (D.N.J. Oct. 25, 2016).

140. *Id.* at *9–10. Other significant indicia of control included the fact that the employer did not allow drivers to conduct other business during their time on duty, provided the drivers with specific delivery routes, and established the time that drivers began work. *Id.*

141. *Id.* at *10–11. The court additionally found that the C prong, proving that the enterprise would "survive the termination of the relationship," could not be satisfied because the drivers did not work for any other company and so would be unemployed once their relationship with the employer ended. *Id.* at *11–12.

142. *Id.* at *13.

143. *See id.* at *10. Although ride-share companies like Uber are able to monitor the drivers' performance through the app's rating system, the drivers are able to establish their own schedules. *See* Pinsof, *supra* note 41, at 355–57.

normal course of business under the ABC test's B prong.[144] Although New Jersey in the past has found "that work performed outside the physical places of the employer's business suffices as indicia" in proving a worker to be an independent contractor under prong B, the fact that ride-share companies are not like traditional companies with a physical place of business makes this indicia inapplicable to classifying workers of ride-share companies.[145]

Additionally, if the legislative purpose of the New Jersey WHL is to protect workers, it would be inequitable not to protect every type of vulnerable worker.[146] If delivery drivers of a mattress company were found to be worthy of protection under New Jersey's wage laws because they provided their services within the company's normal course of business,[147] then it would only be equitable for a New Jersey court to hold that drivers of a ride-share company should be protected under the WHL and WPL since these drivers also certainly provide their services in the company's normal course of business, i.e. transportation, so as to fail the B prong of the ABC test. Considering the current political atmosphere in New Jersey against independent contractors, as signaled by the governor and legislature, the adoption of and intent behind the ABC test in *Hargrove*,[148] and the impetus that the *Dynamex* decision is likely to inspire in ride-share drivers,[149] successful litigation is on the horizon in New Jersey for ride-share drivers who seek to end their misclassification as independent contractors and earn their rightful benefits and protections under New Jersey wage laws as employees.

V. CONCLUSION

The *Dynamex* decision has the potential to change the legal landscape for companies that utilize independent contractors as to how to classify and fulfill certain rights to workers moving forward,

144. *Cf.* Hughes, *supra* note 19 ("The 'B' prong has been the most difficult to overcome for transportation companies, and for good reason: If a trucking company is in the business of transporting goods over highways, it is difficult to assert that the independent contractor driver is performing work outside the usual scope of the trucking company's business.").

145. *See* Deknatel & Hoff-Downing, *supra* note 39, at 69, 69 n.97.

146. Hargrove v. Sleepy's, LLC, 106 A.3d 449, 458 (N.J. 2015) (stating that "[t]he WHL declares that it is the public policy of [New Jersey] to . . . safeguard [workers'] health, efficiency, and general well-being").

147. *See* Hargrove v. Sleepy's, LLC, No. 10-1138, 2016 U.S. Dist. LEXIS 156697, at *10–11 (D.N.J. Oct. 25, 2016).

148. 106 A.3d at 458.

149. *Cf.* McGowan, *supra* note 103 (discussing a 1990s worker misclassification case that reclassified workers as employees, which consequently inspired a number of class action lawsuits by workers).

particularly for the ride-share companies that have become a hallmark of the gig economy. This potential is most prominent in California itself, the jurisdiction of the *Dynamex* decision, and in other states that have utilized the ABC test with the intent to protect workers, such as in New Jersey. Although workers must surmount formidable hurdles—such as alluring settlement offers and arbitration clauses—before litigation can occur, once ride-share drivers galvanized by *Dynamex* clear these hurdles, successful reclassification litigation is likely.

If ride-share companies must reclassify their drivers from independent contractors to employees, the continued feasibility of the business model will be upended due to the aforementioned financial benefits that employers derive from the independent contractor classification.[150] Once settlements begin to appear less appealing to ride-share drivers and arbitration becomes too cumbersome for the ride-share companies, those states that utilize the ABC test in determining certain rights for employees will likely see successful misclassification litigation by drivers. California and New Jersey are especially probable candidates for successful litigation, given the precedential case law and desire to protect workers in both states. Especially in these jurisdictions, *Dynamex* will prove to be the driver of change for the business model of ride-share companies in the gig economy.

150. *See* Rogers, *supra* note 33 (noting one journalist's estimation that if Uber had to classify its independent contractors as employees, it would cost the company over four billion dollars each year).