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INTRODUCTION

Massive changes have disrupted the institution of employment. The growth of the service sector, technological advancements, and developments in the finance market have created a demand for new employment models.[1] The norms associated with full-time employment are rapidly losing status as expectations. In today's economy, workers may have multiple employers, for both brief and extended periods.[2] Workers are more likely than ever to work multiple part-time jobs, work for staffing agencies, or find other type of contingent employment.[3] Employment is changing, pushed by automation and other forms of technological change.[4] Furthermore, globalization and lack of regulation has fed the phenomenon of indirect employment.[5] Workers fill shifts around the clock, often on a part-time basis. In the twentieth century, employment typically involved "a long-term, full-time, direct relationship between a large firm and a worker with set wages and pre-defined duties."[6] Today, a new reality has superseded this notion of industrial employment. Workers may have a combination of jobs, with none

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1. Julia Tomassetti, *From Hierarchies to Markets: Fedex Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1093 (2015).

2. *Id.* at 1118; Grant E. Brown, Comment, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. 15, 33 (2016).

3. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 1, 6 (2006).

4. *The Future of Jobs Report 2018*, CTR. NEW ECON. & SOC'Y, http://reports.weforum.org/future-of-jobs-2018/ (last visited Dec. 28, 2019).

5. V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 82 (2017).

6. Tomassetti, *supra* note 1.

meeting the standard of full-time employment, though the worker may exceed the forty-hour norm.[7]

These changes come amid a rapid shift in the nature of the workplace. Employers' desire to cut costs, combined with advances in artificial intelligence and machine learning, will hasten change in employment.[8] The World Economic Forum predicted that by 2022 the world will see 133 million new jobs.[9] These new jobs will require "adaptation strategies . . . to facilitate the transition of the workforce to the new world of work."[10] The use of non-employee workers allows employers scheduling ease, reduces overtime, and accommodates short-term projects.[11] Workers may benefit from these new arrangements as well, enjoying the ability to schedule their work lives, to choose their own projects, and achieve a measure of freedom.[12] The protections of employment law, however, should continue to reach those workers for whom it was intended.[13] Workers face enough challenges in the twenty-first century without facing relegation to a world of pseudo-employment. But at the same time, the law should not eliminate workplace innovation.

The law distinguishes between employees and independent contractors.[14] Designating a worker as either "employee" or "independent contractor" determines the degree to which employment law applies to the worker.[15] An independent contractor falls outside many of the benefits and protections that the law provides employees.[16] The distinction between employee and independent contractor has grown increasingly important in recent years.[17] Employers today often seek to utilize independent contractors to accomplish work that traditionally would have

7. U.S GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 6-7.

8. Dubal, *supra* note 5, at 67.

9. CTR. NEW ECON. SOC'Y., *supra* note 4. ("One set of estimates indicates that 75 million jobs may be displaced by a shift in the division of labour between humans and machines, while 133 million new roles may emerge that are more adapted to the new division of labour between humans, machines and algorithms.").

10. *Id.*

11. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 6-7.

12. *Id.*

13. *Id.*

14. Tomassetti, *supra* note 1, at 1083.

15. *Being an Independent Contractor vs. Employee*, FINDLAW, https://employment.findlaw.com/hiring-process/being-an-independent-contractor-vs-employee.html (last visited Dec. 28, 2019).

16. *Id.*

17. *Id.*

been done by employees.[18] Currently, courts, states, and administrative agencies use a confusing array of employment tests, created for different purposes and different eras, to classify workers as either employees or independent contractors.[19]

In this article, I propose a new means to define the scope of employment law. I suggest that the legal test for employee status focus on the presence of factors indicating entrepreneurship. Entrepreneurship represents the essence of independent contractor status.[20] Those workers who enjoy genuine entrepreneurial opportunity will be considered independent contractors.[21] Those workers who fall outside that definition will be considered employees. To determine the presence of entrepreneurial opportunity, I look to the study of entrepreneurship, examine the various academic definitions of entrepreneurship, and create a workable legal test. The entrepreneurship test provides three advantages.[22] First, it will reduce the confusion induced by multiple tests.[23] Second, use of the entrepreneurship test will return the question of independent contractor status to its roots.[24] Finally, the entrepreneurship test promises to promote innovation and workplace flexibility.[25]

I. WORKER CLASSIFICATION AND THE CHANGING WORKPLACE

Driven by economic, demographic, and technical changes, the workplace continues to evolve.[26] The standard employment relationship model – an employee performing work within the framework of a full-

18. *See Misclassification of Employees as Independent Contractors*, DEP'T FOR PROF'L EMPS., https://dpeaflcio.org/programs-publications/issue-fact-sheets/misclassification-of-employees-as-independent-contractors/ (last visited Dec. 28, 2019).

19. *See* 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, 299 (2001); *see also Understanding Employee vs. Contractor Designations*, IRS (July 20, 2017), https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation.

20. *See* discussion *infra* Section X.

21. *See* discussion *infra* Section XIII.

22. *See* discussion *infra* Section XIII.

23. *See* discussion *infra* Section III.

24. *See* discussion *infra* Section II.

25. *See* discussion *infra* Section XIII.A.

26. *See* Mansoor Iqbal, Uber Revenue and Usage Statistics, BUS. OF APPS, https://www.businessofapps.com/data/uber-statistics/ (last updated May 10, 2019) (recognizing that since Uber has been launched in New York City taxi usage has declined sharply while apps like Uber and Lyft have been on the rise).

time and open-ended relationship – is giving way to a new reality.[27] The workplace today has shifted to non-standard forms of work, often categorized as temporary and part-time work.[28] The workplace has also seen increasing use of the independent contractor model, in which workers agree to forego the benefits and protections of the employment relationship.[29]

These new forms of work often share common characteristics: working in multiple locations, often from a location other than premises of the employer; the use of information technologies for conducting the work; and schedules that are set by the worker.[30] These new work arrangements provide flexibility for both employers and employees.[31] With such flexibility, companies are able to offer services that previously would have been cost prohibitive.[32] Not all is positive though. These new forms of employment also offer lower and irregular earnings, reduced social security coverage, and lack of access to benefits like health care and retirement plans.[33]

Society has struggled with its approach to these new arrangements, signaling both acceptance and concern. For instance, Uber has faced widespread criticism for its worker status issues.[34] Nevertheless, Uber remains popular, both in the United States and elsewhere in the world. In

27. *See* Paul Schoukens & Alberto Barrio, *The Changing Concept of Work: When Does Typical Work Become Atypical?* 8 EUR. LAB. L.J. 306, 312 (2017) (arguing that the typical employment relationship has been on the decline due to the gradual weakening of its essential characteristics).

28. *See id.* at 314 (finding that "temporary work, part time work, and self-employment represent a third of all employment" in countries within the Organization for Economic Cooperation and Development).

29. *See* Yuki Noguchi, *Freelanced: The Rise Of The Contract Workforce*, NPR (Jan. 22, 2018) https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now (recognizing that the number of people engaged in alternative work arrangements, including contract workers, grew from 10.1 percent in 2005 to 15.8 percent in 2015).

30. *See* Brown, *supra* note 2, at 20 (recognizing the vast autonomy that the independent contractor has in dictating how the job will be completed).

31. *See id.* at 16.

32. *See* Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes that Target the Construction Industry*, 39 J. LEGIS. 295, 308 (2012) (recognizing that when a company classifies employees as independent contractors they avoid having to pay certain employee benefits such as minimum wage, overtime wage, health and pension benefits, as well as union bargaining. Without these costs, companies are able to offer other services or products at a discounted rate).

33. *Id.*

34. Greg Dickinson, *How the World is Going to War With Uber*, THE TELEGRAPH (June 26, 2018), https://www.telegraph.co.uk/travel/news/where-is-uber-banned/; *see also* Andrew J. Hawkins, *Uber Faces an Existential Threat and They Are Losing*, THE VERGE (Sept. 2, 2019), https://www.theverge.com/2019/9/2/20841070/uber-lyft-ab5-california-bill-drivers-labor.

2018, approximately 95 million people used the Uber app monthly.[35] Uber's 2018 global net revenue reached 11.3 billion dollars.[36] Since 2016, the value of Uber bookings increased by two-fold.[37] In the fourth quarter of 2018, Uber reached some 14.2 billion U.S. dollars in gross bookings worldwide.[38] Estimates suggest that riders complete 4 million Uber trips everyday.[39]

Ridesharing services like Uber are under attack around the world from government, taxi companies, and labor advocates.[40] Uber is banned, either partially or completely, in a number of countries in Western Europe.[41] In the United States, Uber faces legislation designed to include Uber drivers within the scope of employment.[42] The California legislature, for instance, has attempted to force California courts and administrative agencies to use an employment test that is intended to find employment status in most cases.[43]

No consensus exists among Uber drivers. Uber reports that their internal surveys indicate that most drivers prefer the freedom offered by independent contractor status. Drivers are free to set their own hours and to drive for multiple companies.[44] Nevertheless, hundreds of Uber drivers signaled their discontent by going on strike ahead of the company's initial public offering in May 2019.[45]

II. DISTINCTION BETWEEN EMPLOYEE AND INDEPENDENT CONTRACTOR

The distinction between employee and independent contractor is fundamental to employment law.[46] Most state and federal employment statutes reach employees but not independent contractors.[47] Worker classification laws, relying on concepts as old as the medieval master-

35. E. Mazareanu, *Monthly Number of Uber's Active Users Worldwide From 2016 to 2019 (in millions)*, STATISTA (Aug. 9, 2019), https://www.statista.com/statistics/833743/us-users-ride-sharing-services/.
36. *Id.*
37. *Id.*
38. *Id.*
39. Iqbal, *supra* note 26.
40. *See* Dickinson, *supra* note 34.
41. *Id.*
42. Hawkins, *supra* note 34.
43. *Id.*
44. *Id.*
45. *Id.*
46. Tomassetti, *supra* note 1, at 1083.
47. *See* Brown, *supra* note 2, at 31.

servant relationship, are ill-equipped to define employment in the twenty-first century.[48] As technology continues to transform the workplace, society must deal with a fundamental disconnect between old and new ways of doing business.[49] Confusion dominates consideration of worker classification, as workers, employers, and the court system remain unclear about who is and who is not an employee.[50] Unfortunately, the legal tests to determine worker status are confusing, yield inconsistent results, and are not suited to the evolving employment relationship.[51]

Worker classification finds its origins in *respondeat superior*, the legal doctrine that creates employer liability for the negligence of its employees for all acts committed in the course and scope of employment.[52] Historically, cases of disputed worker classification involved questions of tort liability for the employer.[53] Early worker classification cases did not concern the scope of statutory protections for workers.[54]

The common law master-servant relationship created the concept of vicarious liability, the liability of an employer for the torts of its employee.[55] Because of this connection to the master-servant relationship, to ascertain employer liability under *respondeat superior*, courts looked to see whether the tort was committed while the servant was acting under the "order, control, and direction" of the employer.[56] This test eventually became known as the "right of control" test.[57] This test provided the analytical tool for 19th century courts to determine whether the tortfeasor was an employee or an independent contractor.[58]

Worker classification became important for a different reason in the 20th century, as the United States saw enactment of the first statutory protections for employees.[59] Because these protections were only for employees, the question of worker status became important for defining

48. *Id.* at 23 n.78.

49. *See* CTR. NEW. ECON. & SOC'Y, *supra* note 4, at 7.

50. Carlson, *supra* note 19, at 296.

51. *Id.* at 299 ("While judges frequently speak of the 'common law' test of employee status and employment relations, they have generally failed to articulate any consistent rule or test.").

52. *Id.* at 304, 315.

53. *Id.* at 315.

54. *See id.* at 302-03.

55. *See id.* at 304-05.

56. Sproul v. Hemmingway, 31 Mass. 1, 5 (1833).

57. Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 68 (2013).

58. Carlson, *supra* note 19, at 304-05.

59. *Id.*

the scope of employment law.[60] The statutes would protect employees, but not those classified as something other than an employee.[61]

The growth of the on-demand economy has created even greater need for a more accurate classification test.[62] Technology has enabled millions of Americans to access products and services only when needed, creating a new business model based on the independent contractor framework.[63] The sharing economy that sprang to vigorous life in the last half-decade can be defined in various ways.[64] A decision by a California court clearly articulated the dilemma this new economic model has caused the courts.[65] In a case involving Lyft drivers seeking to be classified as employees, the court judge described the problem with a graphic analogy:

> As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem . . . . But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide.[66]

The workplace has continued to evolve. In a post-industrial world, current worker classification tests remain tied to twentieth century notions of industrial employment.[67] The demand for innovative work solutions requires a new classification test. [68]

60. *Id.*

61. Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 313 (2011).

62. *See* Brown, *supra* note 2, at 15.

63. *See id.*

64. Some scholars have defined 'sharing economy' "as a set of practices and techniques that leverage digital architectures to facilitate trusted transactions between strangers." Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1634 (2017).

65. *See* Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081-82 (N.D. Cal. 2015).

66. *Id.*

67. *See id.*

68. See *id.*

III. CURRENT EMPLOYMENT TESTS LAG BEHIND A CHANGING WORKPLACE

The United States Government Accountability Office has noted that federal worker classification tests are "complex, subjective, and differ from law to law."[69] Often, the status of workers outside of the full-time norm remains unclear, leaving both employers and employees without guidance as to whether they fall within the scope of employment or not.

Defining the status of a worker has troubled courts and administrative agencies for years. The ongoing struggle to distinguish between employees and independent contractors has been "lengthy and confused."[70] As the United States Supreme Court acknowledged, "[t]here are innumerable situations . . . where it is difficult to say whether a particular individual is an employee or an independent contractor."[71]

In making classification decisions, employers face a system that distinguishes between employee and independent contractor but provides little guidance for classification.[72] Employers wishing to strike contractual agreements to clarify independent contractor status will likely be frustrated, as those agreements are routinely disregarded.[73] Ordinarily when construing the validity of a contractual agreement, a court will start with the actual language of the agreement.[74] But this approach does not work in the classification arena.[75] Instead, the agreement between the employer and the worker receives little weight in the determination of employment status.[76]

For instance, in *Vizcaino v. Microsoft Corp.*, the employer signed a number of agreements with workers.[77] Each of the agreements stated that "the worker was 'an Independent Contractor for [Microsoft],' and nothing in the agreement should be construed as creating an 'employer-employee relationship.'"[78] The agreement with the workers included additional language, cautioning that the workers would be responsible for payment of their own insurance and benefits.[79] In each agreement, the worker

69. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 25.
70. Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 353 (2011).
71. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).
72. *Id.*
73. *See* Jost, *supra* note 61.
74. CSC Credit Servs., Inc. v. Equifax Inc., 119 F. App'x 610, 613 (5th Cir. 2004).
75. Jost, *supra* note 61, at 346.
76. *Id.*
77. Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1010 (9th Cir. 1997).
78. *Id.* (alterations in original) (citations omitted).
79. *Id.*

acknowledged "[y]ou are not either an employee of Microsoft, or a temporary employee of Microsoft."[80] Nevertheless, despite the clarity of the contracts, the appellate court deemed the workers to be employees.[81]

Faced with an inability to contract to a certain status, an employer seeking to classify workers may instead turn to employee protection statutes for guidance. Unfortunately, statutory definitions of employee provide few bright line rules. Instead, an employer attempting to rely on statutory guidance to make a classification decision will once again be frustrated. As an example, like many employment-related statutes, the Fair Labor Standards Act (hereinafter "FLSA") provides little guidance as to what an "employee" is.[82] The statute provides the following relevant definitions: (1) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . .; (2)"Employee" includes any individual employed by an employer; (3) "Employ" includes to suffer or permit to work.[83]

Likewise, the National Labor Relations Act fails at defining the employees that fall within its ambit.[84] Unfortunately, the NLRA fails to include a precise definition of "employee."[85] The statute states that:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor . . . .[86]

Nevertheless, the statute states who is not an employee – an independent contractor.[87] The NLRA specifically excludes independent contractors from the definition of employee.[88] As excluded workers, independent contractors are not guaranteed the rights to organize, join

80. *Id.*

81. *Id.*; *see also* Rutherford Food Corp. v. McComb, 331 US 722, 729 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards Act].").

82. *See* Fair Labor Standards Act, 29 U.S.C. § 203 (2012).

83. *Id.* (defining "Employer," "Employee," and "Employ").

84. *See* National Labor Relations Act, 29 U.S.C. § 152 (3).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

unions, or bargain collectively.[89] Only employees are permitted to organize under the NLRA.[90]

These statutory definitions fail to provide employees, employers, or the court system with a foundational basis for making a worker status determination. Even a good-faith decision as to independent contractor status may result in investigations and lawsuits. Determination of worker classification thus depends on a variety of legal tests.[91]

IV. THE UNITED STATES COMMON LAW AGENCY TEST

In the United States, employee status tends to be based on the common law principles found in the Restatement of Agency.[92] The common law test focuses on the employer's ability to control the worker in the scope of his duties.[93] Courts examine whether the hiring party was able to "control the manner and means by which the product is accomplished."[94] The common law agency test, created in England, migrated to the United States in 1857.[95] A court applying the test inquires whether the person in question was under the control of another to such a sufficient degree to allow the latter to be held accountable for the torts of the former.[96] The right to control test adopts the notion that the relationship between master and servant is defined by the amount of control exerted on the servant by the master.[97] Black's Law Dictionary echoes the common law test. It defines an independent contractor as "one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."[98]

Since the middle of the nineteenth century, courts have used this common law test to determine worker status. To apply the standard, a

89. *Id.* § 157.

90. *Id.* § 152(3) (defining the term "employee" and listing categories of workers excluded from the NLRA's coverage).

91. *See generally id.* (defining "employee" broadly and ambiguously).

92. *See* David Millon, *Keeping Hope Alive*, 68 WASH. & LEE. L. REV. 369, 371 (2011); *see also* Carlson, *supra* note 19, at 299, 315.

93. Carlson, *supra* note 19, at 338.

94. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

95. *See* Boswell v. Laird, 8 Cal. 469, 489-90 (1857) (applying English common law, which holds a master vicariously liable for the torts of his servant under the theory of respondeat superior).

96. *Id.* at 493.

97. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958) (noting that the control of a master differentiates a servant from an independent contractor); RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (abandoning the master/servant language in favor of principal and agent).

98. *Independent Contractor*, BLACK'S LAW DICTIONARY 785 (8th ed. 2004).

court must examine the amount of control retained by the employer over the work of the putative employee.[99] The more control exerted by the employer over the work of the worker, the more likely it is that the worker will be considered an employee.[100] If the employer exerts or retains less control, courts are more likely to determine that the employer has hired an independent contractor.[101]

Nevertheless, the right to control is not the only factor to consider in applying the test. While courts focus on the right to control, there are additional factors to consider.[102] The common law test is composed of numerous factors, each to be weighed individually by the decision maker.[103] There is no consensus on how the various factors should be weighed – which are more important, and which are less important.[104] The nature of the test ensures that no bright line rule of worker status exists.[105] The Supreme Court, in *Community for Creative Non-Violence v. Reid*, named thirteen factors that constituted a non-exhaustive list of factors to consider when applying the common law agency test:

1. The hiring party's right to control the manner and means by which the product is accomplished.
2. The skill required.
3. The source of the instrumentalities and tools.
4. The location of the work.
5. The duration of the relationship between the parties.
6. Whether the hiring party has the right to assign additional projects to the hired party.
7. The extent of the hired party's discretion over when and how long to work.
8. The method of payment.
9. The hired party's role in hiring and paying assistants.
10. Whether the work is part of the regular business of the hiring party.
11. Whether the hiring party is in business.
12. The provision of employee benefits.

99. Pivateau, *supra* note 57, at 76; *see also* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257 (2006).

100. Pivateau, *supra* note 57, at 68.

101. *Id.* at 68-69.

102. Millon, *supra* note 92, at 371-73.

103. The Restatement of Agency includes a list of ten factors which, as the Restatement cautions, is not an exhaustive list. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

104. *See* Millon, *supra* note 92, at 371.

105. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

13. The tax treatment of the hired party.[106]

Unsurprisingly, application of thirteen factors, without guidance on their relative importance, provides uncertain results. Little guidance exists as to how the factors are to be weighed and balanced. Application of the test creates "a legal standard that is often vague and indeterminate."[107] Decisions of worker status are heavily fact-dependent, requiring courts to analyze the cases individually. But the delay and inefficiency of the common law test are not its only failing. Instead, the confused test and uncertain results provide little guidance to employers. Moreover, because the common law test focuses on employer control, it removes consideration of the worker's perspective. The worker is left essentially voiceless in the determination of his legal status.

V. THE ECONOMIC REALITIES TEST

In disputes involving the Fair Labor Standards Act, courts utilize the economic realities test.[108] This test attempts to determine "whether as a matter of economic reality, the individuals 'are dependent upon the business to which they render service.'"[109] Financial considerations are paramount in the use of the economic realities test. Worker status is determined not by the nature of the work, but on the financial realities that accompany the work.[110] The test should measure economic independence.[111] Some variation of the economic realities test is used to classify workers under the FLSA, the Equal Pay Act of 1963, Family and Medical Leave Act of 1993, and the Employee Polygraph Protection Act of 1988.[112]

The economic realities test is a creature of federal courts.[113] In *Goldberg v. Whitaker House Cooperative*, the Supreme Court opined that

106. Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

107. Millon, *supra* note 92, at 371.

108. Brown, *supra* note 2, at 26.

109. Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991) (citation omitted).

110. *Id.*

111. *See* Mednick v. Albert Enters., 508 F.2d 297, 303 (5th Cir. 1975) ("An employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the F.L.S.A., by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate.").

112. *See* MICHAEL S. HORNE ET AL., THE CONTINGENT WORKFORCE: BUSINESS AND LEGAL STRATEGIES § 2.07[1]-[4] (2017).

113. *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141 (2d Cir. 2008) (explaining that unless the statute indicates otherwise, Congress meant to incorporate the common law meaning of "employer" and "employee").

courts should not focus on "technical concepts" but instead should examine "economic reality."[114] The Court suggested that workers are likely employees for FLSA purposes where they "are regimented under one organization, [doing] what the organization desires and receiving the compensation the organization dictates."[115]

The economic realities test examines the financial dependence of the worker.[116] Review of employer control remains, but the more important measuring test is whether the worker is "economically dependent" on the employer or in business for him or herself.[117] The economic reality test goes beyond technical, common law concepts of the master and servant relationship to determine whether, as a matter of economic reality, a worker is dependent on an employer.[118] This standard focuses on "whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself."[119]

While the question of 'control' remains, it is not meant to be determinative for purposes of the economic realities test. As noted by the Supreme Court in *Walling v. Portland Terminal Co.*:

> [I]n determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.[120]

The economic realities test grew out of a concern for employee right to organization and not vicarious liability.[121] In the past, courts have often given weight to the non-control factors of the common law test "when the effect was to extend protection to needy workers, rather than to impose tort liability on employers."[122] The concept of "employee" for protection

114. Goldberg v. Whitaker House Coop. Inc., 366 U.S. 28, 33 (1961).

115. *Id.* at 32.

116. Brown, *supra* note 2, at 26.

117. *Fair Labor Standards Act Advisor: Independent Contractors,* U.S. DEP'T OF LAB., https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp (last visited Dec. 28, 2019).

118. Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998).

119. Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984) (citation omitted).

120. Walling, Wage and Hour Adm'r v. Portland Terminal Co., 330 U.S. 148, 150–51 (1947) (citation omitted).

121. Kwak, *supra* note 32, at 297.

122. *Id.*

purposes was broad.[123] This approach focused on 'control' but a different kind of control.[124] Instead of personal control, the economic realities test focused on the employer's control over two things: capital and the specific project.[125]

VI. THE INTERNAL REVENUE SERVICE TEST

The IRS created its own test to determine employee status.[126] Where the test once was made up of twenty different factors, it has now been simplified.[127] The IRS reduced the test to three factors based on the categories of the twenty-factor test.[128] The IRS grouped the twenty factors into three categories: behavioral control, financial control, and type of relationship.[129]

The IRS summarizes the tests for the categories in the following manner:

> Behavioral: Does the company control or have the right to control what the worker does and how the worker does his job?
> Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how the worker is paid, whether expenses are reimbursed, who provides tools and supplies, etc.)
> Type of relationship: Are there written contracts or employee type benefits? (i.e. pension plans, insurance, and vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?[130]

The IRS maintains that no single factor, or combination of factors, is dispositive on the issue of employee classification.[131] Businesses are required to consider all factors when making classification decisions.[132] "There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor, and no one factor stands alone in

123. United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (The FLSA contains "the broadest definition [of employee] that has ever been included in any one act.").

124. *See* Kwak, *supra* note 32, at 297.

125. *Id.*

126. *See* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 5-8 (2018).

127. *Id.*

128. *Id.* at 7-8.

129. *Id.*; *see also* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, INDEPENDENT CONTRACTOR (SELF-EMPLOYED) OR EMPLOYEE? 2 (2013).

130. *Id.*

131. *Id.*

132. *Id.*

making this determination."[133] The IRS recommends examining the relationship as a whole, considering "the degree or extent of the right to direct and control."[134]

The IRS provides a limited amount of protection for employers who misclassify employees. Employers who are unclear on classification may submit the SS-8 form, which permits the IRS to examine the facts and circumstances and provide a determination of status.[135]

VII. THE ABC TEST

Many states use the "ABC" test for purposes of qualification for state purposes, such as state laws regarding wages, maximum hours, and working conditions.[136] Depending on the state, the ABC test differs, but generally consists of the following factors:

> A): The worker is free from the control and direction of the company that hired them while they perform their work.
> (B): The worker is performing work that falls outside the hiring entity's usual course or type of business.
> (C): The hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business.[137]

The ABC test limits an employer's ability to classify workers as independent contractors.[138] Application of Part B of the test would prevent Uber and Lyft from classifying workers as independent contractors, as driving people is the essence of a ride sharing enterprise.[139] This aspect of the test ensures that only certain types of jobs would fall outside the 'employee' classification.[140] This includes those positions most likely to be outsourced: maintenance, payroll, accounting, and information technology.[141]

Part C of the test provides an even tougher hurdle for employers, as it seems to indicate that independent contractor classification is limited to

133. *Id.*
134. *Id.*
135. *Id.*
136. Dynamex Operations West, Inc. v. Super. Ct. of L.A. Cty., 416 P.3d 1, 7 (Cal. 2018).
137. *Id.* at 34.
138. *Id.* at 35.
139. *Id.* at 37.
140. *Id.* (explaining that this extension of the employee status further ensures that all workers in the usual course of business are protected by the wage order provisions).
141. In addition to the positions noted above, jobs such as electricians and plumbers are noted by the court in *Dynamex* as those that are typically outsourced by a business for contracting work. *Id.*

professionals, especially licensed workers such as chiropractors, massage therapists, and cosmetologists.[142]

VIII. ENTREPRENEURIAL OPPORTUNITY

The common law test includes as one of its factors the presence of entrepreneurial opportunity.[143] Although it represents just one factor, court decisions have suggested that it, rather than control, could provide a framework with which to construe questions of classification.[144] The logic of the entrepreneurial factor is clear. In conducting a classification test, courts and agencies must examine whether or not the worker is doing their own business or that of their employer.[145] Therefore, the ultimate issue in any classification dispute should focus on whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'"[146]

I propose focusing the question of worker classification on the presence of actual entrepreneurship. The protection of workers lies at the heart of most employment statutes.[147] To protect against legal manipulation, my proposed test requires not only genuine opportunity, but the existence of actual entrepreneurship.[148] The proposed test requires employers to make hard choices about the scope of the freedom it provides to its workers.[149] Courts and government agencies should not rely on bare-boned allegations of opportunity, but instead must use a narrow definition of entrepreneurship to define those who are independent contractors and those who are not.[150] In other words, workers must actually do entrepreneurship.

Designating workers as independent contractors will require the company not only to cede control, but also to cede the possibility that

142. *Id.* at 39.

143. FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).

144. *Dynamex,* 416 P.3d at 37.

145. *FedEx Home Delivery*, 563 F.3d at 503 (explaining that the common law and the Restatement are used in a classification test in order to distinguish whether the entrepreneur is taking their own individual risk as a business).

146. *Id.* at 497.

147. *See* Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 535 (2001) (discussing the FLSA as "a major development in the evolution of worker protection in America.").

148. *See infra* Section XII.

149. *See infra* Section XII.

150. *See infra* Section XIII.

workers will achieve larger rewards, monetary or otherwise, than they would have achieved as employees.[151]

To analyze the presence of entrepreneurial opportunity, I look to the academic field of entrepreneurship, examine the various definitions of entrepreneurship, and create a workable legal test. Scholars have called entrepreneurship a "broad and complex concept."[152] There is not a "precise, inherently consistent, and agreed-upon definition."[153] The difficulty lies in the various notions of defining entrepreneurial opportunity.[154]

In recent years, numerous courts, administrative agencies, and scholars have examined the ties between entrepreneurship and independent contractor status.[155] Despite this discussion, entrepreneurship remains difficult to ascertain.[156] Each of these entities has its own unique notion of entrepreneurship with little commonality.[157] Nevertheless, means exist to enable outside parties to identify entrepreneurship when it occurs.

IX. ENTREPRENEURSHIP AND THE NATIONAL LABOR RELATIONS BOARD

On two different occasions in 2019, the National Labor Relations Board (hereinafter "NLRB" or "the Board") reiterated its support for the common law agency test for worker classification.[158] Moreover, the NLRB expressed its belief that facts establishing the presence of entrepreneurial opportunity were particularly persuasive in classifying workers as employees or independent contractors.[159] In *SuperShuttle DFW, Inc.* and *Amalgamated Transit Union Local 1338*, the Board

151. *See infra* Section XIII.A.

152. Domingo Ribeiro Soriano & Ma Angeles Montoro-Sanchez, *Introduction: The Challenges of Defining and Studying Contemporary Entrepreneurship*, 28 CAN. J. ADMIN. SCI. 297, 297 (2011).

153. PER DAVIDSSON, RESEARCHING ENTREPRENEURSHIP 3 (2005).

154. *Id.*

155. *See* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1124 (D.C. Cir. 2017) (a court examines the link between entrepreneurship and independent contractors); SuperShuttle DFW, Inc. 367 N.L.R.B. 75 (2019) (the NLRB, an administrative agency, examines the ties between entrepreneurship and independent contractors); Davidsson, *supra* note 153 (a scholar examines the connection between entrepreneurship and independent contractors).

156. *See supra* note 155.

157. *Id.*

158. N.L.R.B. Advice Memorandum from Jayme L. Sophir, Assoc. Gen. Counsel to Jill Coffman, Reg'l Dir. (April 16, 2019), https://www.nlrb.gov/news-publications/nlrb-memoranda/advice-memos; SuperShuttle DFW, Inc. 367 N.L.R.B. No. 75 (2019).

159. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 3 (Jan. 25, 2019).

confronted a company, SuperShuttle DFW, that converted from an employee based model to one utilizing independent contractors.[160] The Amalgamated Transit Union sought to represent a unit of SuperShuttle DFW drivers, a number of whom signed an agreement acknowledging that they operated as independent contractor franchisees.[161] Under the franchise model, drivers provided their own shuttle vans and paid SuperShuttle DFW a weekly fee for the right to use the brand name and the dispatch/reservation system.[162] The drivers had no set schedule and could choose the number of hours or days they worked each week.[163] Drivers then received the money they earned for completing the assignments they selected. SuperShuttle DFW also permitted workers to hire their own relief drivers if they so chose.[164]

The National Labor Relations Act (hereinafter "NLRA") applies only to employees.[165] It expressly excludes independent contractors from its coverage.[166] In construing status, the NLRB and reviewing courts traditionally applied a common law agency analysis to determine whether individuals were independent contractors.[167] As such, most of the focus emphasized an employer's ability to control the work as the most important factor.[168]

In *SuperShuttle DFW,* the Board noted that "employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa."[169] In reaching this conclusion, the Board expressly overruled the NLRB's 2014 decision in *FedEx Home Delivery.*[170] In *FedEx Home Delivery*, the Obama-era Board criticized entrepreneurship as a factor in classification analysis and limited the importance of the presence of entrepreneurial opportunity in classifying workers.[171] In *SuperShuttle DFW*, the NLRB found that the *FedEx Home Delivery* decision improperly changed independent contractor analysis and unjustifiably

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. 29 U.S.C. §152(3) (2006).
166. *Id.*
167. NLRB v. United Insur. Co. of Am., 390 U.S. 254, 256 (1968).
168. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (AM. LAW INST. 1958).
169. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 at 9.
170. *Id.* at 7.
171. FedEx Home Delivery, 361 N.L.R.B. 610, 610 (2014).

reduced the importance of entrepreneurial opportunity.[172] The NLRB returned to its more traditional independent contractor analysis, which requires consideration of all common law agency test factors in the context of entrepreneurial opportunity, in the same way the NLRB traditionally had evaluated employer control.[173]

Following *SuperShuttle DFW*, the NRLB General Counsel's office issued an Advice Memorandum (hereinafter "Advice Memo") regarding a claim involving Uber drivers.[174] The General Counsel's office concluded that Uber's drivers are independent contractors and do not fall within the scope of the NLRA.[175] The decision favoring Uber indicated that the NLRB's renewed focus on entrepreneurship would likely favor other companies using the same independent contractor model.[176] In the Advice Memo, Associate General Counsel Jayme L. Sophir returned to the legal principle in *SuperShuttle*, which required examination of the relevant facts viewed "through the prism of entrepreneurial opportunity."[177]

Sophir identified the following facts to support the NRLB's conclusion of independent contractor status in the Uber case.

> Drivers were free to set their own schedules;
> Drivers were free to choose where they worked;
> Drivers could, and often did, freely work for competitors;
> Drivers provided the principal instrumentality – the cars they used to complete trips;
> Drivers were responsible for chief operating costs such as gas, cleaning, and maintenance of their cars;
> Drivers were not required to take trips at the direction of Uber and could reject proposed trips at their discretion; and
> Drivers signed contracts which expressly characterized their relationship to Uber as independent contractors – and Uber provided no benefits, paid leave, or holiday pay.[178]

172. In addition to determining that the putative contractor had a significant entrepreneurial opportunity, the agency insisted that it must determine "whether the putative contractor . . . (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in her work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital." *Id.* at 621.

173. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 2 (2019).

174. N.L.R.B. Advice Memorandum, *supra* note 158.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

In focusing on entrepreneurship as a factor in classification, the NLRB reflected the earlier judgment of the District of Columbia Court of Appeal.[179] In 2009, the D.C. Circuit spurred examination of the relationship between independent contractor and entrepreneur status with its decision in *FedEx Home Delivery v. NLRB*.[180] In that case, the court faced the question of whether drivers working for a delivery service were employees or independent contractors.[181] In determining that the drivers were independent contractors, the D.C. Circuit court retained all the common law agency factors, but shifted focus away from the control inquiry.[182] Instead, the court stated that the most important factor in determining worker status was "whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss."[183]

Entrepreneurship, according to the court, provides the best means of analyzing the employer-worker relationship. Entrepreneurial risk and opportunity more accurately reflect the difference between employee and independent contractor.[184] Courts should evaluate the common law factors entrepreneurial opportunities by viewing them through the lens of entrepreneurship.[185] Entrepreneurial risks and opportunities should be the "animating principle" used to evaluate the common law factors.[186]

In 2017, in yet another *FedEx Home Delivery* case, the D.C. Circuit renewed and reiterated its previous findings regarding independent contractor status.[187] Faced with facts, which appeared to be "virtually identical" to those in the previous case, the appellate court faced the question of whether the facts present in the first *FedEx Home Delivery* case should result in the same decision.[188] Citing the need for "stability, consistency, and evenhandedness in circuit law" the court noted that it had no alternative but to reach the same result as the previous court.[189] Moreover, the court felt no need to give deference to the NLRB's finding of employee status, given the Supreme Court's previous finding that whether a worker is an "employee" or "independent contractor" under the

179. *Id.*
180. FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).
181. *Id.* at 495.
182. *Id.* at 497.
183. *Id.* (quoting Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002)).
184. *Id.* (citing Corp. Express Delivery Sys., 332 N.L.R.B. No. 144, 6 (Dec. 19, 2000)).
185. *FedEx Home Delivery,* 563 F.3d at 497.
186. *Id.*
187. FedEx Home Delivery v. N.L.R.B., 849 F.3d 1123, 1123 (D.C. 2017).
188. *Id.* at 1127.
189. *Id.*

NLRA is a question of "pure" common-law agency principles "involving no special administrative expertise that a court does not possess."[190]

X. SCHOLARLY ATTENTION TO WORKER CLASSIFICATION BASED ON ENTREPRENEURSHIP

There has been much scholarly critique of the use of entrepreneurial opportunity to evaluate worker status. In one of the earliest scholarly articles addressing the distinction between employee and entrepreneur, Professor Jeffrey M. Hirsch criticized the D.C. Circuit's *FedEx Home Delivery* decision.[191] Hirsch believed that use of the test described in *FedEx Home Delivery* would assist employers to exclude workers from coverage under employment protection statutes by classifying them as independent contractors.[192]

Professor Veena Dubal also criticized the use of entrepreneurship in classifying workers as employees or independent contractors.[193] Dubal maintains that the recent focus on entrepreneurship as a measure of independent contractor status relies on the neoliberal belief that workers prosper by being free of the "state's protections."[194] Dubal notes that the growth of the on-demand economy has led to battles between businesses and public interest lawyers to control "the doctrinal definitions and legal analyses" of the employee and independent contractor divide.[195] Dubal also confronts the irony that, while the US depends to a large extent on employment regulation to address issues of economic inequality, fewer workers fall within the scope of employment laws and are thus less likely to benefit from those regulations.[196] The proliferation of businesses that rely on non-employee labor has resulted in increasing numbers of workers falling outside the scope of employment. By the year 2020, over 40 percent of the US workforce is projected to fall into the category of legally unprotected labor.[197]

Dubal studied the history of the employee/independent contractor division, and found that the placement of workers into these two different camps is a relatively recent phenomenon.[198] To reach this conclusion,

190. *Id.* at 1128 (citing N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254 (1968)).
191. Hirsch, *supra* note 70, at 359-60.
192. *Id.* at 355.
193. Dubal, *supra* note 5, at 98.
194. *Id.* at 70.
195. *Id.* at 65.
196. *Id.* at 67.
197. INTUIT, INTUIT 2020 REPORT 21 (2010).
198. Dubal, *supra* note 5, at 70.

Dubal examines the taxi industry, for example, because taxi work accounts for the "historic origins and contemporary legal and social meanings of the dual worker categories of employee and independent contractor."[199] Dubal argues that categorization of workers "reflects not clear legal rules, but rather prevailing political and cultural philosophies."[200] Nevertheless, Dubal's article reveals that many taxi drivers enjoy their independent contractor status and have no desire to return to the days of employment.[201]

Not all scholarly attention has been negative; however, Professor Jooho Lee advocated that courts shift their approach and focus on the concept of entrepreneurship in classifying workers.[202] Lee proposes using entrepreneurship as a guide to making independent contractor classification decisions.[203] But Lee once again recognizes that one of the greatest hurdles in this approach lies with the definitional difficulties of entrepreneurship.[204] Courts have failed to comprehend entrepreneurship. Rather than focusing on the academic theories of entrepreneurship, courts have instead relied on "common sense notions of entrepreneurship as profit-seeking or risk-taking."[205] Much of the scholarly attention to entrepreneurship is focused on other areas, noting that academics have focused on "economic theories of the firm rather than looking to the entrepreneur as their main focus."[206]

In devising his test, Professor Lee notes that entrepreneurship scholarship focuses on "three classic theories of entrepreneurship."[207] These three theories each rely on several basic underlying concepts: risk and uncertainty, creative destruction, and entrepreneurial alertness.[208] Lee combines these concepts to create a test based on "whether or not the worker assumes entrepreneurial responsibility within her relationship with the hirer."[209]

Other scholars have mused on the value of entrepreneurship and its relation to society. Professor Mirit Eyal-Cohen reflected on the benefits of entrepreneurship and its potential "for revitalization, economic growth,

199. *Id.* at 68.
200. *Id.* at 70.
201. *Id.* at 105.
202. Jooho Lee, *The Entrepreneurial Responsibilities Test*, 92 TUL. L. REV. 777, 781 (2018).
203. *Id.* at 796.
204. *Id.* at 780-81.
205. *Id.* at 781.
206. *Id.*
207. *Id.*
208. *Id.* at 782.
209. *Id.* at 783.

job creation, and technological renewal."[210] The focus on entrepreneurship has led Congress to stated that "enticing entrepreneurship is a fundamental value in American society."[211] Eyal-Cohen notes the difficulty in describing exactly what "entrepreneurship" is.[212] As she states, it is one thing to advocate entrepreneurship, but it is a very different matter to grasp the "essence of entrepreneurship."[213] Eyal-Cohen argues that understanding entrepreneurship requires examining entrepreneurship by "visualizing it from the eyes of the entrepreneur."[214] Cohen invites the reader to evaluate the presence of entrepreneurship by "considering the four main elements that transmit entrepreneurship and that are inherent to the entrepreneur's agenda: knowledge intensity, transiency, uncertainty, and exit motive."[215]

Tangentially related to an entrepreneurial test, Professor Naomi B. Sunshine advocated the creation of a classification test that measures the ability of putative employees to affect the price of their services. Sunshine believes that the best measure of a contractor's independence is whether or not the worker plays a role in the negotiation of the prices charged to the customer. A worker who cannot control the prices charged for her services lacks the requisite independence to be considered an independent contractor. Sunshine argues that "prices and pay are more clear-cut indications of whether the worker is actually a representative of the company for which she is providing services."[216] Sunshine argues for a standard that involves looking at the ability of the putative independent contractor to negotiate prices or pay. The worker who can dictate prices or pay is an independent contractor. When the worker lacks the opportunity to negotiate prices or pay, the relationships "is presumptively an employment relationship."[217]

210. Mirit Eyal-Cohen, *Through the Lens of Innovation*, 43 FLA. ST. U.L. REV. 951, 952 (2016).
211. *Id.* at 955.
212. *Id.* at 959.
213. *Id.*
214. *Id.* at 960.
215. *Id.* at 959.
216. Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 106 (2018).
217. *Id.* at 150.

XI. THE ELEMENTS OF ENTREPRENEURSHIP

Despite decades of study and widespread use,[218] identifying the elements that make up entrepreneurship remains controversial.[219] The difficulty of defining the field has even drawn the legitimacy of the academic study of entrepreneurship into question.[220] Even with struggling with definitions, many understand the concept of entrepreneurship.[221] Academic study of entrepreneurship has provided different definitions of the concept.[222]

Defining entrepreneurship is essential to the creation of a worker classification test.[223] But what constitutes entrepreneurship? Some scholars have described the concept as "mysterious" and suggest that no acceptable measure will satisfy everyone.[224]

The varying definitions of entrepreneurship share some common elements. When scholars define entrepreneurship, certain elements often appear:

The environment within which entrepreneurship occurs.
The people engaged in entrepreneurship.
Entrepreneurial behaviors displayed by entrepreneurs.
The creation of organizations by entrepreneurs.
Opportunities identified and exploited.
Innovation, whether incremental, radical or transformative.
Assuming risk, at personal, organizational, and even societal levels.

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218. *See* Hans Landström et al., *Entrepreneurship: Exploring the Knowledge Base*, 41 RES. POL'Y 1155 (2012) ("The first author to endow entrepreneurship with a more precise economic meaning was Richard Cantillon in his *Essai sur la Nature du Commerce en Général* (1755/199), in which he outlined the principles of the early market economy based on individual property rights and economic interdependency.").

219. Candida G. Brush et al., *Doctoral Education in the Field of Entrepreneurship*, 29 J. OF MGMT 309, 311 (2003).

220. See Margaret Kobia & Damary Sikalieh, *Towards a Search for the Meaning of Entrepreneurship*, 34 J. EUR. INDUS. TRAINING 110, 111 (2010) ("In the past decade or so, researchers and educators in this field have had and still have to confront the question 'what are we talking about when we talk about entrepreneurship?' The answer to this question however, has been and still is unclear, delayed and overlaps with other sub fields.").

221. Nadim Ahmad & Richard G. Seymour, *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection*, ORG. FOR ECON. CO-OPERATION & DEV.1, 5 (2008).

222. *Id.*

223. *See Deborah H. Schenk & Eric M. Zolt, Forward, 69 TAX L. REV. 311 (2016).*

224. Donald Bruce & Beth Glenn, *Does the Tax System Measure and Encourage the Right Kind of Entrepreneurial Activity? An Updated Look at the Time Series Data*, 69 TAX L. REV. 389, 390, 392 (2016).

Adding value for the entrepreneur and society.[225]

Entrepreneurship consists of those practices relating to the creation or discovery of opportunities and their enactment.[226] Entrepreneurship "is the process whereby an individual or a group of individuals use organized efforts and means to pursue opportunities to create value and grow by fulfilling wants and needs through innovation and uniqueness, no matter what resources are currently controlled."[227]

Entrepreneurship can focus on activities, generally new and innovative, taken in response to perceived business opportunities.[228] Entrepreneurship often relates to the creation of new firms.[229] Entrepreneurship is the "process of discovery, evaluation and exploitation of opportunities."[230]

XII. THREE DIMENSIONS OF ENTREPRENEURSHIP

Studies of entrepreneurship reveal three main dimensions.[231] These dimensions are (1) the processes and events that make up entrepreneurship, (2) the skills and traits that characterize an entrepreneur, and (3) the results that entrepreneurship generate.[232] We may conclude then that entrepreneurship is composed of processes, behaviors, and outcomes.[233]

225. Timothy M. Stearns & Gerald E. Hills, *Entrepreneurship and New First Development: A Definitional Introduction*, 36 J. BUS. RES. 1, 1 (1996).

226. Şana El Harbi & Alistair R. Anderson, *Institutions and the Shaping of Different Forms of Entrepreneurship*, 39 J. OF SOCIO-ECON. 436, 436 (2010).

227. BJORN BJERKE & HANS RAMO, ENTREPRENEURIAL IMAGINATION: TIME, TIMING, SPACE AND PLACE IN BUSINESS ACTION 23 (Edward Elgar ed. 2001).

228. Patricia P. McDougall & Benjamin M. Oviatt, *International Entrepreneurship Literature in the 1990s and Directions for Future Research*, *in* ENTREPRENEURSHIP 2000, at 293 (Donald L. Sexton & Raymond W. Smilor, eds. 1997).

229. *See* Sang M. Lee & Suzanne J. Peterson, *Culture, Entrepreneurial Orientation, and Global Competitiveness*, 35 J. WORLD BUS. 401, 402-03 (2000).

230. Scott Shane & S. Venkataraman, *The Promise of Entrepreneurship as a Field of Research*, 25 ACAD. OF MGMT. REV. 217, 220 (2000).

231. David Stokes & Nicholas C. Wilson, *Entrepreneurship and marketing education: time for the road less traveled?* INT'L J. ENTREPRENEURSHIP & INNOVATION MGMT. 1, 4 (2010).

232. *See* Kobia & Sikalieh, *supra* note 220.

233. *Id.*

A. Process

The development of a new business or innovative strategy is central to the process dimension of entrepreneurship.[234] One can view entrepreneurship as "the process of creating something new of value by devoting the necessary time and effort, assuming the accompanying financial, psychic and social risks, and receiving the resulting rewards of monetary and personal satisfaction and independence."[235] In other words, "entrepreneurship is a process by which individuals – either on their own or inside organizations – pursue opportunities without regard to the resources they currently control."[236] "The essence of entrepreneurship is the willingness to pursue opportunity, regardless of the resources under control."[237]

The entrepreneurial process encompasses "the identification and assessment of opportunities, the decision to exploit them oneself or sell them, efforts to obtain resources and the development of the strategy and organization of the new business project."[238]

B. Behavior

The next dimension of entrepreneurship focuses on behavior: the skills, traits, and actions of the putative entrepreneur.[239] One study suggests the following definition: Entrepreneurship is the manifest ability and willingness of individuals, on their own, in teams, within and outside existing organizations, to: perceive and create new economic opportunities (new products, new production methods, new organizational schemes, and new product-market combinations) and to introduce their ideas in the market, in the face of uncertainty and other obstacles, by making decisions on location, form and the use of resources and institutions.[240]

234. Stokes & Wilson, *supra* note 231, at 7.

235. ROBERT D. HISRICH & MICHAEL P. PETERS, ENTREPRENEURSHIP 10 (5th ed. 2002).

236. Howard H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRATEGIC MGMT. J. 17, 23 (1990).

237. *Id.*

238. ALVARO CUERVO ET. AL., ENTREPRENEURSHIP: CONCEPTS, THEORY, AND PERSPECTIVE 3 (2007).

239. Stokes & Wilson, *supra* note 231, at 6.

240. Sander Wennekers & Roy Thurik, *Linking Entrepreneurship and Economic Growth*, 13 SMALL BUS. ECON. 27, 46–47 (1999).

Entrepreneurial behavior is sometimes described as behavior that "manages to combine innovation, risk-taking, and proactiveness."[241] Research into entrepreneurial behavior has focused on explaining the behaviors of entrepreneurs – what the entrepreneur does as well as what the entrepreneur is.[242] Research has yielded certain behaviors common to entrepreneurs:

> the ability to search and gather information
> the ability to identify opportunities
> the ability to deal with risk
> the ability to establish relationships and networks
> the ability to make decisions under uncertainty and ambiguity
> leadership ability
> the ability to learn from experience[243]

C. *Outcome*

Outcome also defines entrepreneurship.[244] Genuine entrepreneurship "results in the creation, enhancement, realization and renewal of value not just for the owners but all participants and stakeholders."[245] The entrepreneurial process – the set of behaviors that characterize entrepreneurship – must produce a concrete result.[246] If process and behavior do not create value, entrepreneurship does not exist.[247]

XIII. THE ENTREPRENEURIAL OPPORTUNITY CLASSIFICATION TEST

Entrepreneurship consists of three dimensions: process, behavior, and outcome.[248] Creating a legal definition requires consideration of each dimension of entrepreneurship.[249] Any proposed legal test should incorporate elements of each of the three dimensions to ensure the presence of genuine entrepreneurial opportunity.[250] My proposed

241. Cuervo, *supra* note 238, at 3.
242. Jose M. Veciana, *Entrepreneurship as a Scientific Research Programme*, ENTREPRENEURSHIP: CONCEPTS, THEORY, & PERSP. 23, 53 (2007).
243. *Id.*
244. Pivateau, *supra* note 57, at 102.
245. *Id.*
246. *Id.*
247. *Id.* at 103.
248. *Id.* at 102.
249. *Id.*
250. *Id.* at 103.

definition of entrepreneurship incorporates a synthesis of all three dimensions:

> Process: [t]he identification, evaluation and exploitation of an opportunity.
> Behavior: [t]he management of a new or transformed organi[z]ation so as to facilitate [t]he production and consumption of new goods and services.
> Outcome: [t]he creation of value through the successful exploitation of a new idea.[251]

These three dimensions should guide the creation of a workable legal test. We begin by distilling each dimension to the idea at its core. Entrepreneurial processes involve innovation. Entrepreneurial behavior is characterized by risk. Finally, entrepreneurial outcomes can be identified by results. Together, these elements – innovation, risk, and results – guide the development of a legal test designed to determine the presence of genuine entrepreneurial opportunity.[252]

A. Entrepreneurship Requires Innovation

The concept of entrepreneurship has long been dependent on the presence of innovation. Innovation involves the successful exploitation of a new idea.[253] Joseph Schumpeter famously defined entrepreneurs as "innovators who implement entrepreneurial change within markets."[254] Schumpeter defined entrepreneurs as "individuals who exploit market opportunity through technical and/or organizational innovation."[255]

Thus, innovation is a necessary component of entrepreneurship.[256] Schumpeter's definition equates entrepreneurship with business innovation by "identifying market opportunities and using innovative approaches to exploit them."[257] In Schumpeter's view, the entrepreneur is "the pivot on which everything turns."[258]

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251. *See* Stokes & Wilson, *supra* note 231.
252. *See id.*
253. Tessaleno C. Devezas, *The Impact of Major Innovations: Guesswork or Forecast?* 1 J. OF FUTURE STUD. 33, 34 (1997).
254. Pivateau, *supra* note 57, at 103.
255. *Id.* at 102.
256. Ahmad & Seymour, *supra* note 221, at 7.
257. *Id.* at 8.
258. Thomas C. Leonard, *Redeemed by History*, 17 HIST. OF ECON. IDEAS 189, 191 (2009).

Innovation stimulates demand and that new demand leads to the creation of wealth.[259] Entrepreneurship incorporates "an attitude of helping innovative ideas become reality by establishing new business models and at the same time replacing conventional business systems by making them obsolete."[260]

The entrepreneur as innovator establishes change within markets by creating new combinations.[261] These new combinations may appear as:

> Introduction of new goods
> Introduction of new methods of production
> Opening of new markets,
> Opening of new sources of supply
> Industrial reorganization[262]

Thus, the first thing a court should look for to determine the presence of entrepreneurial opportunity is whether or not the position provides an opportunity for innovation.[263] I propose that courts construe this element broadly. The entrepreneurial worker classification analysis will examine factors that indicate that the job requires or rewards innovation and creativity. How might the innovation analysis take place in real life? In evaluating this factor, courts might well look to many of the factors commonly designated as "control" factors.[264] Instead of control by the employer, however, we invert the analysis. Instead of focusing on employer control, we frame the question as one of employee opportunity. Are workers given the freedom to create productivity solutions? The more freedom retained by the worker, the less likely that the worker is actually an employee. Thus, employers seeking to classify workers as independent contractors must provide those workers with the ability to create or modify work processes.[265] Employers must focus on the ends sought by the work, and not the means by which the work is accomplished.[266]

259. Steven Horwitz, *Consumption, Innovation, and the Source of Wealth*, FEE (Jan. 6, 2011), https://fee.org/articles/consumption-innovation-and-the-source-of-wealth/.

260. George M. Korres, et al., *Measuring Entrepreneurship and Innovation Activities in E.U.*, 3 INTERDISC. J. CONTEMP. RES. BUS. 1155, 1156 (2011).

261. James W. Garland et. al., *Differentiating Entrepreneurs from Small Business Owners: A Conceptualization*, 9 ACAD. OF MGMT. REV. 354, 354 (1984).

262. *Id.* at 357.

263. *Id.*

264. Pivateau, *supra* note 57, at 104-05.

265. *Id.* at 105.

266. *Id.*

B. *Entrepreneurship Requires Risk*

The concept of risk is integral to the presence of entrepreneurship.[267] Thus, the entrepreneurial classification analysis necessarily requires an evaluation of risk.[268] The concept of risk impliedly involves an element of uncertainty.[269] Risk-taking is a key feature defining entrepreneurship.[270] Richard Cantillon, the economist who first described entrepreneurship, believed that entrepreneurs were those who took on risk: purchasing products (or labor) before consumers have indicated whether, or how much, they will pay for those products. Employees receive a guaranteed income, while the entrepreneur bears the risk of the marketplace.[271] Entrepreneurship cannot exist without an element of uncertainty. Frank Knight believed that entrepreneurship required assuming a special type of risk he called uncertainty.[272] In Knight's view, uncertainty arises out of partial knowledge.[273] For Knight, uncertainty referred to those outcomes that cannot be calculated, but may only be subjectively estimated.[274] An entrepreneur assumes responsibility for economic uncertainty.[275] The entrepreneur does this because presumably profit will compensate him for bearing that risk.

The entrepreneurship test will require an examination of uncertainty.[276] For an employer to classify a worker as an independent contractor, the worker must face uncertainty. The duration of the work must be uncertain, success must not be guaranteed, and there must exist the possibility of profit as well as the possibility of loss.[277] Theoretically, the opportunities for profit and loss should be roughly equal.[278] The potential for large rewards must be counterbalanced by the potential for a large loss.[279]

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267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *See* Ahmad & Seymour, *supra* note 221, at 6.
272. FRANK H. KNIGHT, RISK UNCERTAINTY AND PROFIT 199 (Univ. of Chi. Press ed. (1971) (1921)).
273. *Id.*
274. *Id.* at 236-37.
275. *Id.* at 237.
276. Ahmad & Seymour, *supra* note 221, at 7.
277. *Id.*
278. *Id.* at 7.
279. *Id.*

The element of risk will be an important part of the entrepreneurial worker analysis.[280] An employer who provides too great a risk may find workers unwilling to take the position.[281] Moreover, employers may be unwilling to provide opportunities for great rewards, if those rewards come at a cost to the employer.[282]

C. *Entrepreneurship Requires Results*

Finally, the third element of the proposed entrepreneurial classification analysis is the presence of genuine market opportunity. Entrepreneurship involves more than mere effort. In determining the presence of entrepreneurship, Peter Drucker focused on not just a quest for opportunity, but the response to the quest, as well as the exploitation of the idea.[283] "[T]he entrepreneur always searches for change, responds to it, and exploits it as an opportunity."[284] In a market economy, profit opportunities motivate entrepreneurs.[285]

Entrepreneurship is more than simply creating new ideas or reintroducing discarded ideas. Instead, entrepreneurship, if it is to be considered entrepreneurship, must make a difference.[286] Entrepreneurship consists of "the competitive behaviors that drive the market process."[287] The concept of the market process is integral to understanding entrepreneurship.[288] Under the entrepreneurial analysis, the proposed work must involve a certain level of success to constitute entrepreneurship.[289]

As one scholar noted, "[i]t is one thing, for example, to envision some desirable new Internet application and quite another to implement the idea, convince others that it is worth pursuing, and then market the application successfully."[290] True entrepreneurship is not just the imagining and implementation, it is the final result.

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280. *Id.* at 5.
281. Lee, *supra* note 202, at 783.
282. *Id.*
283. PETER F. DRUCKER, INNOVATION AND ENTREPRENEURSHIP: PRACTICE AND PRINCIPLES 33 (1985).
284. *Id.*
285. *Id.*
286. Per Davidsson, *supra* note 153, at 6.
287. *Id.*
288. *Id.*
289. *Id.*
290. Thomas B. Ward, *Cognition, creativity, and entrepreneurship*, 19 J. OF BUS. VENTURING 185, 185 (2004).

Granted, this element of the analysis could prove troublesome to courts. It may be difficult for a firm to prove the potential for profit.[291] The best evidence of opportunity would consist of evidence of market success by other similarly situated individuals, either at the firm or at similarly situated firms.[292] If the position is so new or different that there is no evidence of success, a firm may have difficulty in proving the existence of market outcomes. Nevertheless, even in the absence of evidence of other entrepreneurs engaged in the same or similar activity, a court should be able to make a determination of whether true opportunity exists or not.

CONCLUSION

Worker classification remains a key issue in employment law.[293] The use of a new entrepreneurship test would ensure three things.

The entrepreneurship test promises to reduce confusion. The presence of indicia of entrepreneurship could eliminate much of the uncertainty involved in worker classification analysis.[294] The entrepreneurship test as discussed above would remove much of the ambiguity involved in the normal 'control' test.[295]

Further, the entrepreneurship test will return independent contractor analysis to its roots.[296] The question that lies at the heart of the classification inquiry is whether the worker is in business for himself or for an employer.[297] The remade worker status test improves on the entrepreneurial approach used in *FedEx Home Delivery* by focusing on more than just the presence of entrepreneurial potential.[298] In my proposed worker classification test, the focus rests on genuine entrepreneurship. The test focuses not merely on the presence of entrepreneurial rights, but on the exercise of those rights. It is not enough that the rights exist in the abstract; they must be made concrete by their exercise. If only a small percentage of contractors take advantage of entrepreneurial opportunity, it is good evidence that such opportunity is lacking.

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291. *See* Kwak, *supra* note 32.
292. Per Davidsonn, *supra* note 153, at 6.
293. *See* U.S GOV'T ACCOUNTABILITY OFF., *supra* note 3.
294. Ahmad & Seymour, *supra* note 221, at 7.
295. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958).
296. *Id.*
297. *See* INTERNAL REVENUE SERV., *supra* note 129.
298. Fedex Home Delivery v. N.L.R.B., 563 F.3d 492, 511 (D.C. Cir. 2009).

Finally, the new test will promote innovation and workplace flexibility. The changes in the employment arena are real and will continue. Millions of jobs will be lost and millions more will be created.

The world will see continued demand for innovative work arrangements. As businesses create these new arrangements, it is imperative that the protections of employment law reach those workers for whom it was intended.[299] To ensure that employment protections reach those for whom they are intended, there must be some means to define the scope of employment law. I suggest that the legal test for employee status focus on the presence of factors indicating entrepreneurship. In other words, only those workers who enjoy genuine entrepreneurial opportunity will be considered independent contractors.

299. *See* U.S GOV'T ACCOUNTABILITY OFF., *supra* note 3.